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The right to protect sites: Indigenous heritage management in the era of native title

Edited by

Pamela Faye McGrath



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THE RIGHT TO PROTECT SITES

INDIGENOUS HERITAGE MANAGEMENT IN THE ERA OF NATIVE TITLE

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*Pamela Faye McGrath
March 2016*

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Deane Fergie holds postgraduate qualifications in social anthropology from the Australian National University and the University of Adelaide, having been awarded a PhD in 1986. Since 1989 she has undertaken a number of cultural heritage

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Garrison Hitchcock is a Melbourne-based social anthropologist and cultural heritage manager. From 1999 to 2003 he was anthropologist in the Native Title Office, Torres Strait Regional Authority. He has also worked as a cultural heritage manager in the Queensland and Victorian governments. Since 1995 he has been director of Arafura Consulting, which provides consulting services in the areas of social mapping and landowner investigation, native title, cultural heritage and natural resource management, with a focus on Melanesia, including the Torres Strait. He wrote the anthropological connection reports for five successful native title consent determinations in the Torres Strait and was extensively involved in the Torres Strait Regional Sea Claim, providing archival and ethnographic research and mapping services. He is a Fellow of the Australian Anthropological Society, the Royal Geographical Society and the Linnean Society of London and a Research Affiliate in the School of Culture, History and Language at the Australian National University.

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Emma Lee is a senior Trawlwulwuy woman from Tebrakunna country, now known as Cape Portland, north-east Tasmania. She has almost completed her PhD at the Institute of Regional Development, University of Tasmania, specialising in developing joint management models and processes for Tasmania's protected areas. In 2016, Emma was the sole, and first Tasmanian Aboriginal, recipient of the Indigenous Fellowship Endeavour Award. She is a spokesperson for her regional body, Melythina Tiakana Warrana Aboriginal Corporation, and an honorary member of the international rights group ICCA Consortium. Emma has over 20 years' experience in professionally caring for country.

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Rod Lucas was awarded a PhD in anthropology and psychiatry at the University of Adelaide in 1999 and has been a lecturer in anthropology at the University of Adelaide since 1999. He has taught an upper-level tertiary course on the anthropology of Aboriginal land tenure and sacred sites. He lectures in native title practice at the University of Adelaide's summer school. Since 1989 he has worked as a consultant on a number of heritage surveys, work area clearances, Mining Exploration Access Surveys and several native title matters. With Deane Fergie, he has specialised in societies in the Lakes region of South Australia. He has co-researched three native title claims (all to successful consent determination) and peer-reviewed three more. In these contexts he has worked with Aboriginal people who identify as Dieri, Arabana, Kokatha, Antakirinja, Yankunytjatjara, Wangkangurru/Yarluwandi, Barngarla, Gawler Ranges, Kaurna, Ngarrindjeri and Walmanpa.

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Pamela Faye McGrath is Research Director at the National Native Title Tribunal. The genesis of this book was a project she initiated in her previous position as Research Fellow with the Native Title Research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). An applied anthropologist by profession, Pamela is also a historian of Indigenous-settler engagements on some of Australia's most remote desert frontiers. Pamela has been involved with native title research, policy analysis and teaching for over 15 years. In recent years she has worked with native title groups and PBCs from around Australia, leading and convening many collaborative research projects, seminars and community of practice initiatives in the areas of knowledge management, Indigenous heritage and future acts, and PBC governance. Pamela currently holds the office of President of the Australian Anthropological Society.

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Richard Martin is a postdoctoral research fellow and consulting anthropologist at the University of Queensland. His research focuses on issues of land and identity in the southern Gulf of Carpentaria in northern Australia. His current academic work includes a project investigating concepts of ‘nature’, ‘nativeness’ and ‘invasiveness’ and their impact on understandings of belonging in society. He has published a range of scholarly articles in anthropology, cultural studies and Australian literary studies. Richard has also carried out applied research on native title claims and Aboriginal cultural heritage issues around Queensland.

Ben Scambary was appointed Chief Executive Officer of the Aboriginal Areas Protection Authority in January 2008. He is an anthropologist with 20 years’ experience working with Aboriginal people in the Northern Territory. Much of this experience is associated with the use and development of land and the conduct of research, agreement negotiation, dispute mediation and, more recently, the protection of sacred sites. In 2007 he completed a PhD in anthropology that focuses on alternative forms of Aboriginal economic development in the context of agreements with the mining industry in Western Australia, Queensland and the Northern Territory.

Andrew Sneddon is the Director of the University of Queensland Culture & Heritage Unit, a commercial heritage consultancy within the University of Queensland. Andrew has worked in the field of cultural heritage management for over 20 years and has prepared assessments and management plans for heritage places of local, state, national and world heritage significance. Andrew has extensive practical archaeological and anthropological experience, both in Australia and abroad. He has assisted with native title claims in a number of jurisdictions and has participated in cultural heritage surveys and impact assessments across Australia. He has specialist knowledge in the field of heritage law. Andrew was formerly a member of the Executive Committee, Australia ICOMOS (International Council on Monuments and Sites), and was co-author of the revised Burra Charter 2013 and accompanying practice notes.

Matthew Storey is Chief Executive Officer of Native Title Services Victoria Ltd. He is also a director and executive member of the National Native Title Council. Matthew lived in the Northern Territory for nearly 25 years before taking up his current position with Native Title Services Victoria in early 2012. While he was in the Territory he worked for many years as a senior Crown law officer with the Solicitor for the Northern Territory, primarily in the area of Aboriginal land rights. He has

also held the positions of Associate Professor and Head of Law at the Northern Territory's Charles Darwin University and Director of the Northern Territory Anti-Discrimination Commission. He has worked for the North Australian Aboriginal Legal Aid Service, where he was primarily responsible for the Stolen Generations cases. Matthew completed a Bachelor of Economics and Bachelor of Laws at Charles Darwin University in 1995. He has subsequently completed a Master of Laws specialising in environmental law at Macquarie University and a Graduate Diploma in Energy and Natural Resources Law at the University of Melbourne.

Carolyn Tan is a Perth-based lawyer. Since 2003 she has been an in-house legal counsel with the Yamatji Marlpa Aboriginal Corporation, the native title representative body for the Pilbara and Geraldton regions. Before that, for 15 years she was a litigation partner with the law firm Dwyer Durack, where she also practised in native title and Aboriginal heritage law. Carolyn holds a PhD for her thesis, 'The effect of the "public-private" dichotomy on the concept of Indigenous sacred place in the religious freedom and heritage protection laws of Australia, USA, Canada and New Zealand'.

David Trigger is Professor of Anthropology at the University of Queensland. His research interests encompass the different meanings attributed to land and nature across diverse sectors of society. His research on Australian society includes projects focused on a comparison of pro-development, environmentalist and Aboriginal perspectives on land and nature. In Australian Aboriginal studies, Professor Trigger has carried out more than 35 years of anthropological study on Indigenous systems of land tenure, including applied research on resource development negotiations and native title. He is the author of more than 60 major applied research reports and has acted as an expert witness in multiple native title claims and associated criminal matters involving Aboriginal customary law. Professor Trigger is the author of *Whitefella comin': Aboriginal responses to colonialism in northern Australia* (Cambridge University Press, 1992) and a wide range of scholarly articles. His most recent book is a co-edited cross-disciplinary collection titled *Disputed territories: land, culture and identity in settler societies* (Hong Kong University Press, 2003).

Liz Vaughan is a co-founder of the Western Australian grassroots organisation the Aboriginal Heritage Action Alliance. Her recently completed Honours thesis at the University of Western Australia examined the evolution of Aboriginal heritage protection in Western Australia under the *Aboriginal Heritage Act 1972* (WA). Elizabeth has been active in the communication of Aboriginal and archaeological heritage issues in Western Australia, presenting on the topic

Notes on contributors

at national archaeological conferences, universities, community organisation meetings and via online lectures. She also engages in active communications with communities of interest and the media and through social activism. A long-time advocate for the promotion of Aboriginal cultural heritage in Western Australia, Elizabeth played a significant role in campaigning for the protection of heritage and environmental values at James Price Point as a core member of the prominent Broome-based community organisation Save the Kimberley Inc. She currently works as an independent research consultant on the Western Australian Aboriginal heritage legislation. She works closely with politicians and stakeholders to achieve positive reform of the *Aboriginal Heritage Act* as part of her role with the Aboriginal Heritage Action Alliance. Additionally, Elizabeth pursues her passion for educating people about and engaging with Aboriginal heritage and cultural landscapes through her work in tourism in the far north Kimberley region of Western Australia.

Chapter 1

THE FATE OF INDIGENOUS PLACE-BASED HERITAGE IN THE ERA OF NATIVE TITLE

Pamela Faye McGrath and Emma Lee

‘Heritage is not just a pretty place; it is a political resource.’
— Laurajane Smith (2010, p. 60)

Introduction

Beyond the colonial frontier, Aboriginal and Torres Strait Islander peoples have rarely engaged in physical warfare with settlers over the protection of their places. Protest, passive resistance and engagement with the judicial system have long been the tools of choice to gain rights over land. *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1 (*Mabo*) was the touchstone legal case that has shaped the contemporary spaces for Aboriginal and Torres Strait Islander peoples’ access to place-based rights at a national level.¹ Despite the earlier introduction of state and territory land rights legislation such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Aboriginal Land Rights Act 1983* (NSW), *Mabo* was unique in overturning the doctrine of *terra nullius* and provided the catalyst for the Australian Government’s introduction of the *Native Title Act 1993* (Cth) (NTA) as the statutory vehicle for the incorporation of the recognition of native title rights in Australian law. But have native title rights improved the ability of Aboriginal and Torres Strait Islanders to legally protect places of significance?

¹ *Mabo* was preceded by the landmark judicial observation by Blackburn J in *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 of the existence of an Aboriginal system of land rights, but the case ultimately failed to ascribe a place for their recognition within the legal framework.

On the face of it, they should have. Along with rights to hunt, fish, gather and engage in cultural activities, native title rights to protect sites — first recognised in *Hayes v. the Northern Territory* [2000] FCA 671 — have become standard in native title determinations. In addition, the NTA provides traditional owners,² in specific circumstances, with a procedural right to negotiate the terms on which they will consent to other parties using their lands. Combined with longstanding state, territory and federal laws supposedly intended to protect Indigenous heritage, native title should have delivered Aboriginal and Torres Strait Islander peoples far greater ability to manage and protect places of significance. But it is far from clear that it has. Although in the era of native title there is now greater legal and public recognition of the intangible qualities of the relationship between people and place — the fact that intangible cultural practice gives rise to tangible heritage — there remains a fundamental divide between the place-based rights of native title and the state's management of Indigenous place-based heritage.

Taking a multidisciplinary approach to the examination of these issues, *The right to protect sites* takes stock of the successes and failures of Indigenous heritage management in the era of native title as they have been experienced in different jurisdictions around the country. The thematic focus of the volume is on place-based heritage (as opposed to intangible or moveable heritage) — that is, it is concerned specifically with sites and areas of cultural, archaeological, historical or other significance to Aboriginal and Torres Strait Islander peoples. When recognised and managed by government statute, such places become 'Indigenous heritage' — part of Australia's national heritage estate. This introductory chapter pulls together threads of insight and analysis from our contributing authors to examine how, overall, the native title regime has (or has not) impacted on the role of Aboriginal and Torres Strait Islanders in the management of Indigenous place-based heritage and what might be done to address some of the more significant challenges facing those who wish to protect it.

What we find is that the failures of current arrangements are widespread and have many dimensions. Permits to destroy or interfere with places of significance to Aboriginal and Torres Strait Islander peoples are being granted at an alarming rate, policy reforms have narrowed instead of broadened the dimensions of

2 'Traditional owners' is used here to refer to individuals of Aboriginal or Torres Strait Islander descent who have social responsibilities and cultural authority in relation to particular lands or waters. For a comprehensive analysis of the use of the term in the context of native title and land rights, see Edelman (2009).

what is considered Indigenous ‘heritage’ and the burden of dismantling barriers to participation in Indigenous heritage management is still the purview of Aboriginal and Torres Strait Islander people. The procedural rights to negotiate afforded by the NTA do not extend to a right to say ‘no’ to developments that potentially impact on places of significance, thus undermining the ability of native title groups to enhance heritage management practices and outcomes through agreement-making processes. The terms by which the status and conservation of heritage places are recognised under state and territory heritage laws have not kept up with the rhetoric of place-based rights inherent in native title, the majority of reported Indigenous heritage remains under the control of government, and many places of significance are legally impacted shortly after documentation in order to make way for development. Local conflicts around heritage protection are commonplace, exacerbated by the absence of the right to veto development (Schnierer, Ellsmore & Schnierer 2011, pp. 6–9).

So, although native title rights have been helpful for traditional owner groups in some parts of the country (see Brennan et al. 2015), native title has proven so ineffective as a heritage protection strategy that in some cases there are people who feel better off without it (Lee, Chapter 12). At the heart of its ineffectiveness are the legal and conceptual gaps that exist between *sui generis* native title rights and Indigenous heritage regimes, and the failure of successive governments around the country to effectively reform to accommodate the native title rights of Aboriginal and Torres Strait Islander peoples in relation to places of significance.

Heritage is not a native title right

Heritage scholar Laurajane Smith defines ‘heritage’ not as a ‘thing’ but as a cultural process of meaning making about group identity, history and contemporary social relations (Smith 2010, p. 63; see also Hall 1999; Smith 2006). The heritage places that are the critical subject of this volume are places where the interests and identities of Aboriginal and Torres Strait Islander peoples and the authorised heritage discourses of government collide: ‘theatres of memory...[places] at which individuals, policy makers, bodies of expertise...engage in performances that construct and negotiate cultural and social identities’ (Smith 2010, p. 63).

In many respects the idea of ‘Indigenous cultural heritage’ is a misnomer. The management of ‘heritage’ is an industry that is subject to the whims of multiple interests, while ‘Indigenous culture’ belongs to Aboriginal and Torres Strait Islander peoples, to be shared with others regardless of the political impetus.

The distinction between the place-based heritage of Aboriginal and Torres Strait Islander peoples — as defined by them — and the heritage sites that governments recognise and protect cannot be overemphasised. They are two very different social facts that emerge from two very different discourses. The former is a cultural landscape; the latter a state-informed project to identify and manage the competing values of places within such a landscape (see Smith 2010, p. 63; Hall 1999). ‘Heritage’ as defined and protected by statute is not a concept drawn from Indigenous traditional law and custom (Tan, Chapter 2; McCaul 2014, p. 4), and the responsibilities of Aboriginal and Torres Strait Islander peoples to protect places of significance do not amount to a right to control state-sanctioned heritage.

Nevertheless, places that are valued by Aboriginal or Torres Strait Islander peoples can also be valued by the state, to the extent that governments are sometimes willing to protect them in the face of other interests — sometimes, but not always. Inevitably, the amount of Aboriginal and Torres Strait Islander peoples’ place-based heritage that a government is willing to recognise as of sufficient public significance to warrant protection will only be a fraction of the total place-based heritage of a particular people. This value gap, which is implicitly described in many of the contributions to this volume, contributes to the tension that exists between Indigenous heritage management regimes and native title rights and adds to the ongoing frustration of Aboriginal and Torres Strait Islander peoples who find this is yet another gulf in their relations with settler society that cannot be closed.

Aboriginal and Torres Strait Islander heritage places are a major component of Australia’s overall national heritage estate. There are a number of challenges associated with attempting to understand the collective size and scope of this estate. Diverse criteria for defining sites, inconsistent triggers for registering sites and differences in the reporting of site destructions make the task of calculating the numbers of places on various state and territory heritage registers extremely difficult (Schnierer, Ellsmore & Schnierer 2011, p. 51). Putting these issues aside, a crude tallying of numbers suggests that there are at least 150,000 Indigenous heritage places and objects currently listed on state, territory and federal government registers around the country³ — double the estimated 75,000

³ One of the weaknesses of this estimate is that it is compiled from a number of sources that provide information about heritage listings on the registers of different jurisdictions at different points in time. Sources relied on were: P Hubert, ACT Department of Environment and Planning, pers. comm., 28 January 2015; Schnierer, Ellsmore & Schnierer (2011, pp. 43, 53, 56); Department of Environment and Heritage Protection

registered that existed in 1993, the same year the NTA came into existence (Ritchie 1996, p. 28). Although this figure is only indicative, it is nevertheless a powerful illustration of the extent of place-based heritage of Aboriginal and Torres Strait Islander peoples that exists and the intensity with which its values have endured despite the disposessions of colonisation.

As with ‘heritage’, contemporary recognition of native title is also a ‘cultural process’ — one that is located in overlapping social and legal domains, characterised by both negotiation and conflict. At the time of writing, native title rights have been recognised over 2.2 million square kilometres (almost 30 per cent) of Australia’s landmass and 145 Prescribed Bodies Corporate (PBCs)⁴ have been established to enable native title holders to manage those rights (NNTT 2015; AIATSIS 2014). On the face of it there would seem to be an innate link between the notion of place-based heritage and the territorial character of native title rights. But, as Carolyn Tan (Chapter 2) explains, native title and Indigenous heritage are two separate regimes that have very different theoretical origins, legal characteristics and limitations. The heritage of a state is construed as a public-interest limitation of private or government property rights and does not provide rights to the people in whose culture the heritage was originally conceived. Native title, on the other hand, is a private (albeit communal) group right that, although predating all other forms of Australian property right, is also capable of being limited by heritage laws. The result is widespread incommensurability between state and territory Indigenous heritage legislation and the NTA that has created ‘an ill-fitting array of unsatisfactory and contradictory sources of public law, made workable by the negotiation of private arrangements that vary markedly on both an individual and a regional basis’ (Ritter 2006, p. 125).

Even though the regimes rarely align, native title and Indigenous heritage laws have nonetheless impacted on each other in some remarkable ways. Native title was born in an era of intense heritage controversies, notably the case of the Hindmarsh Island Bridge women’s site in South Australia, which changed public opinion at the time and influenced the shape of the NTA (Lucas & Fergie, Chapter 8; see also Fergie

(Qld) 2012, p. 162; P Langeberg, SA Department of State Development, pers. comm., 17 February 2015; Aboriginal Heritage Tasmania 2014; Office of Aboriginal Affairs Victoria.

⁴ Created by the NTA and administered through the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), PBCs have prescribed responsibilities to manage native title rights on behalf of their members and to negotiate land access for third parties with interests in native title lands.

1997; Lucas 1996). In the early years of native title, heritage information in the possession of state governments was sometimes used against native title claimants in an effort to undermine their claims for recognition of rights. But heritage management activities, specifically participation in heritage surveys, have also been an important way for many native title groups to demonstrate not only their rights to protect sites but also their ability to control the access of other people (Lucas & Fergie, Chapter 8). And in some regions the emergence of native title has been responsible for a renewed interest among traditional owners in heritage places and their ongoing protection (McNiven & Hitchcock, Chapter 7).

One of the suggested drivers of the increase in Indigenous heritage listings over the past two decades has been reforms to state and territory legislation that require more rigorous recording and reporting of sites (Schnierer, Ellsmore & Schnierer 2011, p. 51). But the coincidence of this increase with the emergence of the native title regime suggests native title may also have played a role, although exactly what that role has been remains unclear. The procedural rights afforded to native title groups to negotiate the undertaking of future acts⁵ may well be at play, but, as the work of McGrath (Chapter 3) underscores, considerable gaps exist in our knowledge about how Indigenous heritage is being managed on native title lands and that makes this proposition difficult to assess. What is certainly true is that the NTA has dramatically altered the geopolitical context in which Indigenous heritage management now occurs. As a result of the future act regime, there are more players and more opportunities, and the business of Indigenous heritage management is now part of a much bigger, more politicised and commercially very sensitive arena (Lucas & Fergie, Chapter 8; McGrath, Chapter 3; Godwin 2005). That the business of Indigenous heritage remains very much a non-Indigenous enterprise is underscored by the identities of the contributing authors to this volume. Although they are exceptionally knowledgeable about the operation and practice of heritage and native title in the jurisdictions about which they write, the vast majority are not Aboriginal or Torres Strait Islander people and their ability to comment on the experience of living as the *subjects* of native title and heritage laws is therefore limited.

5 A future act is a proposal to deal with land in a way that under the NTA affects native title rights and interests. For more information on the operation of the future act regime and the right to negotiate, see NNTT n.d; McGrath, Chapter 3.

The operation of Indigenous heritage regimes in the wake of native title

The legal frameworks relevant to the management of Indigenous heritage in Australia are complex and involve all levels of government. They include federal and state heritage legislation, state and territory planning and environmental management laws, mining and energy laws, and local government by-laws (although generally Indigenous heritage is not protected by local government) (Productivity Commission 2013, pp. 146, 150). The NTA has not helped to simplify this legislative landscape. In 1996, only a few years after the NTA was established, David Ritchie estimated that there were fourteen distinct Australian laws that dealt in some way with Aboriginal or Torres Strait Islander heritage (Ritchie 1996, p. 28). This number has now grown to at least 20, not including federal legislation and state native title Acts (see Productivity Commission 2013, p. 148, for a list of principal state and territory heritage legislation).

Every state and territory has responded differently to the emergence of native title and there is considerable disparity in the way that governments accommodate native title holders and other Aboriginal and Torres Strait Islander groups within existing heritage management regimes. Among other things, each jurisdiction takes a unique approach to the definition of Indigenous heritage places; criteria for significance; survey methodologies; reporting requirements; processes for authorising destruction of sites; access to procedural fairness; and the right to appeal decisions (see Schnierer, Ellsmore & Schnierer 2011; Shearing 2006; Edelman et al. 2010). The arrangements for consultation with Aboriginal and Torres Strait Islander parties vary considerably and all pay little regard to traditional modes of governance or the durable and enduring processes of decision-making embedded in familial structures (Sutton 2003; Watson 2014). Each jurisdiction contributes to a dysfunctional whole, with the inconsistent reporting of heritage activities making it impossible to benchmark national heritage outcomes (Schnierer, Ellsmore & Schnierer 2011, p. 39).

At all levels of government, attempts to reform legislative arrangements for the management of Indigenous heritage have been drawn out, highly controversial and for the most part unsuccessful. At the time of writing, the Western Australian *Aboriginal Heritage Act 1972*, the Tasmanian *Aboriginal Relics Act 1975* and the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHPA) all remain in force, substantially unaltered in the 20 years since the NTA was brought into law. Those reforms that have been implemented appear to have done little to increase Indigenous control over place-based heritage, and

improving the articulation of native title and heritage regimes remains a ‘work in progress’ in most jurisdictions (Edelman et al. 2010, pp. 6–7). Commonwealth Government heritage laws have also remained unaltered and unresponsive to native title. The ATSIHPA was established to provide protection of last resort when a place of significance is under imminent threat. Despite many reviews recommending it be amended or repealed, it remains fundamentally unchanged and remarkably ineffective: of the 155 applications made under ATSIHPA since 2007, 130 have been unsuccessful and the remaining 25 have yet to be resolved (Productivity Commission 2013, p. 165).⁶

The unique cultural practices and post-contact social histories of Aboriginal and Torres Strait Islander peoples, combined with what are in some instances very diverse frameworks for managing Indigenous heritage, mining and exploration and native title, have resulted in manifold heritage outcomes for different groups around the country. In the case of New South Wales, which is detailed in Chapter 4 by Janet Hunt and Sylvie Ellsmore, Aboriginal people have for many years been navigating a morass of legal and procedural processes in order to ensure heritage protection, and native title is just one more among many diverse strategies through which control over land and water, and ultimately places of significance, might be secured. Moreover, native title is a contested strategy in New South Wales and, on its own, has provided little traction. One recent native title determination in the state — *Phyball on behalf of the Gumbaynggirr People v. Attorney-General of New South Wales* [2014] FCA 851 (Gumbaynggirr) — is a case in point. It was resolved through a complex tenure arrangement that included, among other things, Aboriginal freehold title under the New South Wales Aboriginal land rights legislation and joint management arrangements (Hunt & Ellsmore, Chapter 4).

Graham Atkinson and Matthew Storey’s account of the situation in Victoria (Chapter 5) tells a similar story of traditional owners successfully deploying the rhetoric of rights to advocate for a stronger relationship with government and greater involvement in and control over the management of significant places. The development of the Victorian *Traditional Owner Settlement Act 2010*, which sits outside of the native title regime but was leveraged out of the conversation about

⁶ In 2004, heritage protection provisions were added to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which allow for Indigenous places of significance to be recognised under the National Heritage List and Commonwealth Heritage List (Productivity Commission 2013, p. 149).

recognition of traditional rights that the NTA initiated, provides an example of how, with sufficient political will, a preferable and more beneficial approach to achieving heritage management aspirations can be arrived at. However, although in many respects Victoria leads the way towards providing free and informed consent to Aboriginal people in the area of heritage management, there remains a gap between law and policy and their practical application that requires ongoing redress.

Richard Martin, Andrew Sneddon and David Trigger's account of the situation in Queensland (Chapter 6), where developers are afforded extraordinary freedom to negotiate heritage management outcomes with native title parties with minimal transparency, highlights the failure of government in that state to adequately respond to the social and cultural complexities of Aboriginal and Torres Strait Islander rights to speak for country and attendant attitudes towards heritage, including its potential value as an economic resource. The authors' assessment is that the government's deliberate use of a 'power blind' approach has gone too far and there is a pressing need to find a way to balance statutory oversight of heritage management processes with the empowerment of traditional owners.

Chapter 7, by Ian McNiven and Garrick Hitchcock, examines the effectiveness of heritage management regimes in the Torres Strait — a culturally and legally unique region of Queensland and the birthplace of the native title regime. Importantly, they draw attention to the often overlooked significance of marine-based heritage places and provide an account of a series of maladaptive heritage management policies and practices that have been imposed on the region. They conclude that the recognition of native title rights in the Torres Strait has not been accompanied by best-practice approaches to heritage protection occurring elsewhere. They also emphasise the considerable opportunities that exist as a result of native title for greater community-led involvement in the identification and management of heritage places under threat from development.

In South Australia traditional owners have responded very differently to the native title and heritage management regimes of their state government. In Chapter 8, Rod Lucas and Deane Fergie characterise native title holders' current strategies as creatively using a long history of political manoeuvres and heritage battles to leverage greater control over land and places of significance. They describe a recent trend towards the 'decentralisation' of heritage management, which has effectively sidelined the state through the use of agreement-making, partnerships with independent lawyers and direct dealings with developers. Although not everyone is benefiting, the 'innovative accommodations between protection, knowledge and power' that

have resulted have enabled many groups, such as the Ngarrindjeri, to transcend the limitations of the NTA and instead insist on their own sovereignty-like governance arrangements.

For many years the *Northern Territory Aboriginal Sacred Sites Act 1979* (NT) has been regarded as one of the strongest and most effective legislative frameworks for the protection of Indigenous heritage in the country. The statutory separation of the Aboriginal Areas Protection Authority from government, the independence and Aboriginality of the Authority Board and the transparency of any ministerial review process are fundamentals that have enabled the Act to be unique and effective. It is the only Australian statute that separates the identification and protection of Aboriginal sacred sites from the diverse range of non-sacred Indigenous and other heritage places that are conserved by the *Heritage Act 2011* (NT) (HA). Yet, as Gareth Lewis and Ben Scambary's account of Australia's first successful prosecution of the desecration of a sacred site at Bootu Creek in the Northern Territory (Chapter 9) illustrates, there endures a consistent pattern of resource contestation between Aboriginal people and miners that points to the failure of 30 years of Aboriginal land rights, native title rights and legislated heritage protection to offer any meaningful traction in the resolution of these contests. Lewis and Scambary's articulation of the cultural and social importance of places of significance, their position in the 'moral topography' of traditional owners (Bainton, Ballard & Gillespie 2012, p. 23) and the potential ramifications of their destruction underscore the highly personal nature of heritage conflicts and the extent to which, for Aboriginal and Torres Strait Islanders at least, their resolution is far more than just a business transaction. Lewis and Scambary draw our attention to the undermining of both native title and land rights that has occurred as a result of the state being both *owners* of minerals and *protectors* of heritage, and the 'far reaching, catastrophic and intergenerational' consequences that arise from the ongoing devastation of people's place-based heritage.

Current arrangements in Western Australia, where the state struggles to imagine a post-'mining boom' future for which it is economically unprepared, are among the most divisive in the country and are resulting in some of the worst heritage outcomes for Aboriginal groups. Liz Vaughan (Chapter 10) reviews key developments in the emergence of the existing regime and the suite of controversial amendments that, at the time of writing, were before the state parliament for consideration. She observes the extent to which political and industrial influences are aligned in Western Australia, documenting the incremental gains that have been achieved as a result of the enduring activism of Aboriginal people

seeking to prevent efforts on the part of the government to narrow the criteria for protection. Even when parties have negotiated in good faith, the Western Australian Government still puts at risk the cultural values being conserved by not fulfilling the funding and other administration arrangements as part of its own signatory responsibilities (McDonald, Chapter 11).

Jo McDonald's account (Chapter 11) of the structures in place to manage places of significance in the Dampier Archipelago (Murujuga) in the Pilbara region of Western Australia provides a detailed case study of how the Western Australian regime has worked in practice. McDonald describes a situation where, despite the fact that native title rights were ceded over the area — which has been recognised as a place that meets the 'Outstanding Universal Values criteria of the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage List' — the operating framework has nevertheless provided local Aboriginal groups with a seat at the negotiation table, resulting in one of Australia's first and largest native title settlement agreements. The terms of the Burrup and Maitland Industrial Estates Agreement and the benefits it provides have enabled local Aboriginal managers to pursue a range of innovative land management, educational and research projects. Yet, despite the layers of Aboriginal governance for which the agreement provides, development continues in the area and many sites (among them ancient rock art) remain at risk.

In Chapter 12, Emma Lee considers the unique circumstances of Tasmanian Aboriginal people and their long history of advocacy for recognition of rights, from the Wybalenna petition of 1846 to the present. She explores the reasons why native title has failed in Tasmania and illustrates how the heritage management regime of the state continues to remain deeply entrenched in a shameful past of genocide and denial. In Tasmania, argues Lee, Aboriginal people and their heritage are considered by the state to be 'somewhere else' in both time and place. Lee nevertheless sees the absence of native title in Tasmania as a possible advantage, as it has enabled instead the pursuit of alternative strategies to gain control over land and heritage, albeit with varying degrees of success.

The only Australian jurisdiction that is not discussed at any length within this volume is the Australian Capital Territory (ACT). Native title has had no enduring presence in the ACT and is completely absent in the ACT's Aboriginal heritage management laws and policies. There have been no native title determinations; no Indigenous Land Use Agreements; no future act applications, determinations or agreements; no land acquisitions by the Indigenous Land Corporation; and no declarations of Indigenous Protected Areas (AIATSIS 2014, pp. 5–11). In 2001, the

ACT Government reached an agreement with two native title claimant groups representing the Ngunnawal people that established a special 99-year Aboriginal lease over Namadji National Park — which takes up almost half of the entire ACT territory — on condition that all native title claims be either fully determined or withdrawn (AIATSIS 2014, p. 3). In the absence of both native title and an effective joint management agreement over Namadji National Park, what remains is a system that, although providing blanket protection for Aboriginal places, allows minimal input from Aboriginal people into decision-making. This lack of engagement has had serious repercussions for the involvement and employment of Aboriginal peoples in heritage activities and has constrained Aboriginal groups from using the land for ‘customary’ activities (Williams 2013, p. 18).

The native title system has also undergone significant reform over the past 20 years, including various legislative changes to the NTA, significant amendments to the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth), amendments to tax and charities legislation, and the introduction of new legislation for Indigenous corporations (McGrath, Stacey & Wiseman 2013, p. 53). These reforms were motivated, to an extent, by the difficulties faced by PBCs and others in navigating the complex and at times incommensurable relationships and obligations created by the intersection of communally held native title rights with other Australian laws. But they were also driven by a desire to create certainty for other parties with commercial interests in native title lands (McGrath, Stacey & Wiseman 2013, pp. 36, 37). To date, no reforms to the NTA have been directed explicitly towards improving the articulation of native title with state, territory or federal Indigenous heritage management regimes.

The failure to reform Indigenous heritage regimes to better accommodate native title (and vice versa) has not necessarily been a purposeful strategy on the part of government. Amending heritage laws is a challenging proposition, in part because in order to do so governments must fight some deeply entrenched ‘culturally determined beliefs and psychological postures’ held by non-Indigenous citizens about the validity of Aboriginal and Torres Strait Islander cultural practices that have remained impervious to the rhetoric of native title (McCaul 2014, p. 4). These include suspicion about the authenticity of contemporary Indigenous cultural practice given the loss of traditions — a perception that Aboriginal people use heritage strategically to take advantage of others — and a belief that the rights of non-Indigenous Australians should prevail over those of Aboriginal and Torres Strait Islanders (McCaul 2014, p. 27; Martin, Sneddon & Trigger, Chapter 6). In the case of Tasmania, it is the myth of social and cultural extinction that Aboriginal people must counter continually

(Lee, Chapter 12). Such narratives contrast starkly with those of Aboriginal and Torres Strait Islander peoples themselves that speak of ‘enduring loss and personal injury’ but also cultural survival and revival (Lewis & Scambary, Chapter 9; Lee, Chapter 12).

A right to negotiate is not a right to protect

Under current arrangements it is not a native title ‘right to protect sites’ that offers greatest assistance to traditional owners seeking to manage places of significance on their own terms, but procedurally afforded rights to negotiate over the doing of future acts. In areas of non-exclusive native title, rights to protect sites enable traditional owners to carry out activities (such as clearing away debris or putting up signage) that have the effect of protecting sites, but not to control the access of others in order to enforce those protective responsibilities (Tan, Chapter 2). As *Hayes v. the Northern Territory* [2000] FCA 671 helps clarify, where non-exclusive rights have been recognised (which is generally the case), they yield to other non-native title rights. And so, in areas where ‘exclusive possession, occupation, use and enjoyment as against the whole world’ have been recognised, it is not the right to protect sites *per se* that enables protection from damage but the right to prevent others who might damage sites from entering the area. But even these can be overridden or extinguished by other forms of tenure (Tan, Chapter 2).

The right to negotiate provides native title groups with an opportunity to agree to the terms on which they will provide their consent for development on their lands, including how places of significance might be managed, thus potentially extending the scope of heritage arrangements otherwise provided for by state or territory legislation (O’Faircheallaigh 2008, p. 34). Some commentators argue that, even in areas where exclusive forms of title do not exist, native title, and specifically the right to negotiate future acts, has enhanced the control and influence of traditional owners in the development contest, generating income and enabling groups to step away from their dependence on the state and pursue their own development agendas (Langton 2012; Lucas & Fergie, Chapter 8). However, as already noted here, the right to negotiate does not come with a concomitant right to say ‘no’ to developments that pose an unreasonable threat to place-based heritage.

Pamela Faye McGrath (Chapter 3) takes a closer look at what is known, and not known, about the management of Indigenous place-based heritage under confidential future act agreements. What she finds are some remarkable statistics about the scale of development occurring on native title lands and some considerable gaps in public understanding of how these are impacting on places

of significance. On average, around 3800 future act notices are issued every year and an unknown number of agreements are negotiated in response. What little information is available suggests that the number of future act-related agreements currently in place is likely to be in the thousands. Almost nothing is known about the number of Indigenous heritage assessments conducted as a result of processes set out in these agreements or their outcomes, but in some regions it is not unusual for native title groups to collectively participate in thousands of days worth of heritage surveys every year (YMAC 2013). The work of future act-related heritage management has in turn created an extraordinary amount of information about the cultural, archaeological, historical, environmental and commercial value of native title land, but this important legacy remains out of reach to many, exacerbating the loss of knowledge that occurs when physical places are interfered with or destroyed (McGrath, Chapter 3).

Combined with chronic under-resourcing, the inability to refuse development results in a power asymmetry that considerably undermines the negotiating position of native title parties and compromises their capacity to protect places of significance (McGrath, Chapter 3; Martin, Sneddon & Trigger, Chapter 6; O'Faircheallaigh 2008, p. 133). Only a small percentage of mining agreements negotiated under the NTA's future act regime both offer and enable high levels of protection for places of significance (O'Faircheallaigh 2008, p. 43) and, where negotiations fail, native title groups have little success in challenging the granting of exploration and mining licences. The procedures and institutions of native title agreement making are such that, when combined with those of state Indigenous heritage laws, they 'provide a clear benefit to developers' and these benefits are magnified in the agreement-making process by the 'substantial financial resources' developers have available to them compared with those of native title groups (Cleary 2014, p. 133). In a zero-sum game, where the resources are redistributed away from one set of actors to another (Engelen, Keulartz & Leistra 2008), Aboriginal and Torres Strait Islander people are, and continue to be, in the position of loss.

Connections between people, place and cultural action are undermined when Aboriginal and Torres Strait Islander peoples must participate in negotiations over heritage that require a separation of the cultural self from the statutory rules of the frameworks by which places of significance are regulated. The contests that occur in the face of competing interests in land and the limited choices that come with the right to negotiate are characterised by Lewis and Scambary (Chapter 9) in terms of a clash of 'metaphorical bodies', a battle that the intangible ancestral presence of country inevitably loses. Governments, for the most part, remain

purposefully oblivious to what is occurring in the heritage space as a result of future act agreement making and continue to privilege the commercial interests of industry by excluding Aboriginal and Torres Strait Islander people from having any genuine input into how their heritage is defined and managed, and ignoring the potential of Indigenous heritage to contribute to the long-term social and economic wellbeing of Aboriginal and Torres Strait Islander people.

The limits of recognition, authority and protection at the intersection of heritage and native title

During the years since *Mabo*, Australia's courts and tribunals have widened the grounds on which Aboriginal and Torres Strait Islander parties may object to proposed activities that potentially impact on places of spiritual significance (Sneddon 2012, p. 238). But in some states and territories it is one step forward, two steps back, as some governments respond to the strengthening of the private rights of Aboriginal and Torres Strait Islander peoples under native title by actively undermining the public values of Indigenous heritage. In the most remarkable instance of such narrowing of recognition, the Western Australian Government recently attempted (and ultimately failed) to apply a legal interpretation of a definition of 'ethnographic site' that required evidence of in-situ contemporary religious or ritual activity, thus enabling the delisting of a number of registered sites and preventing the registration of new ones (Vaughan, Chapter 10; McIntyre 2015; *Robinson v. Fielding* [2015] WASC 108). As one commentator pointed out at the time, if Australia's best-known and most visited sacred site, Uluru (Ayers Rock) was located in Western Australia, it would not qualify as Indigenous heritage (Laurie 2014).

In addition, native title has not resulted in any substantial change in the degree of input that governments afford Aboriginal and Torres Strait peoples into decision-making about Indigenous heritage, and in many instances non-Indigenous experts and proponents of development projects have considerably more influence over Indigenous heritage outcomes than do traditional owners. In Tasmania, South Australia, Victoria and New South Wales, where leadership is asserted through localised participatory frameworks based upon kinship and traditional ownership and not random representations on government-appointed generalist advisory bodies, Aboriginal peoples can claim a measure of self-determined victory in heritage management (Atkinson & Storey, Chapter 5; Hunt & Ellsmore, Chapter 4; Lee, Chapter 12). But these wins are limited. In New South Wales, a self-determination model exists but is based on residence and membership of Local Aboriginal Land Councils rather

than kinship or traditional ownership (although this can coincide in some, though not all, locations). Proposed reforms to the New South Wales regime provide for the input of native title holders in decision-making about heritage but still do not deal with future act provisions, continuing to duplicate notification and consultation requirements with native title groups among other Aboriginal groups, organisations and individuals (Hunt & Ellsmore, Chapter 4). Victorian laws provide for relatively progressive accommodation of traditional owner rights in relation to Aboriginal heritage management, but paradoxically this has been achieved outside of the native title regime through a state-wide settlement package. None provides for the ideals of free, prior and informed consent enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to which Australia is a signatory (Atkinson & Storey, Chapter 5), as without incorporation into domestic laws the convention is not Australian law. Such authority and consent are important not just because they enable rights to protect sites but also, perhaps more importantly, because they facilitate Aboriginal and Torres Strait Islander peoples' rights to development.

While still framing the protection of significant places within a state-informed development context, the *Northern Territory Aboriginal Sacred Sites Act 1979* (NT) measures significance in accordance with Aboriginal tradition rather than imposed 'scientific' heritage criteria and places decision-making into the hands of a predominately Aboriginal Authority (the Aboriginal Areas Protection Authority), whose members are appointed by a minister based on nominations from the Northern Territory land councils. This system has operated for some 30 years and has generated a register of nearly 2000 sacred sites, a further 10,000 recorded sacred places and more than 20,000 site-protection measures prescribed as conditions within over 5000 Authority Certificates (site clearances). All of this has been achieved without major impediment to mining, tourism, pastoralism or urban or any other form of development in the Northern Territory. On the contrary, the Act has provided clarity, certainty and confidence to these sectors. As a framework for mediating and negotiating positive outcomes for the protection of sacred sites in often controversial circumstances, its success can be measured by the relatively low numbers of prosecutions undertaken for breaches of the Act and by the lack of any significant changes being made to the legislation since 1989. That said, the Bootu Creek case documented by Lewis and Scambary (Chapter 9) clearly demonstrates that, regardless of increased input of Aboriginal peoples into heritage-related decision-making, commercial imperatives will always place their landscape and cultural values at risk, especially where penalties are an ineffective deterrent and the mechanisms of prosecution are too onerous.

Queensland is one of the few jurisdictions where the authority of native title groups has been formalised and prioritised within heritage legislation through recognition of agreements negotiated between native title parties and the proponents of development. Although this affords unprecedented agency and control to native title groups, the legislation is not without its critics and many observers argue the legislation goes too far in its privileging of the rights of native title parties. Some from within the native title sector itself have argued that the status afforded native title parties under the Queensland legislation is inappropriate, as it does not properly define or provide for the independent recognition of the traditional owners of Aboriginal heritage, who will not always be native title parties. Moreover, the regime is overly reliant on an ‘unduly technical and legalistic process for determination of native title rights and interests’ and the test of whether native title exists is more onerous and complex than that which needs to be applied to identify the appropriate custodians of Aboriginal heritage (QSNTS 2010, p. 2). Overall, the control that the Queensland regime appears to offer Aboriginal and Torres Strait Islanders is illusionary: ownership of Indigenous heritage still ultimately rests with the Crown; there is no independent body such as, for example, an Indigenous Heritage Council to provide objective oversight; and, outside of the agreement-making framework, it is the minister who makes the final decision on whether a site is to be impacted. The Queensland Government has successfully extricated itself from any responsibilities to conserve Indigenous heritage, even in the public interest. Instead, it has shifted the burden of negotiation and compliance onto Aboriginal and Torres Strait Islander peoples (Godwin 2003 in Edelman et al. 2010, p. 31; Martin, Sneddon & Trigger, Chapter 6; Rowland, Ulm & Reid 2014, p. 332).

The ineffective enforcement of heritage laws and the failure to prosecute those who break them is a further weakness common to all of Australia’s Indigenous heritage management regimes. Many Aboriginal and Torres Strait Islander people do not have access to mechanisms through which they can seek redress for damage to or interference with sites, as illustrated by the court case over illegal activities of the Biamanga Mountain site described by Hunt and Ellsmore (Chapter 4). In Victoria, enforcement has been identified as one of the key weaknesses of an otherwise relatively progressive Aboriginal heritage management regime: inspectors do not have the authority to enter private premises to investigate possible breaches of the *Aboriginal Heritage Act 2006* (Vic.) if consent of the owner is not granted (Atkinson & Storey, Chapter 5). In Queensland, there are no forums for Indigenous parties to lodge grievances about conduct, or mechanisms in place for investigating breaches (Edelman et al. 2010, pp. 30–1), and in Western Australia Aboriginal parties have

no rights to appeal decisions of the minister. The ‘due diligence’ or ‘duty of care’ approach to the identification of Aboriginal heritage sites in some jurisdictions allows for ignorance to continue to be used as a defence when sites are damaged (Hunt & Ellsmore, Chapter 4; Vaughan, Chapter 10; Edelman et al. 2010, pp. 30–1). The failure has been so great in Western Australia that the state Auditor-General has found the state government to be an ‘ineffective regulator’ that is unable to enforce compliance with its own heritage laws (Vaughan, Chapter 10). Across Australia to date there has only been a single successful prosecution for ‘desecration’ of a site, and Scambary and Lewis’s account of it — the Bootu Creek case (Chapter 9) — shows how difficult it is for Aboriginal people in the Northern Territory to ensure that sites of significance are protected from development, even with the full weight of both native title and land rights behind them.

Without detracting from efforts that reinvigorate cultural practices or revisit them in light of colonising actions (Lee, Chapter 12), the ongoing damage to the place-based heritage of Aboriginal and Torres Strait Islander peoples brings with it significant social costs, particularly where inadequate protection of ‘Aboriginal sites damages individuals, tears at the fabric of their societies and undermines the very ability of already vulnerable groups to reproduce their traditions and therefore themselves’ (Lewis & Scambary, Chapter 9). It is unthinkable that a government would issue a permit to destroy or interfere with the cultural practices of Aboriginal or Torres Strait Islander peoples. Yet the current administration of both heritage laws and native title in effect sees the legacy of the places created through cultural action considered fair game in the economic development strategies of successive governments and treated as little more than policy levers to be pulled when economic times get tough. Increasingly, Aboriginal and Torres Strait peoples and their organisations are carrying the burdens of proof, negotiation, administration and protection, requiring them to be regulators and watchdogs while also being the subject of legislation itself. The lack of a nationally consistent statutory regime for managing Indigenous heritage means that Aboriginal and Torres Strait Islander peoples must often struggle with these burdens on their own, separated from each other and undermining the advancement of a national approach and collective action that might act as a bulwark against injustice and neglect.

Reimagining the fate of Indigenous place-based heritage

This volume provides many insights into the sheer scale of the systemic haemorrhage and loss of Indigenous place-based heritage currently underway. It seems to us as though the enormity and complexity of the challenge of finding a way to

provide the degree of authority Aboriginal and Torres Strait Islander peoples seek in relation to place-based heritage, while also meeting the economic needs of the country as a whole, is so great that the search for workable solutions that satisfy everyone's interests has stalled. The demands of taking stock have left those involved weary and with little energy for positive strategic action. But immense changes are required, and on multiple fronts, if the current situation of chronic neglect of Aboriginal and Torres Strait Islander place-based heritage is to be addressed.

It starts with encouraging more discussion and action within and among governments. The Australian Government's recently released *Australian heritage strategy* (2015) has begun to rectify the invisibility of Aboriginal and Torres Strait Islander peoples place-based heritage within the national approach to the overall management of Australia's heritage. Yet the vision of greater inclusivity is yet to be supported by detailed changes. At the time of writing, the ATSIHPA remains under review and may soon be amended to 'to improve protections and cut red tape around Indigenous cultural heritage' as part a suite of proposals included in the Australian Government's *Our north, our future: white paper on developing Northern Australia*. This will involve establishing a system to accredit state and territory Indigenous heritage protection regimes in order to 'simplify' arrangements for investors and reduce regulatory duplication (Australian Government 2015, pp. 12, 79). It would appear that Indigenous heritage management is a space that the Australian Government is keen to vacate as soon as possible.

But what Aboriginal and Torres Strait Islander peoples have been asking for, and what many of the contributors to this volume are advocating, is more, rather than less national oversight of how Indigenous place-based heritage is managed in this country. During a series of community dialogues around the UNDRIP in 2014, participants made it clear that they want 'legislation that specifically protects cultural heritage to be consistent across jurisdictions' (AHRC 2014 p. 165). A consistent approach to the recording, measuring and reporting of places of significance is essential. The successful establishment of similar national legislative schemes for corporations and health practitioners suggests that the creation of such national legislation and standards is achievable. The Council of Australian Governments (COAG) could be an effective forum for pursuing a comprehensive and meaningful national scheme for Indigenous heritage management, but an increase in political will at all levels of government will be required before the issue can even get put on the agenda. Ensuring the transparency and accountability of the system, however, should not undermine the ability of local Aboriginal and Torres Strait Islander authorities to make their own decisions about how best to

balance their rights and responsibilities in relation to place-based heritage with rights and responsibilities in relation to social and economic development.

The solutions will be both technical and political. Structural reform might begin with unpacking UNDRIP and embedding its principals across new regulatory and legislative mechanisms to broaden the view of rights-based heritage protection. In addition, new international frameworks such as the International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples (the ILO Convention) could be supported and promoted, having already been ratified by over 20 countries. Article 7 of the ILO Convention states that, globally, Indigenous peoples have the right to ‘decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control over their economic, social and cultural development’ (Yupsanis 2010, p. 440). The ILO Convention in itself could inform developing national law without increasing Australia’s international obligations (Triggs 1999).

As evidenced in the contributions to this volume, there is a strong case for pursuing reform to state and territory heritage protection models in order to provide Aboriginal and Torres Strait Islander peoples with greater decision-making powers in the definition and management of Indigenous heritage. Local decision-making structures, mandated standards and methodologies for surveys, increased penalties for damaging heritage places and rights to appeal decisions would all work to counterbalance the inequities of current arrangements. But, beyond tinkering around the edges of existing frameworks, there is no reason that legislative reforms could not or should not involve a complete overhaul of the concepts on which current heritage legislation is predicated (Tan, Chapter 2). Reconceptualising existing notions about the value, legitimacy and beneficiaries of Indigenous place-based heritage, and nesting them in a rights-based approach that is consistent with native title, would eliminate the absurd situation in which many traditional owners currently find themselves: having rights to protect sites with no methods of enforcement.

Reforming native title law to better accommodate traditional authority in the management of place-based heritage is also necessary. The most obvious place to start is with the future act regime. Removing the constraints placed on the right to negotiate and providing native title parties with an ability to veto projects will go some way towards addressing the current power imbalances around negotiating tables and will dramatically increase the ability of native title parties to negotiate higher standards in Indigenous heritage assessments and more resourcing for

monitoring of compliance. Furthermore, developing more creative and flexible formulations of native title rights that articulate the nature of traditional authority in relation to the use, definition and protection of places of significance would go some way towards enhancing the practical effectiveness of rights to protect sites (Tan, Chapter 2).

Increased, and more appropriate, consultation with Aboriginal and Torres Strait Islander groups regarding improving existing frameworks will be fundamental to the success of any reform agenda. The Aboriginal and Torres Strait Islander Social Justice Commissioner's 2010 *Native title report* noted the urgent need for governments to improve their approach to engaging with Aboriginal and Torres Strait Islander peoples generally (AHRC 2010, p. 57), and a lack of consultation on Indigenous heritage reform specifically was raised during the Productivity Commission's recent review of the financial barriers to exploration (Productivity Commission 2013 p. 10). As Hunt and Ellsmore argue in relation to New South Wales (Chapter 4), much headway could be made if governments around the country stopped trying to frustrate the intent of the NTA and other land rights regimes with attitudes of 'managed destruction' and instead develop and implement models for the management of Indigenous heritage that Australia's Aboriginal and Torres Strait Islander citizens genuinely feel they can support.

Targeted capacity building for native title corporations and support for more effective and innovative dispute-resolution mechanisms will also make a considerable difference to the ability of Aboriginal and Torres Strait Islander groups to negotiate fair and just terms for the management and protection of significant places (Martin, Sneddon & Trigger, Chapter 6; McGrath, Chapter 3; McNiven & Hitchcock, Chapter 7). Encouraging further research about the heritage values of place (McDonald, Chapter 11), with fine-grained ethnographic analysis of the cultural politics of authority and the attendant responsibilities of all stakeholders (Martin, Sneddon & Trigger, Chapter 6) will further add to our collective understanding of the social impacts of current arrangements and build an evidence base for future decision-making.

But none of this will make much difference unless it is accompanied by supportive and effective political leadership and bureaucratic support at all levels of community and government. As the chapters collected here attest, in every jurisdiction around Australia the heritage protection gains during the era of native title have only been achieved through 'intense and persistent' activism of Aboriginal and Torres Islander peoples (Hunt & Ellsmore, Chapter 4). Aboriginal

and Torres Strait Islander peoples should not have to keep doing this alone. What is required now is nothing less than a national public conversation led by both Indigenous and non-Indigenous champions of culture, heritage and sustainable development from within community, government and industry who together build the impetus for change. Within Aboriginal and Torres Strait Islander communities, leadership is required to ignite and sustain debate over the nature of heritage protection and the needs of future generations (Marsh 2013). From within government, real effort and meaningful resources are required to push the agenda through the ‘Kafkaesque maze’ of bureaucracy (Langton 2015).

The value gap that exists between the heritage of the state and the cultural landscapes of Aboriginal and Torres Strait Islander peoples will likely never be closed, but this should not preclude a reimagining of the intercultural space in which Australia’s Indigenous heritage estate is understood and managed. From top down to bottom up, change needs to be drastic and immediate. The strategy of relying on non-Indigenous governments and private industry to uphold fairness is clearly failing. New and savvy means of activism are necessary in order to take ownership beyond the Westminster system and formalise Indigenous governance as an alternative to the current paradigm. At the most fundamental level, reinstating sovereignty over place-based heritage will require the imagination and active pursuit of a future beyond the limits of existing frameworks. In the meantime, Aboriginal and Torres Strait Islander peoples will continue to use whatever means are available to them — heritage regimes, native title rights, Indigenous Protected Areas or the courts — to manage and protect the important places and landscapes for which they are so very responsible.

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Chapter 2

THE DIFFERENT CONCEPTS AND STRUCTURES FOR HERITAGE PROTECTION AND NATIVE TITLE LAWS: THE NATURE AND PITFALLS OF PUBLIC HERITAGE AND PRIVATE RIGHTS

Carolyn Tan

Heritage protection laws and the native title regime are two common legal tools used in Australia to protect Aboriginal and Torres Strait Islander places of significance. Heritage protection laws in Australia tend to be based on a model derived from general heritage laws designed to preserve heritage for the public. They are about what society wants to keep. Public bodies use this model to assess heritage on behalf of the wider public; their assessments are based on the significance of the heritage and whether places should be protected in the interests of the community as a whole. Recent legislation has given more emphasis to the role in the assessment process of the Aboriginal and Torres Strait Islander people whose heritage it is, but the basic model — that is, heritage assessment based on wider public interest — tends to be retained. In contrast, native title rights are supposed to be derived from the laws and customs of the traditional owners of the land and waters. They are framed as private rights of certain groups that are recognised by the Australian legal system, rather than as something belonging to the wider community. Under native title, therefore, rights such as the right to protect places of significance should be assessed according to the content of the traditional laws and customs rather than by assessment systems set up for

the benefit of a dominant public. However, under the Native Title Act 1993 (Cth) and the jurisprudence that has developed, native title rights, especially the right to control access, are vulnerable to extinguishment. Also, rights under validly granted tenure are said to prevail over native title rights. The resulting vulnerability of native title rights makes them ineffective in protecting places of significance to Aboriginal and Torres Strait Islander peoples in the face of the tenure and licences of others. This chapter examines these contrasting theoretical origins, the resulting models of heritage protection and native title rights, and the consequences for protection of sites.

Introduction

Two common legal tools used to protect places of significance to Aboriginal and Torres Strait Islander peoples — otherwise referred to here as ‘sites’ — are heritage protection laws and the native title scheme. Both are often used in tandem to encourage proper heritage surveys and heritage protection agreements; however, both have very different natures and theoretical origins and both have their own conceptual difficulties and limitations. This chapter aims to provide a brief overview of the concepts that underpin the common model of heritage protection legislation in Australia and the native title rights to protect places of significance.⁷

The basic model for heritage protection, derived from inherited heritage protection laws, is based on the assumption that the state, territory or nation preserves heritage in the interests of the wider public. The model tends to be regarded as a public interest limitation or exception carved out of private or ‘government’ property and the rights of property owners. Heritage-assessment systems and procedures are geared to the public interest nature of heritage protection. Heritage protection is explicitly balanced against private property rights and other public interests. This model tends not to provide rights for the particular people to whose culture the heritage originally belonged and does not assess cultural beliefs in accordance with the understandings of those people.

Under the native title system as governed by the *Native Title Act 1993* (Cth) (NTA) (rather than the common law, which will not be discussed in this chapter), native title is construed as a private group right. It is not something granted by or

⁷ The practical use and effectiveness of these legal tools is a wider topic and will not be covered in this chapter.

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managed for the state or the public. Native title rights find their origin and nature in the traditional laws and customs of the native title holders.

It is common for native title determinations to include a right to protect sites or significant places. However, native title proceedings and determinations will only afford such rights as the NTA and courts recognise, and these rights are vulnerable and have limitations. In addition, framing the native title rights as rights of the native title holders to protect significant places does not necessarily provide legal protection to the places themselves, so protection offered under this system probably does not match the nature of what many traditional laws and customs provide.

As a result, neither system as it is currently construed provides an adequate solution to the crucial need for Aboriginal and Torres Strait Islander peoples to be empowered to protect their places of significance. The reasons for this are explained below.

Heritage protection legislation

Basic statutory models of protection for Aboriginal and Torres Strait Islander peoples' heritage

The heritage protection legislation in Australia that covers Aboriginal and Torres Strait Islander peoples' heritage has been developed over a range of times, and the various pieces of legislation contain different wordings and precise models. Nevertheless, various federal, state and territory legislation seems to follow the pattern of either of the two models derived from early heritage protection legislation used to protect 'sites' and 'monuments' — the two main types of cultural heritage recognised in Article 1.1 of the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).

This chapter will refer to these two models as the 'archaeological model' and the 'general heritage model'. These models assume and are designed around an understanding of heritage as something to be protected for the public benefit for various national or regional values rather than around the specific interests of the people to whom the area may be most significant.

Archaeological model: protection of sites

The archaeological model was created for site protection. Two key aims of archaeological protection are the pursuit and recording of scientific information and the preservation of material and places for study and information gathering. The early archaeological protection legislation was designed to preserve sites and materials from pillagers and destructive forces so that sites and objects could be

protected for study and information purposes (Byrne 2008). Typically, under archaeological protection legislation it was an offence to excavate, alter or damage a site or object without requiring that an area be listed first. This protection could be overridden, and excavation and removal could be allowed by permit. Permits were usually granted to professionals who would respect the scientific and educational aims of archaeology. Normally no rights were given to the communities whose ancestors created the relevant objects or sites. Furthermore, in the absence of any repatriation provisions, any archaeological material that was recovered during excavation was assumed to belong to the state or its museums, and the usual form of legislation did not give the descendants or communities of the original owners any rights to these materials or the places where the material was found.

General heritage model: protection of monuments

Most of today's general heritage legislation adopts the general heritage model. The general heritage model was originally created to protect monuments — that is, places associated with great historic events and people, and outstanding architectural or artistic monuments. The early aims of the general heritage model were to enhance national pride and create unifying myths and narratives at a national or regional level (see, for example, Davison 1991, 2008; Byrne, Brayshaw & Ireland 2003; National Estate Committee of Inquiry 1974). Later those aims expanded to include preservation of places of social and cultural significance and the less grandiose features of history, such as sites or buildings associated with ethnic or other minorities. However, the expansion to cover the heritage of minorities was often aimed at celebration of a national identity marked by diversity of origin. For example, the Burra Charter in Australia (Australia ICOMOS 2013) speaks of places of cultural significance reflecting the diversity of 'our communities', telling us about who 'we' are and the past that has formed us.

Under the general heritage model, a place must usually be listed before protection is granted, so the assessment under the model involves selectivity and discretion as to what is to be protected in the first place. The choice for preservation is often based on a ranking system designed to preserve what is regarded as the 'best of its kind' (McConville 1984). This ranking system is usually shaped by what heritage professionals and government believe is sufficiently significant for 'us' (the wider community). When it comes to social or cultural significance, the aim is to find samples that are representative and informative rather than the most attractive or spectacular. There has never been any consideration of preserving everything, nor could there be.

Under the general heritage model, heritage is seen as belonging to the public or society as a whole. The heritage preservation process has been described as ‘asserting a public or national interest’ in things ‘traditionally regarded as private’ (Davison 1991, 2008; Johnston 1992). None of this necessarily involves a change of legal ownership, as heritage property is often still in private hands, but it does substantially encroach on the legal rights of private owners in relation to their property and there will always be pressure to limit the scope of this ‘aberration’. Such pressure manifests itself in a tight reading of statutory definitions of the types of places to be protected.

General heritage model, archaeological model and Aboriginal and Torres Strait Islander heritage protection

Both the general heritage model and the archaeological model reflected the fact that the heritage was protected for the public by public officials. The heritage to be protected was what fell within certain statutory definitions and criteria; government-appointed professionals identified and assessed that heritage; and sites were recorded on a government register. This was a process conducive to an apparently objective and scientific, or at least professional, approach to assessment consistent with the aims of both models outlined above.

The statutes for Aboriginal and Torres Strait Islander heritage protection tend to derive from one or a mixture of both of these traditional models. When Aboriginal and Torres Strait Islander heritage provisions were inserted into general environmental or heritage legislation, usually the same process that was used for the other aspects of heritage protected by that legislation was followed: a listing or a declaration was required before protection was afforded and the assessment of the heritage was made by a government official (see, for example, *National Parks and Wildlife Act 1974* (NSW); *Environmental Protection and Biodiversity Conservation Act 1999* (Cth)). The federal legislation of last resort — the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHPA) — also follows the process in that an assessment and a declaration are required before protection is obtained.

Until relatively recently, most of the Aboriginal and Torres Strait Islander heritage statutes followed the archaeological model. So, under such heritage statutes, it was an offence to damage a site, and permits to damage or alter sites had to be obtained from a government official or government-appointed body. Commonly, the government set up a committee with professional expertise to assist in the assessment process.

Under Aboriginal and Torres Strait Islander heritage schemes, protections for sites of ethnographic significance are treated in a similar manner to those for archaeological sites. Examples of legislation of this type currently include the *Aboriginal Heritage Act 1972* (WA) (WAAHA), the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (NTASSA), the *Aboriginal Heritage Act 1988* (SA) (AHA (SA)) and the *Heritage Act 2004* (ACT) (ACTHA) in its provisions dealing with Aboriginal places. It was not until the 21st century generation of statutes in Queensland (the *Aboriginal Cultural Heritage Act 2003* (Qld) (QCHA), the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (TSICHA) and the *Aboriginal Heritage Act 2006* (Vic.) (VAHA) that more protections were added to the same basic structure. Under these Acts, far more details must be provided and additional procedures have to be undertaken before a person or body can obtain a right to damage a place of significance.

Protection for the benefit of the public and public values

Given that specific Aboriginal and Torres Strait Islander heritage legislation and provisions were derived from the two heritage models discussed above, the legislation has also from time to time been interpreted as being aimed at protecting Aboriginal and Torres Strait Islander heritage for the benefit of the wider public. It can probably be assumed that, when the specific Aboriginal and Torres Strait Islander heritage provisions are inserted into general heritage or parks legislation, this is to ensure that such heritage is included as part of the heritage of the state or nation. For example, the report of the National Estate Committee of Inquiry into the National Estate (the Hope inquiry) (National Estate Committee of Inquiry 1974) recommended protection of Aboriginal sites ‘as part of the National Estate’. Forty years later, the 2015 Australian Heritage Strategy (Department of the Environment 2015) contains positive statements about the links between heritage and strong communities, such as Indigenous communities (p. 7), and recognises that Indigenous heritage places are those particularly important to Indigenous people (p. 11). It speaks of training for Indigenous Australians, partnerships to identify and protect Indigenous heritage places (pp. 33–4) and the promotion of Indigenous consultation guidelines (p. 43). However, it also refers to cultural heritage underpinning ‘our sense of place and national identity’ and says ‘our natural, historic and Indigenous heritage places’ are ‘valued by Australians’ (pp. 6, 14; emphasis added). The strategy reiterates that the Australian community decides which stories and events are chosen to be remembered (p. 7). There is no suggestion of change in legislative models for decision-making.

When it comes to specific legislation for preserving Aboriginal and Torres Strait Islander heritage, one assumes that the intent is to benefit the relevant Aboriginal and Torres Strait Islander peoples, but express references to the heritage being protected for the *benefit* of these peoples are usually absent. While most statutes speak of preservation of the heritage, most say nothing about the beneficiaries of the preservation. The VAHA (ss. 3 and 12) and QCHA/TSICHA (s. 5) provide more of a flavour of an intent to benefit Aboriginal/Torres Strait Islander peoples in their statements about respect for Aboriginal/Torres Strait Islander culture and tradition, primary guardianship by Aboriginal/Torres Strait Islander people or recognition of the role of Aboriginal/Torres Strait Islander people in conservation. However, they still do not expressly say that there is any intent to benefit Aboriginal and Torres Strait Islander peoples. The long title of WAAHA states explicitly that Aboriginal heritage is preserved for the benefit of the whole community. In *Traditional Owners — Nyiyaparli People and Minister for Health and Indigenous Affairs* [2009] WASAT 71 (*Niyaparli*) ([18], [21]) the State Administrative Tribunal of Western Australia decided that decision-making on sites under the WAAHA was to be exercised by the minister acting on behalf of the community. In a recent decision concerning the WAAHA (*Robinson v. Fielding* [2015] WASC 108 (*Robinson*), [128]), it was confirmed that the WAAHA focused on the interest of the community and that the purpose of the Act was the preservation of significant places on behalf of the community. The Supreme Court of Western Australia acknowledged (at [129]) that, for the effective operation of the Act, ‘input’ of some kind from Aboriginal people was required to establish the existence and significance of sites. However, ‘input’ is still far short of saying that Aboriginal people are intended to be the key beneficiaries of the legislation.

The High Court in *Onus v. Alcoa of Australia Ltd* (1981) 149 CLR 27 (*Onus*) (at 34–35, 39–40, 48–49, 59–60), while recognising that the relevant custodians had standing to sue due to their special interest in their heritage over and above that of the general community, found that Aboriginal relics legislation in Victoria was not passed for the particular benefit of Aboriginal people; rather, it was for the Australian, or at least Victorian, community generally. When it came to Australian legislation that specifically protected Aboriginal places of significance, in *Tickner v. Bropho* (1993) 114 ALR 409 [30], French J said that the ATSIHPA was enacted ‘for the benefit of the whole community’ to preserve ‘what remains of a beautiful and intricate culture and mythology’. His Honour identified the protection as being a matter of public interest and pointed out that this interest had the potential to clash with private interests, which the

minister had to balance. This language also suggests that the aim was to preserve something for ‘the collection’ rather than for the specific values of the Aboriginal people, although the intention was no doubt that both interests would be served.

Of course, the protection of Aboriginal and Torres Strait Islander heritage for the benefit of the public does not preclude protection for the benefit of the relevant Aboriginal or Torres Strait Islander communities. There is an assumption that the statutory intention to protect heritage for the public benefit will also benefit the relevant Aboriginal and Torres Strait Islander custodians as well as the general public and that these interests converge. For example, in *Minister for Indigenous Affairs v. Catanach* [2001] WASC 268 at [45], Pullin J, referring to the WAAHA, mentioned that Aboriginal sites are of value not only to Aboriginal people but also to the Australian community as a whole. In the High Court case *Commonwealth v. Tasmania* (1983) 158 CLR 1 (the *Tasmanian Dam case*), the Tasmanian Government argued that the specific Aboriginal and Torres Strait Islander heritage provisions in the *World Heritage Properties Conservation Act 1983* (Cth) (s. 8) were not justified by the ‘race power’ contained in the Constitution because the areas were to be protected for their universal value and significance to people as a whole, not only for people of a special race, and Aboriginal people were not given any special benefits or rights under the legislation. The minority justices agreed. The majority, however, held that it was a law with respect to race and made comments to the effect that the legislation was a law for the benefit of all Australians but also a special law for Aboriginal people. The majority did not see any apparent conflict in these benefits (at 59, 172, 181, 275). However, Mason J (at 159) did acknowledge that the purpose of the protection of a site under the legislation may be unrelated to features which made it significant to Aboriginal people.

Difficulties can arise, however, if the interests of the public and those of the Aboriginal and Torres Strait Islander custodians diverge, particularly when the community interest in preserving heritage excludes or outweighs the interests of the Aboriginal and Torres Strait Islander group to whom the place is significant. One is reminded, for instance, of the debate over the traditional ceremonial practice of painting over ancient rock art in the Kimberley region — a practice that was criticised for damaging ‘the cultural heritage of mankind [sic]’ (see, for example, Bowdler 1988).

Natural justice and rights to be notified

The lack of express intentions to benefit Aboriginal and Torres Strait Islander peoples is accompanied in many cases by a lack of provisions providing for express

rights for those groups to whom the sites are significant. For example, under the WAAHA (s. 18(5)), there is a right of tribunal review for the landowner against a decision of the minister on whether or not to grant a consent to damage a site, but there is no corresponding right for the traditional custodians or even a right to be a party to such a review (see *Niyaparli; FMG Pilbara Pty Ltd and Minister for Indigenous Affairs* [2012] WASAT 31).

The absence of express rights has led to uncertainty about whether there are rights that would require Aboriginal and Torres Strait Islander groups to be notified about registration of sites or grants of permits to damage sites. Some, especially recent, Aboriginal and Torres Strait Islander heritage provisions have specific requirements about notifying relevant local Aboriginal or Torres Strait Islander organisations or groups about such matters.⁸ However, most of the earlier Aboriginal and Torres Strait Islander heritage provisions and most of the general heritage and environmental provisions do not contain any such notification or consultation requirements.

There is also uncertainty about whether Aboriginal and Torres Strait Islander people have rights to be notified under natural justice principles. Courts have expressed doubts as to whether the traditional custodians are considered to have sufficient rights and interests to entitle them under natural justice or procedural fairness principles to a right to be informed and to comment if they do happen to discover the impending destruction of their place-based heritage. Aboriginal and Torres Strait Islander custodians have been found, at least in some limited circumstances,⁹ to have legitimate expectations to be heard before decisions are made to disturb sites. However, these expectations are often based on the policies and actions taken by a department, which have created the expectation, rather than a recognised right by virtue of the fact that it concerns their heritage (see *Country Energy v. Williams; Williams v. Director-General National Parks and Wildlife* [2005] NSWCA 318). In *Western Australia v. Bropho* (1991) 5 WAR 75 at 93, a majority of the Western Australian Supreme Court expressed doubts

⁸ For example, AHA (SA), s. 13, where a failure to consult properly before a decision was made was able to invalidate the decision: *The Aboriginal Legal Rights Movement Inc v. South Australia and Stevens* (1995) 64 SASR 558; NTASSA, from s. 19F on; ACTHA, s. 31; VAHA from s. 38; QCHA/TSICHA from s. 57 and in Queensland Government (2004).

⁹ For example, *Carriage v. Stockland Development* [2004] NSWLEC 553; *Williams v. Director-General of Department of Environment and Conservation* [2004] NSWLEC 613; *Anderson v. Director-General of Department of Environment and Conservation* [2006] NSWLEC 12.

about such rights to procedural fairness, although other judges of that court accepted that procedural fairness should apply, at least in the form of some opportunity to convey information to the government-appointed committee making recommendations to the minister; however, they would not necessarily have this opportunity before the minister made the ultimate decision (*Western Australia v. Bropho* (1991) 5 WAR 75 per Malcolm CJ at 80; *Woodley v. Minister for Indigenous Affairs* [2009] WASC 251, [49]–[50]; *Robinson*, [140], [143]).

By contrast, courts have found that people seeking to develop land and whose property or commercial interests might potentially be affected by heritage protection are clearly entitled to natural justice and they are even entitled to see confidential and gender restricted material, even if that disclosure would itself be damaging to the heritage values of the area.¹⁰

Impacts on assessment of significance

In both the general and the specific Aboriginal and Torres Strait Islander heritage legislation, as a usual objective exercise of statutory interpretation and fact finding, one must ascertain whether an area falls within statutory definition and criteria. In order for the statute to apply, the question that must be asked is whether a place is in fact a ‘sacred site’ or an area of ‘particular significance’, or whether it fits any other statutory description. A similar exercise applies when ascertaining whether an impugned activity also falls into the definitions that would make an activity an offence or one that enables protective action to be taken — for example, whether it would in fact desecrate an area of significance or cause a type of damage to it that is prohibited.

Evidence is required to establish that the place does come within the definition. Such evidence is open to be tested for adequacy and credibility. As indicated in particular in the *Crocodile Farm* and *Hindmarsh Island Bridge* cases (referred to in footnote 10), the need for proponents of development to be able to test such evidence has even trumped concerns about traditional laws about restrictions on disclosure.

10 For example, in the *Crocodile Farm* cases of *Western Australia v. Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 54 FCR 144; *Western Australia v. Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 37 ALD 633; and *Minister for Aboriginal Affairs v. Western Australia* (1996) 149 ALR 78; or the *Hindmarsh Island Bridge* cases of *Norvill v. Chapman* (1995) 133 ALR 226, 241, 253–4; *Chapman v Luminis Pty Ltd (No. 2)* [2000] FCA 1010; *Chapman v. Luminis Pty Ltd (No. 3)* [2000] FCA 1120; and *Chapman v Luminis Pty Ltd (No. 4)* [2000] FCA 1121.

The precise evidence required will also depend on the wording of the statute. If the legislation only requires that an area be of significance to a group in accordance with its traditions, then it may be sufficient to prove that there is a tradition handed down about a place, whether or not there are any facts that establish that the matters asserted in the tradition are true (Mathews 1996, p. 159). However, it will be necessary to prove as a matter of objective fact that there is a tradition, and these facts may be open to testing as to credibility. In these heritage assessments, there is a danger that the approach taken to Aboriginal and Torres Strait Islander heritage will be the same as the approach to other forms of heritage, where significance is often seen as something inhering in the place itself that can be ascertained objectively in a scientific or professional manner (Tainter & Lucas 1993; Davison 2008). There are also always dangers that findings as to credibility may be affected by ethnocentric understandings. It is beyond the scope of this chapter to discuss examples of assessors using matters such as lack of corroborating written records, lack of wide knowledge of significance and lack of logical consistency or rationality of the belief to determine both whether the evidence of significance is credible and what would amount to damage to a site. However, many of these issues arose in the Hindmarsh Island Bridge Royal Commission and debates and were extensive critiqued (see, for example, Harris 1996; Bourke 1997; Andrews 1998; Fergie 1996; Hemming 1996; Tonkinson 1997; Weiner 2001, 2002).

Even apart from credibility issues, it gets more problematic if there is a need to establish that a place is in fact a 'sacred place' or similar. No one has argued that assessors need to find that a place is actually sacred or that the beliefs about it are true, but facts may need to be established if the grounds of significance and what amounts to interference with it are said to depend on such facts. For example, if the tradition is that burial grounds are areas of significance that must not be disturbed then the factual issue could arise as to whether a place is in fact one where there have been burials. The mere belief that there have been burials may not be sufficient (see, for example, Neate 1989; *Anderson v. Minister for the Environment, Heritage and the Arts* [2010] FCA 57, upholding a decision by the minister, who was not satisfied that a place was the site of a massacre).

These difficulties of objective assessment have been well illustrated in New Zealand cases under the *Resource Management Act 1991* (NZ), which refers to Maori sacred areas such as *wahi tapu*. In *Te Rohe Potae O Matangirau Trust v. Northland Regional Council and Nicholson* (unreported, Environment Court, A107/96, 18 December 1996), the court noted that the genuineness of a belief was

not sufficient: it is sometimes necessary for a consent authority to make findings about the existence and nature of *wahi tapu* as part of the process of deciding a resource consent application, and this question is decided on evidence of probative value in the same way as any other question of fact. Similarly, in *Te Toka Tu Moana O Irakewa v. Bay of Plenty Regional Council and Whakatane Regional Council* (unreported, Environment Court, A93/2000, 1 August 2000) the court said that it was a court of ‘law not lore’, that it had to make decisions based on the facts before it and that ‘he [sic] who asserts must prove’ ([27]).

While all these assessment problems can be heavily criticised, they do flow from a positivist model whereby a public official or body is making decisions as to whether the facts objectively satisfy the criteria prescribed by a public statute designed to protect public heritage.

The question then is whether the native title system offers a more appropriate conceptual basis for the protection of sites.

Native title and the rights to protect sites

Private rights under traditional laws and customs

Native title comes from a very different source from that of heritage protection legislation. It is not something created by Parliament or in the interests of the wider public. Its origins lie in the traditional laws and customs of the Aboriginal and Torres Strait Islander peoples to the extent that these are recognised by the common law and formally recognised by way of native title determinations by courts (*Mabo v. Queensland No. 2* (1992) 175 CLR 1 (*Mabo*), 57–59, 61; *Fejo v. Northern Territory* (1998) 195 CLR 96 (*Fejo*), [46]; *Sampi v. Western Australia* (2010) 266 ALR 537, [71]). Native title rights and interests therefore are derived from, and should be assessed under, the traditional laws and customs of the native title holders and by them.

Furthermore, such native title rights are private, albeit collective, rights vested in Aboriginal and Torres Strait Islander peoples. In contrast to the statutory heritage schemes, it is at least obvious that these are legally recognised rights of a group that are enforceable by the group and need not be exercised for any public benefit other than the interests of the group itself.

These rights of native title holders would fall into the traditional categories of rights giving rise to natural justice or procedural fairness in the event of government actions or permits to diminish or interfere with such rights (see, for example, the formulations of procedural fairness in *Twist v. Randwick Municipal*

Council (1976) 136 CLR 106, 109; *Kioa v. West* (1985) 159 CLR 550, 582) and standing to sue for any legal remedies that might be available in relation to protecting their rights (as in *Onus* 35–36). The NTA, in pt 2 div. 3, especially div. 3P, has also set out a future act scheme in which registered native title claimants are given various (albeit restricted) rights to be notified and opportunities to negotiate or comment on activities that affect their native title rights.

It appears that, under native title law, rights to protect or care for sites are not made conditional on or limited by potential damage to sites. Traditional owners can take action to maintain and protect sites even when they are not under any immediate threat. However, under heritage legislation, the custodians of sites must often seek legal injunctions to protect sites from damage. In doing so, they usually have to establish that the sites in question will be damaged or desecrated if the injunctions are not granted.

Vulnerability of native title

Native title rights that are recognised by the dominant Australian legal system and court determinations are limited and vulnerable, and not as extensive as rights under traditional laws and customs.

Under the native title scheme, all rights are vulnerable in the sense that they can be overridden and prevailed over by validly granted tenure, past and future (*Mabo*, 63–64, 88–89; *Wik Peoples v. Queensland* (1996) 187 CLR 1, 132–133, 250; *Western Australia v. Ward* (2002) 213 CLR 1 (*Ward*), [193]–[194], [308]). This means that if government permissions — for example, tenements for mining or licences for other development — are given to carry out an activity that may have the effect of damaging a site then this permitted activity prevails over any native title rights to protect that site. While the existence of sites and rights to protect sites are obviously relevant to determinations of whether future acts can be done, there is no right of veto to prevent damage to sites. This is even the case when the determined native title rights include a right to exclusive possession. For example, the Martu people were determined to have a right of exclusive possession, but that in itself would not have prevented a determination to allow a mining development to proceed (*Western Desert Lands Aboriginal Corporation v. Western Australia* (2009) 232 FLR 169, [71]). The abilities and discretions that statutory tribunals and governments have to allow future acts that prevail over rights to protect sites can in many ways be seen as the equivalent of the discretionary right to consent to or authorise the damage to sites under heritage legislation.

In deciding whether a statutory grant of authority to carry out activities, such as a mining tenement, in an area of a site does in fact give authority to damage sites and thus prevail over any native title rights, the relevant heritage regime may also need to be considered. It is arguable, for instance, that such grants may be subject to the heritage regime, which prohibits damage to sites unless there is a specific consent or permit to allow such damage. Indeed, usually proponents put forward the existence of the heritage regime as a reason that the grant of the future act would not be likely to cause damage to sites. In that event, it may be that the grant of such a consent or permit is a new future act and not valid if the whole future act process has not been complied with. An analysis of this argument is beyond the scope of this chapter but should be borne in mind in considering whether the particular grant will in fact permit damage to sites.

Limitations of requirement for laws and customs to be ‘traditional’

The other difficulty is that the native title scheme only recognises native title rights and interests if they derive from *traditional* laws and customs — that is, the laws and customs must derive from a system that has been continuously observed and acknowledged from the time of sovereignty (*Members of the Yorta Yorta Aboriginal Community v. Victoria* (2002) 214 CLR 422 (*Yorta Yorta*)). These traditional laws and customs may have adapted to differing circumstances over time, so the precise means of exercising rights is not frozen in time (*Yorta Yorta* [44]–[47]). However, this leaves scope for questions about the extent to which the laws and customs can adapt to newly identified sites, changes in custodianship, and changing attitudes to and interpretations of the treatment of sites.

It could certainly be argued that, while the system of laws and customs has to have continuity, the actual rules and applications may change in the same way that the application and interpretations of the general common law have changed substantially over the centuries. This means that, while a traditional system provides basic ways of identifying and understanding sites and how they should be treated, there would be scope for ongoing recognition of new and different sites, new interpretations of what amounts to damage and new means of protecting such places. In other words, while the right to protect sites must be derived from traditional laws and customs, the actual sites and means of protection may not have had to exist at sovereignty or be established as having existed at that time.

Native title rights to protect sites and limitations of the formulations of those rights

The concept of native title rights to protect sites also has limitations. The rights recognised under the NTA are broken down into a bundle of rights rather than plenary rights flowing from ownership of the land (*Ward*, [76], [95], [615]–[618]). Within the native title scheme, native title rights recognised in determinations by courts usually include some form of the right to protect sites. Indeed, as noted in *Hayes v. Northern Territory* (1999) 97 FCR 32, ‘any form of native title which did not recognise the need to protect sacred and significant sites would debase the whole concept of recognition of traditional rights in relation to land’ ([56]).

Rights to protect sites fall into two broad categories. In the first category are groups that have been determined to have rights to ‘exclusive possession, occupation, use and enjoyment’ of sites as against the whole world. A right to protect sites is implied by those groups’ ability to exclude others who might damage the sites. Their right to protect arises from the general right to control access and exclude others rather than a right that relies upon or is limited by the existence of a site to protect, so strictly it may not be a ‘right to protect sites’. However, there have been determinations, often negotiated as a compromise, where there have been specific rights of exclusive possession at and around sites, suggesting that the rights of control are very much rights aimed at protecting sites (see, for example, *Hunter v. Western Australia* [2009] FCA 654).

The broad right to control access to a site can be prevailed over or extinguished by other valid tenure, so it is subject to the same vulnerability as all native title rights, discussed above. However, the right to control access may be useful to guard against people who have no valid authority to be in a site or hold valid tenure over the area of the site. In *Mabo* Brennan J did suggest that ‘native title, being recognised by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence’ (61). There could be actions, including legal actions, to prevent damage to sites, including court injunctions to prevent trespassers or awards of damages for any damage caused to the land by those trespassers. There could be other direct action that could be taken pursuant to rights to exclude others — perhaps even by physical blockades of the area.

In the second category are areas where no general rights to exclude or control others have been determined. In such cases it is common for there to be at least a right to maintain or protect places of importance, albeit in a manner that does not enable the relevant group to actually prevent people with properly granted authority to be there from entering onto the land and carrying out activities on it. The general right to maintain and protect sites is construed as not involving any control of access by others (for example, *Northern Territory of Australia v. Alyawarr Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [136]–[140]). Following what was described in *Ward* [52] as ‘the preferable approach’, these types of rights are most commonly framed as rights to carry out activities, being activities of kinds that could be described as protecting sites. They are not usually framed as a right to the actual protection of the site. It is not appropriate for determinations to list or limit the activities, but one could imagine that these could be as simple as checking up on the condition of the site and cleaning up rubbish or overgrowth. They could involve carrying out rituals designed to maintain the sacredness and efficacy of the site. There may be a right to be present to monitor activities near the site and perhaps film or record this for evidence. There would be the ability to try to educate and exercise moral persuasion, such as by making requests not to damage the sites and explaining their significance. There could also be legal remedies that could be taken to prevent unlawful activities, although these actions would not in themselves necessarily be dependent on a native title right.

There are potential difficulties where there is a right to carry out activities to protect sites but no right to protection of a site itself. As an extreme example, limitations have been revealed in the religious freedom litigation brought to protect sacred areas in the United States. These actions by indigenous American groups relied on the constitutional rights to free exercise of religion. While all of those cases were taken with an aim of protecting sacred places, the plaintiffs were forced to frame them as actions to protect their right of religious exercise — namely, the right to carry out religious activities at or in relation to the sites. Many of the cases were unsuccessful for a variety of reasons related to the inability to show any infringement of the right to carry out these religious activities or any coercion to carry out or not carry out activities contrary to their beliefs (Tan 2011). The leading decision of the US Supreme Court, *Lyng v. Northwest Indian Cemetery Protective Association* 485 US 439 (1988), accepted that the whole sacred area, and quite likely also the religion, would be destroyed by the proposed developments but found there was no coercion

to act against religious beliefs or any infringement of the right to carry out religious activities, even though the point of the activities might be lost.¹¹

Similar difficulties arise in human rights litigation to protect sites, as these usually also have to be framed in the terms of the international human rights instruments as rights of people or groups of people to believe or do activities. For example, art. 27 of the International Covenant on Civil and Political Rights (ICCPR) deals with the rights of minorities to enjoy their own culture and to profess and practise their own religion, and art. 12 of the United Nations Declaration on the Rights of Indigenous Peoples is also framed as a right to maintain, protect and have access to religious and cultural sites. In the case of *Lansmann v. Finland* before the UN Human Rights Committee (Human Rights Committee, Communication No 511/1992, 52nd session, UN Doc. CCPR/C/52D/511/1992 (8 November 1994)), Sami reindeer herdsman complained under art. 27 of the ICCPR about quarrying works at a sacred mountain, but the committee analysed the complaint in terms of the impact of quarrying on reindeer herding activities and in its reasons gave no consideration to the fact that it was a sacred mountain that was the subject of the quarrying. These illustrate some potential difficulties with the usual formulation of native title rights as rights to do things in relation to sites as opposed to having a form of protection for the sites themselves.

Fortunately, native title rights to protect sites are usually more expansive than specific religious activities and can cover a wider range of activities that occur at sites. There will usually be many activities to maintain and protect sites that will be infringed upon or interfered with by works at the sites; for example, if there is a large development at the site this might prevent cleaning up at the area. In these situations, if the relevant work was not pursuant to what would be regarded as a validly granted authority under the NTA then there should be arguments available that actions, such as injunctions, can be taken to prevent interference with those activities, even if these actions cannot be framed as actions to give protection to the sites themselves.

¹¹ Cases in Australia that have sought to use the free exercise of religion provision in s. 116 of the Australian Constitution to prevent developments that would interfere with sites have also argued these matters on the basis of religious rights to control and manage land — in other words, also ‘activity’ rights (see FMG Pilbara Pty Ltd/Ned Cheedy on behalf of the Yindjibarndi People/Western Australia [2009] NNTTA 91 and, on appeal, *Cheedy v. Western Australia* [2010] FCA 690), although the different religious freedom jurisprudence in Australia meant that the courts did not need to analyse what would amount to an infringement of these particular rights.

It is the case that many traditional laws and customs create obligations for native title holders and others entering the land to protect areas of significance. The emphasis would then be on protection of those places themselves rather than on the activities of the native title holders. There may be scope to seek creative ways of formulating native title rights to reflect this. There is nothing in the terms of s. 223 of the NTA or at common law that requires rights to be framed solely as a right to carry out activities. The challenge would be to formulate a right to require protection of a place in a manner which does not amount to a control of access or a form of exclusive possession. In an obiter comment in *Fejo* the court listed as one of the possible rights ‘a right to maintain the land in a particular state’ ([47]). An example could be a right of the kind found in the *Charter of Human Rights and Responsibilities Act 2006* (Vic.), s. 19(2)(d), being a right ‘to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs’, which does not in itself protect just physical activities.

Origin of the right in traditional laws and customs and effect on assessment of places of significance

Putting aside the limitations and vulnerability of native title rights, a question arises as to whether the different legal nature of a native title right to protect sites will result in any different treatment of the sites or the assessment of their significance when compared with the situation under heritage legislation discussed previously. In this regard, a distinction needs to be drawn between general native title right to protect sites and the references in the NTA in the expedited procedure provisions in s. 237(b) or in the criteria for future act determinations in s. 39(1)(a)(v) concerning sites. The latter do not arise from or form part of the native title right to protect sites but are specific statutory criteria and likely to be treated in similar ways to heritage legislation discussed above — for example, by objective decision-making after testing all the evidence in order to ascertain whether a particular situation falls within those terms (see Sneddon 2012 for a comprehensive analysis of many of these cases and the way the tribunals and courts have handled evidence about sites and cultural significance). The questions often turn on whether there are sites or areas of particular significance that will be interfered with, and this is said to require evidence of such ‘particular’ significance (for example, *Western Australia v. Thomas* (1996) 133 FLR 124, 173–4 (the *Waljen* case); *Western Desert Lands Aboriginal Corporation v. Western Australia* (2009) 232 FLR 169 at [108];

WF (deceased) on behalf of the Wiluna Native Title Claimants/Western Australia/ Emergent Resources Ltd [2012] NNTTA 17; Yindjibarndi Aboriginal Corporation RNTBC/Western Australia/FMG Pilbara Pty Ltd [2014] NNTTA 8, [17], [119], [125]–[131]). This terminology of ‘particular significance’ seems to follow that of the ATSIHPA and other heritage legislation that uses that phrase, which was no doubt aimed at limiting the types of areas that would be open for protection.

However, when it comes to native title rights arising from traditional laws and customs, requirements that sites should be of particular significance or any level of significance should not be relevant if the laws and customs do not draw such fine distinctions.

As discussed above, the nature of the native title rights, commonly determined, are rights to carry out activities. The emphasis will usually be on the nature and extent of that right, not on the quality or assessment of the significance of the site itself. In the case of rights of exclusive possession, the issue will not turn on the existence of sites but instead on the right to exclude others from the area. Developers seeking to overcome any native title rights to protect sites or areas of significance are likely to rely first on the vulnerability and limitations outlined earlier to override the native title right. However, if the right cannot be overridden in that way, it may become necessary, at least in the case of non-exclusive rights to protect sites, to ascertain whether the relevant place is a site or area to which the native title right can apply.

If the right is defined narrowly — for example, by reference to sites of particular significance only — then the same arguments may be raised as to whether the site is in fact of particular significance. However, even if rights are more widely defined as applying to any sites or areas of significance in accordance with traditions, there could still be attempts to argue that a particular place is not such a site at all. We could see the same sorts of arguments raised as those that have dogged attempts to protect sites under heritage legislation. The content of rights to protect sites has not been tested in litigation, so one can only explore a view of what would be the appropriate principles to be applied.

Assessment of the significance of places protected by native title rights

It is clear that the source of a native title right to protect sites is not statutory and should not be corrupted or overlaid by precedents from heritage legislation. Such rights find their source and nature in traditional laws and customs, and assessment of whether a place comes within the definition of a ‘site’, and the nature of the rights that can be exercised in relation to it must be determined by those laws and customs. A place is a site if the laws and customs say it is. How

and when such places need protecting, and by whom, are matters that are also determined by those laws and customs.

This means that there should be no scope for judgment on whether the laws and customs are rational in designating a place as a site or in relation to beliefs about sites. If the tradition provides that burials or ceremonies or the like took place somewhere, it should not matter if there is no objective evidence that they actually did take place there. As with the heritage cases, there may be greater difficulties where there is no specific tradition about a place but only a tradition about a rule that a place is a site of significance where certain events have taken place. It may be necessary to consider whether the traditional laws and customs also provide for how one assesses this and to use the logic provided for under the traditional laws and customs rather than subject the application of those laws and customs to western modes of logic. It is vital, for instance, not to import legal positivism into Aboriginal and Torres Strait Islander traditions (Burns 2011).

Disputes and orthodoxy

The principle in western religious freedom jurisprudence that it is not appropriate to make judgments as to orthodoxy should apply equally to traditional laws and customs. One basis in the religious freedom jurisprudence for not making judgments on orthodoxy is that it is inappropriate for courts to make decisions about theological correctness. Another key factor is that religious freedom principles are based on individual rights to believe and to act in accordance with those beliefs. If it is up to each individual to decide what they believe then orthodoxy is irrelevant. However, if the question is ‘What is prescribed by traditional laws and customs?’ then this could require a more objective exercise of analysing the different views about what the traditional laws and customs of the group are, which could then also raise questions of orthodoxy.

Much will depend on which people are judged to be the experts on laws and customs. These experts would define and, if necessary, give evidence of those laws and would be the people designated under the traditional laws and customs as the experts. This could result in a slightly circular process as to who decides who really is the expert.

Under traditional laws and customs analysed as a whole, there may be scope for a variety of interpretations of what qualifies as a site and why it is significant. There may be no monolithic orthodox position under the traditional laws and customs but different degrees or forms of knowledge and different traditions — all valid — about the same place. In such circumstances, the native title rights

should take into account the flexibility of the laws and customs and the fact that they may encompass the full variety of stories and types of significance.

Native title agreements

This chapter does not deal with the practical ways in which the existence of native title rights to negotiate or the ability to seek determinations from independent bodies like the National Native Title Tribunal have encouraged negotiated agreements between governments, developers and native title parties around issues of heritage protection. Agreements could be reached — and some have been — on placing exclusion zones around sites, but these will depend on the relative bargaining power of, or goodwill between, the parties and how important the site locations are to the aspirations of developers. Incentives to enter into such agreements could be provided by legislation that increases the rights to protect sites, whether in stronger forms of heritage protection legislation or amendments to the NTA to make native title rights less susceptible to extinguishment or prevailing tenures.

Summary and possible ways forward

As outlined above, the traditional models for heritage protection derive from and are designed for a notion of heritage as something belonging to the community and the public interest. These models are ill-suited to places of significance to Aboriginal and Torres Strait Islander peoples, which belong to particular custodian groups and are not public property. However, if there were the political will, legislation could frame a different model to break out of the mould and deal with the conceptual problems described. Amendments can be made — and have been made in the past — that enlarge the role of traditional custodians. Past amendments could be extended to build in requirements for custodians to make assessments of significance and damage. There is also no reason why a form of rights-based heritage protection cannot be created.

As a contrast to the typical heritage legislation, native title rights do not derive from the public interest but are accepted as private rights. Despite this, the native title system is also not well placed to protect sites, mainly because native title rights are vulnerable to extinguishment and to being prevailed over by validly granted tenure. Of course, the NTA could be amended to limit extinguishment and make it harder for future acts to be granted if such future acts could result in damage to sites or else require the placement of conditions to prevent such damage. However, this too requires the political will to strengthen the legislation, and this has not been evident so far.

In the meantime, within these limitations, there may be scope for more creative and flexible formulations of native title rights to give some protection to significant places, even if there are no native title rights to control access or exclude others. Given that the rights derive from the traditional laws and customs, which would place emphasis on the protection of the land and important areas there, it would be appropriate for the native title jurisprudence to give due recognition to the origins and conceptual contexts of those laws and customs in the framing and assessment of those rights. So far, however, there have not been any significant cases testing the extent of common law native title rights to define or protect sites outside the limitations of the future act system. We await further creative developments.

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Chapter 3

FUTURE ACTS, FUTURE HERITAGE? THE EXTRAORDINARY SCALE AND UNKNOWN IMPACTS OF DEVELOPMENT-RELATED INDIGENOUS HERITAGE MANAGEMENT ON NATIVE TITLE LANDS

Pamela Faye McGrath

Development — predominantly mining and exploration — is occurring on Aboriginal and Torres Strait Islander land on an extraordinary scale. At the time of writing, over 80,000 ‘future acts’ have been notified since the introduction of the Native Title Act 1993 (Cth), and thousands of agreements between native title groups, proponents and governments have been negotiated in response. But very little is known about how such future act agreements and related Indigenous heritage management activities are shaping the lives and cultural landscapes of Aboriginal and Torres Strait Islander peoples. Through an investigation of what is known about the number of agreements being made, surveys being conducted and sites being documented and disturbed, this chapter highlights the extent to which the future act regime has enabled the extensive documentation of the place-based heritage of native title groups but done little to prevent such heritage from being destroyed almost as quickly as it is recorded. A massive store of information about the competing values of land has been created but, for a number of reasons, it remains largely inaccessible to Aboriginal and Torres Strait Islander peoples. In the hands of individuals, families and corporations, the information assets of Indigenous heritage

management processes on native title lands could be used to support a range of social and economic development initiatives. But this potential will remain for the most part unrealised unless steps are taken to build the information management capacities of native title corporations, ensure greater transparency in heritage management processes, and establish national standards and reporting frameworks. More research about the scale, scope and impacts of agreements and Indigenous heritage management activities on native title lands is urgently needed in order to develop policy that supports improved governance and more equitable conditions for the negotiation of future act agreements so that native title groups are able to sustainably manage their irreplaceable place-based heritage on their own terms.

Introduction

Since the introduction of the *Native Title Act 1993* (Cth) (NTA), Aboriginal and Torres Strait Islander peoples have increasingly been managing the impacts of development on places of significance through confidential agreements negotiated under the NTA's 'future act' regime. A 'future act' is one that affects native title because it interferes with the ability of Aboriginal and Torres Strait Islander peoples to exercise and enjoy their rights (NTA ss. 233, 227). The NTA sets out the parameters of agreement making between native title parties, governments and proponents of development projects over the doing of future acts and provides native title groups with a procedural 'right to negotiate' the terms on which they will consent to future acts on their lands. This right to negotiate does not extend, however, to the right to say no to a future act, even if places of special significance are potentially at risk.

As well as providing financial compensation and other benefits (Langton 2012; O'Faircheallaigh 2012), future act agreements may set out how places of cultural, historical, archaeological or other significance will be managed in response to a particular project. In doing so, they have the potential to provide more protection to a greater number of places of significance to Aboriginal and Torres Strait Islander peoples than currently afforded by the Indigenous heritage laws of state and territory governments. However, very little is known about the total number of future act agreements currently in place, their scope in relation to Indigenous heritage issues, or the extent to which their potential to improve upon Indigenous heritage laws is effectively being leveraged.

There have been some early warning signs that future act agreements may be failing to improve Indigenous heritage management for native title parties. But, for a number of reasons, the extent of any failure is difficult to evaluate. The sharing of information about the specifics of future act agreements is constrained by the confidential nature of the agreements themselves (O'Faircheallaigh 2008, p. 36) and there is a general reluctance among state governments and proponent companies, along with Prescribed Bodies Corporate (PBCs),¹² Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs), to share even the most basic information about their heritage management activities. The nature of what little information is available varies considerably, making it very difficult to compare or measure outcomes between, and even within, jurisdictions and preventing the compilation of a comprehensive picture of the overall impact of the future act regime on Indigenous heritage nationally. Moreover, this lack of information hinders considered analysis of the operation of the future act regime and its effectiveness in supporting native title groups to use development opportunities to pursue long-term cultural and economic aspirations.

Greater critical engagement with heritage management under the future act regime is well overdue. At the time of writing, Aboriginal and Torres Strait Islander peoples have access to the right to negotiate over almost five million square kilometres (64.5 per cent) of Australia's landmass (see Figure 3.1). This includes more than 2.2 million square kilometres where native title rights have been recognised and are (or are soon to be) managed by over 145 PBCs (NNTT 2015c, 2015f; AIATSIS 2014). This area increases with every registered native title claim and every positive determination of native title. In South Australia and Queensland, the right to negotiate applies to over 66 per cent of each state; in Western Australia the figure is almost 85 per cent; and in New South Wales the figure is 45 per cent, even though native title has so far been determined to exist over less than 16 per cent (128,444 square kilometres) (NNTT 2015c).

As it currently stands, in over two-thirds of Australia the inevitable contest between the place-based interests of Aboriginal and Torres Strait Islander peoples and those of developers are permitted to be resolved via confidential agreements that are less than transparent about their treatment of and impacts on Indigenous

¹² Created by the NTA and administered through the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), PBCs have prescribed responsibilities to manage native title rights on behalf of their members and to negotiate land access for third parties with interests in native title lands.

heritage. Among the many relevant facts that are currently difficult or indeed impossible to ascertain about the scope of Indigenous heritage management activities on native title lands under the auspices of such agreements, this chapter focuses on:

- the number and coverage of future act related agreements negotiated since the introduction of the NTA
- the number of heritage activities (surveys, assessments, etc.) undertaken on native title lands as a result of these agreements
- the number of places of significance documented, reported and impacted on as a result of these activities
- the fate of the information assets created and collated as a result of Indigenous heritage assessments on native title lands.

Investigating these realities requires the unpacking of some fairly complex and highly legalistic processes and relationships, not all of which are open to public scrutiny. The available evidence is often only partial and is as tangled and dispersed as the legislative and policy regimes in which it is embedded. So I have taken care to be clear about the assumptions inherent in particular data and the limits of the conclusions we can draw from them. Although it is often incomplete, the picture that emerges points to the extraordinary pressures to which places of significance to native title groups are currently subjected as a result of mining and other development projects, and the great and growing extent of Indigenous heritage management activities occurring as a result of these projects.

But before delving deeper into how Indigenous heritage is managed on native title lands, I will provide a fuller explanation of how the future act regime regulates the various and often inconsistent interests of developers, state governments and native title parties. The terms ‘native title parties’ and ‘native title groups’ are used interchangeably here to refer to the collectives of Aboriginal and Torres Strait Islander peoples who have claimed native title or have had their native title rights determined and who have direct interests in, and are therefore parties to, future acts. The terms ‘places of significance’ and ‘place-based heritage’ are also used interchangeably to refer to areas located on the traditional lands of Aboriginal and Torres Strait Islander peoples that have cultural, historical, archaeological or other values attached to them and therefore call for special management and/or protection. The term ‘Indigenous heritage management’ is used very specifically here to refer to the processes and professional practices associated with the identification, documentation, assessment and ongoing management of such places in the context of development.

Indigenous heritage management under the future act regime

As previously noted, the NTA provides native title parties with a right to negotiate the terms by which they will grant consent to a future act but, unlike the statutory land rights scheme of the Northern Territory, not a right to veto a project. The right to negotiate only applies to certain types of future acts — namely, the grant of mining tenements and petroleum titles and certain compulsory acquisitions of native title rights and interests (Sumner 2007, pp. 6, 11). Where a proposed future act attracts the right to negotiate, the government intending to do the act must give notice of the proposal in accordance with s. 29 of the NTA.¹³

The size, scope and potential impacts of mining, exploration and petroleum future acts vary considerably. Some future act notices relate to single exploration licences that may enable a small-scale individual prospector to fossick for gold or other precious gems. Other future act notices, however, are very ambitious in scale and propose projects of high commercial returns over long time-frames with multiple tenements that cover large areas of land and/or water. By way of illustration, one particular Northern Territory future act agreement is for 25 years, covers more than 52 exploration licence applications and five mining leases, and includes all associated activities such as use of water resources for ore treatment and the construction and operation of pipelines and equipment (ATNS 2011). This example is by no means an exception; the Agreements, Treaties and Negotiated Settlements Project database references hundreds of similar agreements. Petroleum exploration licences can be similarly extensive, among other things obliging grantees to conduct seismic surveys of hundreds or even thousands of square kilometres during the life of the tenement (Lucas & Fergie, Chapter 8).

For certain categories of future acts that are considered to have minimal impact on native title (for example, exploration licences) governments can assert that the right to negotiate does not apply, thus circumventing the need to make an agreement and fast-tracking the process. The NTA requires that native title parties be notified of expedited procedures and be given an opportunity to object.¹⁴ A native title party can object on a number of grounds, one of which is that the

¹³ State governments are able to establish alternative future act regimes as long as they are consistent with the NTA (NTA ss. 43, 43A), but to date only South Australia has done so, and then only in relation to the grant of mining tenements and compulsory acquisitions.

¹⁴ A detailed description of the processes by which future acts are notified and managed is provided by Sumner (2007). NNTT's webpage also provides information about future acts and Indigenous Land Use Agreements: see NNTT (2015a); NNTT (n.d).

notified procedure affects areas or sites of particular significance (NTA s. 237).¹⁵ The timeframe for lodging an objection is four months, during which period the native title party must gather sufficient evidence to illustrate how the proposed future act will interfere with their native title rights or places of significance. Future act objections are managed by the National Native Title Tribunal (NNTT), which facilitates the negotiation of an agreement if the parties are willing. If negotiations fail, the NNTT holds an inquiry into whether the future act can proceed and, if so, under what conditions.

Since the NTA was established in 1993, governments around the country have issued more than 80,000 future act notices, the vast majority being related to mineral or petroleum licences located in Western Australia. On average, that is around 3800 notices every year. Despite the recent downturn in the mining industry, the level of future act activity is being sustained. In 2014 alone 3362 future acts were notified, almost 80 per cent of which were issued by the Western Australian Government. More than 83 per cent (66,878) of all future act notices ever issued asserted that the expedited procedure applied — that is, that the proposed activities would have a minimal impact on native title rights and so no native title agreement need be negotiated. Native title parties subsequently objected to 32 per cent (21,529) of these expedited notices (NNTT 2015d). In 2014, almost all future act notices issued (84 per cent) were notified as expedited.¹⁶

The kinds of Indigenous heritage issues and activities covered by future act agreements may include survey methodologies; processes for consulting members of the native title group; site and object mitigation strategies; processes for seeking permission to interfere with sites; and formulas for determining appropriate levels of compensation (Quinn 2005, p. 17). But, other than what is needed to ensure compliance with state regulation, there is no requirement for agreements to deal with such matters. They can complement and expand on state, territory or federal government heritage laws but cannot modify or disallow their operation. In effect, it is the regulatory framework of the relevant jurisdiction that sets the bar for

15 The other grounds are direct interference with the carrying on of the community or social activities of the persons who are the holders of native title or major disturbance to any land or waters concerned (NTA s. 237).

16 Statistics on future act notices provided by A Gordon, NNTT Senior Business Systems Analyst, pers. comm., 5 September 2015.

Figure 3.1 (opposite page): The location of the right to negotiate, as illustrated by the location of native title determinations and registered applications, 31 March 2015 (NNTT 2015c)



Native Title Determinations & Registered Applications

As at 31 March 2015

- Native title determined to exist
- Registered Native Title Body Corporate yet to be nominated
- Claimant applications that have compiled with the registration test

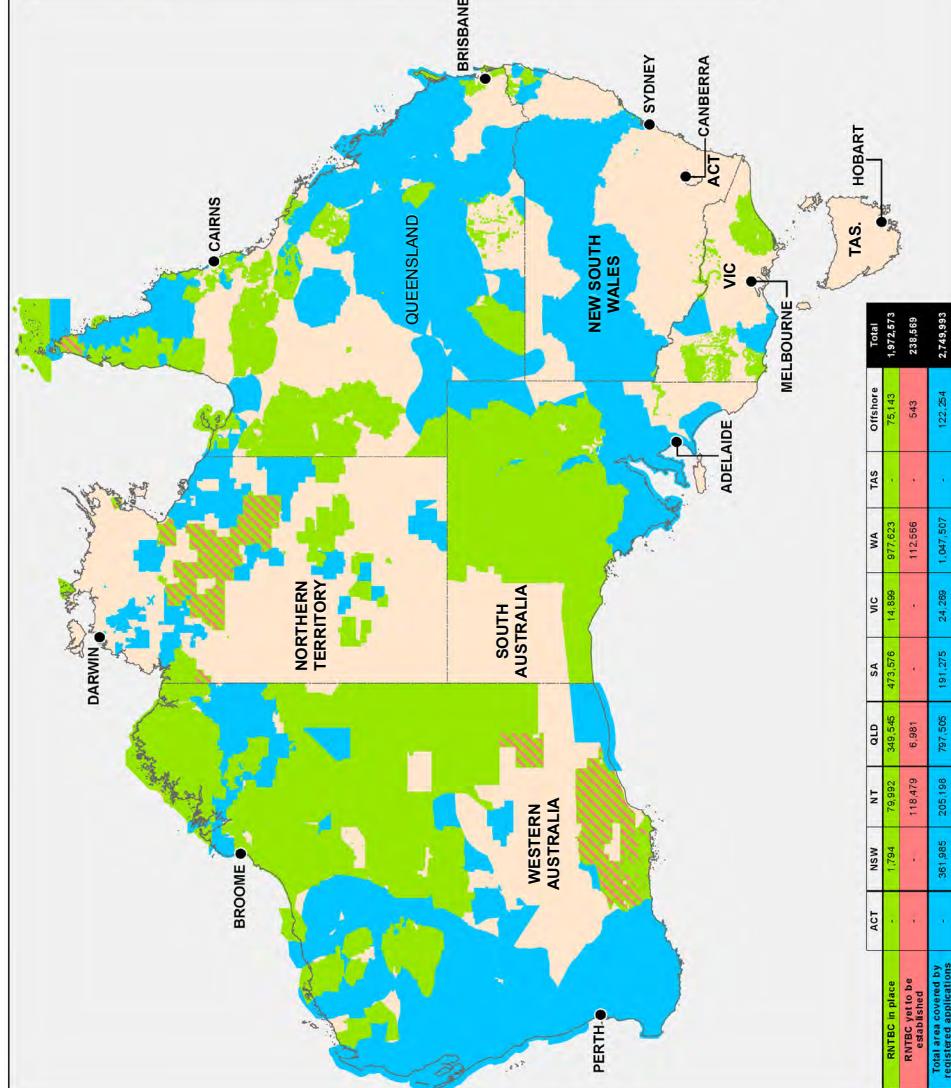
Only a small number of native determinations may yet exist in effect under the Native Title Act. The court may decide that the determination of native title will take effect conditional upon certain conditions being met. In these cases, the Native Title Act does not apply to the land until the conditions are met. Land Use Plans, or other agreements, may be established and registration of a prescribed body corporate (PBC). In these cases, the determination, or relevant part, will not be registered on the Native Title Register.

Areas not claimed such as private freehold, within a registered application are not necessarily depicted.

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Indigenous heritage management under the future act regime, and sometimes that will be where the bar remains. For example, Western Australia's Burrup and Maitland Industrial Estates Agreement, until recently the most substantial native title agreement ever negotiated and one of the few on the public record, contains 'no provisions dealing specifically with Indigenous heritage, simply allowing for the operation of the general law' (Ritter 2006, p. 138; see also McDonald, Chapter 11). The recognition of native title rights within state and territory Indigenous heritage regimes remains limited, and few legislative reforms since the introduction of the NTA have provided for the management of Indigenous heritage via future act agreement (see Edelman et al. 2010; Productivity Commission 2013; Schnierer, Ellsmore & Schnierer 2011; McGrath & Lee, Chapter 1).

The management of future acts is a statutory obligation of PBCs, but one that at times is in considerable tension with cultural obligations and native title rights to protect sacred places and communicate knowledge about them to younger generations (Bauman, Strelein & Weir 2013, p. 7). The types of places that native title groups might be concerned about will not necessarily be limited to ethnographic sites of mythological or ritual significance. Places of historical importance, such as the sites of family camps, massacres or missions, also resonate with cultural significance, and archaeological sites such as galleries of rock art, quarries and even scatters of stone tools are frequently imbued with a contemporary significance that renders them inseparable from the cultural landscapes in which they are embedded (Weiner, Godwin & Oste-Brown 2002).

The legal and cultural processes necessary to the negotiation, implementation and monitoring of future act agreements are costly and time-consuming, and in particular the amount of work required to identify and manage the impact of future acts on places of significance is substantial. The assessment of the likely impacts of infrastructure such as pits, waste dumps, mining camps, railway lines, access roads and office complexes, as well as those of lower impact ground-disturbing works such as exploratory core drilling, can be onerous but are absolutely necessary if places of significance are to be identified and appropriately managed. Where damage cannot be avoided, strategies for site mitigation, monitoring of ground disturbing works and appropriate models for compensation must be put in place. PBC members must be informed and consulted, meetings convened, experts engaged, advice prepared and delivered, contracts and payments managed, heritage assessments organised and outcomes documented. These expensive and time-consuming activities are necessary if

native title groups and their representatives are to ensure that the potential impacts of development are mitigated.

The proponents of future acts provide financial assistance to support many of these activities. But where adequate resources are not readily available — importantly, such resources include the cultural experts and decision-makers of the native title group itself — the integrity of processes is undermined and places of significance are potentially put at risk. Many PBCs utilise the services of NTRB/NTSP lawyers, anthropologists and geospatial specialists to assist with responding to s. 29 notices, organising associated heritage assessments and negotiating agreements. However, heritage management and post-determination assistance with future acts are not among the statutory functions of NTRBs and NTSPs; they are not services that the NTRBs and NTSPs are currently funded by government to deliver and there is significant variability in the nature of the support that they can provide (DAE 2014, p. 43). Despite being stretched to capacity, many NTRBs and NTSPs have nevertheless found ways to provide such services to PBCs through grant funding, cost recovery or cross-subsidisation with other activities, and separate corporate entities that operate on a fee-for-service basis (DAE 2014, p. 107). However, not all proponents are willing to work with NTRBs and NTSPs on the grounds that their consultative processes entail significant costly delays and politicise Indigenous heritage processes in order to leverage additional benefits from native title agreements (Scamvary 2013, p. 90). A number of PBCs have also sought political and administrative independence from NTRBs and NTSPs and now manage their future acts either on their own or with the assistance of private law firms and land access specialists.

Accepted methodologies for Indigenous heritage assessments and reporting under future act agreements vary considerably, shaped primarily by the legislative frameworks of the jurisdiction in which the matter is located and the internal policies and practices of the grantee parties and native title groups involved. The work area clearance (WAC) methodology (see Lucas & Fergie, Chapter 8) is widely used, providing Aboriginal or Torres Strait Islander consultants and disciplinary specialists with an opportunity to conduct ethnographic and archaeological investigations of areas likely to be disturbed by activities. Further surveys may later be conducted to record in detail sites that cannot be avoided and to develop and implement mitigation and monitoring strategies. Even when a WAC methodology is applied, the quality and effectiveness of heritage assessments still vary considerably in response to factors such as the time allowed to assess the areas in question; the skills, knowledge and attitudes of those involved and the

level of trust between them; the extent and quality of information the proponent provides about the location and likely impacts of their proposed activities; and the extent and nature of the information being recorded.

Currently, there are no national frameworks or standards to assist native title groups, researchers or advisers with evaluating and managing Indigenous heritage under future act agreements. Nor are there any accepted tools for measuring and evaluating the cumulative impacts of multiple future acts on local cultural landscapes, or their overall impact on our national heritage estate. There is almost complete separation of native title and Indigenous heritage policy in public discourse, with government documents such as the Australian Heritage Strategy (Department of the Environment 2015) (which does not once mention native title) and the Productivity Commission's review of costs associated with mineral and energy resource exploration (Productivity Commission 2013, p. vi) (whose terms of reference explicitly excluded any investigation of native title and future act processes), giving the impression that the relationship between the two policy spheres does not deserve dedicated attention. As the following figures highlight, however, there is a great deal going on in relation to Indigenous place-based heritage on native title lands that warrants both closer inspection and greater government oversight.

Number and coverage of future act related agreements

One of the most significant gaps in our knowledge about the impacts of the future act regime on Indigenous place-based heritage is the number and scope of agreements that have been made in response to the 80,000 future acts that have been notified since 1993. There are three distinct types of agreements that might ultimately result from the notification of a future act: s. 31 agreements, future act objection agreements and Indigenous Land Use Agreements (ILUAs). Each of these types of agreements, discussed in more detail below, is managed and reported differently. Public knowledge of their numbers and coverage is variable, and the total number of agreements is unknown.

Section 31 agreements

The agreements negotiated between parties about the doing of non-expedited future acts are commonly referred to as 's. 31 agreements' after the specific provision in the NTA that establishes how such negotiations normally proceed. The NTA provides for a minimum negotiating period for s. 31 agreements of at least six months. If an agreement cannot be reached within that time, the matter

can be moved to an arbitral inquiry conducted by the NNTT (NTA s. 35(1b)). Once a s. 31 agreement is finalised, parties are required to lodge the details about it with the NNTT.

Even though s. 31 agreements must be reported to the NNTT, some issues with reporting procedures have resulted in the NNTT not having an exact figure for the number of agreements that have been made over the years. Details about their contents are not recorded by the NNTT and it is not unusual for parties to provide only minimal information about the agreement. In Queensland, the government has formalised this approach by establishing a ‘dual deed’ system where the applicant and native title parties generally have two agreements: a s. 31 deed and a confidential ancillary agreement. The deed is provided to the NNTT; the ancillary agreement, which covers matters such as land access arrangements, compensation and the management of Indigenous heritage, is not (Queensland Government 2015). Consequently, while we are able to estimate approximately how many s. 31 agreements have been made since the introduction of the NTA, there is no freely available information about their timeframes, the area of land they cover, or their coverage and scope in relation to the management of Indigenous heritage.

To the best of our knowledge, since the introduction of the NTA there have been over 3000 s. 31 agreements negotiated, covering an unknown area of land.¹⁷

Future act objection agreements

In cases where future acts have been notified as expedited and a native title party has objected, the grantee party (the company or individual who is being issued the tenement) may reach an agreement with the native title group in question that provides for them to withdraw their objection in exchange for certain protections and benefits. Referred to here as ‘future act objection agreements’, such agreements will usually include provisions for how Indigenous heritage will be managed in relation to the proposed activities. These are private commercial contracts that are not required to comply with s. 31 of the NTA and therefore are not lodged with the NNTT.

There is no information currently available about the number of future act objection agreements that have been negotiated since the introduction of the NTA, or about their scope and coverage. It is impossible to even approximate a total figure. The only indication available of their possible numbers is that at the time of writing more than 21,000 future act objection matters had been finalised (NNTT 2015d),

¹⁷ According to figures published by the ATNS, by 2012 at least 2663 s. 31 agreements had been lodged with NNTT in the past 20 years (ATNS 2012).

which potentially means more than 21,000 future act objection agreements have been made between native title parties and the proponents of future acts.

ILUAs

Indigenous Land Use Agreements (ILUAs) are another vehicle through which governments and developers can negotiate with native title groups about how places of significance are managed in relation to development projects on their lands. ILUAs are voluntary agreements and can address a wide range of issues — for example, consultation protocols, co-management of conservation areas, compensation and extinguishment of native title. Significantly, they can also deal with Indigenous heritage management issues in relation to future acts such as mining, housing and other public infrastructure developments; pastoral leases; and commercial enterprises (NNTT 2015a). ILUAs must be registered with the NNTT, which then publishes basic information about the location, the nature of the agreement, the parties involved and the relevant subject matter.

As at 30 June 2015, 1012 ILUAs, covering 2,118,482 square kilometres of land (27.5 per cent of the country) and 12,301 square kilometres of sea, had been registered or were being considered for registration with the NNTT (NNTT 2015b). Not all ILUAs relate to future acts or contain provisions for the management of Indigenous heritage, but the contents of the agreements are not published, making it difficult to ascertain how many do. Nevertheless, their broad subject identifiers provide some indication and it can reasonably be assumed that, at the very least, any ILUA related to ‘Mining’ or ‘Energy’¹⁸ projects will be likely to address Indigenous heritage issues.

As at 30 June 2015, 300 ILUAs relating to ‘Mining’ or ‘Energy’ projects were registered with the NNTT. The footprint of these is some 1.7 million square kilometres, but their collective size is much larger due to overlapping and successive agreements covering a single area.¹⁹

Although no in-depth research has been undertaken into the effectiveness of these different kinds of future act agreements, analysis by political scientist Ciaran O’Faircheallaigh (2008, p. 37) of a number of different kinds of mining agreements suggests that they vary considerably in both the levels of protection

¹⁸ ILUAs categorised as ‘Mining’ include ILUAs recorded as having subject matters that include ‘Exploration’, ‘Mining’, ‘Small mining’, ‘Medium mining’, ‘Large mining’ and/or ‘Fossicking’. ILUAs categorised as ‘Energy’ include ILUAs recorded as having subject matters that include ‘Petroleum/Gas’, ‘Petroleum’, ‘Gas’, ‘Energy’ and/or ‘Pipeline’.

¹⁹ A Gordon, NNTT Senior Business Systems Analyst, pers. comm., 5 September 2015.

offered to Indigenous place-based heritage and the resources that are made available to support implementation, monitoring and evaluation activities.

Number of Indigenous heritage assessments on native title lands

It is difficult to gauge with any precision the intensity with which places of significance located in the areas covered by future act agreements are being identified and evaluated. On the basis of what is known, it is safe to say that the level of related survey and monitoring activity is considerable, a fact that is reflected in the ‘explosive’ growth of the Indigenous heritage management industry over the past 15 years (Smith 2013, p. 15).²⁰ But, as with so many other aspects of the future act regime, there are no reliable figures available about heritage management activities on native title lands and it is extremely difficult to determine with any certainty the total number, scope or outcomes of activities nationally. Further, very little is known about who is conducting surveys, what their qualifications are, or what methodologies they are employing to determine the significance of places that are found to be in the way of development.

The reporting of Indigenous heritage surveys and assessments is not mandatory in any jurisdiction, except where required to provide evidence for the registration of sites or for the granting of permits to disturb them. In Queensland there are currently no regulations or guidelines that expressly require surveys be undertaken as part of heritage management processes, and provisions for the mandatory reporting of Aboriginal or Torres Strait Islander heritage sites were recently removed from legislation (DEHP 2012, p. 220). Cultural heritage management plans (CHMPs) are compulsory for certain high-impact activities but not for low-impact activities, and the lack of a mandatory reporting framework makes it difficult to determine just how many CHMPs are being developed as part of native title agreements (DEHP 2012, p. 161). The Queensland Government itself admits that ‘the number of [reported] CHMPs per year (20–30) does...appear small given the number of major projects that are likely to be undertaken each year in Queensland’ (DEHP 2012, p. 220). In such circumstances, measuring ongoing compliance with agreements becomes an exercise of considerable guess-work (Rowland, Ulm & Reid 2014, p. 341).

Figures published by a handful of companies about their own survey activities on native title lands provide some indication of the extraordinary scale of heritage

²⁰ A 2010 survey of Australian working archaeologists highlighted a recent shift towards Indigenous archaeology, with 66.4 per cent of respondents working in that field (Ulm et al. 2013, p. 37).

management activity occurring in some areas. In 2007, Rio Tinto Iron Ore's (RTIO) Aboriginal Training and Liaison Unit employed six archaeologists whose primary function was to undertake Aboriginal heritage surveys on their Pilbara tenements (Scambary 2013, p. 89), and between 2009 and 2013 the company conducted more than 45,000 field days' worth of surveys over almost 2000 square kilometres in these tenements alone (RTIO 2015).²¹ This equates to around 25 people every day for five years out on country surveying for heritage sites. And those figures are only for a single proponent and only in one small corner of a single mining region. Also in the Pilbara, junior miner Fortescue Metals Group (FMG) has surveyed more than 430 square kilometres of country within a single native title claim. FMG works with similar intensity with at least six other Aboriginal groups in the region, and during 2013 alone it finalised 30 future act agreements (FMG 2013, p. 25).

Heritage activity on this scale brings both benefits and burdens for members of native title groups. Heritage surveys provide an opportunity to get out on country, have a look around and pass on knowledge to younger generations (Lucas & Fergie, Chapter 8). They can also be financially rewarding. Daily rates of between \$300 and \$600 for Indigenous consultants on surveys are not unusual²² and, although short-term and unpredictable, this income is potentially significantly higher than the weekly government welfare payments for job seekers.²³ This makes it an attractive employment option, albeit one that can cause considerable conflict between groups or families vying for the available work and raises the spectre of strategic fabrication of cultural value and the 'selling-off' of heritage for financial gain (Martin, Sneddon & Trigger, Chapter 6). Heritage work is even more rewarding for the legal and heritage professionals who make it their core business. The daily rate for archaeologists and anthropologists to conduct a heritage survey can be upwards of \$2000; the fees lawyers charge to negotiate the overarching future act agreements is even higher.

21 This figure includes the time of traditional owners, consultants and company representatives.

22 O Norris, pers. comm., November 2014.

23 Members of native title groups are also usually remunerated for their involvement in future act negotiation meetings through the payment of 'sitting fees'. Given the amount of time future act agreements can take to negotiate — which, according to the Minerals Council of Australia is on average 39 months (2013, p. 2) — this offers some redress to the significant voluntary labour native title holders contribute to the management of future acts on their lands (see McGrath forthcoming).

In areas of intense future act activity and where proponents are up against tight deadlines and even tighter budgets, the demands on native title groups to participate in future act meetings and provide advice and decisions about heritage can be overwhelming. In the 2012–13 year alone, the Yamatji Marlpa Aboriginal Corporation (YMAC) organised 247 Indigenous heritage surveys and held future act meetings on 191 days (YMAC 2013a, pp. 44, 76). Similarly, in 2012 the Central Land Council (CLC), whose area of responsibility covers 771,747 square kilometres of some of Australia’s most remote and arid country, received 88 future act notices on behalf of the native title groups it represents. In response, it undertook 21 surveys and field trips, held 31 consultation meetings and made three trips to remote areas to identify native title holders (CLC 2013, p. 101).

The YMAC recently described the current number of heritage work programs in the Pilbara as placing ‘considerable pressure on the native title groups we represent, particularly Elders with extensive cultural knowledge and authority who are required to participate in multiple surveys, often for weeks at a time’ (YMAC 2013b, p. 2). Some traditional owners in the Pilbara region feel that they are under ‘significant pressure’ to participate in heritage surveys and that decision making is undermined by the refusal of some companies to work through representative structures established as part of native title claim processes (Scambary 2013, p. 169).

Not all native title groups have experienced such intense future act-related heritage management activity, and for some groups the opportunity to participate in a heritage survey is a rare one. But even for a ‘quiet’ PBC, the time and social effort involved in managing future acts can be considerable. The Nyangumarta native title group, for example, whose country in the east Pilbara contains no viable iron ore deposits, enjoys a reputation of being among the least busy groups in the region. Nevertheless, research undertaken by the author on native title related activities since the Nyangumarta people first lodged their native title claim in the late 1990s reveals that over the past 15 years they have had dealings with more than 60 representatives from at least 27 different mining and energy companies and participated in no fewer than 23 heritage surveys and 14 future act meetings (McGrath forthcoming). Further, this research suggests that both the opportunities and the burdens of future act work increase post-determination. In the 10 years leading up to their native title determination (1999 to 2009), future act negotiations and heritage surveys comprised only 5 per cent of the total time Nyangumarta people spent on native title activities. In the first five years after

their native title rights were recognised, however, this increased to 32 per cent (McGrath & Rose 2015).

Number of places of significance documented and impacted on native title lands

There are likely to be many thousands of places of cultural or other significance to Aboriginal and Torres Strait Islander peoples that have been documented and are currently being managed as a result of future act heritage surveys or assessments, but information on exactly how many, where they are located and their particular values is not readily available.

Even in jurisdictions where reporting of heritage sites is mandatory, it is generally accepted that many more places of significance to Aboriginal and Torres Strait Islander groups are documented under processes resulting from native title agreements than ever make it to the official registers of state and territory governments. This is supported by the figures published by some companies about their own Indigenous heritage management activities; for example, between 2006 and 2013 FMG documented more than 5000 Aboriginal sites as a result of future act related heritage assessments, 1800 of which were located on the country of a single Pilbara native title group (FMG 2013, pp. 25, 27). Another Pilbara-based mining company has a custom-built geospatial heritage database referencing over 44,000 documents and containing information about more than 9500 ethnographic and archaeological sites collected during four decades working in the region.²⁴ These two figures alone exceed the total number of sites (14,365) that have been registered across the entire state of Western Australia (Vaughan, Chapter 10). The number of places of significance documented on mining company databases around the country is anecdotally so large that reporting them would create a backlog of bureaucratic paperwork that would take decades to clear, leaving companies in some jurisdictions reluctant to acknowledge their corporate holdings of information about site locations for fear of being prosecuted by state governments for failing to report them.

Non-reporting of heritage sites on native title lands occurs for a range of reasons. Native title groups may not report places of significance in order to protect culturally restricted knowledge from inappropriate revelation. They must weigh up the risks associated with exposing such knowledge against the value

²⁴ This information was provided to the author during discussions with the mining company involved about a possible project to return relevant information held in the database to a local native title group.

of having places formally recognised and protected under heritage laws. Many places recorded during heritage surveys will never be disturbed by the proposed development and so are not reported. Lucas and Fergie's account of how heritage is assessed and reported in South Australia (Chapter 8) suggests that many places documented as a result of future act related WACs are not reported to the state government because the people involved see their responsibilities to identify and protect heritage places as having been adequately fulfilled. And because future act agreements allow for the definition of a 'place of significance' to be broader than the definition of Indigenous heritage sites under relevant state legislation, many would not qualify for recognition or registration under those regimes and there is little purpose in reporting them anyway.

Moreover, just because a place of significance is reported does not mean that it will be protected from authorised damage. Many reported Indigenous heritage sites are legally impacted following registration, to such an extent that one of the major threats currently facing Australia's Indigenous heritage estate is the progressive and cumulative destruction of Indigenous place-based heritage through government-approved development (Schnierer, Ellsmore & Schnierer 2011, p. 121), much of which is evidently occurring on native title lands under the future act regime. According to the 2011 *State of the environment report*, between 2007 and 2011 the great majority of new additions to state government Indigenous heritage site registers — in some cases all new additions — were generated by compliance surveys carried out in response to development proposals (Schnierer, Ellsmore & Schnierer 2011, p. 51). In Western Australia alone during that five-year period, more than 7200 heritage places (many of which did not qualify to be registered as heritage sites) were reported to the state government through development-related heritage survey reports (Schnierer, Ellsmore & Schnierer 2011, p. 56). In the five years prior, between 2001 and 2006, the Western Australian Government received 487 applications to disturb Aboriginal sites. Nearly 85 per cent of these were approved (some with conditions), 13 were referred back to the proponent and only one was declined (EPA 2007, p. 234). In New South Wales, around five permits to impact Aboriginal heritage sites are reported every week, and in the 12 months to August 2014 all of the 82 applications for permits to impact sites submitted to the Office of Environment and Heritage were approved (Hunt & Ellsmore, Chapter 4). Without more comprehensive figures on the ratio of sites reported to sites impacted, however, it is impossible to establish a baseline understanding of the density of the underlying Indigenous place-based heritage and the extent to which the cumulative impacts of multiple future acts are threatening its integrity.

The information legacies of Indigenous heritage management on native title lands

All the many thousands of future act agreements made and Indigenous heritage surveys conducted since the introduction of the NTA have created an enormous amount of information about the cultural, commercial and environmental values of native title land. Each future act has its own unique information ‘footprint’ comprising information assets gathered and collated during the many activities associated with it. By way of example, the information footprint of an uncontested exploration drilling program might include minutes of negotiation and planning meetings; contracts setting out the terms of agreement; maps of work program areas; maps and associated reports from past and present archaeological and ethnographic surveys; environmental survey reports and maps; field notes and photographs from various events and surveys; and applications to state government to register or impact on sites of significance. Such documents are both intercultural and multidisciplinary in character — that is, they comprise a mix of scientific, commercial, legal, social and administrative information and Indigenous cultural knowledge. Almost all of them will have geospatial qualities — that is, they contain information about places and people that can be represented on a map — for example, the significance and location of Aboriginal sites and sensitive environmental features in relation to ore bodies and tenements, who has the cultural authority to make decisions about particular sites, and the history of non-Indigenous land tenure and use. This information reveals a lot about the relationships between the commercial, environmental and cultural values of native title land, what values have already been degraded, and what values may be exploited or protected into the future.

The information assets of heritage projects are dispersed and distributed through complex trade routes, passing through many hands and ultimately accruing in the filing cabinets and databases of many different individuals and organisations: mining companies, state government departments, the NNTT, NTRBs and NTSPs, private law firms, heritage consultants, PBCs and individual members of native title groups. In theory, PBCs or their legal representatives are always provided with copies of these assets, but in the author’s experience this does not always occur. Sometimes these documents and the cultural information they contain become separated from the Aboriginal and Torres Strait Islander peoples to whose heritage they relate and instead are owned and/or controlled by the companies who commissioned and paid for surveys (or their successors as a result of company sales or takeovers), local or state governments that required copies of reports to be submitted in order to

approve site impacts, and the consultant archaeologists and anthropologists who conducted and reported on heritage assessments.

Information about previous heritage management activities on their lands is not always easy for PBCs to get hold of; nor, when returned, is it necessarily easy to manage. As the figures presented in this chapter illustrate, for many PBCs the amount of work involved in managing the heritage implications of future acts is enormous: 145 PBCs and 273 claimant groups are currently managing the impacts of development on heritage in over 60 per cent of the country. Collectively they field thousands of future act notices every year, organise and participate in thousands of surveys and identify tens of thousands of places that are potentially in the way of development. Records disappear and documents created by entities that no longer exist — for example, due to corporate failure or takeover — may be impossible to locate. Where access can be facilitated, some native title groups and their representatives do not necessarily have the technological and administrative capacity to manage them securely. The reasons for this are as complex as the information itself: inadequate financial resources, few or no skilled employees, corporate or political instability, and unreliable infrastructure and technologies.

The capacity of PBCs to manage their future act loads varies considerably between organisations, influenced by factors such as location, income, the nature of the underlying native title determination, the traditional laws and customs of members, the time for which the corporation has been operational, and whether they have negotiated any future act agreements (McGrath, Stacey & Wiseman 2013, p. 30). A recent AIATSIS survey of 22 native title organisations showed that the majority struggle with the challenge of securing their large and diverse collections of cultural materials and corporate records. More than half identified their holdings of heritage survey reports to be at particular risk of damage or loss. Although some native title organisations have at least one employee with information management expertise, such specialists constitute less than 3 per cent of the sector's estimated workforce. All respondents — regardless of size or location — indicated that they urgently require more skilled people and greater access to technology if they are to appropriately respond to the knowledge management risks they are currently facing (McGrath, Dinkler & Andriolo, 2015).

Responding to future acts and the threat that they pose to places of significance is a responsibility that native title groups take very seriously, but a lack of capacity to keep track of information about past heritage activities on country potentially undermines future decision-making. A recent review of the roles and functions of native title organisations, conducted by Deloitte Access Economics (DAE), has

once again emphasised the often recounted fact that PBCs are chronically underfunded and lack the capacity to comply with a range of regulatory requirements, among them state and federal Indigenous heritage legislation and the demands of the future act regime (DAE 2014, p. 11). In some instances PBCs fail to deliver on their responsibilities (see, for example, Barker & McKenzie 2015), and even well-resourced PBCs such as Nyamba Buru Yawuru Ltd in Broome report that future acts represent a significant drain on limited resources. Some PBC boards and members are concerned that their organisations may mishandle future act negotiations through lack of capacity, thus missing out on the chance to protect their native title and places of cultural significance and/or to achieve appropriate compensation (DAE 2014, p. 77). These risks are greater in regions, such as the Pilbara, where groups often work simultaneously with multiple proponents on many projects. Without the capacity to collate and analyse data from multiple surveys through time, native title groups will find it difficult to answer even the most basic questions about the cumulative impacts of development on their land — for instance, how many and where have ethnographic and archaeological sites already been documented? Why are they significant? How many of those sites have been damaged or entirely destroyed by development, and how many more can we afford to lose?

Privileged access to the resources, systems and skills necessary for dealing with large amounts of information gives mining companies and governments a definite advantage over the native title groups with which they negotiate. It is not unusual during future act negotiations and heritage surveys for PBCs and their representatives to rely on those sitting on the other side of the table to provide most of the documentation about the scope and impacts of the matter at hand (for example, tenement locations, project plans, details of previous surveys, etc.) because they do not have the necessary access, resources or capacity to produce them themselves. The quality and reliability of the information provided depends entirely on the competency and goodwill of the government or company representatives involved. In a situation of poor PBC corporate capacity, it is a high-stakes relationship of trust that everyone involved has little choice but to accept.

It is important to emphasise that it is not just native title groups that struggle to create and manage the information assets created by future acts and Indigenous heritage management; companies and governments also find it difficult. The aforementioned heritage management database belonging to a Pilbara-based mining company was developed in 2009 after senior managers identified their

lack of capacity to manage information about Indigenous heritage as a critical business risk. The system took five years and 14 people to build. Native title groups have expressed concerns about the security and reliability of information held on some state government registers (Productivity Commission 2013, p. 145; Hunt & Ellsmore, Chapter 4), and these concerns are not unfounded. The Australian Capital Territory Government, for example, recently admitted that Aboriginal heritage places in its jurisdiction are potentially at risk because of limited funding to assist with documentation and management of the pressures of development (OCSE 2011, p. 6). The Queensland Government has also identified a lack of capacity to manage heritage information, with a 2009 review of its Cultural Heritage Database identifying an urgent need to upgrade its systems. The perceived beneficiaries of this upgrade, however, are not Aboriginal or Torres Strait Islander groups but ‘development proponents and other land users’ seeking information about the location of Aboriginal heritage sites in order to meet their duty of care obligations (DEHP 2012, p. 220).

Realising the future heritage potential of future acts

The DAE review of native title organisations proposes a future in which even those PBCs whose land is not in areas of significant resource extraction activity will be in a position to generate income through fee-for-service or government-funded Indigenous heritage management activities (DAE 2014, p. 21). What the review only tacitly acknowledges, however, is the extent to which this will require not only capacity building for PBCs but also greater government recognition of and support for the authority of native title groups.

The case for better equipping native title groups to assess and manage the impacts of development on their place-based heritage, and in turn to manage information about their place-based heritage, is compelling. A growing body of research suggests cultural heritage projects, in particular those related to land, cultivate cultural confidence, create direct and indirect employment and foster sustainable economic development (see, for example, Burgess et al. 2009; Harvard Project 2006; Starr 2013, p. 103). Proactive management of cumulative impacts of development on heritage guards against permanent damage to or loss of land-based assets, enables better use of existing resources, benefits regional environments and communities and contributes to industry’s social licence to operate (Franks, Brereton & Moran 2009, p. 355).

The Productivity Commission recently made a number of recommendations about reform of current Indigenous heritage processes in order to reduce the amount

of time, money and paperwork required to comply with mining and heritage regulation. If implemented, they will have flow-on effects for the management of Indigenous heritage under the future act regime. The recommendations include improving access for developers to information about Aboriginal and Torres Strait Islander places held on state and territory heritage registers and accrediting state and territory government processes that meet Australian Government standards of Indigenous heritage protection (Productivity Commission 2013, p. 2). This proposed ‘one-stop shop’ approach to the management of place-based heritage, which was reiterated in the recently released Australian Heritage Strategy (2015), is in part problematic because the bar for the Australian Government’s own engagement with Indigenous people on heritage issues has itself been set so low (Shearing 2012). With its focus on expediting land approvals to cut the costs of doing business, this approach also fundamentally fails to recognise that native title parties, along with mining companies and other non-Indigenous land users, are consumers of heritage-related information and therefore also clients of the system.

There are other steps that might be taken to address some of the burdens and challenges of the future act system as it currently stands. In those areas where native title has been determined to exist and rights to protect sites have been recognised, it makes both legal and cultural sense that native title holders, through their recognised representatives, be the primary contact for Indigenous heritage matters and that they have more input into and control over the management of places of significance under state and territory heritage laws. In some jurisdictions this may require legal reform, but it could also feasibly be achieved through incorporating native title groups into heritage decision-making structures, as is the case with the Registered Aboriginal Parties system in Victoria (see Atkinson & Storey, Chapter 5).

It cannot be over-emphasised just how little is known about what is happening in native title heritage nationally. Strategies that provide for more transparency and oversight of the development-driven heritage industry are urgently required. At all levels of government, those charged with a legal responsibility to protect and preserve Australia’s heritage — including its Indigenous heritage — need to better understand what is happening on their watch. The compelling argument for greater empowerment of native title holders in relation to both place-based heritage and economic development²⁵ does not negate the need for increased

²⁵ The many challenges facing Aboriginal and Torres Strait Islander peoples attempting to balance tensions between cultural matters, environmental protection and economic

visibility into the processes, practices and impacts of heritage management activities currently occurring under confidential native title agreements. The challenge will be to encourage transparency without encroaching on the rights of native title groups to manage their places of significance as they see fit and without being forced to unnecessarily disclose information about them.

Establishing national standards for survey methodologies and consistent reporting requirements would provide for quality assurance and improved compliance. And while there are excellent reasons why the reporting of site locations should not be compulsory unless the risk of impact is imminent, at the very least the mandatory reporting of all surveys — their scope and the number and values of the places they document, regardless of whether they would qualify for protection under the relevant state or territory heritage laws — would establish a national baseline against which outcomes could be measured. Full and consistent public disclosure about the number and type of places being impacted and destroyed would also motivate the proponents of development projects, as well as native title parties, to explore all options before agreeing to site destruction so as not to risk damaging their corporate reputations and undermining their social licences to operate.

Supporting PBCs, NTRBs and NTSPs to build their information management capabilities is crucial. However, the value of these capabilities will only be realised if there is a commensurate increase in access to relevant information. The dispersed and inaccessible nature of information related to Indigenous heritage management activities can potentially be addressed through strategies that encourage mining companies, governments and other developers to evaluate their holdings of heritage information and, where possible, repatriate them to native title groups. A voluntary, collaborative, national survey of the heritage archives of mining companies would shed considerable light on the amount of Indigenous place-based heritage that has been recorded to date, as well as its fate. It would also be an opportunity for proponents to investigate the legal, commercial, technological and cultural challenges of repatriating heritage materials and to devise ways to address them.

The gaps in public knowledge discussed here might not be of such concern if Aboriginal and Torres Strait Islander peoples were able to negotiate agreements under conditions that provide for free, prior and informed consent. But with the

development objectives have recently been reported as part of a Council of Australian Governments (COAG) investigation into Indigenous land administration and use (DPMC 2015).

negotiating power of native title parties undermined by the absence of a right to say no and an inability to match the resources of most governments and mining and energy companies (Cleary 2014, p. 133), greater independent oversight of the Indigenous heritage management outcomes of future act agreements is justified.

In conclusion, it is worth reflecting on what the place-based heritage of Aboriginal and Torres Strait Islander peoples in regions such as the Pilbara would look like today had the NTA and the future act regime not been in place over the past 20 years of the mining ‘super boom’. There is little doubt that it would be in a far worse state than it is now. The challenges that governments face in balancing native title rights with a broader public good are profound and the procedural rights to negotiate that are afforded native title groups under the NTA represent a meaningful attempt to provide some degree of equity. Yet the fact remains that, in the absence of an ability to refuse future acts, the inevitable contest between the cultural and economic values of land remains an unequal one and the destruction of places of significance to Aboriginal and Torres Strait Islander peoples that began with the colonisation of this continent in 1788 continues unabated.

Until a more comprehensive understanding of the intensity and consequences of the future act regime is achieved it will continue to be difficult to argue for policy reforms that provide greater agency to native title groups and enable them to more effectively manage their place-based heritage on their own terms. As the number of places of significance being documented and destroyed continues to climb, the urgency of addressing the apparent gaps in the evidence base grows. There remains much work to be done; at stake is nothing less than the continued existence of a unique and irreplaceable heritage and the wellbeing of the people to whom it belongs.

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Chapter 4

NAVIGATING A PATH THROUGH DELAYS AND DESTRUCTION: ABORIGINAL CULTURAL HERITAGE PROTECTION IN NEW SOUTH WALES USING NATIVE TITLE AND LAND RIGHTS

Janet Hunt and Sylvie Ellsmore

The destruction of Aboriginal cultural heritage in New South Wales has been substantial, but Aboriginal people continue to fight to protect cultural heritage and maintain cultural practices for future generations using whatever means they can. While a land rights system in place since 1983 has provided one mechanism to regain control over land, native title provides a relatively new opportunity in New South Wales for Aboriginal people to achieve greater protection of their lands and cultural heritage — one that, to date, has delivered important but limited outcomes. This chapter describes the complex legal framework operating in New South Wales, especially the intersection between cultural heritage management, native title and land rights frameworks. The authors use examples from different parts of New South Wales to highlight how the current legislative framework both enables and frustrates attempts by Aboriginal people to gain management or control of their culture and heritage. A detailed case study of the Gumbaynggirr people's 17-year battle to win both land rights and native title over the same area of land illustrates how various facets of this complex framework were used to strengthen traditional owners' voices and control over their cultural heritage. The Gumbaynggirr case study adds to weight to evidence that suggests successive New South Wales governments have adopted a conscious

strategy of delay to avoid transferring control of culturally significant lands to Aboriginal people through either land rights or native title. Finally, the chapter considers proposals for reform of cultural heritage management laws being considered by the current New South Wales Government and how adequately these align with what Aboriginal people in New South Wales have been calling for to radically improve culture and heritage management systems.

Introduction

New South Wales is the state with the largest Aboriginal population in Australia — a population that suffered the earliest and most intense colonisation. The destruction of cultural heritage in the state has been substantial, but Aboriginal people continue to fight to protect cultural heritage and maintain cultural practices for future generations using whatever means they can. As Aboriginal people own only around 1 per cent of the state's land area, most of their cultural heritage is found on private and public lands.

The state's planning laws and processes give poor protection and only limited voice to Aboriginal people in relation to development. A major avenue that Aboriginal people in New South Wales have used for access to and control over their cultural heritage is that of gaining access to and control over land and waters, either through claims or purchase or by negotiating joint management arrangements with public land managers. Under the state's land rights scheme, claims to Crown land can be made by statutory Aboriginal land councils.

Native title provides a relatively new opportunity in New South Wales for Aboriginal people to achieve greater protection of their lands and cultural heritage; it is one that, to date, has delivered limited outcomes. It remains highly contested within Aboriginal communities in New South Wales as to whether native title is capable of providing genuine benefits and whether the land rights and native title systems serve to support each other or encourage competing voices that can undermine efforts to protect and manage cultural heritage.

This chapter describes the complex legal framework operating in New South Wales, especially the intersection between cultural heritage, native title and land rights frameworks. The authors use examples from different parts of New South Wales to highlight how the current legislative framework both enables and frustrates attempts by Aboriginal people to gain management or control of their culture and heritage.

A detailed case study of the Gumbaynggirr people's 17-year battle to win both land rights and native title over the same area of land — one of the most recent native title claims to be determined and the first determination of native title by consent over land council land in New South Wales — illustrates how various facets of this complex framework were used to strengthen traditional owners' voices and control over their cultural heritage. In that case, as a result of Aboriginal land claims made over the area and extensive negotiations both inside and outside the courts during the life of the native title claim, the land has come to be jointly owned in freehold by the Nambucca Heads Local Aboriginal Land Council and the Unkya Local Aboriginal Land Council and is reserved as the Gaagal Wanggaan (South Beach) National Park — a *National Parks and Wildlife Act 1974* (NSW) (NPWA) 'Part 4A park' managed by a board of Aboriginal owners who are also Gumbaynggirr native title holders. The Gumbaynggirr case study adds weight to evidence that suggests successive New South Wales governments have adopted a conscious strategy of delay to avoid transferring control of culturally significant lands to Aboriginal people through either land rights or native title.

Finally, the chapter considers proposals for reform of cultural heritage management laws put forward by the current New South Wales Government and whether these align with the ongoing aspirations of Aboriginal people in New South Wales to see a radically improved culture and heritage system.

The current legal framework for cultural heritage in New South Wales

The current legal framework within which Aboriginal people in New South Wales struggle to protect their cultural heritage involves the interaction of three key laws: the NPWA, the *Aboriginal Land Rights Act 1983* (NSW) (ALRA (NSW)) and the *Native Title Act 1993* (Cth) (NTA). Other Acts also have an impact, particularly the *Environmental Planning and Assessment Act 1979* (NSW) (EPAA (NSW)), the *Heritage Act 1977* (NSW) (NSWHA), the *Native Title (New South Wales) Act 1994* (NSW) (NTA (NSW)) and natural resource management laws including the *Fisheries Management Act 1994* (NSW) (FMA).

In terms of developments or activities that may harm or destroy an Aboriginal heritage site or the cultural values associated with it, under the state's planning laws most development is approved by local government, with some larger projects approved by the relevant New South Wales minister (EDO NSW 2013).

Local councils in New South Wales are required to develop standard Local Environment Plans (LEPs). The standard LEP mandates that known Aboriginal

heritage is identified and conditions can be placed on any proposed development to avoid or minimise damage to that heritage.²⁶ An LEP will be valid even if it does not consider Aboriginal heritage. While a number of councils work actively to promote and protect Aboriginal cultural heritage,²⁷ many councils have not undertaken the research to ensure that such Aboriginal heritage is recorded in LEPs and there have been concerns that, even where this work is done, often local Aboriginal people and organisations are not properly consulted or involved in development of the plans (NSWALC 2009b, p. 19).

With some key exceptions, where a development may impact on Aboriginal culture and heritage, the NPWA (discussed in the following section) requires the developer to use ‘due diligence’ to avoid damage or requires them to obtain an Aboriginal Heritage Impact Permit (AHIP). The AHIPs authorise damage or disturbance of known sites and/or outline conditions to minimise or avoid damage to them during development work. This system is full of flaws and conflicts of interest. The policies about how to attain AHIPs, who needs to be consulted in the Aboriginal community and when a permit is needed under the NPWA are developed by the NSW Office of Environment and Heritage (see DECCW 2010a, 2010b). The proponents of developments on private lands decide who to consult about their projects and employ archaeologists or others who conduct the required Aboriginal cultural heritage impact assessments. Furthermore, the provisions of the EPAA (NSW) allow the Minister for Planning to determine that certain developments are ‘state significant’. This can exempt the developer from the necessity of cultural heritage assessment altogether and from the requirement to obtain an AHIP, and allows them to establish an alternative process. Between March 2011 and June 2013, over 500 such state significant developments were finalised (Department of Planning and Infrastructure 2014, p. 52). There is limited information on how these major projects impacted on Aboriginal cultural heritage.²⁸

26 As LEPs are public documents, there are provisions which allow for LEP maps not to specify the location of Aboriginal heritage where that heritage is sensitive.

27 For example, at least four local councils in New South Wales have established Aboriginal Keeping Places (noting also that most Keeping Places in New South Wales are established and run by local Aboriginal land councils); award winning projects such as the Aboriginal Cultural Heritage Management Development Assessment Toolkit developed by the Shellharbour City Council, Wollongong City Council and Kiama Municipal Council; and the Aboriginal Heritage Office, which is jointly supported by eight North Sydney Councils.

28 It is common for major mining projects to be required to consider Aboriginal cultural heritage as part of the environmental impact statement. Such conditions replace the

On a more positive note, additional approvals are required for developments impacting on known Aboriginal heritage places if those places are included in the New South Wales State Heritage Register. As of 2014, the register listed 26 sites under the Aboriginal heritage category. Only five years ago there were just nine listed places that have protection under the NPWA (NSWALC 2009b, p. 18), and sites such as the Bundian Way and Brewarrina Fish Traps have benefited from such registration, with funding made available for their protection (OEH n.d.).

While the planning laws provide a broad framework for planning and development in the state, the more specific legislation relating to Aboriginal cultural heritage that historically has been the focus of most Aboriginal activism and agitation for reform in New South Wales is the NPWA.

The National Parks and Wildlife Act

The NPWA²⁹ is the primary legislation for the protection of Aboriginal cultural heritage. This Act theoretically provides ‘blanket’ protection for Aboriginal cultural heritage ‘objects’ and ‘places’ (see NPWA ss. 2, 5). This definition of ‘Aboriginal cultural heritage’ is narrow, based on an archaeological understanding rather than a contemporary assessment by Aboriginal people of the value of their tangible and intangible cultural heritage. This narrow definition has itself made protection of some cultural heritage difficult (NSWALC 2009b, p. 14).

A statewide heritage database of over 65,000 items or places exists — the Aboriginal Heritage Information Management System (AHIMS) (OEH 2012, p. 7). The register covers only a small proportion of the Aboriginal heritage in the state and is known to contain errors (Ellsmore 2012). While it is available to anyone needing to know whether the activities they are conducting may be in an area of known cultural heritage significance, its incompleteness has been identified as a serious problem in past and current reviews of the legislation.

The NPWA gives the director of the National Parks and Wildlife Service ownership of, and therefore ultimate control over, the protection or destruction of Aboriginal cultural heritage on all public and private lands, including the power to issue AHIPs.

There is a significant level of authorised destruction of Aboriginal heritage in New South Wales. Permits for the disturbance or destruction of Aboriginal

requirement for an Aboriginal Heritage Impact Permit. Data on how many ‘state significant’ projects include Aboriginal culture and heritage conditions is not published.

²⁹ The origins of the NPWA go back to 1969, when an earlier Act was amended to establish the Aboriginal Relics Advisory Committee. This committee had no Aboriginal members.

cultural heritage are common, with around five per week being issued in the late 2000s on public and private lands (NSWALC 2009a). In the 12 months to August 2014, the Office of Environment and Heritage issued 82 permits. One hundred per cent of permits in this period were approved, with none refused. Since the 2010 reforms to the NPWA designed to increase protection of Aboriginal heritage (discussed below) were enacted (New South Wales Parliament 2014), up to 2014 292 permits were approved. Nearly all permits include conditions to mitigate damage to heritage and authorise harm to known Aboriginal heritage sites (see summary of contents, OEH 2013b). The ongoing rate of permits issued in New South Wales points to an Australia-wide trend identified by Schnierer, Ellsmore and Schnierer (2011) in Aboriginal heritage protection management — that is, the increase in identification of Aboriginal cultural heritage has not led to an increase in protection, but rather to better informed, regulated harm to that heritage by government agencies.

Consultation with Aboriginal people is required in order to determine the location of Aboriginal cultural heritage near a development, its significance and what is recommended to avoid damage to it. A developer is required to contact the Local Aboriginal Land Council (see later in this chapter), the New South Wales native title representative body, NTSCORP Ltd, to identify any native title claimants, the Office of the Registrar, ALRA (NSW), for any ‘Aboriginal owners’ (discussed later in this chapter) and more widely seek Aboriginal people who may have ‘cultural knowledge’ (DECCW 2010a). This is a wide group, and it is left to the developer to determine how to consult if there is competing or contradictory advice or ‘knowledge’ between these groups — a process that is a concern for both Aboriginal groups and development proponents.

Native title claimants and holders, where they exist, are prioritised as the groups to be consulted and an alternative notification and consultation process can be agreed under an Indigenous Land Use Agreement (ILUA), which takes precedence.³⁰ Given the small number of native title determinations in New South Wales and the limited resources of those recognised native title groups, in practice it is land councils who play the primary role in responding to permit applications.

Under the NPWA the minister responsible for the Act can also declare an area of cultural significance to Aboriginal people to be an ‘Aboriginal Place’ ‘when it is or was of special significance to Aboriginal culture’ (NPWA s. 84). By the end of 2011

³⁰ The NPWA includes provision for an Alternative Culture and Heritage Schedule to be established through an ILUA, which would replace the consultation process outlined in policy.

there were 77 identified ‘Aboriginal Places’ across the state. The list had grown to 102 by October 2014 (OEH 2013a). The Aboriginal Place provisions arose in 1974 largely in response to the groundbreaking NSW Sites of Significance Survey undertaken between 1973 and 1987 by the NSW National Parks and Wildlife Service and Ray Kelly, the first Aboriginal person employed by the service (Kijas 2005). This was the first wide-ranging Aboriginal heritage study undertaken in New South Wales, and one that involved Aboriginal people in identifying important cultural heritage sites (Organ 1994). The study documented key sites on Gumbaynggirr land that would later be the subject of land claims and native title claims.

The survey contributed to the growing recognition that the earlier ‘Aboriginal relics’ approach to cultural heritage was quite inadequate, as Aboriginal people identified many different sorts of sites — from ceremonial sites and places associated with Dreaming stories to places of post-contact history such as old reserves or burial sites — as important to them.

Finally, it should be noted that the NPWA established a 13-member Aboriginal Cultural Heritage Advisory Committee (ACHAC) appointed by the minister responsible for the environment to provide advice on ‘high level Aboriginal cultural heritage issues’. However, this group is not a decision-making body in relation to Aboriginal cultural heritage.³¹

State of destruction — authorised and unauthorised harm to Aboriginal heritage in New South Wales

The New South Wales Government considers that the level of protection for Aboriginal heritage is increasing, and points to the growing number of Aboriginal Places declared (NSWEPA 2012, pp. 71–4). However, Aboriginal communities have faced consistent difficulties in accessing the current laws to prevent or prosecute unauthorised destruction to their cultural heritage. Gaining protection for important sites is not always easy, as the Bundjalung people found when they tried unsuccessfully to protect a culturally and historically significant site

³¹ ACHAC’s statutory membership includes the NTSCORP Ltd, the NSWALC and nominees from LALCs, elders groups, registered Aboriginal owners and registered native title claimants. The membership of NTSCORP, as the state’s Native Title Representative Body, was added in 2010 as part of the round of amendments to the NPWA discussed. However, the body is appointed by the New South Wales minister, who has chosen not to appoint a NTSCORP nominee since 2011, and this position remains vacant. The NSWALC resigned from ACHAC in 2012–13 in protest at a lack of consultation over proposed culture and heritage reforms.

— a massacre site at Angels Beach (Weiner 2011). Even where sites and places are recognised, key Aboriginal organisations point to the high rate of approved destruction as evidence that Aboriginal cultural heritage is in a state of crisis in New South Wales, describing the NPWA as ‘like Dracula being in charge of the blood bank’ (NSWALC & NTSCORP 2011, p. 5).

Unauthorised destruction of Aboriginal cultural heritage is an offence under the NPWA and the responsible department’s director-general may bring prosecutions in such cases and may issue a stop-work order where cultural heritage is under threat. However, much reliance is placed on developers themselves to exercise caution and ‘due diligence’ (DECCW 2010b).

One of the most shocking examples of cultural heritage destruction occurred in 2010 at the Biamanga Mountain, south-east of Bega on the far south coast of New South Wales. Biamanga Mountain (the ‘Father mountain’) and Gulaga (the ‘Mother mountain’) dominate the cultural landscape of the Yuin people of that area. As Schnierer, Ellsmore and Schnierer (2011, p. 202) observe:

There are hundreds of registered Aboriginal sites and objects at Biamaga and Gulaga on the New South Wales Aboriginal Heritage Information Management System. The Register of the National Estate also includes a listing for Mumballa Mountain that acknowledges five sacred sites.

Biamanga Mountain is a men’s ceremonial site and Biamanga National Park is one of the joint managed national parks under Part 4A of the NPWA. Biamanga Mountain is a recognised Aboriginal Place, although the national park and the Aboriginal Place have different boundaries, with the latter extending into some areas of state forest land managed by Forests NSW (now Forestry Corporation of NSW). Logging occurred within the Aboriginal Place until 1992 and this has seriously degraded the area, including sacred sites.

In March 2010 Forests NSW’s plan to log within part of the Aboriginal Place was approved, although their licence to do this indicated that it was to avoid the ‘specific location of Aboriginal objects and gazetted Aboriginal Places’ (Schnierer, Ellsmore & Schnierer 2011, p. 204). In April 2010 Yuin elders protested that logging was occurring within the Aboriginal Place and the state government was made aware that Forests NSW was logging in an area in breach of its licence conditions. The traditional owners and environmental groups took a case to the NSW Land and Environment Court for an injunction to prevent the logging and for restoration of the damage — actions that required the NSW Department of Environment and Climate Change (DECC) (now the Office of Environment and

Heritage) to use its powers under the NPWA. The case was successful in stopping the unauthorised logging, but the same department then declined to prosecute Forests NSW for this illegal damage to an important cultural site, claiming that Forests NSW had simply made a mistake. In a supreme irony, NSW Forests took the traditional owners to court for trespass when they attempted to stop the illegal operations. Fortunately, the court found the protestors not guilty (Schnierer, Ellsmore & Schnierer 2011).

In June 2010 the New South Wales Parliament passed the National Parks and Wildlife Amendment Bill, which made changes to the NPWA designed to give greater protection to Aboriginal cultural heritage through heavier fines and penalties and a strict liability clause which overcomes the previous situation where people could only be sanctioned if they destroyed cultural heritage ‘knowingly’. The NPWA maintains a defence that a person took ‘due diligence’, but it is a much stronger regime on paper than had previously existed. Also included under the new regime are expanded provisions to allow development near Aboriginal cultural heritage sites for ‘low impact activities’. These activities no longer require a prior Aboriginal heritage survey. Although the new laws include the strong strict liability offence, the other new provisions may have created new opportunities for the destruction of Aboriginal heritage, particularly where people lack sufficient knowledge to identify Aboriginal sites and therefore to make an assessment of what reasonable care is required to avoid damage to them (NSWALC & NTSCORP 2011).

Prior to 2010, the penalties were low and prosecutions remained few and far between (NSWALC 2009b, p. 15). When these amendments and their associated regulation came into effect in October 2010, Aboriginal people hoped that this would slow the rate of destruction and better protect their cultural heritage. However, reports of ongoing destruction persist, even by government-owned entities (NSWALC & NTSCORP 2011, p. 11).

There has been one successful and high-profile prosecution under the amended laws — the *Cromer case* (*Office of Environment and Heritage v. Ausgrid* [2013] NSWLEC 51 (*OEH v. Ausgrid*)). The site in question was an unfenced, large engraving of a footprint by the side of a road at Cromer in Sydney’s North Shore. It was sliced through in December 2010 during the laying of electrical cables by a company subcontracted by state-owned corporation Ausgrid (which was known as EnergyAustralia at the time). The Metropolitan Local Aboriginal Land Council reported that the site marked an important cultural route of the Garigal people and was first catalogued in 1979. It was a known site recorded on AHIMS, which agencies — including Ausgrid — are required to consult before

undertaking work of this type. There is no native title claim or determination over the area.

The Land Council ran a campaign through the media for the Office of Environment and Heritage to investigate and prosecute the damage. Initially Ausgrid claimed no responsibility although, as noted above, the NPWA does not require intent to be proved since the 2010 amendments created the strict liability offence for destruction of known sites. After questions were raised in New South Wales parliamentary budget estimates hearings about the department's failure to prosecute, a prosecution was made in the final months before the time for such a prosecution would have expired.

In *OEH v. Ausgrid*, Ausgrid pleaded guilty and was fined \$4690 from a possible maximum fine of \$220,000. The reasons that Pepper J gave for the small fine included that, although the site was recorded on AHIMS, there was limited evidence on the specific significance of the rock engraving in question, which was covered in leaves and dirt and not protected by a fence. This would be the case for all but a tiny minority of known sites in New South Wales: there are 4000 sites within North Sydney alone and a tiny percentage of these are identified with signage or other forms of notification.

The NSW Aboriginal Land Council (NSWALC) expressed extreme disappointment about the decision and called on the state government to appeal given the low level of the fine. The Office of Environment and Heritage did not intend to appeal the decision and noted that the decision took in Ausgrid's cooperation, its early guilty plea and its remorse. The Chief Executive of the National Parks and Wildlife Service, Sally Barnes, was reported as stating at the time (McKenny 2013):

There are 113 rock engraving sites in the Northern Beaches area and companies like Ausgrid are aware of their locations and have legal obligations to protect objects of Aboriginal heritage. I acknowledge that Ausgrid pleaded guilty to this offence and cooperated during the investigation, however the incident should never have occurred in the first place.

In the year to August 2014, the Office of Environment and Heritage reported that 60 complaints about the destruction of Aboriginal cultural heritage had been brought to the attention of the department. On these 60 complaints, 14 compliance outcomes were undertaken, leading to 12 advisory or warning letters, one remedial direction and one penalty notice. No one was taken to court (New South Wales Parliament 2014).

Land rights and cultural heritage

The second key piece of legislation that bears on Aboriginal cultural heritage is the ALRA (NSW). The ALRA (NSW) established a statewide system of Aboriginal land councils that preceded the passing of the decision in *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1 (*Mabo*) and the subsequent introduction of the NTA. Today the network of 119 Local Aboriginal Land Councils (LALCs) remains the largest independent vehicle through which Aboriginal people in New South Wales work to protect and advocate for Aboriginal cultural heritage and other land-related issues, supported at the state level by the NSWALC.³²

The ALRA (NSW) emerged from an important development in land rights and place-based heritage for New South Wales: the 1980 New South Wales Parliament Select Committee of the Legislative Assembly upon Aborigines (the Keane committee). The Keane committee considered not only Aboriginal people's demands for land rights and redress for past dispossession but also the matter of cultural heritage legislation as part of a far broader brief about the causes of Aboriginal socioeconomic disadvantage. The first Keane report recommended the establishment of both a land rights system and a parallel system of local Aboriginal heritage groups headed by an Aboriginal Heritage Commission. While the former system was established by the ALRA (NSW) in 1983, the latter recommendation languished.

The Keane committee was established following a sustained period of activism and political agitation by Aboriginal people in New South Wales for Aboriginal lands rights (Goodall 1996), which incorporated demands for Aboriginal control of Aboriginal culture and heritage (Norman 2009). In 1973, the *Aborigines Act* 1969 (NSW) had been amended to enable an Aboriginal Lands Trust to be established to hold freehold title to some small areas of old Aboriginal reserves and to enable it to make claims for Crown land. The Gumbaynggirr people were among those who made claims through this process. But the change did not satisfy Aboriginal demands, as people wanted the reserves to be placed under the control and ownership of their residents (Wilkie 1985, p. 10). Then, in 1977, the NSWALC was established by Aboriginal community representatives in Sydney as an independent, unfunded Aboriginal organisation to campaign and lobby for a statewide land rights system. The link between land rights and Aboriginal cultural heritage was evident in the very first claim submitted — the

³² At the outset regional land councils were also established, but these were later abolished (Morris 2013).

Terry Hie Hie claim over a reserve and other Crown land near Moree, including a sacred site and another historical place. This claim was part of the Aboriginal campaign for a more extensive system of land rights (Wilkie 1985, pp. 10–11). Only later was NSWALC brought under the ALRA (NSW), with funding for the Aboriginal land council system established through a 7.5 per cent share of state land tax from 1984 until 1998 (ALRA (NSW) s. 28; Smith 1997). NSWALC's founding aims included not only the return of land to Aboriginal people in New South Wales but also the return of sacred sites, the right to access sites and the right to undertake cultural hunting and fishing (NSWALC 2009a, 2010).

Any Aboriginal person living within the boundaries of a land council in New South Wales may become a member and vote for the board of their Local Aboriginal Land Council (LALC). In this provision, the ALRA (NSW) differs markedly from the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), with its focus on traditional owners. In New South Wales there are no formal structures that require or enable particular decisions to be deferred for decision to groups with cultural authority over lands rather than the broader elected membership, although consultation groups like an elders or a cultural heritage subcommittee can be established. The recognition of traditional cultural authority in relation to heritage matters was to have been achieved by the parallel and complementary Aboriginal heritage structures proposed in the report of the Keane committee. This land council membership structure can create some tensions and difficulties, especially from a native title perspective, as it is not uncommon for traditional owners to be outnumbered in LALCs by Aboriginal members from other areas, leading to a land council board that is not representative of local cultural authority.

The ALRA (NSW) outlines specific responsibilities of land councils to take action to protect the culture and heritage of Aboriginal people and to promote awareness in the community of the culture and heritage of Aboriginal persons within their boundaries. (For LALC responsibilities in relation to cultural heritage, see ALRA (NSW) ss. 52(4), 106.) This includes Aboriginal people who are not members of the land council. Although the ALRA (NSW) does not provide for the return of land which is of cultural or traditional significance (other than through Part 4A joint management arrangements, discussed later in this chapter), land councils are required to consider the cultural heritage significance of the land before leasing, developing, selling or otherwise 'dealing' with the land (see ALRA pt 2, div. 4, Land Dealing provisions). In practice Aboriginal land councils play an important role in the management of Aboriginal cultural heritage in both public and private lands in New South Wales on behalf of the entire Aboriginal community, members or otherwise, through

the monitoring of development activities, advice to local councils, employment of sites officers, development or participation in heritage programs, cultural tourism, support for local elders and Aboriginal cultural activities undertaken by other groups, advocacy for improved heritage protection and more.

Land rights in New South Wales give freehold title over land successfully claimed, so in many ways this provides stronger Aboriginal control over cultural heritage and a much stronger form of title than is generally possible under native title. The slow pace and relatively small scale of successful land rights claims to date, with just 2530 claims successfully settled of 36,523 lodged and 7662 claims rejected by 30 June 2013 (NSWALC 2013, p. 50), is frustrating to many. By 30 June 2014 the number of claims awaiting determination had reached 25,809 (NSWALC 2014, p. 26). Despite this, land councils are by far the largest Aboriginal landholding group in New South Wales. Claims by 2009 amounted to a total area of just under 82,000 hectares (Office of the Registrar n.d.).

Interaction between New South Wales land rights and native title legislation

With the landmark *Mabo* case handed down in 1992 and passing of the NTA, the New South Wales Government responded with the NTA (NSW). The NTA (NSW), among other things, aimed to validate past actions by the state government that may have been considered to be invalid or left the state government open to a claim of compensation. This potentially could have included land claims made or granted to Aboriginal land councils by the state government through the ALRA (NSW). Land claims granted to land councils prior to 1994 were validated as acts that extinguish native title (NTA (NSW) pt 5).

To try to prevent future potential conflicts between land rights and native title, the ALRA (NSW) was amended to make it clear that, where native title was capable of being recognised, native title would have ‘precedence’ over land rights (New South Wales, Legislative Assembly, 1994). Land claims could no longer be made over land that was subject to an undetermined native title claim and land granted to a land council after 1994 was to be ‘subject to native title’ that may exist (ALRA (NSW) s. 36). No clear provisions were made about the status of land claims made by land councils before 1994 but which had not yet been granted.

The *Native Title (New South Wales) Act* made amendments that provided for the NSWALC to act as the native title representative body for New South Wales. The NSWALC established a native title unit which made many of the first native title claims. However, in the following years it was decided that there was too much potential for

conflict between land rights and native title, and the native title unit of NSWALC was established as an independent ‘NSW Native Title Services Limited’ — the predecessor of the current New South Wales native title representative body NTSCORP Ltd.

Tensions arising between the land rights and native title systems from the provisions in the ALRA (NSW) which were designed to accommodate native title include that land subject to a native title determination, or over which a native title claim is lodged, is not ‘claimable Crown land’. Thus, as native title claims extend across larger areas of the state, the potential for land claims under the ALRA (NSW) reduces.

Also, land owned by a land council over which there is an underlying native title claim cannot be ‘dealt’ with, meaning it cannot be leased or sold. This has led to the perverse outcome where land councils must seek a ruling that native title does not exist if they wish to make use of many income-generating opportunities of their land. As noted below, land councils represent the largest number of non-claimants who have successfully sought determinations that native title does not exist over land in New South Wales.

The complex interaction of the land rights system and native title in New South Wales is commented on in the 2013 NSWALC annual report (NSWALC 2013, p. 58):

The demand for advice and assistance in native title matters is only likely to increase as more LALCs seek to deal with their land and larger areas of the State are covered by registered native title claims.

Despite this, there are considerable efforts by Aboriginal people to bring the land rights and native title systems together, particularly when it comes to issues of culture and heritage. At the local level, traditional owners dominate many land council memberships, land councils play a key role in ensuring traditional owners are notified and consulted about developments proposed in their area, and it is common for traditional decision-making to be informally incorporated into land council decisions and board elections through consensus. A memorandum of understanding exists between NSWALC and NTSCORP as the two peak state bodies responsible for representing land rights and native title respectively.

The case study on how Gumbaynggirr people sought to strategically use both the land rights and native title systems to achieve the highest level of cultural heritage protection for their lands (below) provides some interesting insights in the opportunities and tensions that exist when Aboriginal people persist with claims through the potentially conflicting systems.

Joint management and ‘Aboriginal owners’

Further complicating things in New South Wales is the concept of ‘Aboriginal owners’ and the priority role that the ALRA (NSW) and the NPWA create for this group, especially in relation to decisions over land of culture and heritage significance.

The definition of ‘Aboriginal Owner’ contained in the ALRA (NSW) (s. 171(2)) is similar in many ways to that of a native title holder. He or she is an Aboriginal person who is directly descended from the original Aboriginal inhabitants of the cultural area in which the land is situated; has a cultural association with the land that derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land; and has consented to the entry of the person’s name in the NSW Register of Aboriginal Owners. The Registrar of the ALRA (NSW) is responsible for determining who should be included in the register, and how ‘cultural area’ is defined. The register is currently largely confined to areas where Aboriginal people have a role in a small number of jointly managed national parks rather than to the whole state.

The changes to the ALRA (NSW) and the NPWA to recognise Aboriginal owners were introduced in 1996 following two unsuccessful attempts to introduce similar legislation in 1991 and 1992 (Smith 1997). Again, the introduction of legislative change to recognise Aboriginal access to lands of cultural importance has a significant history. A blockade by traditional owners of the Mutawintji National Park in far western New South Wales in September 1983 eventually led to this legislation, which recognised the cultural significance to Aboriginal people of seven existing conservation reserves, among them Mutawintji, Mungo and Jervis Bay national parks. This enabled the reserves to be handed back to Aboriginal people.

The *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996* (NSW) introduced Part 4A and Schedule 14 into the NPWA and s. 36A into the ALRA (NSW). It gave powers to the minister to negotiate lease-back and joint-management arrangements with land councils and Aboriginal owners for existing parks and land that is the subject of a land claim. Land councils gain freehold title over the national parks, contingent on 30-year lease-backs and joint-management arrangements through the establishment of an Aboriginal Board of Management. An Aboriginal Board of Management has responsibility for the care, control and management of the leased lands and waters, and a majority membership of Aboriginal owners. The board includes a member from the land council as well as the National Parks and Wildlife Service and others, and remains subject to the

control and direction of the minister. The land councils receive rent (which must be spent on the park) for loss of use of the land.

In addition to requirements under the ALRA (NSW) that land claims are to be granted subject to native title, under the NPWA Part 4A, park leases must also state that the leasing of the land is ‘subject to native title’ (NPWA s. 71AD) as well as any existing interest. The lease must contain acknowledgement that the public has a right of access to the land and an acknowledgement that Aboriginal owners are entitled to enter and use the land for hunting, fishing, gathering and cultural activities (NPWA s. 71AD). These access rights are subject to regulations and the terms of any plan of management established for the park. The role of native title holders is not built into the management of a jointly managed park through the legislation — the focus is on Aboriginal owners, who may be the same as or different from a recognised native title group.

As well as using the NPWA, sch. 14, to gain control over existing national parks, Aboriginal people may lodge and settle land claims over conservation land proposed as national parks where the Aboriginal community agrees to co-management with the government. In 2007, three conservation reserves, collectively known as the Worimi Conservation Lands, were granted to the Worimi Aboriginal community north of Newcastle through the Worimi Local Aboriginal Land Council as a result of a successful land claim. This was the first time the ALRA (NSW) had led to a conservation co-management agreement with the NSW National Parks and Wildlife Service.

Aboriginal people may also sign a memorandum of understanding with the NSW National Parks and Wildlife Service for the ‘co-management’ of reserves and parks which remain state owned and thereby gain a greater voice in cultural heritage management. As of 2014, 15 such agreements existed (OEH 2014). Under these agreements, the group with which the agency enters into an agreement is not required to be a native title claimant group.

How well the state’s joint-management arrangements are actually working in practice, particularly in management of Aboriginal cultural heritage, remains an open question. While there are strong examples of the benefits to Aboriginal communities from involvement in joint management (Hunt & Mackay 2009; Bauman & Smyth 2007), significant limitations have also been identified, particularly in relation to the aspirations of Aboriginal communities to manage land in a way that is not supported by the National Parks and Wildlife Service.

For example, staff employed on the park must be employed using New South Wales Government agencies’ processes and requirements. In the case of the

Gumbaynggirr jointly managed national park (Gaagal Wanggaan — South Beach), these requirements mean that the staff employed on the park are not necessarily Gumbaynggirr people. There have also been issues with National Parks and Wildlife Service staff directing Gumbaynggirr people not to camp in areas that have traditionally been used by Gumbaynggirr families. The plan of management is to address these issues; however, under the current law, although a plan of management is a future act of which native title claimants and holders must be notified, there is no formal requirement that native title claimants or holders be involved in the development of the plan or that their wishes be accommodated if the board or the minister does not agree with their input.

The extent of native title in New South Wales

Compared with other jurisdictions, the settlement of native title claims in New South Wales has been slow and the areas covered by successful determinations or ILUAs small. Successful claims have been resolved at a pace which the Federal Court of Australia has variously described as ‘glacial’, ‘palpably unjust’,³³ ‘intolerable’ and ‘entrench[ing] injustice over generations’.³⁴ Nevertheless, for some Aboriginal people involved, the outcome has given them the potential to have a greater say over cultural heritage matters than previously. Native title claims or determinations now cover around 50 per cent of the state’s land area, and native title rights are protected over a number of current and future national parks in New South Wales. This suggests that the potential of native title in New South Wales is far greater in the future, although the settlements achieved to date suggest that native title is likely to offer non-exclusive, culturally focused rights, such as rights to hunt, gather and protect sites, rather than ownership of cultural significant places.

As of 2014 there had been 508 native title applications in New South Wales, of which 209 have been claimant applications. A total of 21 claimant applications have been registered. Of eight positive determinations in 2015, three have found

³³ See *Barkandji Traditional Owners #8 v. Attorney General of New South Wales* [2015] FCA 604, Jagot J, [12]: ‘But, I have said before, and I say again today, that no one in Australia should have to wait for 18 years to have their claim resolved. Timeliness, efficiency and proportionality are part and parcel of just outcomes. When justice is delayed, it is also denied. No one should be in any doubt. The winds of change are still blowing though how parties deal with native title claims. The glacial pace at which they have moved in the past is palpably unjust.’

³⁴ See *Yaegl People #1 v Attorney General of New South Wales* [2015] FCA 647, Jagot J, [12].

that native title exists in the whole area and five have found that it exists in part of the area claimed (NNTT n.d.). Historically, a significant number of the claims that have determinations in New South Wales are brought by local Aboriginal land councils (non-claimant applications) seeking a determination that native title does not exist in order to deal in that land.

There have now been eight consent determinations in New South Wales. The first was won by the Dunghutti people over 12.4 hectares in Crescent Head in 1997, but no cultural heritage issues were raised (ATNS n.d.; NNTT n.d.). The second was the 2007 Githabul consent determination, which covered over 1199 square kilometres of national parks and state forests between Casino and Tenterfield and the Queensland border. The ILUA that was agreed with the New South Wales Government allows for Githabul involvement in the management of 11 national parks, consultation about the management of 13 state forests, transfer of freehold title over 102 hectares of land to the Githabul Nation Aboriginal Corporation, and employment opportunities for at least four Githabul people.

A cultural mapping project has recorded the many facets of cultural heritage and cultural practice important to Githabul people in the region (McLean 2013). However, implementation of this agreement is moving slowly and relations with the National Parks and Wildlife Service were difficult from the outset. Furthermore, internal conflict among Githabul around coal seam gas proposals in the area (Dell 2013; McMillan 2011), suggests that in this case native title has so far failed to deliver cultural heritage protection that satisfies all of the Githabul people. For example, the Githabul people are currently struggling to respond to the potential cultural heritage impacts of the coal seam gas industry.³⁵

In December 2013 the Bandjalang people obtained the third and fourth consent determinations in the state over a 2750 square kilometre area. In making the determination, the Federal Court recognised the non-exclusive, customary access and use rights of the Bandjalang people and the protection of sacred sites such as the Goanna Headland. Cultural heritage issues are specifically highlighted in the determination. The Gumbaynggirr determination, in August 2014, was the fifth consent determination. As discussed later in this chapter, the Gumbaynggirr (Gumma-Warrell Creek) determination was the first to recognise native title over Aboriginal land council land in New South Wales.

35 From 2014, the Githabul Nation Aboriginal Corporation was in special administration due to governance concerns (Coyle 2014). The corporation is no longer under administration.

In 2015 there were three more consent determinations settling lengthy Barkandji and Yaegl claims. The two Yaegl claims were over the Clarence River in Yamba and Maclean and extended over country from Wooli to Ulmurra and Woody Head, while the huge Barkandji claim area stretched from just south of the Queensland border to the Murray River east of Mildura, with non-exclusive rights recognised over a vast area of western New South Wales, including Wilcannia, Menindee and Broken Hill. These claims give Barkandji and Yaegl people the right to 'maintain and protect from physical harm sites and places of importance' in non-exclusive areas and in both cases give them a range of rights to enable them to continue to practise their cultural activities.³⁶ Exclusive rights were also recognised over some land owned by LALCs in the area.

Nine ILUAs have been registered in New South Wales over areas where native title has not been determined or where it has been determined to be extinguished (Hunt & Mackay 2009). Two deal with mining and two others relate to infrastructure development, only one of which (Tumut Brungle) makes any reference to cultural heritage protection (ATNS n.d.).

However, three ILUAs negotiated since 2001 have led to social, economic and cultural benefits for the Bundjalung People of Byron Bay (Sculthorpe 2006). These include the new co-managed Arakwal National Park, land for housing and a cultural centre and other agreements. The co-management of the Arakwal National Park gives the Bundjalung people of Byron Bay considerable say over their cultural heritage, as the park's management plan indicates (Department of Environment and Conservation NSW 2007). It emphasises the significance of the cultural landscape and the many cultural values in the park, including plant species that have been used by the custodians over many generations. The Bundjalung people's right to continue to sustainably harvest such wild resources is embedded in the plan. The Bundjalung people of Byron Bay have a further native title claim under way. Yet these developments have not been without controversy. There have been claims by alternative groups that also claim traditional association to the area. The ILUAs have arguably exacerbated intergenerational conflict and division within the Aboriginal community around Byron Bay.³⁷

³⁶ *Barkandji Traditional Owners #8 v. Attorney General of New South Wales* [2015] FCA 604, Extract from the Native Title Register, pp. 3–4, and *Yaegl People #1 v. Attorney General of New South Wales* [2015] FCA 647, [2]–[3]

³⁷ K Aigner, PhD student researching with the Ngarakwal people, pers. comm., 18 May 2015. See also the decision by the National Native Title Tribunal, dated 25 August 2011, not to register the claim of Numbahjing Clan within the Bundjalung Nation (NC2008/002)

Indigenous Protected Areas

Also significant in New South Wales are a number of Indigenous Protected Areas (IPAs). Where Aboriginal people own or control land, they may manage it as an IPA through the support of the Australian Government. The IPA program assists with the management of cultural heritage in that it supports Indigenous people to secure funding and plan for the management of the land.

In 2014 there were nine IPAs in New South Wales, mostly over relatively small but important areas (Department of Environment n.d.). One of these is the Gumma IPA, declared in November 2011 over an area of land that was at the time part of the Gumma-Warrell Creek native title claim. The Gumma IPA is owned by the Nambucca Heads Local Aboriginal Land Council and identifies the ‘Baga Baga’ and ‘Ngambaa’ clans of the Gumbaynggirr as the Traditional Owners of the area.³⁸ Notification of native title claimants or holders is required when an IPA is created and in the development of plans of management, as future acts. Ongoing consultation on the management of culture and heritage over the area is the responsibility of the Aboriginal landowners.

Gumbaynggirr people’s native title determination

The Gumbaynggirr people’s traditional lands extend from the mid-north coast of New South Wales and include Coffs Harbour, Nambucca Heads, Arrawarra Headland, Bellingen, Bowraville, Urunga, Corindi, Dorrigo and South Grafton. The Gumbaynggirr people’s traditional lands are bordered by those of the Dunghutti to the south and Yaegl to the north.

The Gumbaynggirr people’s claim (NSD 6054/1998) was one of Australia’s longest-running native title claims and has a complex history involving overlapping land claims. The Gumma-Warrell Creek native title claim, as it is known, encompasses a small but precious part of coastal Gumbaynggirr country near Macksville, just south of Nambucca Heads. The claim area is bordered by Warrell Creek and the Nambucca River. The land includes coastal dunes, littoral rainforest, coastal shrubland, mangroves, salt marsh and seagrass beds, and a range of endangered species.

The native title claim was lodged in 1996 following a series of earlier nearby Gumbaynggirr native title claims that were withdrawn or were not successful.

over areas which overlap with the Bundjalung People of Byron Bay claims, for reasons including that there was not a sufficient factual basis to support the claim.

³⁸ This clan definition is not consistent with the definition of the nation adopted by the Gumbaynggirr Native Title Claim Group.

The New South Wales Government owned the land at the time. The claim was amended several times during its life to meet the changing requirements of the NTA. Final amendments made in 2014 removed an area of the claim on which agreement could not be reached with the New South Wales Government and the Nambucca Heads Local Aboriginal Land Council.

The Gumbaynggirr people's non-exclusive native title rights were recognised by consent determination at an on-country Federal Court hearing at Nambucca Heads on 15 August 2014 (*Phybally on behalf of the Gumbaynggirr people v. Attorney-General of New South Wales* [2014] FCA 851). Developments over the life of the claim meant that at the time of the native title recognition the land was jointly owned in freehold by the Nambucca Heads Local Aboriginal Land Council and the Unkya Local Aboriginal Land Council, and had been reserved as the Gaagal Wanggaan (South Beach) National Park — a Part 4A park managed by a board of Aboriginal owners who are now also Gumbaynggirr native title holders.

Aboriginal land claims had been lodged between 1984 and 1995 over the same piece of land. Before the introduction of the ALRA (NSW), Gumbaynggirr people had actively petitioned the New South Wales Government and made claims to the NSW Aboriginal Land Trust for return of land in the area including Stuarts Island, which is adjacent to Gaagal Wanggaan and was the Aboriginal mission site until the 1950s. The site of corroborees and initiations up until the 1930s, the large number of significant cultural sites on Stuarts Island and in the surrounding areas, including Gaagal Wanggaan, were detailed in the historic *NSW Sites of Significance Survey*, discussed earlier in this chapter. Information about the sacred sites in the area gathered by the National Parks and Wildlife Service were used to support the early Gumbaynggirr claims for the return of the land.³⁹

In the 1980s and 1990s, the memberships of the Nambucca Heads and Unkya Local Aboriginal Land Councils consisted of Gumbaynggirr people, with respected elders part of, or working with, the boards of the land councils to make the land claims over parts of Gumbaynggirr country that are particularly culturally significant or under threat.⁴⁰ The Gumma-Warrell Creek native title claim

³⁹ Gumbaynggirr people continue to call for Stuarts Island to be transferred to Aboriginal ownership. Today Stuarts Island is a golf course and sites including a children's burial ground are marked by a small sign and chain fence between the active golf play areas.

⁴⁰ Gumbaynggirr people have another native title claim on foot — the Gumbaynggirr (Boney-Witt) Native Title Claim (NSD6104/1998) — which was due to be settled by Indigenous Land Use Agreement between the NSW Government and the Coffs

was made in the same year and after the NSW Crown Lands Minister refused all the Aboriginal land claims under the ALRA (NSW) for reasons including that Gaagal Wanggaan (or South Beach, as it was then known) was needed for the essential public purpose of nature conservation.⁴¹ The native title claims were lodged as part of a coordinated, strategic effort by Gumbaynggirr people to use all mechanisms available to assert their rights and to gain ownership, control and management responsibility for their traditional lands and waters (Land and Property Management Authority NSW 2010).

The two LALCs, joined by NSWALC and with the support of the native title claimants, lodged appeals to the NSW Land and Environment Court against the refusal of the land claims. The negotiations were lengthy. In the previous state election the then Carr government had made a commitment to establish a large number of new national parks in New South Wales, including in areas that had not previously been considered for nature conservation. The grounds for the appeal included challenging the date when the land was needed for the essential public purpose of nature conservation. The land councils were ultimately successful and the case helped to establish the precedent that the public purpose of land must be considered at the date of Aboriginal land claim, not at the later date on which the minister determines the claim.

In December 2002 the agreement reached before the Land and Environment Court was to grant most of the lands to the north to Nambucca Heads Local Aboriginal Land Council ('Gumma' and the three surrounding islands) and to grant or transfer Gaagal Wanggaan jointly to the Unkya and Nambucca Heads Local Aboriginal Land Councils on the condition that it be leased back to the New South Wales Government as a Part 4A National Park. Consistent with the NPWA and noting the ongoing native title claim, the land was granted 'subject to native title' rights that may exist (NPWA s. 71O).

Although it is a requirement for a Part 4A park to be established, a list of Aboriginal owners through the Register of Aboriginal Owners had not yet been established, so Gumbaynggirr people, wearing both hats as native title holders and as the representatives of the LALCs, were appointed to make up the Aboriginal negotiating panel to negotiate the lease (NPWA s. 71G). The native title claimants

Harbour Local Aboriginal Land Council in 2014–15. At the time of writing the claim had not been settled.

⁴¹ Under the ALRA (NSW), s. 36, land is not claimable if it is needed, or likely to be needed, for an essential public purpose.

and Aboriginal land councils again approached the negotiations strategically, preparing a detailed, shared negotiation position that assisted in articulating aims for which Gumbaynggirr people had been campaigning, such as achieving the highest level of Gumbaynggirr control of the land possible; protection of Gumbaynggirr traditional ecological knowledge and Indigenous cultural and intellectual property (ICIP); and holistic management of the land, waters, natural resources and sites as part of the broader cultural landscape. The negotiations were estimated to last two years but took seven, concluding in 2009.

The lease that was agreed and entered into includes strong provisions to manage the land consistent with native title and, in the event that a determination of native title is made, for the state and the land councils to enter into an ILUA to ‘ensure that any Native Title Rights and Interests are preserved’ (Land and Property Management Authority NSW 2010, cl. 1.5). These provisions coexist with commitments to manage the land consistent with the Gumbaynggirr people’s traditional ecological knowledge, to protect access for the Gumbaynggirr people to use the land for cultural purposes, and a requirement that the state will not issue permits to damage sites without the approval of the land councils.

In the Part 4A lease, the Gumbaynggirr people’s ICIP is specifically defined and identified as property transferred out of the ownership of the state into the ownership of the land councils — ‘in trust for Gumbaynggirr people’ (Land and Property Management Authority NSW 2010, cl. 12.2). Physical cultural property held by the National Parks and Wildlife Service is also required to be transferred to the land councils. The ICIP clauses create an interesting precedent for Part 4A leases and potentially for the recognition of ICIP within non-exclusive native title rights. However, in practice, these provisions have not yet been tested or put into effect: no formal ICIP procedures had been developed by 2014 (for example, in relation to cultural tours of the park or licensing research on the park) (Land and Property Management Authority NSW 2010, cl. 12.1).⁴² Although the transfer to the land councils of cultural materials held by the National Parks and Wildlife Service was included in the lease terms, as of August 2014 no cultural materials had been transferred as required.

The Gaagal Waagaan (South Beach) National Park was formally reserved in 2010. Again acting strategically within overlapping legislative frameworks, in order to align the definition of ‘Aboriginal owners’ eligible to join the board

⁴² The lease requires the board of management and the state government to develop policies and procedures for the management of ICIP and research on the park.

of management with the definition of ‘Gumbaynggirr people’ adopted by the native title claim group, the native title claimants reached a voluntary agreement with the Registrar of the ALRA (NSW) to provide the confidential genealogical research for the native title claim. The claim group definition that the claim group had adopted was inserted into the lease as the definition of ‘Gumbaynggirr people’ with rights to the park.

In the same year, the state government formally agreed that it would enter into negotiations with Gumbaynggirr people to recognise their native title by consent and negotiate ILUAs. In the years leading up to this, and while the negotiations for the land claims and lease terms were underway, the Gumbaynggirr people had progressed the native title claim by providing evidence to the state for assessment in accordance with its ‘credible evidence’ assessment process. The Gumbaynggirr people, whose strong cultural connections to the land were accepted and incorporated into the Part 4A negotiations and who were leading the state in Aboriginal language revival,⁴³ were required to provide an extraordinary level of evidence to prove their ongoing cultural connection for the native title claim.

The extent of the connection material that the state required and the delay this caused to the resolution of the claim were highlighted by Jagot J in her judgment on the Gumbaynggirr consent determination in *Phyball on behalf of the Gumbaynggirr people v. Attorney-General of New South Wales* [2014] FCA 851, [8] and in other later determinations:⁴⁴

[Following the provision of affidavits and expert reports from 1999 to 2002...] Over the next eight years, and it is here that I pause to mention again that justice requires conduct proportional to outcomes, a further 33 affidavits, one witness statement, nine expert reports, a site map, and volumes of source materials and field notes were provided by the Gumbaynggirr People to the State. By October 2009, following an assessment of the Gumbaynggirr material by not only the State’s in-house researchers, but also an independent external expert and both junior and senior counsel of this vast amount of material, the matter remained unresolved. Deputy President Sosso of the National Native Title Tribunal convened mediation

43 For example, the Muurrbay Aboriginal Language and Culture Co-operative in Bellwood, located five minutes from the claim area. The centre was established in 1986 by Gumbaynggirr elders and today acts as a regional language centre. Gumbaynggirr language is today taught in a number of local schools and is the only Aboriginal language in New South Wales that can be taken as a Higher School Certificate subject.

44 See, for example, *Yaegl People #1 v. Attorney General of New South Wales* [2015] FCA 647, Jagot J.

on country involving three days of evidence by Gumbaynggirr witnesses in the presence of the State's lawyers [this was the first on Country native title evidence hearing undertaken under the auspices of National Native Title Tribunal mediation in New South Wales]. On 3 November 2010, almost fourteen years from the day the claim was first made, the State informed the Gumbaynggirr People of its preparedness to resolve the claim through negotiation of an indigenous land use agreement and consent determination.⁴⁵

When the Gumbaynggirr people's native title was recognised on 15 August 2014, it was the first time that native title had been recognised over land owned by an Aboriginal land council and over a Part 4A national park. Consistent with the provisions of Part 4A of the NPWA, although the native title rights recognised were 'non-exclusive', the determination recognises that Gumbaynggirr people's rights and interests are to 'prevail over' those of the land councils as landholders in fee simple, over the rights and functions of the board to manage the park and over the rights and land management functions of the Office of Environment and Heritage over the park.⁴⁶

The native title determination completed the Gumbaynggirr people's long journey to achieving ownership, control and cultural protection of the land. Importantly, it is hoped that the recognition of native title offers a layer of protection for the Gumbaynggirr people's right to access and use the land into the future, which — unlike Aboriginal land rights — does not rely on state government legislation. The native title claim also ensures cultural decision-making by a recognised group that is not defined by a state minister (as is the case with Aboriginal owners) and that does not rely on changeable Aboriginal land council membership and elected boards.

Achieving the native title recognition was not without considerable challenges for the Gumbaynggirr people. The long delays meant that all but one of the original applicants to the native title claim had passed away by the time the determination was made. As part of the submissions to the Federal Court, Michael Donovan, chair of the Unkya Local Aboriginal Council and a Gumbaynggirr man, said:

That we have survived and our Gumbaynggirr Native Title Rights and Interests have also survived is testament to Gumbaynggirr People's resilience and resolve.

⁴⁵ Author's comments inserted.

⁴⁶ See consent determination orders, cl. 14, in *Phybball on behalf of the Gumbaynggirr People v. Attorney-General of New South Wales* [2014] FCA 851; and NPWA Part 4A, particularly s. 71BI.

To the younger generations this is what brought us all here to this day, to this outcome, remember it well and take this wisdom forward into the future.
(Donovan 2014; Williams & Donovan 2014)

The delay in resolving the claim can in part be attributed to the complexity of the issues but also, significantly, to both the lack of resources, which saw some of the Aboriginal parties for periods without legal representation or with limited legal representation, and the previous state government policy requiring detailed ILUAs to be negotiated before a consent determination would be agreed. The consent determination eventually progressed without the completion of ILUAs but with all parties committing to continue to negotiate ILUAs in the future.⁴⁷

At the same time, it is recognised that long timeframes can be essential to ensuring that Aboriginal parties have sufficient time or resources to work through complex legal issues and to ensure informed consent. Failure of the parties to reach agreement over one key part of the claim area — those that had been the subject of pre-1994 grants to the Nambucca Heads Local Aboriginal Land Council — within the more stringent court timetable imposed in the final years of the claim meant that the Nambucca Heads Local Aboriginal Land Council withdrew as a party to the claim and the claim was amended to remove that area in the month before the determination.⁴⁸ There is yet to be a clear case law that tests the provisions of the NTA (NSW) and establishes the effect that pre-1994 land claims transferred to Aboriginal land councils after 1994 have on native title.

A key challenge that the Gumbaynggirr people sought to overcome was the overlapping and competing definitions and structures over who can speak for their country, particularly on matters of culture and heritage. This was achieved by ensuring that the definition of the Gumbaynggirr people native title group was the same as the group recognised as Aboriginal owners. A disciplined, strategic approach helped to minimise, but did not prevent, the opportunities for the various Aboriginal parties to be played off against each other during negotiations and to minimise forum shopping by government decision-makers and those within the Aboriginal community who did not support the native title claim.

⁴⁷ See consent determination orders in *Phyball on behalf of the Gumbaynggirr People v. Attorney-General of New South Wales* [2014] FCA 851.

⁴⁸ The commitments between the parties as noted in the court orders in *Phyball on behalf of the Gumbaynggirr People v. Attorney-General of New South Wales* [2014] FCA 851 included a commitment from the New South Wales Government that, if a future claim was to be made over this area within two years, the state would not require further connection evidence.

The frustrations expressed by many in the New South Wales land rights movement about the ability of native title to deliver meaningful outcomes for Aboriginal people are worthy of consideration in relation to the Gumma-Warrell Creek claim. With land rights and a national park achieved, legitimate questions can be and were asked about what additional benefit native title could provide and whether the level of resources required to successfully achieve native title — particularly when a land council is a respondent party — can be justified. Whether this native title claim has the desired effect of ‘future proofing’ the land in the face of proposed amalgamations of land councils that the state government is considering, for example, and whether the native title claim has the desired effect of ensuring a higher level of decision-making on cultural issues and the future land for Gumbaynggirr people, are yet to be seen. The focus of local energy has now turned to developing the plan of management for the national park — a plan that should give practical effect to the Gumbaynggirr people’s native title rights as articulated in the consent determination and may assist to resolve some of the unresolved issues between the Gumbaynggirr people and the National Parks and Wildlife Service in relation to things like where and when cultural camping can be undertaken on the park and which organisations or individuals will be granted contracts to undertake cultural tourism activities in the park.

In terms of future native title claims over Aboriginal land council land in New South Wales, following the Gumbaynggirr determination in 2014 both the Barkandji and Yaegl determinations have included recognition of native title over Aboriginal freehold land, including by operation of s. 47A of the NTA. Section 47A of the NTA enables the Federal Court to disregard any previous extinguishment over land ‘held for the benefit of Aboriginal people’ and where there is ‘ongoing occupation’, which can include accessing land for occasional camping and cultural activities. The application of s. 47A opens the possibility for native title claims to be made over a large number of the landholdings of local Aboriginal land councils where native title might previously have been considered to be extinguished.

Reforming the law in New South Wales — future opportunities and challenges

Aboriginal dissatisfaction with cultural heritage law and practice in New South Wales is longstanding, and major reform is once again being considered. Since the Keane committee, there have been two major government reviews in New South Wales to achieve Aboriginal cultural heritage reform before the current process,

but both reviews stalled and failed to deliver change.⁴⁹ The latest reform process appears to be suffering the same fate.

In all the reviews to date there have been recommendations to develop stand-alone Aboriginal cultural heritage legislation and an Aboriginal controlled cultural heritage commission for New South Wales. There has also been agreement that Aboriginal ownership of Aboriginal culture and heritage should be recognised and that Aboriginal people should make decisions about the significance of cultural heritage. These reviews have recognised the importance of Aboriginal definitions of cultural heritage, which are holistic, incorporating cultural landscapes and dynamic contemporary aspects of a living culture, with many manifestations — notably language, art, music — and that is intangible as well as tangible. Strong local decision-making has also been recommended by previous reviews and has been a key platform of Aboriginal community campaigning. However, relevant to native title holders is the great divergence of views about who should speak for country which emerged from these inquiries — an issue that remains highly contentious in parts of New South Wales.

The current New South Wales Aboriginal cultural heritage reform process began in 2011. Following the passage of the National Parks and Wildlife Amendment Bill through the New South Wales Parliament in 2010, all major parties committed to establish stand-alone Aboriginal heritage legislation. After several years of consultations and discussion papers, a model was released by the state government (OEH 2013b). This model reflects some of the ideas repeated by Aboriginal people during the consultations, such as the broader definition of Aboriginal cultural heritage and the desire to have stand-alone Aboriginal cultural heritage legislation.

But the model maintains the concept of the Minister for Heritage, supported by a division within the Office of Environment and Heritage, taking responsibility for managing any new Aboriginal heritage legislation. The Office of Environment and Heritage and the minister would be advised at the state level by the ACHAC, which would be expanded in its powers and comprise

⁴⁹ The first was in 1988–89 with the establishment of a ministerial task force that consulted widely with Aboriginal people across the state and developed some principles for new legislation and some options for future protection of Aboriginal cultural heritage, but this did not lead to change. The second was in 1993–96 through the Aboriginal Cultural Heritage Working Group (1996), which developed a Green Paper on Aboriginal cultural heritage that never received Cabinet approval, and once again reform stalled (NSWALC 2010).

Aboriginal people with ‘relevant skills, knowledge of planning and legislation and experience in ACH (Aboriginal Cultural Heritage) matters’ (OEH 2013b, p. 12). It is not proposed that there would be an independent statutory Aboriginal cultural heritage commission or other independent Aboriginal body at the state level under the model. The ACHAC would not have control over cultural heritage or be selected by Aboriginal people, and it would only act in an advisory capacity to the state government (Hunt 2014).

The proposed model also suggests a system of local committees, with boundaries yet to be determined, which would consider individual development proposals that impact on Aboriginal cultural heritage and respond with heritage management plans. Native title holders, native title claimants, parties to ILUAs, Aboriginal owners and ‘representatives of elders and family groups with cultural authority’ are listed among a number of others who might become members of proposed 10-member local Aboriginal cultural heritage committees appointed by the minister (OEH 2013b, p. 35).

The government model rejects the recommendations made by the Aboriginal Culture and Heritage Reform Working Party, which was established by the government at the start of the current review process to consider submissions and provide recommendations on how to reform the system. That Working Party recommended that any new system should build on the existing land council network (OEH 2013c). The government model has potential to include LALCs in providing support to the local Aboriginal cultural heritage committees.

The latest proposed system does not consider the implications of native title in New South Wales in detail. For example, the reforms do not deal with native title future act provisions and the parallel and duplicate requirements to notify and consult native title claimants and holders which exist under native title law. The legislated rights of native title holders to manage their cultural heritage, where this right has been won, seems to be muddled by attempts to combine the statutory land rights system with the native title system in an awkward mix.

Submissions in response to the government’s preferred model closed at the end of March 2014, and the New South Wales Government has given no further public indication of when a proposed new law would be introduced. The main focus of legislative reform has shifted to amendments ‘reducing red tape’ for developments through broader planning reforms (Department of Planning and Environment NSW 2014).

However, both native title and land rights regimes in the state could be considerably affected by the outcome of a current Crown Lands review and proposals to significantly amend the *Crown Lands Act 1989* (NSW). A white paper issued by the government following a Crown lands management review gives greatest emphasis to disposal or transfer of Crown land by sale or through transfer to local government or other community bodies. Transfer to freehold would make this land non-claimable under the ALRA (NSW), although one of the 10 objects of the reform is ‘to preserve cultural heritage (Aboriginal and non-Aboriginal) on Crown land’ (Department of Trade & Investment NSW 2014, p. 11). Of particular concern is the future of Travelling Stock Reserves, as these tend to follow water sources and Aboriginal songlines and are places with rich Aboriginal cultural heritage (Spooner, Firman & Yalmambirra 2010).

Independent of the broader *Crown Lands Act* review, on 21 October 2014 the New South Wales Government introduced the Crown Lands Amendment (Public Ownership of Beaches and Coastal Lands) Bill 2014. The Bill would have prevented Aboriginal land councils from making claims along the coast and beaches, and would have retrospectively applied to around 1800 claims already lodged, which the New South Wales Government had not yet processed (Howden 2014).

This Bill was prompted by the state government’s loss of an appeal in *Coffs Harbour and District Local Aboriginal Land Council v. Minister Administering the Crown Lands Act* [2013] NSWLEC 216 (known as the *Red Rock case*). Similar to the land claims made over Gaagal Wanggaan, the *Red Rock case* related to a very old land claim (1993) that, when it was eventually determined, was refused on the basis that the land was needed or likely to be needed for the essential public purpose of nature conservation as well as for public recreation. On appeal the Coffs Harbour Local Aboriginal Land Council won the right to be granted the beach land, with an easement to ensure continued public access.

The state government withdrew the Bill on 4 November 2014 following a protest outside New South Wales Parliament organised by the land councils and the opposition parties’ announcement that they would not pass the Bill through the upper house. If the proposed provisions of the Bill were in effect at the time of the Gumma-Warrell Creek claim, the Nambucca Heads Local Aboriginal Land Council would not have been successful with its claims over Gaagal Wanggaan.

It remains to be seen whether, this time, cultural heritage reform will proceed or will once again be aborted or undermined by the results of reviews of other legislation. Aboriginal people in New South Wales are still waiting for the 1980 Keane committee’s recommendation to achieve better protection of their cultural

heritage through an Aboriginal cultural heritage commission, which they would control. Campaigning continues for such a body as well as for changes that bring the law closer to the local decision-making that was to underpin the commission model — that is, the right of local Aboriginal communities and traditional owners to be provided with free, prior and informed consent about the management and ownership of their cultural heritage. The place of native title holders or claimants in any new cultural heritage system will remain a matter for dialogue within the Aboriginal community as well as among the policy makers and lawyers who administer and engage with the complex legal arrangements in New South Wales.

Any gains achieved in Aboriginal cultural heritage protection in New South Wales are hard won and have only been attained through intense and persistent Aboriginal activism. And, while delays persist in the land claims process and in the native title regime, the threat of further destruction of Aboriginal cultural heritage remains very real. For Aboriginal people there remains a large gulf between the stated aims of the law and public commitment of the New South Wales Government to protect important Aboriginal heritage, and the practical application of the laws as a regulated destruction scheme. In those cases where genuine protection is offered, it follows many years of delays and administrative hurdles. The historical pattern of dragging out legitimate claims for site protection and for the return of culturally significant lands is arguably part of a specific strategy by the New South Wales Government to frustrate the very intent of current native title, heritage and land rights laws.

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Chapter 5

THE ABORIGINAL HERITAGE ACT 2006 (VIC.): A GLASS HALF FULL...?

Graham Atkinson and Matthew Storey

The aim of this chapter is to explore the contention that the Aboriginal Heritage Act 2006 (Vic.) has laid strong legislative foundations for ensuring traditional Aboriginal owner self-determination in the management and control of Aboriginal heritage but that the administrative processes built upon these foundations have failed to completely fulfil these expectations. This exploration will take place in four sections: first, a review of the legislative history prior to the Act; second, a review of the structures in place under the Act; third, a consideration of the political processes leading up to the Act; and, finally, an assessment of the operation of the Act when compared with other jurisdictions and recommendations for legislative improvement arising from this.

Introduction

The fact of a legislative regime regulating the management of Indigenous heritage is common across Australia. This commonality is emphasised by the existence of Commonwealth legislation in the form of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHPA). Beyond the existence of a legislative regime, however, the commonality largely disappears. While each jurisdiction other than New South Wales and the Australian Capital Territory has specific Indigenous heritage legislation, the structure of most legislative regimes differs markedly. For example, an Indigenous heritage regime can be differentiated on

the basis of whether it confers definitional or declarative protection to place-based heritage. This can be seen in a comparison of specific provisions of the legislation from Western Australia, Queensland and New South Wales.

Section 5 of the *Aboriginal Heritage Act 1972* (WA) (WAAHA) applies the operation of that Act to, *inter alia*:

any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present; [and] any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent.

An offence is created for interference without authorisation (either under the WAAHA or in accordance with ‘relevant custom’) in such places by virtue of s. 17 of the WAAHA. In a similar fashion, the *Aboriginal Cultural Heritage Act 2003* (Qld) (QCHA) at s. 9 defines a ‘significant Aboriginal area’ as any area of particular significance to Aboriginal people because of either Aboriginal tradition or historical (including contemporary historical) factors. Such places are protected pursuant to s. 24 from any unauthorised interference. In addition, under s. 23 proponents are placed under a ‘cultural heritage duty of care’ to take reasonable measures to ensure an activity does not harm Aboriginal heritage. In both cases, possession of an authorisation under the QCHA operates as a defence.

In the *National Parks and Wildlife Act 1974* (NSW) (NPWA) an ‘Aboriginal place’ under s. 84 only exists as such when gazetted by the minister. Section 86 of the NPWA creates an offence of harming or desecrating an Aboriginal place so declared. Similarly, an ‘area of particular significance to Aboriginals (defined to include Torres Strait Islanders) in accordance with Aboriginal tradition’ is protected under ATSIHPA (s. 3) only if an application is made under s. 9 or s. 10 by Aboriginal people and the minister approves the application by making a declaration.

The content of Indigenous heritage regimes could also be analysed on the basis of a number of other attributes — for example, the extent to which relevant Aboriginal or Torres Strait Islander peoples are involved in decisions as to authorisation for interference to place-based heritage; provisions as to whether ownership of Indigenous heritage vests in the Crown, Indigenous custodians or other parties; and whether (or to what extent) the notion of Indigenous heritage is limited to tangible (often archaeological) heritage or whether it is expansive enough to contemplate, for example, the spiritual dimensions of a natural landscape. Aside from these foundational issues, the regimes may vary in operational matters; the efficacy of enforcement regimes; the

efficiency of assessment regimes; and the extent of congruity with relevant land rights regimes, among other things.

However, this chapter limits itself to an analysis of the *Aboriginal Heritage Act 2006* (Vic.) (VAHA) in the context of a range of these matters. To achieve this analysis, the discussion will proceed in five sections.

The first section will review the legislative arrangements in place before the commencement of the VAHA. This will include discussion of the circumstances in which ATSIHPA had broad application in Victoria.

The next section discusses the efforts of Victorian traditional owners themselves to deliver a contemporary regime for the management of their cultural heritage.

The third section reviews in some detail the legislative structure pursuant to the VAHA and its regulations. This section includes a brief comparison with the QCHA, from which the VAHA drew much inspiration. The discussion also traverses the extent to which there is an interrelationship between the structures under the VAHA and those under the *Traditional Owner Settlement Act 2010* (Vic.) (Settlement Act) and the *Native Title Act 1993* (Cth) (NTA).

The following section is drawn from a far more practical perspective: considering how the VAHA operates in practice. In large part this discussion will be informed by the actual experiences of Registered Aboriginal Parties (RAP) required to administer the legislation and also draw upon the two 2012 inquiries into the operation of the VAHA: the Victorian Parliament Environment and Natural Resources Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties (PoV 2012) and the review of the VAHA undertaken by Aboriginal Affairs Victoria (DPCD 2012).

The final section draws upon the preceding discussion by highlighting areas in which the legislative aspirations identified previously have not been matched by the reality of the legislation's operation, as suggested. Drawing upon examples in other jurisdictions and the body of relevant international law, suggestions for further improvement of the VAHA regime are posited.

Legislative history

The first legislation dealing exclusively with Aboriginal heritage in Victoria was the *Archaeological and Aboriginal Relics Act 1972* (Vic.) (AARA). This legislation established an Archaeological Relics Advisory Committee of nine people, one of whom was an 'Aborigine nominated by the Minister' (AARA s. 5(1)(b)(ix)), and also created the position of 'Protector of Relics', who was the director of the National Museum of Victoria (AARA s. 3(1)). The Protector was chair of the advisory committee (AARA s. 5(1)(a)). One of the functions of the advisory

committee (AARA s. 7) was to advise the Governor in Council on the declaration of ‘Archaeological Areas’. The purpose of an Archaeological Area was to control the entry of people onto land for the purposes of the preservation of relics therein (AARA s. 15(1)). A declaration could not be made without the consent of the relevant public land manager or private landowner (AARA s. 15(2)). Even once an area was declared, the land manager, owner or occupier could authorise entry into the area (AARA s. 17(2)). All relics within the area were deemed the property of the Crown (AARA s. 20). Outside of Archaeological Areas, ‘portable relics’ could be ‘picked up’ and ‘collected’ and sold so long as the sale was with the consent of the Protector of Relics (AARA s. 27).

For the period between 1987 and 2006, Victoria had no effective domestic Aboriginal heritage legislation. During this period Aboriginal heritage functions were governed under part IIA of the ATSIHPA. Part IIA was enacted pursuant to the *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987* (Cth) (ATSIHP 1987 Amendment Act) at the request of the Cain Labor government and applied only to Victoria. The Victorian Government’s request followed the failure of the government to get the Aboriginal Cultural Heritage Protection Bill through the Victorian Legislative Council. Part IIA essentially replicated the provisions of the failed Bill. The circumstances of the enactment were described by the then Commonwealth Minister for Aboriginal Affairs, the Hon. Clyde Holding MP,⁵⁰ in the second reading speech to the ATSIHP 1987 Amendment Act (Coombs 2005):

These bills represent a unique and important step on the part of this Parliament to recognise the legitimate and traditional interests of the Aboriginal people of Victoria. It is an opportunity for this Parliament to exercise its constitutional power to enact legislation for the benefit of the Aboriginal people in Victoria. Those powers are being exercised at the specific request of the elected Government of the State of Victoria. Such a request, in the face of an intransient, irrational and unjustifiable stand taken by the Opposition parties in the Victorian Parliament, necessitates the Commonwealth Parliament taking a stand in support of the Aboriginal people who are the subject of these Bills.

In the operation of Part IIA, the Victorian minister, on the application of a ‘local Aboriginal community’ — a scheduled organisation (pt IIA, s. 21A) — was delegated powers (pt IIA, s. 21B) to make a declaration for the preservation of an

⁵⁰ Mr Holding was the Victorian Labor opposition leader before entering the federal House of Representatives in 1976.

Aboriginal place or object (pt IIA, s. 21E), the contravention of which was an offence (pt IIA, s. 21H). Part IIA also made provision for compensation on just terms if the declaration constituted an acquisition of property on other than just terms (pt IIA, s. 21M). In addition, there was provision in Part IIA for a local Aboriginal community to enter into a (voluntary) agreement with a landholder regarding the management of Aboriginal heritage on their land. The terms of the agreement could be recorded on the land titles register (pt IIA, s. 21K). Part IIA also made provision for people nominated by a local Aboriginal community to be appointed as inspectors. Inspectors were granted limited power to make emergency declarations. The ATSIHP 1987 Amendment Act also made certain savings provisions with respect to the AARA and to the effect that the main ATSIHPA provisions could not be utilised unless the processes under Part IIA had been exhausted (ATSIHP 1987 Amendment Act, s. 3).⁵¹

The operation of Part IIA was the subject of some criticism by both the Victorian Government and Aboriginal parties during the 1996 review of ATSIHPA by the Hon. Elizabeth Evatt (Evatt cited in Coombs 2005). The Victorian Government's submission to the Evatt review stated in part (Coombs 2005, p. 3):

The enactment of new Aboriginal cultural heritage legislation at State level would enable the eventual abolition of Part IIA of the Commonwealth Heritage Protection Act. This would be consistent with the Federal Coalition policy that State legislation should be the primary source of statutory protection for Aboriginal cultural heritage, with Commonwealth legislation being used only as a last resort. In principle, Victorian legislation would need to consider mirroring many of the existing provisions of Part IIA, but would also update and incorporate those sections of the existing *Archaeological and Aboriginal Relics Preservation Act 1972* which are considered necessary for the effective protection of Victorian Aboriginal cultural heritage.

The stage was thus set for the passage of new Victorian legislation aimed at achieving these goals. This occurred in 2006 (10 years later) with the passage of the VAHA and the *Aboriginal and Torres Strait Islander Heritage Amendment Act 2006* (Cth), which repealed part IIA (and associated provisions) from the ATSIHPA.

Political processes leading to the VAHA

The process of the passage of the VAHA should not be seen as one in which Victorian traditional owners adopted a passive 'client' approach. The period of

⁵¹ This section operated to insert s. 7(1A) into the ATSIHPA.

the early 2000s was a turbulent one in Victorian Aboriginal affairs. In 2002 the High Court decision in *Members of the Yorta Yorta Aboriginal Community v. Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) appeared to eliminate the possibility of a positive determination of native title in Victoria (or many other areas in south-eastern Australia). In 2003 the Victorian Native Title Representative Body (NTRB), the Mirimbiak Nations Aboriginal Corporation (MNAC) lost its recognition under the NTA.

Two further significant developments occurred at the time of these rather calamitous events. The first was the Labor government securing comfortable majorities in both Houses of Parliament in 2002. The second was the creation of a new Native Title Service Provider (NTSP) with recognition under the NTA — Native Title Services Victoria (NTSV). Recognising the discord effected by the state's 'victory' in *Yorta Yorta*, the new Labor government was committed to resolving native title matters through negotiation and agreement. In the new board of NTSV the state found a partner able and willing to participate in the development of new structures with regard to both native title and Aboriginal heritage.

This was a tipping point in the administration of native title claims in Victoria and for strengthening relationships with the native title claimant groups and stakeholder groups in Victoria. It heralded a new approach to the settlement of outstanding claims, with NTSV going on to play a pivotal advocacy role in related land justice matters, not least in the Aboriginal heritage reform process.

The Victorian Government's approach to native title, coupled with its own security in office, presented a timely opportunity for native title claimant groups to achieve recognition, respect and tangible outcomes. With a majority in both Houses the state Labor government seemed to be in a position to fully implement its stated policy of settling native title claims through the negotiation of agreements and without putting the bar of proof so high as to frustrate the aspirations of native title claimant groups in Victoria.

NTSV board discussions with relevant government ministers suggested the state was prepared to negotiate a range of possible non-native title outcomes in order to settle the claims of native title groups. This amenability to different approaches to claims resolution led to productive discussions with the state on Aboriginal heritage reform matters, particularly in terms of traditional owners having greater control over their own place-based heritage.

While successful native title outcomes in Victoria were thought to be difficult to achieve, the state government's approach to negotiating agreement packages

nevertheless represented a real opportunity that NTSV committed itself to assisting its client groups to take advantage of.

In February 2005 NTSV convened a meeting of representatives in Melbourne of all first nations people of Victoria. The meeting was chaired by Graham Atkinson (co-author of this chapter) as chair of NTSV, with assistance from deputy chair Daphne Milward. The majority of traditional owner groups in Victoria were represented at the meeting, which was reported in *The Age* newspaper on Thursday, 17 February 2005 under the headline 'Aborigines join forces on land rights'.

The meeting discussed key principles for the state government's immediate consideration in relation to Indigenous land justice issues generally, the resolution of longstanding native title claims and options for the structuring of new Victorian legislation for Indigenous management of Aboriginal heritage. These key principles were incorporated into a statement adopted by the meeting. The key principles set out in the statement were based on the fact that the state government needed to recognise Victorian traditional owners in a way never previously done. A key message in the statement was that the control of cultural heritage should reside with traditional owners.

The statement was provided to the then Victorian Attorney-General, Rob Hulls, and the then Minister for Aboriginal Affairs, Gavin Jennings, when they attended on the second day of the meeting. In response to the statement, the Attorney-General agreed to meet with a negotiating team agreed upon by traditional owners to further discuss the land justice principles and their implications.

Following the departure of the ministers, the meeting approved NTSV to convene a further meeting to establish a reference group/negotiating team with the authority to speak on behalf of all traditional owner groups in the state. Pending its establishment, the NTSV board performed an interim role to ensure that the government fully understood the statement of principles and that its implications for the resolution for native title claims and related matters were adequately recognised.

Among the other matters discussed at the state-wide meeting with state ministers in February 2005, the meeting also decided that a reference group should be formed in order to negotiate with government on behalf of traditional owners. At a subsequent meeting in August, convened by NTSV, it was decided that the reference group would be called the Victorian Traditional Owner Land Justice Group (Land Justice Group).

The Land Justice Group was established as an unincorporated body mandated by traditional owner groups, each having nominated a representative onto the

reference group. The full reference group had around 20 members. A smaller team was mandated to negotiate with government on behalf of the full Land Justice Group.

The Land Justice Group was formed with NTSV's assistance for a number of reasons. First, because of historic land grievances of traditional owners, the state suggested the need for a representative group of traditional owners that could advocate directly with government on native title and related matters. Second, because NTSV was a service delivery organisation focused on native title, it was limited in its capacity to advocate to government on the broad range of traditional owner land-related aspirations. Third, NTSV provided formal assistance to only some traditional owner groups at any given time due to resource limitations and the fact that some groups had not lodged claims. Finally, the Native Title Unit in the Victorian Department of Justice indicated that it wanted a review of current policies in regard to the resolution of native title matters in the state, and the state recognised that the Land Justice Group could participate in making a new policy framework.

Both the state and NTSV helped resource the process because they believed that these negotiations could resolve native title matters more expeditiously. All parties also acknowledged that negotiated native title settlements also seek to address underlying aspirations for land justice.

Once established and with a clear mandate, the three co-chairs of the Land Justice Group wrote to the Premier of Victoria requesting a meeting to discuss the land justice aspirations of traditional owners. Premier Bracks in turn instructed three ministers — Rob Hulls, Gavin Jennings and John Thwaites — to engage with the Land Justice Group on 'native title and land-related matters'.

In November 2005 the Land Justice Group was meeting to negotiate the detail of the exposure draft of the Aboriginal Heritage Bill 2005 (the 2005 Bill). A number of resolutions regarding the Aboriginal Heritage Bill were endorsed at that meeting and a submission was prepared for discussion with Minister Jennings at the first meeting of the Land Justice Group's negotiating team with the three ministers in December 2005.

Traditional owner analysis of the 2005 exposure draft

The Victoria-specific provisions under the previous ATSIHPA provided significant powers to Aboriginal community organisations listed in the Schedule, and their decisions were usually final. However, the Land Justice Group argued that the ATSIHPA did not ensure that traditional owners control the management of place-based heritage in their own country. And, as occurred on occasions in Victoria, the

powers of the ATSIHPA still allowed the Victorian Minister for Aboriginal Affairs to suspend the cultural officers that were appointed pursuant to pt IIA.

The exposure draft of the 2005 Bill introduced the possibility for the first time that native title parties might be recognised for the purposes of managing place-based heritage. The 2005 Bill gave traditional owners a foothold but, as the Land Justice Group made clear, that foothold was not secure enough to satisfy its aspirations.

In response to submissions from the Land Justice Group and others, the revised VAHA — which was passed in 2006 — required that all the members of the state-wide Aboriginal Heritage Council be traditional owners from Victoria. This was a welcome change to the old Regional Cultural Heritage Program under Part IIA of the ATSIHPA. The council's role included the recognition of the 'Registered Aboriginal Parties' (RAPs) to replace the functions to Aboriginal community organisations in the current regime. For the first time in Victoria, native title holders had exclusive rights in regard to place-based heritage within the outer boundaries of their claim area. Another benefit to traditional owners was that the criteria for recognising other RAPs gave a clear priority to traditional owner organisations.

However, a less palatable provision in the new Act was that decisions by the RAPs could be reviewed in the Victorian Civil and Administrative Tribunal (VCAT). VCAT was to be bound by the objectives of the new Act, but it would also be required to consider the interests of developers. VCAT, the Land Justice Group noted, may have had considerable experience with developers (through its planning jurisdiction), but it had minimal experience with Aboriginal cultural heritage matters.

On a positive note, the new state-wide Aboriginal Heritage Council was to be resourced to clarify the boundaries of areas over which traditional owners exercised their management of place-based heritage. The Land Justice Group felt that this process, if carefully managed, promised to accelerate the mediation of boundary disputes in a manner that would assist with the progress of native title claims and alternative settlements.

While accepting that the final version of the 2005 Bill was not perfect, there was general acknowledgement that, for any substantial progress to be negotiated with the state government, it needed to occur soon given the pending state election in 2006 and the risk that Labor would lose control of the Legislative Council of the Parliament and be less able to proceed with any major land justice initiatives. It was in the following year that the Labor state government finally enacted the VAHA and established the Victorian Aboriginal Heritage Council under the Act.

The following section looks in some detail at the structures that were eventually implemented once the VAHA passed into law.

Structure of the Victorian Aboriginal Heritage Act

The VAHA follows the definitional protection model described earlier. Section 27 creates as an offence the knowing harm of Aboriginal places or objects in circumstances where the perpetrator knew, was reckless or was negligent to the fact that the thing or place was Aboriginal heritage. Section 28 creates as an offence an act likely to harm Aboriginal cultural heritage in the same circumstances. Section 29 creates an exception to the offences if the harm is committed in accordance with a cultural heritage permit or cultural heritage management plan (CHMP). Sections 33 and 34 also create offences in relation to the possession, purchase and sale of Aboriginal objects (subject to a number of exceptions) or scientific research or excavation on an Aboriginal place or object except in accordance with a cultural heritage permit.

While the VAHA establishes as a ‘principle’ that ‘as far as possible’ Aboriginal human remains and secret or sacred objects⁵² should be owned by Aboriginal people with a traditional connection to them (VAHA s. 12), it makes no reference to the ownership of other components of Aboriginal heritage, including places of significance.

‘Aboriginal cultural heritage’ is defined (VAHA s. 4) to mean Aboriginal places, Aboriginal objects and Aboriginal human remains. An Aboriginal place is defined (VAHA s. 5) to mean a place of ‘cultural heritage significance’ to Aboriginal people. That phrase is in turn defined to mean ‘of significance according to Aboriginal tradition or of archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance’. ‘Aboriginal object’ is given a similarly broad definition based on cultural heritage significance.

Cultural heritage permits

A cultural heritage permit is granted by the Secretary and can authorise excavation and research in relation to Aboriginal cultural heritage; and the purchase, sale or removal of Aboriginal objects or an activity that will harm Aboriginal cultural heritage (VAHA s. 36). However, a permit cannot be issued for an activity that would otherwise require a CHMP (VAHA s. 37).⁵³ An application for a permit must be referred by the Secretary to a relevant RAP (discussed below) if one has been

⁵² The terms are defined in the VAHA, s. 4, to mean secret or sacred according to Aboriginal tradition.

⁵³ The section also provides a prohibition against issuing a permit with respect to Aboriginal human remains or a secret or sacred object.

appointed. The RAP can consent, consent with conditions or refuse to consent to the grant of the permit (VAHA s. 39). The conditions, if any, cannot relate to the payment of money or money's worth to the RAP (VAHA s. 39(2)).

Cultural heritage management plans

A CHMP is a written report containing an assessment of the Aboriginal place-based heritage present in an area and containing recommendations for the management and protection of identified Aboriginal heritage before, during and after an activity (VAHA s. 42). The CHMP is prepared by a cultural heritage adviser, who must be a person holding prescribed qualifications or equivalent experience (VAHA ss. 4, 189).⁵⁴ Pursuant to VAHA s. 43 and regs 55–62 of the Aboriginal Heritage Regulations 2007 (Vic.) (the Regulations), there are three escalating levels of assessment involved in the preparation of a CHMP: desktop, standard and complex. In very general terms a desktop assessment involves a review of the Aboriginal Heritage Register (the Register) (discussed below) and a review of published materials relevant to the area in question. A standard assessment involves a ground survey of the subject area and, potentially, interviews and non-intrusive survey techniques. It must be conducted in accordance with ‘proper Archaeological practice’ (reg. 59(5)). A complex survey involves potentially significant archaeological excavations. A representative of the relevant RAP must be given the opportunity to attend operations involved in a complex assessment (reg. 65). Escalation of the level of assessment is dependent upon the identified existence of Aboriginal heritage at the preceding level of assessment and the activity proposed (regs 58, 60).

The instigator of the CHMP is the ‘sponsor’ — the proponent of the activity or the relevant RAP, local council or Secretary (VAHA s. 44). While a sponsor may voluntarily have a CHMP prepared (VAHA s. 45), a CHMP is required in relation to a range of activities: if required by the minister (VAHA s. 48); if the activity would require the preparation of an environment effects statement⁵⁵ (VAHA s. 49) or when prescribed under the Regulations (VAHA s. 47). The Regulations require the preparation of a CHMP for all activities in ‘areas of high cultural sensitivity’ (reg. 6(a)) or in all areas if the activity is a ‘high impact activity’.

⁵⁴ Generally, the qualifications prescribed are in cultural heritage management, archaeology, anthropology or history, although any excavation involved in the CHMP assessment can only be undertaken by a person holding archaeological qualifications.

⁵⁵ Under the *Environment Effects Act 1978* (Vic.).

(reg. 6(b)). The Regulations go on to extensively define both terms.⁵⁶ An exception in the requirement to prepare a CHMP is provided for in relation to certain specified activities (regs 7–19). These activities include minor works, demolitions, alterations and constructions of one or two dwellings on a lot.

The sponsor of a CHMP must give notice of the intention to prepare the CHMP to the Secretary, the RAP and all affected landowners. The RAP may elect to evaluate the CHMP. There is a mandatory requirement for the RAP and the sponsor to consult and cooperate in the preparation of the CHMP, and the RAP has the ability to participate in the assessment and consult on any subsequent recommendations (VAHA ss. 59–60). If a RAP has given notice of its intention to evaluate a CHMP, the sponsor must apply to the RAP for approval of the CHMP. The RAP can either approve the CHMP or refuse to approve it but only if it does not satisfy the requirements of s. 61 (VAHA s. 63). This section establishes a hierarchy in assessing whether to approve a CHMP: that the activity must be conducted in a way that avoids harm to Aboriginal cultural heritage (VAHA s. 61(a)) ‘if it does not appear possible to conduct the activity in a way that avoids harm’; and the activity must be conducted in a way that minimises harm (VAHA s. 61(b)). The CHMP should also propose specific measures for the management of Aboriginal heritage, contingency plans and requirements for the custody and management of Aboriginal heritage during the course of the activity (VAHA s. 61(c)–(e)).

As noted earlier, the decision of a RAP to refuse to approve a CHMP (or to refuse the grant of a Permit) may be reviewed on application of the sponsor by VCAT. VCAT can approve, amend or refuse to approve the CHMP (or Permit) taking into account similar (but not identical) factors to those contained in s. 61 (VAHA ss. 119, 120, 129).

Cultural heritage agreements

The VAHA (at ss. 68–79) also makes provision for cultural heritage agreements. In summary these provide for agreements between a landowner or manager and a RAP in relation to the protection, use, rehabilitation and access to Aboriginal places or objects in circumstances that do not require the issuance of a Permit or preparation of a CHMP. The cultural heritage agreement under the VAHA takes effect as a deed under seal and may (if appropriate) take effect as a covenant running with affected land.

⁵⁶ These are set out in regs 20–54.

Registered Aboriginal parties and the Victorian Aboriginal Heritage Council

The RAP is clearly a central feature of the operation of the VAHA. It constitutes the key interface between the Victorian Aboriginal heritage regime and the NTA — or the alternative regime established under the Settlement Act.

A RAP can be any body corporate registered by the Victorian Aboriginal Heritage Council (discussed below) as a RAP in respect of a particular area (VAHA ss. 150, 152). If the applicant corporation is the registered native title holder in respect of the area of application then the council must register it as the RAP for that area (VAHA s. 151(2)). Similarly, if the applicant corporation is the Traditional Owner Group Entity under the Settlement Act with respect to the area of application, it must be registered as the RAP for that area. In other cases the council is required to take into account a range of factors (set out in VAHA s. 151(3)). These include whether the applicant has entered into Indigenous Land Use Agreements under the NTA in relation to the area; whether the applicant represents Aboriginal people with traditional or familial links to the area; and whether the applicant can demonstrate expertise in managing and protecting Aboriginal cultural heritage. To date there have been 10 appointments of RAPs. Five of these are registered native title bodies corporate under the NTA or a Traditional Owner Group Entity under the Settlement Act. The process of RAP appointment is discussed further below.

A RAP may charge the prescribed fee for undertaking the evaluation of CHMPs or considering applications for permits. At the date of writing, this fee varied between 10 fee units for evaluation of a desktop assessment over a small area (less than a hectare) to 320 fee units for the evaluation of a complex assessment over a large area (greater than 40 hectares) (Regulations, reg. 71).⁵⁷ RAP personnel attending as monitors during the field component of assessments are also able to charge a daily rate.

In areas where no RAP has been appointed (or if a RAP declines to do so) the Secretary undertakes the CHMP evaluation process (VAHA s. 65).

The Victorian Aboriginal Heritage Council comprises of 11 Victorian Aboriginal people with traditional or familial links to an area of Victoria and an expertise in Aboriginal heritage in Victoria (VAHA s. 131). In addition to determining RAP applications, the council has *inter alia* functions in regard to certain standard setting, public awareness and advisory activities.

⁵⁷ A ‘fee unit’ has a current value of \$13.60. Therefore 10 units = \$136.00; 320 units = \$4352.00 (Department of Treasury and Finance 2015).

It is worthy of note that, while under the Part IIA regime most of the scheduled organisations that constituted the defined ‘local Aboriginal communities’ were cooperatives of local Aboriginal residents incorporated under the then *Co-operatives Act 1996* (Vic.),⁵⁸ the currently appointed RAPs (including those that are not RAPs pursuant to their NTA or Settlement Act status) all define membership on the basis of descent from apical ancestors traditionally associated with the RAP’s area of operation.

The possible tension still within the VAHA arising from the often repeated references to ‘traditional or familial links’ to an area or ‘historical or contemporary interest in Aboriginal cultural heritage in an area’ (for example, in VAHA s. 151(3)(c) and (d)) is a matter identified the parliamentary inquiry (PoV 2012) and the review of the VAHA (DPCD 2012), discussed above, as warranting legislative amendment to ensure that decision-making on Aboriginal cultural heritage is made by those Aboriginal people with traditional rather than merely historical affiliations to the subject area. These proposals have been incorporated into recent proposals for legislative amendment discussed below. These legislative amendment proposals reflect practice under the VAHA, although they are a change from the situation under the Part IIA regime.

These matters are discussed further below.

The Victorian Aboriginal Heritage Register

The Register (established and maintained by the Secretary pursuant to VAHA ss. 144–147) records details of, *inter alia*, all known Aboriginal places, private collections of Aboriginal objects, CHMPs, permits and cultural heritage agreements. Access to the Register is restricted to RAPs and people authorised by them, state and local government officials and landowners, and cultural heritage advisers engaged to prepare a CHMP (VAHA s. 146). Access is granted only to relevant portions of the Register.

The maintenance of Aboriginal heritage registers was a matter considered by the Productivity Commission in its recent report on mineral exploration (PC 2013). The commission recommended that such registers should be maintained and contain copies of heritage surveys and known Aboriginal heritage sites but are subject to limited ‘as needs’ access in accordance with agreed protocols (PC 2013, p. 177). The current Victorian Register would appear to conform to the recommendations of the Productivity Commission.

⁵⁸ Now replaced by the *Cooperatives National Law Application Act 2013* (Vic.).

Enforcement and protection regime

The enforcement and protection regime under the VAHA comprises three main components: the cultural heritage audit and stop orders (VAHA ss. 80–95); interim and ongoing protection declarations (VAHA ss. 96–110); and the system of inspectors (VAHA ss. 159–187). As discussed further below, the enforcement regime in particular has been identified as that in most need of reform.

A cultural heritage audit can be ordered by the minister on the recommendation of the Secretary, the Victorian Aboriginal Heritage Council or an inspector (discussed below) if it appears a CHMP or Permit is being contravened or if the impact on Aboriginal heritage is greater than that contemplated (VAHA ss. 80–81). A RAP is not able to directly seek a cultural heritage audit. The audit is carried out by a cultural heritage adviser under the direction of an inspector (VAHA s. 83). The report produced as a result of the audit must contain recommendations on the amendments to the permit or CHMP ((VAHA s. 84) which, if approved by the minister, becomes the approved CHMP or permit (VAHA ss. 85–86).

The minister can issue a stop order if the minister believes that a person is or proposes to carry out an activity that may harm or not properly protect Aboriginal cultural heritage (VAHA s. 87). The stop order may operate for 30 days, with a possible 14-day extension (VAHA ss. 90–91).

The minister can make a protection declaration in relation to an Aboriginal place or object. It may be applied for by the Victorian Aboriginal Heritage Council, a RAP or at the minister's own initiative (VAHA s. 96) and can be interim (VAHA s. 98 — three months, with a three-month renewal) or ongoing (VAHA s. 103). The protection declaration must clearly identify the place or object to which it relates and must specify the measures to be taken for its protection. It is an offence to contravene a protection declaration (VAHA ss. 102, 108).

Inspectors under the VAHA have the function of monitoring compliance and investigating offences against the Act (VAHA s. 159). Appointment is restricted to public servants or officers authorised under another Act (VAHA s. 160(1)). They must have an appropriate level of knowledge and experience in relation to Aboriginal cultural heritage (VAHA s. 160(2)). Inspectors have quite limited powers of entry, search and seizure. Entry is restricted to premises that are public (VAHA s. 166) or where the owner has given consent (VAHA s. 167).

This is surprising in circumstances where the regulated activity will inevitably take place on private land and a perpetrator may not be inclined to grant access to an inspector. Similar issues arise in respect of the power to 'seize', which can only

be exercised with the consent of the ‘owner’ (VAHA s. 171 — although s. 172 does provide a limited power to seize objects without consent).

Arising from the parliamentary inquiry (PoV 2012) and the review of the VAHA (DPCD 2012) are recommendations contained in an exposure draft of an Aboriginal Heritage Act Amendment Bill (the 2014 Exposure Draft) (Department of Premier and Cabinet Victoria 2014) for creation of the position of Aboriginal heritage officers. These officers could be employees of RAPs with limited powers to issue 24-hour stop orders and the same (limited) powers of inspectors with regard to entry, search and seizure. Even these limited powers would represent an improvement on the current enforcement and protection regime under the current VAHA. It is understood these proposals will be pursued by the current government.

Comparison with the *Aboriginal Cultural Heritage Act 2003* (Qld)

The QCHA⁵⁹ is discussed in detail in Chapter 6. However, for present purposes it suffices to note that it was the first Aboriginal cultural heritage legislation passed in Australia subsequent to the passage of the NTA. For this reason significant regard was had to its provisions when the VAHA was being developed in Victoria.

The two pieces of legislation have a number of common features. Primary amongst these is the Aboriginal cultural heritage body (QCHA s. 36).

The Aboriginal cultural heritage body is a native title party, if there is one (QCHA s. 34),⁶⁰ or another body registered by the minister (QCHA s. 35 — there is no equivalent of the Victorian Aboriginal Heritage Council in the QCHA). However, the functions of an Aboriginal cultural heritage body are only to ‘to identify, for the benefit of a person who needs to know under this Act, the Aboriginal parties for the area or for a particular part of the area’ (QCHA s. 37(1)). The ‘Aboriginal party’ is in turn the native title party, if there is one, or otherwise is a person (QCHA s. 35(7)):

with particular knowledge about traditions, observances, customs or beliefs associated with the area; and the person —

(i) has responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area; or

⁵⁹ Along with the *Torres Strait Islander Cultural Heritage Act 2003* (Qld).

⁶⁰ The definition includes a registered native title claimant, which is unfortunately not a feature of the VAHA.

(ii) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area.

The role of a non-native title Aboriginal cultural heritage body is then to identify such people (QCHA s. 97). The role of the Aboriginal party is to seek agreement with a sponsor regarding the content of a CHMP in order to avoid or, where this is not possible, minimise harm to Aboriginal heritage. If no agreement can be reached, there is a process of compulsory mediation (QCHA s. 106) and ultimate referral to the Land Court (QCHA s. 112).

The Queensland CHMP is required if the proposal also requires an environmental impact assessment (QCHA s. 87) and may be required pursuant to the *Sustainable Planning Act 2009* (Qld) (QCHA s. 89).

The QCHA includes a regime of stop orders that is similar to Victoria's (QCHA s. 32); a register (QCHA s. 46); definitional protection of places and objects (as discussed above); and public servant authorised officers (QCHA s. 121).

It can be seen that the VAHA owes a great deal to its predecessor QCHA. While the RAP structure is not as developed in the QCHA and a body similar to the Victorian Aboriginal Heritage Council is non-existent, the VAHA was clearly modelled on the Queensland provisions.

Of interest then are assessments of the operation of the QCHA. This is supplied by in the following comments (Schnierer, Ellsmore & Schnierer 2011, p. 12):

In Queensland, agreement making is viewed as an attractive way to satisfy the cultural heritage duty of care by developers, however it appears to be undermining the intended use of Cultural Heritage Studies and Cultural Heritage Management Plans. The popularity of the agreement making provision is likely due to its flexibility and lack of prescriptive minimum standards.

Ellsmore (2012) reports three criticisms of the QCHA made by Aboriginal people involved with its operation:

While the Acts aim to deliver ownership and control of heritage to Aboriginal and Torres Strait Islander people, it does not include sufficient provisions to achieve this in practice.

'Aboriginal Cultural Heritage Bodies' recognised by the Qld Government receive little or no funding and are generally not resourced to be able to undertake required functions and

The blanket protection of heritage and the focus on the negotiation of ‘Cultural Heritage Management Plans’ between developers and Aboriginal groups is undermined by the inability of Aboriginal groups to monitor or enforce agreements.

As is discussed below, in its operation the VAHA has overcome some but not all of the limitations of its Queensland predecessor.

The foregoing has analysed and summarised the text of the VAHA. It remains to consider whether the actual operation of that Act matches the intent portrayed by the legislation.

The VAHA in operation

All legislation is eventually a compromise between competing interests. The VAHA is no exception. Broadly, the three interest groups could be identified as traditional owners, proponents (or sponsors) and the state. When one is considering the effectiveness of the operation of an Act there will be matters where one interest group has secured advantage over another and there will be instances where there is simply administrative dysfunction to no party’s benefit. Again, the VAHA is no exception.

Certainly the VAHA has been the basis for many positive developments. Several of these are discussed below. The most significant development, as was mentioned above, is the increased emphasis on traditional owners as the owners of their own heritage. This emphasis is in contrast to the position under the ATSIHPA Part IIA regime, where the scheduled Aboriginal organisations with responsibility for heritage were usually local Aboriginal cooperatives whose membership was based on local residency and not affiliations to country under traditional law. This could lead to a situation where traditional owners were or felt disempowered in control of their place-based heritage. The significance of traditional ownership under the VAHA is underlined by the relationship between a RAP determination under the VAHA and the securing of a positive outcome under either the NTA or Settlement Act.

While the requirement that a Prescribed Body Corporate or Settlement Act Traditional Owner Group Entity also be appointed as the RAP in respect of its determination area is positive, the timeframes associated with resolution under the Settlement Act or determination under the NTA has meant that practically many traditional owner groups will have achieved a RAP appointment long before resolution of native title outcomes. In fact, achieving RAP appointment legitimacy can be a useful step in securing a Settlement Act outcome. However, this practical

outcome has also meant that the Victorian Aboriginal Heritage Council has been obliged to determine many RAP appointments ahead of native title processes. This is an onerous task for the council, and one it does not have the administrative expertise to fulfil expeditiously. The result has been that, for many areas of the state, there is no RAP appointment. In these circumstances the practice of the Office of Aboriginal Affairs Victoria is to advise a proponent to consult with all Aboriginal owner groups that express an interest in a non-RAP appointed area of land. This outcome can cause disharmony within the community and additional expense and delay for the proponent. While some measures are contemplated to reduce this difficulty in future amendments to the VAHA, the underlying problem is the delay in appointing RAPs with complete coverage of the state.

A further very positive outcome of the structures of the VAHA and the role it gives to traditional owners is that, through involving Aboriginal ‘monitors’ in the field work associated with CHMP preparation, there have been significant opportunities to enhance the level of awareness of heritage among traditional owners themselves. In a jurisdiction that has suffered the effects of dispossession to the extent Victoria has, this benefit is significant.

Against these generally positive aspects of the operation of the VAHA, several less positive matters should be noted. The first of these must be the financial position of RAPs. The role of the RAP in considering and approving (or not approving) a CHMP is a statutory function at the very centre of the operation of the Act. As noted above, the Regulations prescribe the rates at which a sponsor compensates a RAP for undertaking this function. Some RAPs operate as sustainable corporations based on the fees that they are able to charge. However, their ability to be sustainable is dependent upon the volume and value of work undertaken. This is because a RAP will have fixed costs (for example, administrative systems, staff, vehicles and equipment) irrespective of the level of construction activity requiring CHMP evaluation. The result is that many RAPs would be non-viable were it not for the other activities of the organisation that can support these fixed costs in low RAP activity periods. In essence, this means that traditional owners can be paying the state to discharge their statutory functions under the Act. By contrast, analysis undertaken as part of the parliamentary inquiry (PoV 2012) and the review of the VAHA (DPCD 2012) suggested that the operations of the cultural heritage advisers (whose fees are uncapped under the legislation) amounted to an industry with an annual turnover in excess of \$42 million (PricewaterhouseCoopers 2012, p. 39). With a few notable exceptions, cultural heritage advisers are non-Indigenous ‘experts’ — commonly archaeologists.

The second area of concern in the current operation of the VAHA is the regime pertaining to enforcement and offences. The structure of this component of the legislation was discussed earlier. There are two main shortcomings with these provisions. First, they provide no role for traditional owners to undertake enforcement and monitoring functions. Secondly, the dearth of inspectors appointed under the Act means that in practice there is no enforcement mechanism. There has not been a single prosecution of an errant sponsor in the history of the VAHA, although many RAP officers and employees will attest there have been a great number of violations. Proposals contained in the recently released exposure draft (released in September 2014) do contain a proposal for RAP appointed officers with authority to impose a 24-hour stop order. If implemented, this will go some way towards improving this aspect of the operation of the VAHA.

The final, but perhaps most fundamental, shortcoming goes to the structure around CHMP evaluation contained in s. 61. It will be recalled that a RAP can only refuse to approve a CHMP if (in the opinion of the RAP) the CHMP fails to satisfy the requirements of s. 61 — that is, the activity must be conducted in a way that avoids harm to Aboriginal cultural heritage (VAHA s. 61(a)); ‘if it does not appear possible to conduct the activity in a way that avoids harm’, the activity must be conducted in a way that minimises harm. In short, s. 61 leaves no doubt that the sponsor’s development takes precedence over the protection of Aboriginal place-based heritage. The development will proceed. The only issue is whether adequate steps have been taken to allow the development to proceed while inflicting only minimal harm on any affected Aboriginal cultural heritage.

In this regard, s. 61 also reflects a prevailing theme throughout the VAHA that Aboriginal heritage is predominantly to be found in artefacts. While this is not a necessary consequence of the definitions contained in ss. 4 and 5, in practice it is certainly the approach adopted by many cultural heritage advisers (most of whom are archaeologically trained). The notion that a proposed road will damage the cultural significance of a landscape, irrespective of the fact that the proposed road path does not contain any artefacts, has been difficult to maintain under s. 61. While both the review of the VAHA and the parliamentary inquiry (DPCD 2012; PoV 2012) recommend a reduction in the scientific emphasis in the management of the Act, no recommendations to this effect are included in the recently released exposure draft.

Filling the glass

The preceding discussion could reasonably be seen as describing an Aboriginal heritage regime that, while perhaps not ideal, at least represents close to Australian

'best practice'. The Productivity Commission's recommendations regarding the maintenance of Aboriginal heritage registers have already been noted (PC 2013 — see above). The commission made two other recommendations regarding Aboriginal heritage regimes. One was that 'Indigenous heritage should be managed on a risk assessment basis' (PC 2013, p. 188). This is explained to mean that, where there is a low risk or likelihood of interference, 'a streamlined duty of care' approach should be followed. However, where there is a higher risk or likelihood of interference, an 'agreement making approach should be adopted'. Failing agreement, governments should make decisions based on clear criteria and in consultation with traditional owners (PC 2013, p. 188).

In this context the commission is quite explicit that 'best practice' is to ensure that effective consultation with affected Indigenous peoples is a central component of the Aboriginal heritage management regime (PC 2013, pp. 155, 157).

With these factors in mind, it should be noted that the other commission recommendation was that, rather than the Commonwealth itself legislating a comprehensive Indigenous heritage management regime, it should establish a regime for the accreditation of state and territory regimes to ensure that best practice standards are applied (PC 2013, p. 188).

Based on the foregoing analysis and discussion it would seem certain that if in the event the Commonwealth Government adopts this last recommendation of the commission, the regime under the VAHA would satisfy whatever criteria the Commonwealth applied. Does this mean, though, that there is no room for improvement in the VAHA regime? Recent developments suggest this is not the case.

Following the extensive dual reviews conducted in 2012 — the parliamentary inquiry (PoV 2012) and the review of the VAHA in September 2014 (DPCD 2012) — the then Victorian (Liberal) Government released the 2014 exposure draft (Department of Premier and Cabinet Victoria 2014). In November 2015, following a change of government in December 2014, the new Labor government introduced the Aboriginal Heritage Amendment Bill 2015 into the Legislative Assembly. With the exception of some matters noted below, the Bill essentially replicates the provisions of the 2014 exposure draft. The Bill was read a second time on 11 November 2015, but at the time of writing (January 2016) had not yet passed the Assembly (although this is expected in early 2016). The government does not control the Legislative Council and, despite the (now) opposition's previous support for the exposure draft when in government, support for all provisions of the 2015 Bill is not guaranteed.

These matters aside, the fact that the Bill runs to over 100 pages suggests that there is room for improvement in the current VAHA. It is not intended here to review the entire provisions of the Bill, many of which may be amended in the Legislative Council (although this task will be undertaken once the Bill passes both Houses). However, some proposals are worthy of note. First, the Bill proposes the creation of the position of Aboriginal heritage officers with most of the powers of the current inspectors (who are to be retitled ‘authorised officers’) but with the power to put in place a 24-hour stop order (cls 95A–95C). While the Aboriginal heritage officers are thus afflicted with the same limited powers of entry, search and seizure, as the current inspectors discussed earlier (under ‘Enforcement and protection regime’), the proposal still represents a significant improvement in the capacity of Aboriginal custodians to protect Aboriginal heritage.

The second significant amendment proposed in the Bill is the clarification of the significance of ‘traditional’ as opposed to only ‘historical’ connection as the basis for the authority with respect to place-based heritage. This is brought about through amendment of existing provisions that make reference to familial or historical association (for example, VAHA s. 151(3)(c)) and the inclusion of a definition of ‘traditional owner’ (cl. 7). Interestingly, the definition currently proposed is modelled almost exactly on the definition of ‘Aboriginal party’ in s. 35(7) of the QCHA. However, this definition may be subject to some refinement to ensure conformity with the provisions of the Settlement Act.

Two other matters of note in the Bill are the inclusion of a ‘Preliminary Aboriginal heritage test’ (PAHT) mechanism (cl. 42). This provision would allow a proponent to apply to the Secretary of the department for a determination as to whether preparation of a CHMP is necessary. Such a determination could be made without reference to the relevant RAP. There is little detail provided in the Bill regarding this proposal, which is being opposed strongly by traditional owners.

The other matter of note is that the Bill proposes the introduction of a regime for the management and protection of Aboriginal intangible heritage (cl. 59, inserting a proposed new Part 5A). Aboriginal intangible heritage is defined (proposed s. 79B) to mean ‘any knowledge of or expression of Aboriginal tradition other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices...but does not include anything that is widely known to the public’. The proposed s. 79C provides that (only) a RAP, native title holder under the NTA or equivalent under the Settlement Act can apply to the

Secretary to have details of Aboriginal intangible heritage register. The proposed s. 79G creates an offence of using registered Aboriginal intangible heritage for commercial purposes without the agreement of the registered owner.

The Aboriginal intangible heritage provisions are groundbreaking and to be applauded. They would be the first Australian legislative recognition of the Convention for the Safeguarding of the Intangible Cultural Heritage (UNESCO 2003). However, these provisions were not included in the (previous government's) 2014 exposure draft, and so the likelihood of these provisions passing the Victorian Upper House is at this time is uncertain, although to be hoped for.

Noting some reservations around matters such as the PAHT and the limited powers of Aboriginal heritage officers in general, the provisions of the 2015 Bill improve on an already Australian 'best practice' regime. This noted, there are a number of fundamental flaws with the VAHA regime that are shared with other Australian jurisdictions. These can be seen in the compatibility of the VAHA with contemporary international standards. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) at Articles 11, 13, 24 and 25 provides for the right of indigenous peoples to 'maintain, protect and develop... manifestations of their cultures'. Similarly, UNDRIP art. 12 provides for the right to 'maintain, protect and have access to...cultural sites'. Article 31.1 speaks directly of Indigenous peoples' 'right to maintain, control, protect and develop their cultural heritage...' Finally, of course, art. 32.2 provides for the necessity to obtain the 'free and informed consent' of an Indigenous people 'prior to the approval of any project affecting their lands or territories and other resources'.

Does the VAHA achieve the standards that the international community expects of it? In many, but not all, respects it does. The RAP structure can constitute an indigenous representative structure through which free, prior and informed consent can legitimately be granted. The process of consultative CHMP development and RAP approval, where it occurs, would constitute free, prior and informed consent. Yet a RAP consent to CHMP in this context is circumscribed by the requirements of the statute. It will be recalled that the approval of a CHMP by a RAP was required to be based on whether the CHMP satisfied the requirements of VAHA s. 61. Section 61 provided that the activity must be conducted in a way that avoids harm to Aboriginal cultural heritage (VAHA s. 61(a)) — 'if it does not appear possible to conduct the activity in a way that avoids harm', the activity must be conducted in a way that minimises harm. Thus it is not open to a RAP to refuse to approve a CHMP on the basis that it will harm Aboriginal cultural heritage or that simply that the relevant Aboriginal community does not want

the project. A CHMP can only be refused on the basis that it fails to ‘minimise harm’. Even this limited right of refusal can be the subject of administrative review by the (non-Indigenous) VCAT. Not only does this structure fail to satisfy the free, prior and informed consent requirements of art. 32.2; it would also fail to satisfy the requirements of arts 11 and 12.

However, there is only one component of one piece of legislation in Australia that achieves the UNDRIP standard. The *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (NTASSA), discussed in Chapter 9 of this volume, in some respects may be the only piece of Australian legislation that achieves the UNDRIP standard. In the Northern Territory regime the statutory Aboriginal Areas Protection Authority (AAPA), upon receipt of an application by a proponent, will consult with identified Aboriginal custodians as to the granting of an authority to the proponent (NTASSA s. 19F). However, the AAPA makes the decision to grant the authority on the basis of whether ‘the work...could proceed...without there being a substantive risk of damage to or interference with a sacred site...’ (NTASSA s. 22(1)(a)). Even this decision is subject to ministerial review (NTASSA ss. 30–32). This component of the NTASSA does not provide for the right of an Indigenous community to, in the words of art. 11, ‘maintain, protect and develop...manifestations of their cultures’. However, s. 22(1)(b) does provide as an alternative basis for the granting of an authority that the proponent has reached an agreement with the custodians. There is no prohibition on the payment of money or money’s worth being a part of this agreement as there is in s. 5 of the VAHA.

To satisfy the requirements of UNDRIP, it is necessary that traditional owners would have the right to agree or not agree to a proposal that may impact upon Aboriginal heritage on the basis of satisfaction of criteria determined by the traditional owner group. By contrast, in Victoria the ‘avoid or minimise harm’ criteria are imposed under the VAHA, as they are also in the Northern Territory (an absence of substantive risk of damage or interference — pursuant to NTASSA, s. 22(1)(a)). While the avoidance of risk of damage may be a criterion determined by traditional owners, there may (or may not) be others. The point is that, in keeping with UNDRIP, once a matter is identified as Aboriginal cultural heritage the management of that matter should lie at the discretion of the traditional owners. It would appear to be only the regime under NTASSA s. 22(1)(9B) that allows for this.

Other international instruments are relevant in an assessment of the VAHA regime. Article 15(1) of the International Convention on Economic, Social and

Cultural Rights goes to the right to take part in cultural life. This has been recognised by the Committee on Economic, Social and Cultural Rights as including 'the right to benefit from cultural heritage' (Ringelheim 2010, p. 291). The notion of the right to benefit from cultural heritage highlights another shortcoming of the VAHA (and other Australian Aboriginal and Torres Strait Islander heritage regimes). While VAHA s. 12 establishes as a principle the notion that Aboriginal heritage should be owned by the relevant Aboriginal people, this principle extends only to secret and sacred objects and ancestral remains. There is no notion that the balance of Aboriginal place-based heritage, by definition appropriated by non-Indigenous Australians, should similarly be returned to the ownership of its creators.

In Victoria, far less than ownership, the VAHA creates no right for traditional owners to even access (pursuant to UNDRIP art. 12) Aboriginal heritage possessed by non-Indigenous people or located on 'private' lands unless the non-Indigenous owner consents to a voluntary cultural heritage agreement (VAHA ss. 68–79).

In Victoria, then, the Aboriginal heritage glass may be half full, but it is still clearly also half empty.

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Chapter 6

CONSERVATION, COMMODIFICATION AND INDIGENOUS HERITAGE IN QUEENSLAND

Richard J Martin, Andrew Sneddon and David Trigger

Indigenous people around Australia strongly assert the significance of their traditions within the contemporary world. Queensland's Aboriginal Cultural Heritage Act 2003 is typical of Australian legislation seeking to manage the tangible and intangible heritage of such traditions: its purpose, clearly stated in s. 4, is 'to provide effective recognition, protection and conservation of Aboriginal cultural heritage'. Missing from the Act is any focus on economic empowerment for Aboriginal people, yet in many parts of Queensland today Indigenous heritage is viewed at least in part as an 'industry' offering a 'way out' of poverty for Aboriginal people through agreement-making relating to development. For the many Indigenous as well as non-Indigenous people employed in managing Indigenous heritage in Queensland, the financial stakes are certainly high in terms of both the fees that people charge to participate in cultural heritage surveys and the potentially much more lucrative forms of remuneration associated with successful developments, which may include sizeable compensation payments for the destruction of significant sites. This chapter examines the disputed intersection between law, cultural politics and economic development aspirations affecting Indigenous heritage management in this context, focusing on tensions and conflict between conservation and commodification.

Introduction

In mid-1995, a group of Aboriginal people assembled at a place called Bluebush Swamp in north-west Queensland's Gulf country to complete a cultural heritage survey for a mining company.⁶¹ The group of Ganggalida, Garawa and Waanyi people had gathered from several different locations around the Gulf and they were joined by the anthropologist David Trigger and archaeologist Ian Lilley. Over the course of a day they traversed the open grassland plain surrounding the swamp, where the mining company proposed to drill a series of exploratory cores in their search for an ore body containing copper, lead and zinc.

The practically treeless plain of black soil and cracking clay around Bluebush Swamp was locally known as productive for hunting, fishing and gathering activities of Aboriginal people both before the arrival of Europeans and through the great changes wrought by colonisation. An archaeological survey of the area had identified a number of stone artefact scatters reflective of such activities. As the group of five men and six women assembled on a stony rise, a senior Garawa man named Blue Bob spoke with considerable emotion. Gesturing to stone artefacts on the ground, he said:

This is all this. Thousand man from old generation. Young generation today. From old generation, and young generation can take over this place. And you got to look after this very important thing... Anywhere you see him [stone tools] you can't pick it up, just leave him in there [on the ground]. From his [old people's] hand, what he been doing. [Before White people] he had nothing, no knife, he never handle'im weapon for knife [i.e. Aboriginal people did not have steel or other metal knives].⁶²

This man was a ritual leader with extensive knowledge of the Aboriginal songlines, or stories, that course through the region, connecting Ganggalida, Garawa and Waanyi people across hundreds of kilometres of country. As he spoke of the stone artefacts, facing a cold winter morning wind, he drew upon this esoteric knowledge to emphasise their significance:

61 The project was more technically known as a 'work area clearance' but, as we here discuss aspects of significance to the Aboriginal and Torres Strait Islander people present, we use the terminology of a 'cultural heritage survey' (see Ritter 2006 for discussion of these terminological and practice distinctions).

62 Audio recording and transcription by David Trigger, August 1995. Blue Bob's full speech has been published in Robson (2009, pp.191–3).

I'm a bit cold for you mob to talk [laughing] ... my people from way back [west], all around the top end, bottom end [along rivers running northwards into the Gulf of Carpentaria]. And I know your story, right to Burketown... If I want to tell you story, I'll give you that story. I know that story. If I want to give you listen, I never give you listen [told you] before, all you my countrymen. I'm still with you. You might lose 'im me [i.e. I might die], or you might hunt me away. I gotta bring all that my member [kin from the west], to Lawn Hill... talk to you, well you listen. If you like it or not. He's gotta come here for argue anybody [i.e. if people want to argue]...all that back people mine [from the west], they only gotta come for meeting [i.e. they will not come deliberately to argue about country].

In this complex speech, delivered haltingly to the hushed group, Blue Bob expressively described the significance of stone artefacts, reminding his audience of Aboriginal life in the bush before colonisation, when people 'had nothing, no knife' and subsistence hunting, fishing and gathering was undertaken with spears and stone tools. To murmurs of encouragement from the assembled group, this respected man proceeded to 'give you listen', to tell what he knew about the cultural landscapes of the Gulf, 'all round that land', foreshadowing a time when he would be gone and the next generation would need to 'look after this very important thing'.

To conclude the speech, significantly, he cautioned those present that he might 'bring all that my member ... to ... talk to you', backing up his authority to speak about the significance of the country and artefacts within it with reference to the traditional knowledge of his Garawa kin. Blue Bob himself was reputed to have considerable powers derived from the world of the Dreaming and related spiritual forces. At one point in his life he is believed to have receded from mundane life into the spiritual realm, returning several years later with enhanced esoteric knowledge, potentially both benevolent and malevolent. When he remarked that 'you might hunt me away', several of those present murmured that this would not happen, reassuring him that his message had been heard and Indigenous heritage would be respected. The reverence with which Blue Bob spoke of such heritage is unmistakable here.

However, the attitudes of Blue Bob and his listeners towards heritage were more complex than the quoted words might suggest. This was an occasion that embodied sensitivities concerning authoritative traditional knowledge and a vigorous politics of reputation among Aboriginal people that can be mobilised through the recording of Indigenous heritage and decisions about its management. As we discuss later in this chapter, Blue Bob and other senior Aboriginal people of his generation

maintained a nuanced attitude towards heritage that included recognition of the need to develop the land to promote the economic participation of Indigenous people. This chapter considers these cultural and social complexities within the context of Queensland's heritage legislation.

In the 20 years since Blue Bob's speech (between 1995 and 2015), a great deal has changed in relation to Indigenous heritage in Queensland. Building on previous legislation,⁶³ Queensland's *Aboriginal Cultural Heritage Act 2003* (QCHA) and its near-identical equivalent for the Torres Strait, the *Torres Strait Islander Cultural Heritage Act 2003* (TSICHA) now offer 'recognition, protection and conservation of Aboriginal cultural heritage' such as the stone artefacts on the Bluebush plain. These Acts specifically empower 'Aboriginal/Torres Strait Islander parties' in the conservation process through a range of consultation and agreement-making mechanisms that recognise Aboriginal people as 'the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage' (*Aboriginal Cultural Heritage Act 2003* (Qld), ss. 4, 5(b)). The state legislation works in parallel with provisions in the *Native Title Act 1993* (and related legislation and jurisprudence), which seek to protect Indigenous heritage by governing 'future acts' and through the making of Indigenous Land Use Agreements (see Rowland, Ulm & Reid 2014 on the evolution of the Queensland legislation; also O'Faircheallaigh 2008). Drafted in response to broader changes in Australia and overseas affecting archaeology and heritage practice (see, for example, Sullivan & Mackay 2012, pp. 551–60) as well as relations between Indigenous and non-Indigenous people across settler societies more generally, such legislation has strengthened Aboriginal people's legal standing in relation to their own heritage, granting them unprecedented influence in negotiations with developers.

However, it is important to revisit Blue Bob's 1995 speech in the light of the legislative reforms described above and to ask whether those reforms have in fact assisted Aboriginal people to 'look after this very important thing' (as Blue Bob put it) — that is, practise heritage conservation — at the same time as they have facilitated agreement-making between Aboriginal people and developers, which typically encompasses aspirations beyond heritage conservation such as economic participation and development. Heritage conservation is the stated object of the QCHA (and the TSICHA). The QCHA says (at s. 4), 'The main purpose of this

⁶³ Including the *Aboriginal Relics Preservation Act 1967–1976* (Qld), the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld) and associated legislation (including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)).

Act is to provide effective recognition, protection and conservation of Aboriginal cultural heritage'. In Queensland in 2015, such heritage conservation exists in some tension with other aspirations pursued by Indigenous people and others through agreement-making with developers that is facilitated by the heritage legislation. These other aspirations, such as for economic participation and development, are not always compatible with heritage conservation — or indeed always in conflict. In this chapter we focus on the relationship between them.

Prominent commentators and researchers committed to improvement in the lives of Indigenous people (Langton 2013; Pearson 2013; Strelein 2015; O'Faircheallaigh 2015) argue that the prevailing legal framework enhancing Aboriginal and Torres Strait Islander peoples' bargaining position in relation to traditional lands and heritage offers significant commercial opportunities, which may assist in addressing their economic disadvantage. The financial stakes of development, specifically in the Indigenous heritage context, are high in terms of both the fees that may be paid to Indigenous people to participate in the consultation process (which includes heritage surveys, archaeological excavation and the like) and the potential ongoing forms of capacity building and remuneration packages associated with successful projects.⁶⁴ The use of cultural heritage as a basis for Aboriginal economic empowerment has important implications, resulting in a process that has been characterised as a kind of Ethnicity or Indigeneity, Inc. (Comaroff & Comaroff 2009). In Canada, Mason (2010, pp. 77–9) considers that the Indigenous heritage 'industry' entails 'an idea of self-conscious tradition', posing questions about cultural authenticity, continuity, transformation, revival and recognition. The same questions arise in Australia.

If the Queensland heritage legislative frameworks enable a linking of cultural heritage and commerce arising out of the emergent relationships between developers and Aboriginal groups, is the cultural value of Indigenous heritage being undermined or at least modified by the desire for financial compensation relating to its management and (potentially) destruction? A related question is: Are there situations in which Indigenous people and others will exaggerate or fabricate the cultural significance of heritage for monetary gain, cognisant of the

64 For discussions of the general economic benefits potentially obtainable from Indigenous agreements, see Langton & Webster (2012), Langton & Longbottom (2012) and the 'Agreements, Treaties and Negotiated Settlements Project' website at www.atns.net.au. McWilliam (1998) reviews compensation issues in relation to cultural heritage sites specifically in the Northern Territory.

leverage that it may offer in negotiations with the wider society? How broadly can ‘cultural heritage’ be defined within the context of the commodification of heritage without losing its significance? How does heritage conservation function at the intersection of law, economic development and cultural politics?

If these are difficult questions for researchers to address, this is perhaps not surprising, because asking about the economic drivers and outcomes of Indigenous heritage claims may well be seen as risking a debunking of their genuine ‘cultural’ basis. Nevertheless, some scholars have presented sophisticated analyses seeking to address related complexities of Indigenous negotiations whereby political drivers of heritage assertions are acknowledged as legitimate strategies for valuing distinctively Indigenous cultural landscapes. If the perspective of ‘developers’ is that Indigenous heritage is ‘chiefly archaeological’ (Weiner 2011, p. 200), in northern New South Wales the Aboriginal view was that ‘even landscape features that are indisputably non-Aboriginal in origin’ (Weiner 2011, p. 191) can be understood to be ‘Indigenous’. So a surviving stand of trees in an urban development area elicits a desire for preservation ‘because it harked back to an undeveloped, and hence more authentically Aboriginal, landscape’ (Weiner 2011, p. 192). Here it is not relevant whether the trees existed ‘pre-colonially’. Thus, a ‘settler-constructed oyster spat culch’ can be regarded as culturally significant because Aboriginal people also used the culch ‘for their own fishing purposes’ (Weiner 2011, pp. 192). Similarly, ‘scarred’ or ‘marked’ trees in this region are likely to be ‘the product of post-contact and non-Aboriginal activities’ (Weiner 2011, p. 201), yet potentially regarded as ‘heritage’. And, if an area is believed to have been where deaths of Aboriginal people occurred during colonial times, it matters not whether physical remains of bodies can still be found there. In coastal northern New South Wales, Weiner (2011, pp. 189–90) depicts the complexities of a landscape that is thereby ‘sacralised’ to ‘re-inscribe’ an Aboriginal version of historical events.

Weiner’s case materials emphasise the views of developers and certain Aboriginal parties but omit the important position of the New South Wales Government on such matters (including the agencies that would give or refuse consent for a development proposal). It is a well-established principle in most Australian jurisdictions that Indigenous heritage comprises more than archaeological sites and can include a stand of trees (or any physical feature) that is part of a broader cultural landscape, regardless of its age, provided the nature of its social or spiritual

significance can be appropriately demonstrated.⁶⁵ Importantly, in New South Wales, where Weiner's study is located, an arbiter (a government agency) exists where there is dispute or confusion — admittedly a matter of some frustration to Aboriginal communities, which assert that their views should be paramount. However, in Queensland the government has removed itself as much as possible from the position of 'consent agency' or 'regulatory body' in relation to proposed developments that may impact Indigenous heritage places. The Queensland Government has done this on the grounds that a government's role should be to reduce the regulatory burden on industry as much as possible (see Rowland, Ulm & Reid 2014, pp. 348–50, on recent Queensland Government statements in this regard). Hence, instead of government oversight, the Queensland legislation and supporting guidelines establish Aboriginal people as 'key' to the identification, assessment and management of heritage places. We address what the implications of this are in Queensland. What happens if Aboriginal parties wish to oppose a development and do so by reference to a postcolonial stand of trees? At what point does the 'sacralising' of a landscape by 're-inscribing' it with an Aboriginal version of history become a blunt strategy for financial compensation — that is, a course of action distinct from heritage significance as such? Is there a risk of fabrication that would be contested by developers, fail in the courts and prompt cynicism among other Australians? What mechanisms are there to prevent a confusing blurring of political/economic strategy and heritage values?

65 Section 84 (read with s. 5) of the *National Parks and Wildlife Act 1974* (NSW) defines an 'Aboriginal place' widely enough to capture Weiner's trees: 'any place...being a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture'. This definition is arguably wide enough to capture a stand of very recent gum trees if the Aboriginal parties can demonstrate they are of 'social significance'. Thus, the Burra Charter (Australia ICOMOS Ltd 2013 — explanatory notes) defines heritage places very broadly: 'Place has a broad scope and includes natural and cultural features. Place can be large or small: for example, a memorial, a tree, an individual building or group of buildings, the location of an historical event, an urban area or town, a cultural landscape, a garden, an industrial plant, a shipwreck, a site with in situ remains, a stone arrangement, a road or travel route, a community meeting place, a site with spiritual or religious connections.' See also the accompanying practice note, 'The Burra Charter and Indigenous cultural heritage'. It would be a difficult case to argue, but see also Sneddon (2012) on the attitude of the courts to such arguments, particularly how 'special significance with respect to Aboriginal culture' is adjudicated in practice.

We have experienced some of the intellectual and political complexities arising from these challenges at first hand.⁶⁶ To illustrate, on one occasion an Aboriginal party identified a location on their country as a highly significant site on the grounds that it was where certain male initiation practices were traditionally conducted, including circumcision rites. This assertion was based on the identification of a particular stone artefact at the site said by some individuals among the relevant Aboriginal community (but contested by others in the same setting) to have been a circumcision blade dating to the pre-colonial period. This would have had serious financial implications for the mining company, including possible fines and a modification of its planned mining activities. The identification of the ‘circumcision site’ also had the potential to commercially benefit the Aboriginal party in the future, including through a requirement for paid community involvement in ‘salvage’ operations that would otherwise not have occurred.

Against these Aboriginal assertions of heritage significance, the ethnographic literature indicated that circumcision had not been a part of the traditional laws and customs of this group before the arrival of White settlers (as indicated in Roth 1897; Tindale 1974). Further, there was evidence to suggest that it played very little, if any, part in that group’s contemporary traditional practices. It is conceivable that ‘circumcision rites’ were being read onto the landscape by one part of the Aboriginal community (in this case, it appeared to be one family) by drawing on initiation traditions from elsewhere, thereby ‘sacralising’ the site in a particular way, as Weiner describes it. However, the claim was vulnerable to criticisms for being strategically motivated if not fabricated in terms of the identification of this particular artefact. The Queensland legislation provides only limited scope to deal with such disagreements, including opportunities for specialists such as archaeologists and anthropologists to provide their views, before it becomes a matter for the courts. In the case study presented above, the matter almost immediately entered the court system because the state issued a ‘breach notice’ alleging disturbance of the site by a mining company in contravention of the Act before the mining company had fully presented its views.

Further, we note that, in the coastal New South Wales setting, Weiner does not report on the economic incentives that can arise for Aboriginal people through cultural heritage management processes, suggesting a solely political/

⁶⁶ This chapter draws on research experiences during cultural heritage surveys and other engagements with Aboriginal people, dating from the late 1970s (David Trigger), the early 2000s (Andrew Sneddon) and the mid-2000s (Richard Martin).

cultural motive for attempting ‘to halt, re-direct or slow down the pace of development’, especially around sites considered to be of particular significance (Weiner 2011, pp. 191–2). Financial and related opportunities may have been limited in the negotiations of the case he reports, although it would be helpful to have that matter addressed more explicitly. Also unaddressed is whether there was unanimity on the heritage issues across the population of Aboriginal people with cultural interests in the area and the broader issue of how disputes within that population relate to economic incentives offered by developers. Certainly, one of the most publicised Indigenous heritage cases in the last couple of decades, the *Hindmarsh Island Bridge case* in South Australia, involved argument over a considerable divergence of views among relevant Aboriginal people (Bell 2008; Fergie 1996; Tonkinson 1997; Weiner 1999).

Our point here is that the ‘knowledge binds’ and ‘institution conflicts’ (Ross et al. 2011), arising from epistemological differences ‘between Aboriginal and non-Aboriginal visions for the landscape’ (Weiner 2011, p. 200) must be considered in light of economic factors as well as political/cultural ones. Critically, such differences are not simply ‘between Aboriginal and non-Aboriginal people’ but within and across these categories of person, reflecting a broad range of views depending on many factors, including decisions about heritage as ‘cultural’, as ‘political’, and as encompassing financial and broader economic benefits derived from participation in surveys and longer-term commercial developments.

Cultural heritage legislation, policy and administration in Queensland

Following earlier versions of legislation (see Rowland, Ulm & Reid 2014 for a detailed review of past and present legislation; also Trigger 1980), in 2003 the QCHA and the TSICHA came into force in Queensland. The Acts aimed to empower Indigenous people in the identification, assessment and management of heritage places through a mandatory consultation and (in certain circumstances) agreement-making process. Along with provisions in the *Native Title Act 1993* and *Native Title Amendment Act 1998* (Cth), which similarly act to protect Indigenous rights in land and waters, the laws position Aboriginal and Torres Strait Islander people at the centre of cultural heritage management processes through the partial withdrawal of the state. This is a development broadly in keeping with ‘neoliberal’ models of governance internationally, albeit ‘chastened’ by compensatory measures designed to recognise collective rights rooted in cultural difference, rather than the classic model of calculating, self-interested individuals (Hale 2005; Comaroff & Comaroff 2009; Engle 2010).

Under the QCHA and the TSICHA, the proponents of activities that may affect Indigenous cultural heritage are not required to apply to a government agency for a permit (as is the case in, for example, New South Wales). Rather, they are required to consult with the relevant Indigenous parties who become the principal decision-makers concerning the significance of heritage places, and who are integral to decisions regarding the manner in which they should be managed. Where a developer and Indigenous party cannot agree over the significance and management requirements of a heritage place, the QCHA and TSICHA provide for mediation processes, including the involvement of specialists such as archaeologists, anthropologists and other professionals, and ultimately either party can seek redress in the Land Court of Queensland.

However, as noted above, the Queensland Government has largely removed itself from the Indigenous heritage consent process, partly in response to years of criticism from Aboriginal and Torres Strait Islander commentators and others (see, for example, Trigger 1980; Godwin 2005; Pearson 2013; Rowland, Ulm & Reid 2014). The legislation does this by establishing a ‘duty of care’ imposed on all individuals and corporate entities whose conduct may adversely impact Indigenous heritage. Under this overarching protection, the legislation also requires the preparation of a cultural heritage management plan in consultation with Indigenous parties for any development requiring an environmental impact statement, which captures all medium to large development projects, including all mining operations.

The results have been mixed. Some Aboriginal groups have demonstrated a sophisticated appreciation of heritage management processes and have worked effectively to balance the needs of heritage against the benefits of development projects. For example, we have worked for some years with one Aboriginal group in Central Queensland that conducts its own training for young community members on the identification and management of archaeological sites, with assistance from experienced archaeologists. Other Indigenous people involved in cultural heritage management have developed their own skills to manage their heritage, manifesting notions of significance and conservation which may be different from those of skilled professionals such as archaeologists (for example, David, Barker & McNiven eds 2006; Smith 1994; Smith & Wobst 2005; Smith & Waterton 2009).

The heritage profession has been alert to these developments. For example, the Burra Charter (Australia ICOMOS Ltd 2013) has recently been augmented

with a new practice note dealing with Indigenous conceptions of heritage (see Australia ICOMOS Ltd 2013 — Burra Charter and practice notes). The courts have also shown receptiveness to Aboriginal worldviews about what constitutes heritage (Sneddon 2012, pp. 221–3). Further, government agencies across Australia have drafted a range of guideline documents explicitly addressing these issues, including the need to be responsive to Indigenous conceptions of heritage.

However, the partial withdrawal of the state from most heritage management processes in Queensland has resulted in adverse impacts, as Rowland, Ulm and Reid (2014) also argue. It is commonly the case that Aboriginal people will deal with archaeologists, anthropologists and other heritage professionals to identify and manage their heritage places, but good heritage practice may also require heritage managers to work with town planners, urban designers, geologists, flora and fauna experts, water managers, contamination-remediation experts, architects and others to achieve the best outcomes. This is why people involved in heritage management are commonly expected to have a range of professional skills and experience in the technical identification, assessment and management of it. So some states require archaeologists of ‘historical’ sites to have completed tertiary education in archaeology to Honours level and to have some years of experience before the state accepts them as an ‘excavation director’.⁶⁷ In some jurisdictions, similar requirements apply for archaeologists engaged in Aboriginal heritage management (see, for example, Department of Environment, Climate Change and Water NSW 2010, cl. 1.6).

However, Queensland’s Indigenous heritage legislation does not require Aboriginal and Torres Strait Islander participants in the process to have any formal training in the development of such skills. The legislation assumes that those Indigenous people involved in heritage assessments are born and raised within a culture that inculcates knowledge of and the capacity to manage heritage in the best possible way. This is a naïve assumption that fails to attend to the issues of Indigenous cultural change and continuity, and the question of what knowledge has been reproduced over generations relating to material technologies and objects

⁶⁷ For example, the Heritage Council of New South Wales (2011, p. 1) states: ‘Excavation Directors are people who have professional training and extensive fieldwork experience in the investigation of relics within historical archaeological sites. Excavation Directors have usually completed tertiary training in archaeology, prehistory or a closely related field. Excavation Directors may be consultant historical archaeologists undertaking paid professional work associated with site redevelopment projects; university employed archaeologists and/or others undertaking research investigations of historic sites.’

derived from Aboriginal and Torres Strait Islander occupation of the bush in earlier times. The symbolic politics of asserted ‘traditional knowledge’ and cultural loss are left unaddressed in what is expected as outcomes from the legislation.

The result is that there have been few, if any, accredited training programs for Indigenous heritage practitioners in Queensland and very little resourcing of Indigenous heritage management bodies. Thus decision-making powers reside in Aboriginal people who may have no technical skills or experience relating to heritage and may make basic errors as a result. We are aware of stone materials being incorrectly identified by community members as artefacts when they are known from a scientific perspective to be naturally occurring objects. Hence, while Aboriginal people have been ‘empowered’ through the creation of an economic niche within a largely deregulated heritage ‘market’, their capacity to take advantage of this opportunity while protecting heritage is circumscribed.

Further, the state’s withdrawal from Indigenous heritage consent procedures makes the process vulnerable to subversion by astute developers as well as by Aboriginal people who may act more in terms of short-term material self-interest than as conservators of heritage. As a mining executive stated in 2012 to one of the authors of this chapter when presented with heritage issues which could potentially affect a project in central Queensland, ‘If it’s okay with the Blackfellas [that is, Indigenous people], it’s all systems go [that is, the development will proceed]’. The process is easily corruptible. During informal conversation between one of the authors of this chapter and a low-level mining company employee, a particularly troubling boast was recorded, with this young man stating, ‘We’ve never had problems in Queensland before, when [Indigenous] people start complaining you just need to shove some money down their throats and they will go away’. Implicit in these statements is a belief that it is easier to negotiate less onerous management outcomes with Aboriginal parties without the involvement of government agencies, given the relative poverty of Indigenous people. In both of these statements, and particularly the latter, a hint of racism is also discernable, suggesting that Aboriginal people prepared to negotiate the destruction of their cultural heritage to facilitate development are irresponsible, if not corrupt. The cultural logic on display here is disturbing, suggesting that the negotiated destruction of cultural heritage invalidates assertions of its significance.

Economic dependency, development and heritage

Importantly, Queensland’s Indigenous heritage legislation makes no reference to ‘economic empowerment’ for Aboriginal people. It is certainly not a stated

objective of the Acts. In fact, there is no suggestion in the heritage legislation that Aboriginal and Torres Strait Islander involvement in Indigenous heritage management will have an economic dimension at all. We are not suggesting that it is inappropriate for Indigenous people to operate strategically within the system, but when the pursuit of economic participation and development results in poor conservation outcomes, the purpose of the cultural heritage legislation has been subverted. In such circumstances, the legislation is being put to uses that it was not designed for and it should therefore come as no surprise that unexpected consequences have emerged.

In a 2012 meeting attended by one of the authors of this chapter in South-East Queensland, a senior Aboriginal woman told another Aboriginal person that 'our cultural heritage is the way out'. In the context of the conversation, it appeared that she meant that cultural heritage offered a 'way out' of poverty through fees and possibly compensation potentially available from proponents of land use development projects. Her observation was predicated on the belief that Indigenous heritage could (and should) be used as a bargaining chip in commercial negotiations with developers and that financial benefits could be had from the identification and management of heritage places. However, such claims of real economic empowerment have not been demonstrated through empirical analysis. We suggest that the present system has the potential to actually entrench Indigenous economic dependency.

Aboriginal people commonly charge a fee for the time that they put into the consultation process and related heritage inputs, which may include work area 'clearance' surveys, archaeological excavations or monitoring activity (Rowland, Ulm & Reid 2014). Involvement in such work can enable substantial income, at least in the short term. To offer some perspective, in 2015 Australia's Newstart allowance unemployment benefit pays approximately \$260 a week; a person on minimum wage could expect to earn an income of approximately \$650 a week (depending on their occupation); and the full-time adult average weekly total earnings are about \$1500. In contrast, Indigenous people engaged in cultural heritage surveys can be paid up to \$600 per day (we are aware of agreements with payments ranging from \$400 and \$700), offering a weekly income of at least \$3000, putting them in the 90th percentile of weekly total earnings in Australia (Australian Bureau of Statistics 2015). However, while superficially attractive, in most cases Indigenous earning opportunities arising out of heritage assessment and management work are intermittent at best and usually only available for the duration of specific development projects (days or weeks and, far less often,

months). Indigenous people are understandably attracted by these sums, but such short-term money alone may not alleviate economic dependency or secure sustainable participation and development. Indeed, such money may offer only short-term economic gains.

While greater incomes through real wage growth for Aboriginal and Torres Strait Islander people are positive just as for others, this raises important questions about the flow-on impacts and sustainability of these fees throughout the economy of disadvantaged communities. One example of negative social impacts was observed by one of the authors of this chapter during a 2011 heritage survey. A 16-year-old Aboriginal girl employed on the project stated that she was contemplating dropping out of school ‘and trying to make it in modelling’. If she did not succeed in that, she said that she would ‘get into’ cultural heritage. In this case, the Queensland legislation — which, as we have noted, includes no requirement that Indigenous people involved in heritage management possess formal education or training — would be providing a young person with a rationale to drop out of school. While this young person’s life choices were doubtlessly shaped by a variety of influences beyond the cultural heritage context set up by the legislation, the comparatively high (but short-term) pay offered to those employed in Indigenous heritage assessment and management arguably risked discouraging her and others from pursuing broader education, training and employment opportunities that may seem to offer less money but over time engender greater financial and career security, providing better opportunities to secure credit and build wealth.

Indigenous people are arguably increasingly aware of these issues. As one person involved with us in the Gulf country stated during an August 2014 field trip, ‘As soon as they change that legislation [that is, the ACHA and the TSCHA], all this cultural heritage stuff is finished, so I’m keeping my certificates and training up [to date] so I’ll have something to go back to when it’s done.’ While it is difficult to conceive of a situation when Indigenous heritage work is ‘finished’ in the way this man suggests, his comments reflect the insecurity associated with such work and manifest some sensible precautions, including planning for an alternative career. Such comments are encouraging but hardly reassuring in terms of achieving a realistic and grounded relationship between Indigenous heritage values and the importance of negotiated economic advancement.

Collective cultural rights, factionalism and individual enfranchisement

Queensland's Indigenous heritage legislation assumes that Aboriginal and Torres Strait Islander communities are immune to financial inducements that potentially influence their attitudes to Indigenous heritage assessment and its management requirements. There is also no apparent awareness of the complexities associated with agreement making within many Aboriginal and Torres Strait Islander communities as these affect the possibilities of enduring consensus about the preservation of heritage sites in the face of both cultural politics and enticements from developers. Further, the legislation adopts a one-dimensional attitude towards those conflicts that exist between collective cultural rights, factionalism and desires for individual and family economic enfranchisement. As a result, existing divisions within and between communities have been maintained and even inflamed under the legislation. Some case material illustrates this proposition.

During an Indigenous heritage survey in Central Queensland in 2012, members of the relevant Aboriginal community requested the involvement of one of the authors of this chapter to provide specialist archaeological advice. However, the author was later removed from the project when the developer began consulting with another Aboriginal group in the same community with less stringent heritage requirements, which lowered costs for the developer and made the second Aboriginal group more attractive as a partner in the consultation process for which that second group was paid. This resulted in a poor conservation outcome (sites of heritage significance were destroyed without appropriate prior recording) and did not reflect the wishes of a large part of the Aboriginal community, which was subsequently marginalised by the mining company and its preferred Aboriginal group.

We have also observed elevated levels of dispute among Aboriginal groups within communities as they have vied for the lucrative but short-term benefits that flow from being the preferred consultation party. For example, an elderly Aboriginal man in a Central Queensland community told one of the authors in 2012 that he wanted to contribute to Indigenous heritage projects on his country, but he was too scared to participate because a particular family in his community with a reputation for violent behaviour controlled that work and would prevent it. In this case, the legislation is neither conserving cultural heritage nor involving a representative range of knowledge holders in the process; nor is it assisting to put money into 'the community', as those funds can be monopolised by forceful individuals and/or families.

The perversion of ‘free’ market logic that the Queensland legislation enables is strikingly evident. In effect, the legislation divides Queensland into patches of territory for which native title holders/applicants make all cultural heritage decisions. Developers are required to consult with those rights holders, who effectively acquire a monopoly over cultural heritage work in that area. This system is manifestly anti-competitive, enabling price fixing, market sharing and other practices that conflict with microeconomic policy in Australia (see Hasham 2014 for reporting on allegations of Aboriginal and mining ‘cartels’ in New South Wales). While in Australia, as in South America (Orta 2013), deregulation and decentralisation are sometimes said to empower Aboriginal and Torres Strait Islander communities (see, for example, Pearson 2013), the state’s efforts to take ‘the community’ into account here raise as many problems as they solve.

One problem is the question of who within ‘the community’ should appropriately speak for the areas in which developments are proposed. In Queensland, as we have discussed, those who speak for country are inflexibly defined in the QCHA and TSICHA as the native title holder/applicant (or the most recent applicant, even if they were unsuccessful in achieving recognition of native title rights, if no others have emerged) (QCHA, s. 34, TSICHA, ss. 34, 35). This provides developers with a level of certainty that proponents in states such as New South Wales lack. However, tying Indigenous heritage management to the native title process ignores the interests of Indigenous people with other kinds of attachments to areas. This is particularly problematic in locations where members of diverse language-named groups reside, many of whom may lack native title connections despite living in such settlements for multiple generations. The community of Woorabinda in central Queensland presents an example. If a proponent wished to develop a parcel of land in Woorabinda, they would only be required to speak with the native title holders/claimants, who constitute a small minority of the Woorabinda population. The many other Aboriginal people at Woorabinda with generations of shared memories deriving from the removals of the 20th century would be excluded from such consultations. That is, the consultation process set down by the legislation would result in consultations that would not include a representative cross-section of the community that would be impacted on by the proposed works.

Certainly the issue of just who holds customary interests in heritage sites can be complex, and necessarily has to be resolved at the local or regional level among the relevant Aboriginal people. To return to the Gulf country setting we discussed above, which introduced the significance of heritage sites, when the issue of a large stone-working quarry area located near the open-cut pit

of Century Mine arose in the 1990s, the respected elder Blue Bob articulated some support for those of his relatives willing to see it destroyed as part of a negotiated agreement securing economic benefits for Aboriginal people. The tensions between diverse perspectives encompassed regional groups apart from those with a formal native title claim interest in the land. It would have been inadequate for decision-making to be restricted solely to the native title party recognised in Australian law, as consultations and discussions were needed across what we might term the relevant jural public with a customary interest in the heritage value of the site and its artefacts.

A related example from the same region concerns a 2011 heritage survey at the town of Doomadgee in the Gulf country. Both Ganggalida and Waanyi people assert connections to the town area based on a continuing system of law and custom; however, Aboriginal people from other groups also arguably possess heritage interests deriving from long histories of residence under missionary rule and then under a shire council. Appropriately, the cultural heritage survey undertaken at the time included both Ganggalida and Waanyi people and sought contributions from other members of the public, resulting in the identification of places of shared heritage significance, including buildings derived from earlier mission times as well as such historical sites as the location of the now removed humpy-dwelling where Blue Bob and his relatives lived for several decades. In this case, the memory of the respected elder Blue Bob — whose complex perspective on cultural heritage has been documented here — was appropriately protected as cultural heritage, although this outcome was secured through the active participation of Aboriginal people through their representative organisations and assisted by effective legal counsel and professional anthropological and archaeological input. An alternative outcome in which this and other historically significant heritage sites were destroyed could easily have occurred under the Queensland legislation if the developers had been unscrupulous and the Aboriginal parties had not been represented by a capable organisation.

Conclusion

The recognition and protection of Indigenous heritage has advanced considerably over the past five decades along with broader developments in the recognition of cultural difference and diversity in Australia. However, the politics of such recognition have produced perverse consequences in some cases. One consequence is that the pressures on Indigenous people to manifest maximal cultural alterity

have increased rather than decreased (Povinelli 2002). In relation to cultural heritage, we find that such pressures have at times encouraged the exaggeration or attempted fabrication of heritage. Such fabrication — distinct from processes of cultural recovery and revival — risks devaluing heritage and prompting counterproductive cynicism across the broader society. At the same time, the urge for Indigenous people to be integrated or assimilated into the productive ‘mainstream’ or ‘real’ economy has continued unabated and even strengthened. In this context, the contradictory nature of recognition poses challenges that are inadequately addressed by Queensland’s legislation.

Queensland’s Indigenous heritage legislation purports to empower Aboriginal and Torres Strait Islander people at the same time that it reduces government regulation for mining and other development proponents. This alone ought to cause concern, given the asymmetries that exist between Indigenous people and developers, which can include some of the largest and most powerful corporations in the world. Further, deregulation has dubious results for heritage conservation more generally. Indeed, it is difficult to imagine a largely deregulated environment being conducive to consistently good heritage management across the state as well as to meaningful and sustainable Indigenous economic empowerment. The suggestion that Aboriginal people suffering economic disadvantage and related social crises (Sutton 2009) can effectively negotiate their empowerment through economic participation, and development needs to be examined critically rather than simply parsed politically or bracketed from consideration altogether (see, for example, Weiner 2011). In our view Queensland’s Indigenous heritage legislation has enabled abuses of the system in return for questionable progress towards economic development aspirations. This is a matter only cautiously discussed by heritage professionals, who are themselves sometimes beholden to special interests within negotiations and at risk of inappropriate alignment with them. Other heritage professionals, to our knowledge, are concerned that measured criticism of the prevailing system and even muted calls for reform may be the stimulus for a wholesale jettisoning of the laws, which would be undesirable because the legislative and administrative regime in Queensland has many positive aspects. We are not alone in these observations (see, for example, Rowland, Ulm & Reid 2014).

In our view the state government should assume a greater role as a regulatory body in relation to Indigenous heritage in the same way that it is a regulatory body for other heritage issues across Queensland. This recommendation may be unpalatable to some Aboriginal and Torres Strait Islander people, who may

see it as inconsistent with the principle that Indigenous people's views on their heritage should be paramount. It may also be unpalatable to some developers and government. However, a strengthening of government oversight of Indigenous heritage management would be a means of avoiding adverse heritage impacts. It would place the courts at one further remove, introducing an arbiter into disputes before the activation of litigation processes. Opponents of this recommendation may characterise it as paternalistic meddling and could point to failures of the system predating the present one, when government agencies did occupy a regulatory role. However, a modification of the system as we have recommended, with appropriate checks and balances and transparent decision-making, need not exclude Indigenous stakeholders from the process or subvert their legitimate aspirations to speak for country. Indeed, Indigenous people's aspirations to speak for country may be enhanced by reforms, particularly if greater resources were made available to support training for Indigenous people in effective heritage management. Importantly, any changes need not impact Indigenous people's ability to take commercial advantage of the heritage management system.

We conclude that claims that Queensland's Indigenous heritage legislation results in economic empowerment through increased economic participation and development for Aboriginal people should be regarded with scepticism until these claims have been appropriately empirically demonstrated. Our experience is that the laws have not challenged the marginalisation of many Indigenous people seeking recognition of heritage and economic advancement. While the money that is forthcoming from Indigenous heritage agreements is actively pursued by some, it is characteristically insufficient for serious investment in sustainable futures. While some Aboriginal people understandably see such money as 'a way out' of disadvantage, such outcomes are presently unclear. As we have argued, the assumption that resources arising from such agreements will contribute towards economic empowerment through participation and development is overly simplistic. In some cases, such resources may actually entrench economic dependency and accentuate other inequalities, effectively widening 'the gap' between Indigenous and other Australians even as they temporarily enrich some individuals and/or families.

This chapter makes no comment on the merits of collective economic action as opposed to individual entrepreneurialism among Aboriginal people. However, our second recommendation is that the legislation be amended to include a mechanism by which disputes within communities over the distribution of money available through cultural heritage processes may be resolved or at least

ventilated, including methods by which multiple viewpoints can be gathered and adjudicated, if not reconciled. Relatedly, heritage negotiations should maintain an holistic approach to the ‘community’, involving a disposition that acknowledges the interests of those who may not be captured within the description of native title claimants or holders.

In spite of the flaws in the system, the authors of this chapter support the basic form and intent of Queensland’s Indigenous heritage laws, the design of which seeks to empower Aboriginal people by placing a degree of control over their heritage into their own hands, providing them with economic opportunities and partly remedying other inequalities arising from the legacies of colonialism in Australia. In our view, the flaws do not justify the abandonment of the system, but rather its targeted reform. The alternative — inaction — will facilitate a continuing perversion of the system, with negative corollaries, including a growing cynicism about Indigenous heritage across the broader society. Those who work in this field — and produce the enormous pile of consultancy reports the legislation prompts — must attend seriously to these issues and avoid uncritical simple descriptive reportage of Indigenous assertions of heritage significance. In place of such uncritical reportage we call for thick description which deals empathetically with the dynamics of recognition, including its contradictory demands. This is to ask for a close and careful analysis of the ethnographic complexity associated with the protection and management of Indigenous heritage and the negotiations and renegotiations of its significance between Indigenous people and their supporters and the broader society. ‘This very important thing’ that Blue Bob described — Indigenous heritage across the Australian landscape — demands a renewed effort to protect it.

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Chapter 7

FROM MISSIONARIES TO MABO: PLACE-BASED HERITAGE MANAGEMENT AND NATIVE TITLE IN TORRES STRAIT

Ian J McNiven and Garrick Hitchcock

Nineteenth century colonialism had a major impact on the place-based heritage of Torres Strait Islanders, ranging from the destructive practices of missionaries to the collection practices of outsiders, including government officials, traders and anthropologists. Many places of significance have also been damaged or destroyed as a result of government infrastructure developments over the past half-century. An immediate consequence of the successful 1992 Mabo native title case was that Torres Strait Islander communities were empowered to help minimise the impacts of a number of large-scale developments upon heritage sites and places. Unfortunately, these positive steps have not translated well to local community infrastructure developments such that the region is now out of step with well-established processes of heritage assessment and protection on mainland Australia. Indeed, Torres Strait has developed a reputation for heritage assessment that falls below national standards of best practice. While in principle native title rights and state legislation provide scope for adequate protection of place-based heritage, local native title bodies are poorly resourced to implement best-practice impact assessments of infrastructure developments and respond to the new challenges of erosion of coastal sites from sea level rise.

Introduction

Torres Strait covers an area of approximately 50,000 square kilometres, encompassing hundreds of islands, sandbanks, rocks, shoals and coral reefs. It is spread 150 kilometres north–south between the mainlands of Australia and New Guinea and links the Coral Sea to the east and Arafura Sea to the west (Figure 7.1). Over 90 per cent of the region consists of shallow seas and coral reefs teeming with marine life. It is no coincidence that the Indigenous peoples of Torres Strait possess a maritime culture and are marine subsistence specialists *par excellence* (Barham 2000; Davis 2004; Haddon 1935; McNiven & Hitchcock 2004). Importantly, the region's maritime culture includes seascapes rich in cosmological and spiritual meaning which go to the heart of cultural identity (Fuary 2009; Mulrennan & Scott 2000; Nietschmann 1989; Sharp 1993). Most of the indigenous population identifies as Torres Strait Islanders, with the Kaurareg of the south-west Torres Strait identifying as Aboriginal people. Of the Strait's more than 150 islands, 16 are home to 17 community settlements, with an Indigenous population of over 7000.

Before Britain annexed Torres Strait to the colony of Queensland in two stages in 1872 and 1879, the region was in international waters (Mullins 1995). After more than a century of colonial governance, Torres Strait operates as a semi-autonomous entity with an international border and complex and demanding administrative and governance structures heavily funded by the Queensland and federal governments (Beckett 1987; MacDonald 2007; Saunders 2000). Thursday Island is the administrative, commercial and transport hub for the region.

Archaeological research reveals that human occupation of Torres Strait extends back at least 9000 years, to the time of the Strait's formation by rising sea levels at the end of the last ice age (McNiven 2011). For most of this time, the Indigenous people of the region had their own cultural systems in place to manage important or culturally significant places with little interference from outsiders. British colonial annexation and occupation dramatically changed this cultural autonomy, as sites and objects were destroyed or removed to museums and private collections, and people's capacity to protect and curate knowledge of such places and objects was often jeopardised and compromised. Today, the right of Torres Strait Islanders to engage with, protect and manage their heritage is enshrined by a range of legislation, most notably the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (TSICHA), which is underpinned in many respects by the *Native Title Act 1993* (Cth) (NTA). More broadly, these rights are protected, at least notionally, by Article 11 of the United Nations Declaration on the Rights

of Indigenous Peoples (UNDRIP), which was adopted by the United Nations General Assembly in 2007 and to which Australia became a signatory in 2009 (United Nations General Assembly 2007).

Yet legal and moral safeguards are one thing; practice is another. This chapter charts over 150 years of management of places of significance in Torres Strait, from annexation, *terra nullius* and missionary times in the late 19th century to the modern legislative era of heritage protection, native title, self-determination and governance.

Torres Strait is the birthplace of native title rights recognition for Aboriginal and Torres Strait Islander peoples through the famous *Mabo case* (*Mabo v. Queensland (No. 2)* (1992) 175 CLR 1). Remarkably, the innovation of native title recognition has not been matched by best-practice heritage management. Indeed, processes of Indigenous heritage site assessment and protection associated with much-needed infrastructure developments on Torres Strait islands fall well below standard practices in place across most of mainland Australia.

Taking an historical approach, this chapter examines the development of heritage management practices in Torres Strait from the destructive actions of missionaries in the late 19th century to developments arising out of the new legislative and governance challenges stemming from successful native title determinations that began emerging in the late 20th century. We show how native title recognition of Torres Strait Islander lands and seas has been instrumental to a number of successful processes and projects around the protection of place-based heritage in the region. However, such successes have been more the exception than the rule. Key heritage concerns requiring future attention are mitigating the impacts of climate change and better resourcing of individual island native title and heritage bodies to respond to the fast-tracking of local infrastructure developments.

Heritage management in Torres Strait before native title

Like all parts of Australia, management of places and objects of significance to indigenous peoples across Torres Strait changed fundamentally with European colonial settlement. Up until the 1860s, Torres Strait Islander contact with Europeans was limited largely to interactions with transiting mariners and British Admiralty expeditions intent on charting the region's seas, reefs and islands (for example, the voyages of HMS *Fly* and HMS *Rattlesnake* in the 1840s) (Jukes 1847; MacGillivray 1852; Mullins 1995). Interactions during this 'passing trade' era tended to be fleeting, and often involved exchanges of objects such as steel axes and hoop iron for local water, food and artefacts as well as human remains, including

skulls and mummified bodies (McNiven 2001; Mullins 1992, p. 22; Mullins 1995, p. 6). Torres Strait Islanders generally had control of these interactions due to their superior numbers and well-developed mercantile skills, and objects invariably were exchanged through mutually agreed transaction values. As such, few instances are known of visiting mariners wilfully damaging, destroying or stealing culturally significant objects.

The most celebrated exception to this mutuality was theft of the turtleshell mask adorned with human skulls and associated burning and destruction of the *Kulka* cult shrine on Auridh by Captain Charles Lewis from the *Isabella* expedition in 1836. Many of the skulls were believed to be those of castaways from the *Charles Eaton*, which was wrecked on the northern Great Barrier Reef in 1834. The castaways' skulls were eventually buried in a Christian cemetery in Sydney, while the remaining Indigenous skulls and mask were deposited in the Australian Museum (Lahn 2013).

During the 1860s, contact with Europeans intensified with the establishment of a small number of beche-de-mer stations (Mullins 1992). Interactions increased dramatically in the 1870s with the arrival of the pearlshell industry, the London Missionary Society (LMS) and colonial settlement of Thursday Island (Beckett 1987; Ganter 1994; Mullins 1995). The presence of pearlshellers, missionaries and colonial officials had profound effects upon Torres Strait Islander communities, including the fate of important sites and objects. The process of impact was two-pronged. First, dramatic social and cultural transformations, particularly the process of Christianisation, saw many Torres Strait Islanders strategically shift their focus away from selected traditional sites and objects, particularly those associated with ceremonial and ritual practices. Second, many outsiders, particularly anthropologists and museum curators, associated these dramatic social and cultural transformations with cultural loss and a concomitant need to record, collect, and archive 'traditional' cultural information and objects under the guise of 'salvage anthropology'. Yet, as Ash (2013) points out, many post-contact cultural changes by Torres Strait Islanders during the late 19th century are better seen as cultural transformations and elaborations as opposed to cultural degradation and loss. In many instances, Torres Strait Islanders deliberately and strategically adapted to and embraced new opportunities (practices and objects) presented by outsiders. Indeed, the arrival of Christian missionaries is celebrated every year in most Torres Strait Islander communities with 'Coming of the Light' ceremonies.

During the late 19th century, numerous Pacific Islander missionary teacher operatives working under limited British LMS oversight settled and set up

churches on selected islands across Torres Strait. In many cases, missionary teachers actively destroyed spiritually charged sites and objects which they believed jeopardised the transformation of Torres Strait Islanders into Christians. Ash, Manas and Bosun (2010, p. 77) note that the 'LMS implemented a range of coercive measures designed to eradicate non-Christian beliefs and was responsible for the destruction and reconstitution of many non-Christian Torres Strait cultural sites'. On Mer in the Eastern Islands, Loyalty Islands missionary teachers burnt the sacred house (*pelak*) (Sharp 1993, p. 100). Haddon (1908, p. 266) reported that the *Tomog zogo* divinatory shrine on Mer had been burned by an LMS missionary teacher prior to Haddon's visit in 1888. On Ugar, numerous *zogo* shrines with shells, coral and stones were piled together at Wasidog by early missionaries (Teske 1987a, pp. 22–3). In the Western and Central Islands, a major strategic focus was *kod* sites, used largely for male ceremonial practices, including initiations. According to Shnukal (2004, p. 333), 'missionary-teachers were instructed to destroy the *kooda* [*kod*] and deliberately built their first grass-churches on these sites'. The *kod* at Dabangay on Mabuyag (aka Mabuiag) was severely damaged by order of the Reverend John Done (Church of England) in 1918 (Lawrie 1970, p. 244; Shnukal 2015). A cult shrine consisting of an arrangement of turtle carapace bones and skulls on Masig was 'destroyed by fire by the first missionaries' in the 1870s (Haddon 1935, p. 93). In the 1870s, the *Mamoose* (community-appointed leader) of Mabuyag 'gave his consent' for LMS missionaries to remove around 50 human skulls and to burn sacred objects from the revered Awgadhalkula cave on the islet of Pulu (Haddon 1901, pp. 141–2). The skulls, consisting of 49 crania and 82 mandibles, were deposited in the Natural History Museum (London) by Reverend Samuel McFarlane, while the sacred cave was subsequently 'nearly filled up with earth by a South Sea teacher [LMS missionary]' (Haddon 1901, pp. 141–2; 1904, p. 305; Thomas 1885).

It is also clear that Torres Strait Islanders took measures to conceal and protect significant sites and objects from destruction by missionaries. For example, Haddon (1935, p. 199) was informed that people on Erub hid sacred 'ceremonial objects' associated with the *Daido-siriem* cult in a cave and 'blocked' it up to conceal it from missionaries. Similarly, the twin *zogo baur* carved posts used by the Miriam were found 'hidden in a cave' on the island of Waier near Mer. The ceremonial posts, associated with turtle hunting and possibly the *Waiet* cult, were found by Robert Bruce, a teacher working for the LMS, in the 1880s and donated to the Kelvingrove Museum (Glasgow) in 1889 (Allan & Spiers 2012; Haddon 1908, pp. 214–16). In other situations, sacred objects were hidden in

plain sight. For example, Shnukal (2004, p. 333) notes that ‘some large shells and smooth round stones that had adorned that most sacred of places were removed and incorporated into the newly built churches’. As Ash (2013, p. 51–2) cogently notes, ‘Pacific Islander teachers practiced an Indigenised form of evangelical Christianity, which, ironically, tolerated (in part) a syncretic incorporation of non-Christian beliefs and practices’.

The collection of objects from significant places and deposition in museums by missionaries intensified dramatically with the anthropological research of Alfred Haddon from Britain. Haddon’s scientific collections from 1888–89 and 1898 predominately comprise small portable objects (for example, domestic utensils, ritual items and ceremonial body adornments) and are housed mostly in the British Museum and the Cambridge University Museum of Archaeology and Anthropology (Herle & Rouse 1998; Moore 1984). Yet Haddon also collected objects from important sites, particularly figurative stone ‘carvings’ or what he called ‘stones of power’ (Hadden 1935, pp. 360–4). Examples include the Gawer fish head stone figure from Dauar and Kaperkaper anthropomorphic stone figure from Mer in the Eastern Islands, and a dugong stone figure from Tudu in the Central Islands (Haddon 1908, pp. 28, 53; 1935, p. 361). Haddon also noted that numerous stone figures had been removed from Erub (Eastern Islands) to various museums and suggested that the general lack of stone carvings in the Western Islands related to removal by ‘Christian zealots of various nationalities’ (1935, pp. 192, 360). The Queensland Museum holds numerous carvings collected by A.O.C. Davies (schoolteacher, Mer), including stone figures from Mer and Dauar and the famous sacred figure of Waiet stolen from a cave on Waier in 1925 (Haddon 1935, pp. 143, 157, 170, 399; Simpson 1955, pp. 26–8).

In some ways, the practices of missionaries and anthropological collectors lend strong support to Barrett’s (1954, p. 37) conviction that the islands of Torres Strait had ‘been well combed for ethnological specimens’. Yet many valuable sites and objects survived this colonial onslaught. Ash (2013, p. 55) makes the point that:

It is ironic that in spite of the best attempts by missionary-teachers to destroy Torres Strait objects and places, the spiritual powers of the old places remained, and remain. Not all such places disappeared or were erased, rather retaining some of their former importance, becoming reinscribed in community memory in a conceptual schema that implicates the LMS in place and in the past.

Similarly, culturally significant and sacred objects from the 19th century continue to be held by families and communities as treasured heirlooms. Examples

include Kebisu's stone-headed club (*gabagab*) on Iama and the ceremonial drum (*warup*) known as *wasikor* on Mer.

The construction of significant government infrastructure commenced in the 1960s and comprises buildings (including houses), dams, airstrips and/or helicopter pads, roads, quarries, sewerage treatment plants and rubbish dumps on all community islands. These works saw a new phase of damage and destruction to place-based heritage across Torres Strait. For example, Laade (1969, pp. 39, 158) reported that special old meeting places were destroyed by the building of a teacher's house and medical aid post on Mer, while other building construction destroyed a *zogo* site on the island. On Thursday Island, 'tribal elders of the Kaurareg tribe' were 'outraged' after 'sacred stones' had been removed from the proposed site for the Thursday Island Childcare Centre (*Torres News* 1994, pp. 1, 3).

Most references to development impacts on sites of significance refer to the construction of airstrips. While these facilities represent something of a lifeline for island communities, their installation has come at a cost to the place-based heritage of Torres Strait. On Boigu, the airstrip was built over Koey May (a well site) and former gardens (Boigu Island Community Council 1991, p. 26). On Saibai, the Thurickangegath canal was 'closed by earth works during the construction of the airstrip' (Singe 1986). On Iama, a large garden area (Neal 1989, p. 29) and *kod* site were destroyed by clearing for the airstrip. In the case of the *kod* site, some remains (*bu*, Australian trumpet shells) were salvaged and moved to the side of the airstrip (Teske 1987b, p. 36). On Mua, a site with a *bu* shell arrangement was moved to make way for the airstrip (Teske 1986, p. 26). On Ugar, the Wedding Stone 2 engraving site was moved to make way for construction of a helipad (Fitzpatrick, Cordell & McNiven 1998).

Heritage and native title in Torres Strait

In 1995, the Torres Strait Regional Authority (TSRA) was appointed the Native Title Representative Body (NTRB) for the Torres Strait region under the provisions of the NTA. The primary function of the TSRA Native Title Office (NTO) is 'Facilitating the research, preparation and making of claims by groups of Aboriginal Peoples or Torres Strait Islanders, for determinations of native title and for compensation for acts affecting their native title'. According to the TSRA website, legal representation and assistance to its Torres Strait constituents has seen the NTO successfully obtain 19 of the 26 determinations of native title that have been made to date over land and waters in the region, 25 of which have been obtained by consent. As of December 2014, 21 Prescribed Bodies Corporate (PBCs) were registered for Torres Strait (Strelein 2013).

The role of place-based heritage in native title determinations in Torres Strait has been variable. With *Mabo*, tangible sites such as stone boundary markers were important forms of evidence used to demonstrate long-term land ownership (Keon-Cohen 2011, p. 95; Sharp 1996, p. 64). In the case of the regional sea claim (*Akiba on behalf of the Torres Strait Islanders of the regional sea claim area v. Queensland (No. 2)* [2010] FCA 643), one of the authors of this chapter was commissioned by the NTO to prepare an expert witness report (McNiven 2008). The 200-page report documented a wide range of archaeological evidence demonstrating cultural associations with the sea, including antiquity of occupation of the region, use of marine foods, use of marine products for technology and other artefacts, ritual engagements with the sea, exchange/movement of items between islands and with adjacent mainlands, and inter-island settlement patterns. The report was uncontested by the respondents (State of Queensland). The inclusion of an archaeology expert witness report for the Torres Strait sea claim was an explicit acknowledgement of the importance of archaeology to the native title process (see also Harrison, Veth & McDonald 2005; Lilley 2000).

Heritage management in Torres Strait: successes

Culture Site Documentation Project

A broad range of place-based heritage related projects and initiatives have taken place across Torres Strait over the past two decades as a direct result of the legal, cultural and social implications of native title. The first major initiative was the Culture Site Documentation Project (CSDP) from 1996 to 1998. The CSDP was the first overview of Indigenous heritage sites and associated management issues for Torres Strait. It was instigated in 1996 by the Island Coordinating Council (ICC) (now Torres Strait Island Regional Council) following receipt of a national estate grant through the then Queensland Department of Environment. The stimulus for the CSDP was growing concern amongst many Torres Strait Islander leaders about the loss of places of significance. For example, at the conference 'Our culture: maintenance and preservation of Torres Strait Islander culture', held on Thursday Island in 1992, senior community members pointed out that 'significant domains of traditional knowledge and cultural heritage sites and places were being lost or jeopardised by uncontrolled development and other pressures associated with social change' (McNiven & David 2004a, p. 75). Such concerns were further crystallised in the early 1990s, when 'the issue of culture site protection came to a head, particularly with an invigorated expression of Islander cultural identity and heritage following the landmark

Mabo native title court decision' and implementation of the NTA (McNiven, Fitzpatrick & Cordell 2004, p. 75).

Key players in the implementation of the project were Joe David (ICC) and Vic McGrath (TSRA). The two lead consultants on the project were Judith Fitzpatrick (an anthropologist with extensive experience working with Torres Strait Islanders, especially the Mabuyag community) and John Cordell (an anthropologist with extensive experience working with Indigenous peoples and customary marine-tenure). Recognising the importance of place-based heritage and associated management needs, the project team was expanded to include Ian McNiven. Results of the project were detailed in an unpublished report (Fitzpatrick, Cordell & McNiven 1998), with an overview included in McNiven, Fitzpatrick and Cordell (2004).

A major aim of the CSDP was to identify a range of practical and programming issues associated with documenting and managing places of significance across Torres Strait so that individual island communities could begin to take control of the management of their own place-based heritage. At the time, it was envisaged that heritage site management should be integrated within existing management programs in Torres Strait, particularly the MaSTERS program for management of marine resources (Mulrennan & Hanssen 1994). This association with the MaSTERS program reveals that site management in Torres Strait was seen to be linked directly with broader marine resource management concerns — an explicit acknowledgment of the intimate relationship that exists between Torres Strait Islanders, cultural sites and maritime identity.

Due to financial and logistical constraints, the CSDP focused on a literature survey of places of significance supplemented by a series of short visits to Mabuyag (Western Islands) and Poruma (Central Islands) to speak to community leaders and elders about heritage issues and concerns. The project documented 621 known and potential archaeological sites across 42 islands in the region and identified four key conservation issues for Torres Strait sites: (1) threats from infrastructure developments; (2) threats to rock-art sites from weathering; (3) lack of recordings of storyplaces (especially those in the sea); and (4) lack of formal site management programs within the region (McNiven, Fitzpatrick & Cordell 2004, p. 73).

The bias in recording of places of significance on islands, with few sites recorded within the sea, was identified as a major issue for Torres Strait. In particular, it was noted that, 'The fact that many of these reefs and waterways were used in the past (as many are today) and have names and stories associated with them indicates the existence of an elaborate and textured seascape, little known and little appreciated by

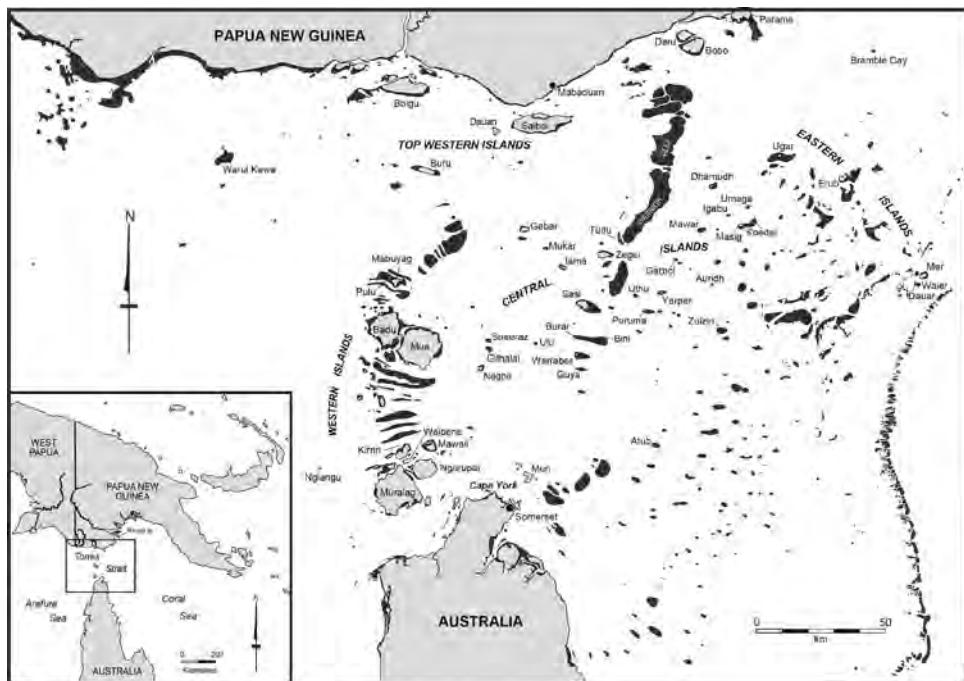


Figure 7.1: Map of Torres Strait

outsiders' (McNiven, Fitzpatrick & Cordell 2004, p. 78). When potential marine sites are considered, McNiven, Fitzpatrick and Cordell (2004, p. 78) state that 'we predict that well over 1,000 archaeological sites exist across Torres Strait and that the total number of culture sites is at least 1,500'.

The CSDP recommended that, 'Effective management of cultural heritage sites across Torres Strait will require a major increase in resourcing to support community-based cultural heritage management programs for individual islands' (McNiven, Fitzpatrick & Cordell 2004, p. 73). The key recommendations for management of Torres Strait Islander heritage sites were as follows:

- Heritage site conservation needs to be included in all stages of planning development in the region.
- Some form of site officer program needs to be developed whereby islanders can take on the task of documenting and managing their own sites.
- In the planning and development processes, site information needs to be stored, managed, and released in a way that addresses local community views and protocols (Fitzpatrick, Cordell & McNiven 1998, p. x).

Hitchcock (2010a, pp. 1–2) notes: ‘This vision for cultural heritage management has not occurred to date. However, it is important to note that despite the passing of the years, much in this comprehensive report remains very relevant today.’ It was stated further that the CSDP ‘should be regarded as a foundational document for cultural heritage management in Torres Strait’.

Archaeological research

An immediate spin-off of the CSDP was two collaborative place-based heritage and archaeological research projects with the Goemulgal community of Mabuyag in the Western Islands and the Dauanalgal community of Dauan in the Top Western Islands. The Mabuyag project was established in 1998 and involved the Goemulgaw Kod (an island-based cultural organisation established in 1994), archaeologist Ian McNiven and anthropologist Judith Fitzpatrick. It focused on the sacred islet of Pulu and the production of site details and associated historical and environmental information aimed at developing the region’s first Indigenous Protected Area (IPA). During the course of surveys on Pulu, a previously unknown rock-shelter site featuring highly weathered rock art and a midden deposit with digging disturbance from pigs was found. Eager to know more, the Goemulgaw Kod supported subsequent excavations at what became known as Baidamau Mudh (Tigershark Rockshelter) in 1999, followed by placement of wire mesh across the surface of the midden to restrict further pig disturbance (see Hitchcock et al. 2015; McNiven et al. 2008). At the time it was pointed out that the work at the site represented ‘the first archaeological excavations undertaken in Torres Strait with the explicit aim of providing background information for establishing management plans for cultural heritage sites’. Furthermore, the ‘placement of wire across the floor of the site to deter pigs is believed to be the first culture site conservation work of its kind undertaken in Torres Strait’ (McNiven 1999).

Positive community outcomes of the Tigershark Rockshelter excavations and IPA research led to the Goemulgaw Kod, McNiven and Fitzpatrick applying successfully in 2000 for a Cultural Heritage Projects Program Grant from Environment Australia (Canberra) for the Pulu Culture Site Mapping Project (McNiven et al. 2002, 2009). The project focused on detailed mapping, small sample excavations and comprehensive radiocarbon dating of middens, *bu* shell arrangement shrines and a dugong bone mound. The final project report included a detailed catalogue of human remains from the sacred Awgadhalkula cave on Pulu held by the Department of Palaeontology at the Natural History Museum in London. These remains have been the focus of minor research over the past 130 years (Bonney & Clegg 2011; Thomas 1885).

A concurrent project — the Pulu Rock-Art Recording Project, focusing on rock art associated with the Pulu *kod* — was funded by a Coastcare grant awarded to the Mabuyag community in 2000 (David et al. 2003). Significantly, during the course of the project a number of members of the Mabuyag community used red ochre pigment (made by grinding ochre fragments collected from the surface of the *kod* site) to depict their respective totems (for example, *dhangal* (dugong) and *kaigas* (shovel-nosed shark)) on granite boulders at the *kod* (Brady 2010). The paintings are the first known rock art produced in Torres Strait for over a century (see David, Barker & McNiven 2006, cover image).

The Dauan project was a pilot rock art conservation study concerning the Kabadul Kula site. Inspection of the site by Ian McNiven in 1998 revealed two major panels of heavily weathered paintings, with one panel partly concealed by a large active termite nest. Following discussions with senior local community members, it was agreed that the site should be recorded in detail and conservation management plans developed. Following a successful AIATSIS grant in 1999, in April 2000 work at Kabadul Kula was undertaken by Ian McNiven with rock art expert Bruno David and rock art digital enhancement expert John Brayer (McNiven, David & Brayer 2001). The results of computer enhancement of digital photographs of the rock art were extraordinary and dramatic, and created local and international interest (David et al. 2003; McNiven, David & Brayer 2000; McNiven et al. 2004; see also Brady 2010). Following consideration of conservation options for the site outlined in McNiven et al. (2004) and McNiven and Brady (2007), the Dauan community recommended removal of the encroaching termite nest and sample excavation of underlying archaeological deposits. In 2007, the termite nest was removed and excavations undertaken (funded by the federal Department of the Environment and Water Resources through its National Indigenous Heritage Programme) (Brady et al. 2010; McNiven, Brady & Barham 2009).

The Kabadul Kula results generated the immediate interest of the Badu and Mua communities of western Torres Strait. As a result, the Native Title Office on Thursday Island offered funds for McNiven, David and Brayer to visit these communities in May 2000 to meet with senior elders and councillors to showcase rock art recording and conservation practices and to discuss community interest in establishing future site-recording and archaeological research projects. The following year, McNiven and David established the Western Torres Strait Culture History Project (David & McNiven 2004a). This highly successful and productive collaborative archaeological research project between Monash University and the Mabuyag, Badu and Mua communities (funded by an

Australian Research Council Discovery Projects grant and a series of AIATSIS research grants) has revealed 9000 years of dramatic cultural change and a rich history of dynamic secular and ritual seascape engagements (see McNiven 2011 for a summary overview).

Major archaeological discoveries in the Western Islands were matched by the remarkable results of the Murray Islands Archaeological Project (MIAP) in the Eastern Islands. Established in 1998, this collaborative research project, primarily between James Cook University and the University of Arkansas, the Mer Island Community Council and traditional Meriam landowners, focused on determining the long-term history of marine resource use on the islands of Mer and Dauar (see, for example, Barham, Rowland & Hitchcock 2004; Carter 2004; Carter et al. 2004). As with archaeological work in the Western Islands, success of the MIAP was conditional upon community support and access permissions from appropriate landowners and custodians. Such permissions were greatly facilitated by continual dialogue with anthropologists working for the NTO on Thursday Island.

Cultural heritage management impact assessments

The close working relationship that began to develop between archaeologists and native title anthropologists in Torres Strait during the late 1990s carried over into heritage impact assessments. While a few impact assessments had been carried out in the late 1980s and 1990s (Hatte 1996; Horsfall 1987; Neal 1989), the years 1999 and 2000 marked a fundamental change in heritage impact assessment and native title in Torres Strait with the proposed Chevron gas pipeline and the PNG Gas Project. The planned pipeline route traversed the seabed of Torres Strait in order to bring natural gas extracted from the Southern Highlands Province of Papua New Guinea to the Australian mainland for processing at Gladstone in Queensland. Although the initial 1998 Chevron environmental impact assessment identified few archaeological issues given the pipeline's route, it was stated that 'interest in Native Title over land and sea country is high and claims have been registered, but what implications, if any, this will have in terms of construction through territories held under CMT [Customary Marine Tenure], has yet to be investigated' (NSR Environmental Consultants 1988, p. 70).

In this connection, the ICC's Pipeline Reference Group identified a range of heritage issues. A key concern was the potential that culturally significant places could exist in the sea given the maritime culture of Torres Strait Islanders. Towards this end, the ICC commissioned anthropologist John Cordell and

archaeologist Ian McNiven to undertake an independent heritage assessment of the proposed pipeline route. Assessment focused on interviews between McNiven, Joe David (ICC) and senior elders and leaders from communities that had sea territories taking in the proposed pipeline route. The ensuing report pointed out that ‘interest among Torres Strait communities in their cultural heritage is running high’ and that this has been ‘sparked’ by *Mabo* and native title claims (Cordell & McNiven 1999).

The Chevron assessment determined that a broad range of culturally sensitive sites and places occur in the sea either near or on the pipeline route. It was stated that, ‘Whether or not such places in the sea have any recognised or recognisable legal validity from an official heritage registry or Native Title standpoint, they have a *de facto* reality and social value, and are cognitively and collectively meaningful from a cultural standpoint to Torres Strait societies’ (Cordell & McNiven 1999). As a result, a more thorough assessment was undertaken by McNiven and anthropologist Garrick Hitchcock from the NTO on Thursday Island. It was recommended that the pipeline should be moved to avoid damaging a spiritually important and dangerous place near Iama. Chevron surveyed an alternative route that a follow-up heritage assessment found to be acceptable to the Iama community (Hitchcock 2000). The pipeline was never constructed, as it was diverted to Caution Bay near Port Moresby (PNG–LNG Gas Project). The Chevron pipeline assessment project was the first heritage assessment in Torres Strait to recognise intangible place-based heritage sites in the sea and the importance of spiritual values of the sea. As such, it was a milestone in heritage impact assessment not only for Torres Strait but also for Australia more generally.

The momentum of the positive outcomes of the Chevron pipeline heritage impact assessment culminated with the Department of Defence radar tower dual developments on the islands of Dauan (involving the Dauan island community) and Koey Ngurtai (Pumpkin Island) (involving the Badu island community) in 2003 and 2004. Stage 1 involved a survey and impact assessment of both development areas by consulting archaeologists Ian McNiven and Bruno David (Monash University) and anthropologist Kevin Murphy (NTO, TSRA) working closely with senior community representatives. Native title was integral to the broader rationale and methodology of the project, with McNiven, David and Murphy (2003) highlighting that, ‘Cultural heritage is an integral component of a person’s Native Title rights... Activities that diminish the cultural values of a place would, therefore, directly and deeply impact on a person’s Native Title’. As such, it is necessary ‘irrespective of whether Native Title has been extinguished or not, to undertake cultural

heritage investigations prior to initiation of any particular development activity'. Furthermore, 'the inclusion of Native Title claimants, Indigenous interested parties to Native Title claims, and other Indigenous groups, organisations and individuals as appropriate, in the consultation and negotiation of all stages of a project where Indigenous cultural issues might arise, would be a sensible management measure'.

Culturally significant archaeological sites were recorded across the two development areas and it was recommended that large-scale salvage excavation of sites take place (McNiven, David & Murphy 2003). Subsequent Stage 2 salvage excavations, with considerable involvement of the Badu and Dauan communities, recovered highly significant cultural remains that required further impact management recommendations (David & McNiven 2004b, 2005; McNiven & David 2004a, 2004b; see also David et al. 2009; McNiven 2006).

Land use planning and agreements

Increasing awareness of the need for heritage management, particularly in relation to mitigating the impact of infrastructure developments on known and potential place-based heritage, has seen the TSRA implement two complementary processes. First, the TSRA Sustainable Land Use Plan sets out an interim, non-statutory process for determining land use function and a guide to future development for 15 community islands. It notes the importance of heritage sites and places to Torres Strait Islanders and presents guidelines for best-practice principles for heritage management for each community island (RPS Group 2010).

The Torres Strait NTO has also begun developing detailed heritage clauses in Indigenous Land Use Agreements (ILUAs) in the region. Previously, such clauses made only general reference to the TSICHA and its 'duty of care' provisions. In addition to providing basic guidelines for managing heritage sites and places, clauses set out responsibilities for contractors and PBCs, as follows:

- Contractors identifying heritage materials during the construction of community facilities are required to cease works. They are to promptly inform the PBC about the object or area and discuss with the PBC and relevant native title holders whether the work could continue and if so, on what conditions.
- The PBC has reciprocal obligations to identify and consult with the relevant native title holders and to advise where the works can continue and, if so, under what conditions.

The new clauses outline a much more detailed process by which heritage assessments and monitoring takes place, including the number of monitors and time frames for

completion of monitoring work (Hitchcock 2010a). Native title heritage agreements of this kind are considered to comply with the ‘duty of care’ provisions within the TSICHA.

Ranger programs and Indigenous Protected Areas

In 2009, the TSRA (through the Land and Sea Management Unit), established the Torres Strait Ranger Program following a successful grant application under the Australian Government’s Caring for Our Country initiative (TSRA 2009, pp. 1–2). An identified work activity for rangers is the recording and management of heritage sites. As such, the ranger program is well placed to make a significant contribution to heritage planning and site management and protection. The first ranger program was the Mabuygiw Rangers on Mabuyag, which was launched in May 2009 and employs three local rangers (*Torres News* 2009). In 2010, Hitchcock worked closely with the Mabuygiw Rangers, providing on-the-job training in site survey, recording and management (Hitchcock 2010a). A site recording form was developed with the capacity to be easily modified for different island communities. Around 100 heritage sites were recorded for Mabuyag and surrounding islets, with basic summary details entered onto the Queensland Department of Environmental and Resource Management Torres Strait Islander Cultural Heritage Database — the most recorded for any Torres Strait island.

The Torres Strait Rangers Program has a central role to play in implementation of plans of management for IPAs across the region. To date, three IPAs have been declared for Torres Strait — Warul Kawa IPA (declared 2000), Pulu IPA (declared 2009) and Warraberalgahl and Porumalgal IPA (declared 2014) (see, for example, Hitchcock, McNiven & Pulu IPA Committee 2009; Hitchcock et al. 2015; Hitchcock & McNiven 2013). The production of plans of management for all three IPAs was supported by the Torres Strait Land and Sea Management Unit and the TSRA and funded by the federal Department of Environment, Water, Heritage and the Arts. In all cases, eligibility for IPA declaration was a result of community ownership of respective islands through successful native title determinations. In the case of Warul Kawa, management is complex, as native title rights and interests are shared between the Guda Maluilgal (people of Boigu, Dauan, and Saibai) and Maluilgal (people of Mabuyag and Badu). All three IPA plans of management identify the need to protect and manage heritage sites.

Heritage management in Torres Strait: problems

Despite Torres Strait being the home of the landmark *Mabo* native title case and witnessing a broad range of successful place-based heritage initiatives such as ranger programs and IPAs, serious gaps and omissions remain that in many cases place the region out of step with mainland Australia. Major issues include destruction of sites from coastal erosion and sea level rise associated with global warming, lack of formal impact assessment of fast-tracked government infrastructure developments, poor resourcing of native title bodies and legislative limitations.

Beach erosion and sea level rise

A broad range of natural processes continue to disturb and destroy sites across Torres Strait. Examples include weathering and termite infestation of rock art sites and fire damage to *bu* shell arrangements and *zogo* sites. However, the single largest threat to the future protection and preservation of place-based heritage across Torres Strait is the continuing problem of beach erosion and inundation exacerbated by projected sea level rise associated with global warming (see, for example, Duce et al. 2010; Green et al. 2010; Parnell, Smithers & Duce 2010; SEA 2011). The issue of beach erosion of old village middens and ritual sites in Torres Strait has been highlighted by archaeologists since the 1970s (David & Weisler 2006; Harris, Barham & Ghaleb 1985, p. 7; McNiven & Feldman 2003; Rowland 1985, p. 124; Vanderwal 1973, pp. 176, 181).

Over a decade ago, the potential issue of erosion of low-elevation ceremonial sites on the coast fringe linked to sea level rise from global warming was identified for the *kod* site on Pulu (David et al. 2003, p. 38; McNiven et al. 2002, p. 74). In recent years, the issue of shoreline erosion and destruction of spiritually important sites has been taken up by senior community leaders and native title bodies charged with oversight of cultural issues, including heritage. For example, Keith Pabai, chairman of the Boigu native title corporate body, expressed major community concerns over the erosion of graves in the local cemetery (ABC 2009). Similarly, coastal erosion of cemetery graves on Warraber caused considerable local community distress (O'Neill, Green & Willie 2012, p. 7). The potential for future inundation of sacred sites and cemeteries is also highlighted in the TSRA's *Torres Strait climate change strategy 2014–2018* (TSRA 2014).

The Australian Human Rights Commission's *Native title report 2008* showcased Torres Strait in its analysis of human rights issues linked to the known and potential

impacts of climate change on Indigenous heritage (AHRC 2009, pp. 242–4). It was pointed out that access to, and protection of, place-based heritage was a fundamental human right of Torres Strait Islanders. The fact that considerable money is being invested by various government agencies to model the effects of sea level rise (for example, erosion and inundation) on Torres Strait islands and develop contingency plans to adaptively manage associated social and infrastructure impacts is a positive step in the right direction (see, for example, Parnell, Smithers & Duce 2010). However, after a number of years of action, it is clear that few resources are being directed towards either modelling and monitoring sea level rise impacts on heritage sites or developing culturally appropriate contingency plans and mitigation strategies for sites where impact from coastal erosion is taking place or imminent. Ironically, coastal erosion mitigation strategies such as seawall construction, sand relocation and revegetation have the potential to negatively impact places of significance, especially buried archaeological sites.

Fast-tracking community development

Heavy financial investment in Torres Strait communities by state and federal government agencies in recent decades has resulted in a broad range of infrastructure developments such as housing, schools, health centres, council centres, shops, dams and associated water piping, sewage treatment plants and associated piping, and airstrip and road construction and maintenance. In most cases, the developments have been long overdue and are considered by most community members as essential services. Unfortunately, construction has generally been fast-tracked, with no formal heritage assessment process.

Three issues are at play in this regard. First, anecdotal evidence suggests that informal advice on potential impacts to place-based heritage is sometimes sought from relevant native title bodies. While this ad-hoc process is useful for known sites of contemporary significance, it fails to consider previously undocumented sites and, in particular, buried archaeological sites. Second, heritage issues tend to be considered only after developments are near commencement or have already started. As such, protection of place-based heritage immediately is positioned as a financial burden and hindrance to the installation of an essential service. Third, once development and ground disturbance commence, local community members are rarely if ever employed as heritage monitors. This situation contrasts markedly with mainland Australia, where the involvement of Aboriginal people in such assessments is standard practice. As a result, Torres Strait Islanders are denied the chance to obtain employment in this area, actively protect their own heritage and obtain relevant skills

and experience (Hitchcock 2010a). In short, ‘cultural heritage is rarely if ever managed in the region’ in terms of infrastructure developments (Hitchcock 2010b).

These three issues came into play with resurfacing of the airstrip on Iama in 2006. During preparations, earthmoving machinery exposed archaeological materials (for example, shells, bones, stone artefacts and shell artefacts) associated with an old settlement site. Some of this material may also have been associated with the *kod* site which was heavily disturbed during initial construction of the airstrip in the 1960s (see above). Some members of the Iama community raised concerns about the disturbance of cultural material. Informal, unpaid monitoring of disturbed areas by community members revealed a series of significant artefacts, including rare clamshell objects. Little could be done to mitigate such impacts given that any delay in reopening the airstrip (an essential service) was considered unacceptable by most of the Iama community.

Subsequent inspection of the ground surface along the edges of the airstrip in 2007 by McNiven revealed fragments of human skull that had clearly been exposed by resurfacing activities. As a result of these observations, in 2009 McNiven (in his official capacity as president of the Australian Archaeological Association) wrote to the manager of the TSRA’s Land and Sea Management Unit on Thursday Island pointing out the unacceptable nature of such disturbance. It was noted that the discovery of human remains is an issue under the *Coroners Act 2003* (Qld). More broadly, it was also stated that a ‘duty of care’ exists under the TSICHA ‘for activities that may harm Torres Strait cultural heritage’ (s. 6(d)). Section 23(1) of the TSICHA states that, ‘A person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Torres Strait Islander cultural heritage’. McNiven recommended that, ‘To help ensure Duty of Care provisions are not breached I strongly recommend that all infrastructure developments in Torres Strait are preceded by some form of cultural heritage assessment involving appropriate senior Torres Strait Islanders and, where necessary, specialist “cultural heritage assessors” such as “archaeologists”, “anthropologists” and “historians”’ (Letter to TSRA from the Australian Archaeological Association Inc., dated 2 February 2009, in possession of McNiven).

Poor resourcing of native title bodies

In 2010, the TSRA Land and Sea Management Unit took steps to develop a more formal process of heritage assessment in the region centred on local native title bodies (Hitchcock 2010a; see also Strelein 2013, p. 80). These steps were in line with the Queensland Government’s approach, where Indigenous heritage issues are the

responsibility of relevant individual PBCs. In this connection, two Torres Strait Islander native title bodies — Masigalgal (Masig) and Dauanalgal (Dauan) — had successfully registered under the TSICHA as ‘cultural heritage bodies’ (Wallace 2008). In 2008, the Queensland Government proposed that ‘cultural heritage bodies can be involved in a range of activities such as site surveys, monitoring, development of cultural heritage management plans, cultural heritage studies and the recording of cultural heritage sites’ (Wallace 2008). Since 2008, five more Torres Strait PBCs have become registered ‘cultural heritage bodies’ — Goemulgaw (Mabuyag) in 2009, and Mer Gedkem Le (Mer), Mualgal (Mua), Mura Badulgal (Badu) and Ugar Ged Kem Le Zeuber Er Kep Le (Ugar) in 2010.

Torres Strait PBCs are poorly resourced to undertake formal heritage impact assessments of proposed infrastructure developments (see Strelein 2013, pp. 77, 80). The development of cultural heritage management plans for developments not only requires planning well before proposed construction commences but also appropriate financing (such as happened with the 1999–2000 Chevron gas pipeline and 2003–04 Department of Defence radar tower sites on Koey Ngurtai and Dauan). PBCs need appropriate support in the knowledge that proper pre-planning and budgeting for formal heritage impact assessments is factored into costs for all infrastructure developments in Torres Strait. Over the past decade, few infrastructure developments in the region have been associated with a formal heritage assessment process. Clearly, PBC oversight of place-based heritage matters, while culturally and legislatively appropriate, needs to be better resourced to take on such duties. Furthermore, the TSICHA is a minimally regulated piece of state government legislation that places too much emphasis on self-assessment by developers. Within the broader context of Queensland, Rowland, Ulm and Reid (2014, p. 329) make the apt point that such limitations ‘fall short of best practice seen elsewhere in Australia’.

Conclusions

In a recent detailed historical overview of compliance in Aboriginal and Torres Strait Islander heritage legislation in Queensland, Rowland, Ulm and Reid (2014, p. 332) note that ‘It is difficult to measure the extent of compliance with the TSICHA but indicators available would suggest that it is extremely low and ad hoc’. While the current state legislative and administrative framework provides little scope for action, native title provides considerable opportunities for active community-led heritage assessment, protection, and management.

In a key report detailing the current state and future needs of place-based heritage management in Torres Strait, Hitchcock (2010a) notes that a desperate need exists to support native title based ‘cultural heritage bodies’ within the framework of the TSICHA. It was also considered highly advantageous for a cultural heritage manager staff position and Torres Strait cultural heritage committee or working group to be created within the TSRA (Hitchcock 2010a). Finally, Hitchcock (2010a) recommends that all native title authorisation processes and ILUAs need to more comprehensively incorporate heritage management provisions which address the ‘duty of care’ guidelines of the TSICHA.

Clearly the necessary legislative frameworks are in place to better protect the unique and culturally significant sites and places of Torres Strait. What is required is for governance structures and, in particular, the TSRA to work more effectively with these frameworks and to better resource PBCs to help overcome the region’s developing reputation for substandard heritage management practices.

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Chapter 8

ABORIGINAL HERITAGE IN SOUTH AUSTRALIA: PROTECTION, KNOWLEDGE, POWER

Rod Lucas and Deane Fergie

This chapter provides an overview of the significant changes that have affected heritage practices since the advent of the Aboriginal Heritage Act 1988 (SA) — a period of rapid change in the broader landscape of Aboriginal rights. It focuses on innovative accommodations between protection, knowledge and power, especially with the arrival of new players in the native title era. The Act privileges the preservation of material remains, an echo of its origins in an earlier ‘relics’ act. This has facilitated a strong role for archaeology, but has generated a more fraught role for anthropology, and for non-material heritage. The Act did not anticipate the Native Title Act 1993 (Cth) and the two Acts do not articulate easily. This has impacted on recent uses of the South Australian Act and led to conflicts over who speaks for Aboriginal heritage in South Australia. The negotiation of heritage agreements under petroleum and mining Acts has been a feature of the past decade. We examine case studies from the Lake Eyre Basin and Lower Murray. Agreements made by Aboriginal groups in these areas, we argue, provide Aboriginal people with greater power and control over cultural knowledge, and in this way have reinvigorated heritage protection in South Australia, to a large extent outside of the bureaucratic heritage framework.

Introduction

The ethnohistorical record in South Australia suggests that Aboriginal people were asserting their rights to protect sites and objects of cultural significance long before there was a legislative framework for such action. Police trooper Samuel Gason, who lived close to Aboriginal groups in the Lake Hope region of the far north in the 1860s, told Howitt (Gason n.d., pp. 11–12):

They also think that their departed friends can establish themselves in an ancient tree — and they at all times speak with respect of these trees and reverence them and are careful that they shall not be burnt or cut down.

In a published account Gason (1879, p. 280) noted:

There are places covered by trees held very sacred, the larger ones being supposed to be the remains of their fathers metamorphosed. The natives never hew them, and should the settlers require to cut them down, they earnestly protest against it, asserting they would have no luck, and themselves might be punished for not protecting their ancestors.

Aiston, a retired policeman who lived at Mulka on the Birdsville Track in the early 20th century, noted similarly (1930, pp. 2–3):

all of the trees in this country were deemed incarnations of blackfellows who had died, and none of the old blacks would cut them down...If a tree, that represents an incarnation, is cut down, the person represented by the tree is obliterated, but if the tree sprouts again from the stump, the spirit has another lease of life.

On the other side of Lake Eyre, Hercus (2009, p. 269) recorded a major *urumbula* (native cat) site:

It was called *Pitha-kalti-kalti* ‘crooked box tree’, because of the very special box tree that once grew there in the middle of a bare saline area. The tree had been felled in the very early days of European settlement for making fence-posts, much to the distress of Arabana people, and no tree has managed to grow there since.

Such records remind us that Aboriginal heritage in South Australia has always been an Aboriginal concern, in which knowledge, cultural responsibility and care have always been in Aboriginal hands. Engagement with the state, however, has rarely reflected that positioning.

It was not until the latter half of the 20th century that the identification and protection of Aboriginal heritage was taken as the business of government and bureaucracy. This was effected through state legislation that simultaneously re-tasked institutions (initially the South Australian Museum and later various state government departments), created a data repository (a central Register of Sites and Objects) and forged the governance structures (local and state heritage committees) to carry out that work. The detailed history of that exercise in governance is not our focus; it is well covered in the work of Wiltshire & Wallis (2008), which outlines the legislative history, the various structural arrangements instigated to administer the relevant acts and the varying ‘tenor’ of those administrative units.

Rather, we focus here on some of the complications that have arisen from the intersection of Aboriginal heritage and native title in South Australia since the 1990s. In particular, we are interested in tracing the increasing complexity of the heritage field in which the number and scale of players has changed markedly in the past two decades. We argue that the circumstances and provisions of the *Native Title Act 1993* (Cth) (NTA) (along with contingent changes to complementary legislation like the *Mining Act 1971* (SA)) have provided opportunities for some Aboriginal groups to essentially sidestep the state control of Aboriginal heritage matters and to enter into partnerships with resources developers (in particular) in ways that have proved mutually beneficial. That is, forms of recognition provided by native title’s ‘future act’ provisions have been strategically utilised by some South Australian Aboriginal groups (often before a determination of native title)⁶⁸ to increase their capacity to protect cultural heritage at the same time as building their own community organisations and even generating income streams that support wider community aspirations and governance needs. Agreement making, partnerships with lawyers independent of the state and direct dealing with developers have been hallmarks of the most productive of these innovations. While predicated on a legislative backbone of heritage protection that provides a final recourse, these innovative strategies highlight the desire of Aboriginal people to control knowledge about their heritage and

68 Under state guidelines, anyone who is a registered as a claimant under either the *Native Title Act 1993* (Cth) or the *Native Title (South Australia) Act 1994* (SA) is automatically a ‘native title party’. Authorisation to mine or explore requires that a ‘native title mining agreement’ be negotiated with the native title parties. The Department of State Development cannot grant a mining lease until an agreement has been negotiated with the native title holders or claimants (see DSD 2009).

their growing power to wrest control of it from the state and non-Aboriginal parties more generally.

The legislative framework

Two state Acts have dominated Aboriginal heritage over the past 50 years. Here we provide a brief overview of them.

Aboriginal and Historic Relics Preservation Act 1965

Proclaimed on 3 August 1967, the *Aboriginal and Historic Relics Preservation Act 1965* (SA) (the Relics Act) was the first piece of heritage protection legislation in South Australia. It was a product of Don Dunstan's tenure as a progressive Minister for Aboriginal Affairs and Social Welfare in 1965 and as Premier in 1967 — a period of rapid social change in South Australian institutions and political policy generally. Under the Relics Act, 'relic' meant any trace, remains or handiwork of an Aboriginal person but did not include any handiwork made by an Aboriginal for the purpose of sale (s. 3). These 'traces' and 'remains' were inevitably physical, beginning a material and archaeological bias that has oriented heritage protection in South Australia ever since. They also belonged to the past. This materiality was explicit in the types of damages envisaged to be prohibited by the Act:

- A person shall not willfully or negligently deface, damage, uncover, expose, excavate or otherwise interfere with any relic in an historic reserve or carry out any act likely to endanger the relics thereon except with the written permission of the Minister. (Section 23)
- A person shall not knowingly conceal, destroy, deface or damage a relic of the nature of cave paintings or rock engravings or stone structures or arranged stones or carved trees of Aboriginal origin. (Section 28(1))

'Sacred sites' were not mentioned, nor were post-contact sites, living areas or natural features of cultural significance. Heritage was in the 'things' and not in Aboriginal knowledge of those things or in broader Aboriginal practice or world views. Most particularly, the Relics Act was about the past.

The Relics Act provided the power to declare certain locations within the state to be of particular significance and thus protected, although this power was considerably weakened if the site happened to be on privately owned land (s. 18). In such cases, the consent of the landowner was necessary before such an order could be made. One significant provision of the Act was that the Crown owned all relics found in certain designated historic or archaeological areas (s. 21). However (s. 4(1)):

Notwithstanding any of the provisions of this Act, Aboriginals shall not be denied free access to and enjoyment of relics of their forebears and they may make such use of any relic of their forebears as is sanctioned by their tribal law.

An Aboriginal and Historic Relics Advisory Board was appointed to advise the Minister of Education (who administered the Relics Act) on matters relevant to the Act, and this comprised ‘one representative each to be nominated respectively by the Council of The University of Adelaide, the Museum Department, the Department of Aboriginal Affairs, the Department of Lands (whose representative shall be the member of the Pastoral Board nominated by land holders) and a chairman nominated by the Minister’ (s. 6(2)). This gives a fair indication of those whose interests were deemed to be coincident with Aboriginal heritage matters; from this it would appear that Aboriginal heritage was a matter of education about traces and remains that were in danger of being physically damaged. The Director of the state’s Museum Department was deemed the Protector of Relics (s. 7(1)). The Protector and every member of the police force could act as an inspector under this Act (s. 2(2)). In a bizarre echo of the treatment of Aboriginal people under assimilation policies, the minister could issue an ‘identity card’ stating the name of a person and the fact that he was an inspector or warden of Aboriginal relics (s. 11).

In 1974 the advisory board was replaced by the Aboriginal and Historic Relics Unit (AHRU) of the South Australian Museum. The AHRU was responsible for creating and maintaining the Register of Aboriginal Sites, ensuring that significant sites were properly protected, and coordinating regional surveys. In the early 1980s the AHRU was transferred to the Department of Environment and split into two separate branches — the Aboriginal Heritage Branch (AHB) and the State Heritage Branch (responsible for ‘European’ heritage). In 1993 the AHB was transferred to the Department of State Aboriginal Affairs, now the Aboriginal Affairs and Reconciliation Division of the Department of Premier and Cabinet (South Australian Museum n.d.).

The Relics Act established a political economy of knowledge between Aboriginal people and the State. As Jane Jacobs (1983, p. 76) has highlighted:

To have a site protected under the Relics Act it was necessary for Aboriginal communities to pass over considerable amounts of information about the site to the Relics Unit for recording on their register. This condition of site protection discouraged many Aboriginal groups from using the service or, if they chose to participate, offering only secular or non-secret sites for recording and, consequently, protection.

Jacobs, whose study explored the development of land rights around the establishment of the Olympic Downs (Roxby) uranium and copper mine, went on to note (1983, pp. 76–7):

Once such information is passed to the Government then the Aboriginal power-base, their cultural autonomy, is lost. Held within an external body, outsiders can have access to the information, facilitating their emergence as apparent experts on Aboriginal culture and endorsing their claim to the right to arbitrate over Aboriginal land issues.

Aboriginal Heritage Act 1988

The *Aboriginal Heritage Act 1988* (SA) (AHA (SA)) repealed the Relics Act and an earlier *Aboriginal Heritage Act 1979* (SA)⁶⁹ at the same time as it amended the *Mining Act 1971* (SA) and the *Planning Act 1982* (SA). It offered wider forms of protection and acknowledged that heritage was primarily an Aboriginal concern; it thus opened up questions of ownership, representation and the power to speak for heritage — issues that have only amplified since its declaration. It thus had broad-ranging impacts.

All Aboriginal sites, objects and remains in South Australia are protected under the AHA (SA), whether entered on the Register of Sites and Objects or not. But what qualifies as a site or object again reflects a broader range of interests than those of Aboriginal people. An ‘Aboriginal object’ is defined in s. 3 of the AHA (SA) as an object of significance according to Aboriginal tradition or of significance to Aboriginal archaeology, Aboriginal anthropology or Aboriginal history. An ‘Aboriginal site’ means an area of land that is of significance according to Aboriginal tradition or that is of significance to Aboriginal archaeology, Aboriginal anthropology or Aboriginal history.

Section 12 of the AHA (SA) states that, if a person proposes to take action in relation to a particular object and that action may constitute an offence against the AHA (SA), the person may apply to the minister under this section. Upon receiving an

⁶⁹ Interestingly, as Jacobs observed from the perspective of 1983, ‘Despite opposition from both the Heritage Unit itself and Aboriginal communities, the 1978 Bill was passed in 1979. Three years later the Act remains unproclaimed and the Heritage Unit still operates from the 1965 legislation. Pressures from the mining lobby have discouraged proclamation and resulted in new amendments to the Act during 1981’ (Jacobs 1983, p. 78). The amendments included the provision for objections to be made, not just by landholders directly affected, to the registration and protection of a site (Jacobs 1983, p. 79).

application the minister must determine whether the object is an object entered in the Register of Sites and Objects and, if so, provide the applicant with this information. If the object is not entered in the register, the minister must determine whether it should be entered and give the applicant written notice of the determination.

The owner or occupier of private land or an employee or agent of such an owner or occupier who discovers an Aboriginal site or an Aboriginal object or remains must, as soon as practicable, report the discovery to the minister giving information on the nature and location of the site, object or remains (AHA (SA) s. 20). The maximum penalties for not complying with this section are fines of \$50,000 for a body corporate or in any other case \$10,000 or six months' imprisonment. However, this section does not apply to a traditional owner of the site or object or to an employee or agent of the traditional owner (AHA (SA) s. 20(2)).

A person must not, without the authority of the minister, disturb, damage, or interfere with any Aboriginal site, object or remains (AHA (SA) s. 23). The maximum penalty in the case of a body corporate is \$50,000 or in any other case \$10,000 or imprisonment for six months. The inclusion of possible imprisonment elevates offences under the Act to criminal acts.

The minister may authorise an Aboriginal person or group of Aboriginal persons to enter land for the purposes of gaining access to an Aboriginal site, object or remains (AHA (SA) s. 36). Before giving an authorisation under this section the minister must allow the owner or occupier to make representations on the question of whether the authorisation should be given and, if so, subject to what conditions. A person must not, without reasonable excuse, obstruct a person acting under this authorisation. The maximum penalty for contravention of this section is \$2000 or three months imprisonment.

Pepper (2014) emphasises the considerable power that is afforded the minister under the AHA (SA) ss. 21, 22 and 23. Specifically, the minister is vested with the power to authorise damage, disturbance, excavation or removal of Aboriginal cultural heritage, including Aboriginal remains. Pepper (2014, p. 14) states:

The Minister is obliged to take 'reasonable steps' to consult with the State Aboriginal Heritage Committee ('the SA Committee') on protection matters, but he or she has no duty to take into account its advice in making a determination under the SA Act. The Minister also decides upon the membership of the SA Committee and Aboriginal groups have no right to appeal the merits of a Minister's decision to allow for damage of Aboriginal cultural heritage.

Community responses to the AHA (SA) review unsurprisingly include various comments on the appropriateness of ministerial power as well as the general bureaucratic dominance of non-Indigenous personnel in heritage management (Roughan n.d., pp. 20–1). A community respondent to the AHA (SA) review (Roughan n.d., p. 26) is quoted as follows:

We have to have the final say over our land, not the Minister. 173 years of this treatment, and no outcomes, is too long... [Premier] Dunstan put it in to safeguard Aboriginal land and sites. And now we have another [proposed] Act, but where has it got us? Nowhere. Always talking about the same points.

Aboriginal groups are afforded the power to determine what constitutes significant cultural heritage, but the minister decides whether an object or site is ‘Aboriginal’ for the purposes of the AHA(SA) (s. 13), although the minister must accept the views of traditional owners in relation to the definition of that land or object (s. 13(2)).

A brief comparison

The Relics Act (1965) and the AHA (SA) share some key foci. First, material culture, principally in the form of archaeology, has been privileged under both Acts. The Relics Act initially was administered by the South Australian Museum — a museum predominantly of natural history. There is a parallel between this natural history orientation and the focus of the AHA (SA), especially on Aboriginal objects and remains — relics of the past — as opposed to ‘living heritage’ and ‘living’ cultural significance.⁷⁰ Second, scholarly expertise has been a focus, and a requirement, of both Acts. Professionally trained archaeologists, historians and anthropologists have been central to reporting, reviewing and administering work under the Acts. Like a natural history museum, the AHA (SA) explicitly references the significance of expert disciplinary fields of knowledge: Aboriginal archaeology, Aboriginal

70 This past emphasis is highlighted by the championing of an ‘outside the box’ approach in a recent project, put forward as a new direction for state Aboriginal heritage (Aboriginal Heritage Branch 2010, p. 4). In 2009 the Aboriginal Heritage Branch (Aboriginal Affairs and Reconciliation Division, Department of the Premier and Cabinet) partnered with the Viliwarinha Yura Aboriginal Corporation to record a songline between Hawker and Lake Torrens along the Hookina Creek, using a ‘cultural landscape’ approach. The project is notable for its explicit integration of knowledge, song and story with archaeology, together with its direction by elders and senior community people. Previous ‘large sites of significance’ encompassing cultural landscapes such as Lake Gairdner and the Meeting of the Waters (around Hindmarsh Island) have proved especially controversial and contested.

anthropology and Aboriginal history. In the AHA (SA) era, archaeology has dominated this state regime.

Both Acts supported the creation and maintenance of a repository of information on Aboriginal sites, objects and remains (referred to as a ‘central archive’ in the AHA (SA), s. 3, and known as the Register of Sites and Objects).

There were also key differences between the Relics Act and the AHA (SA), especially in terms of structural location and governance. The AHA (SA) entrenched the Aboriginal Heritage Branch, Department of Environment and Planning and its successors (for example, the current Aboriginal Affairs and Reconciliation Division, Department of the Premier and Cabinet — AARD DPC) as the administrator of the AHA (SA) and, more especially, as a part of the state bureaucracy rather than as a body with statutory authority. It is a bureaucracy that has become more indigenised, but not thoroughly indigenised. Moreover, non-Aboriginal political control was retained, especially by the ministerial powers provided for by s. 23.

An Aboriginal heritage committee was created under s. 7 of the AHA (SA). The committee is now referred to as the State Aboriginal Heritage Committee (SA) to indicate its formal status as the principal body, distinct from local Aboriginal heritage committees. The committee advises (either on its own initiative or by request) the Minister for Aboriginal Affairs and Reconciliation on issues relating to the protection and preservation of Aboriginal heritage (AHA (SA) s. 8). Committee members do not represent particular heritage groups, although an effort is made to have broad coverage and knowledge of Aboriginal heritage throughout the state. Members are appointed, as far as is practicable, from all parts of the state by the minister to represent the interests of Aboriginal people throughout the state (AHA (SA) s. 7(2)); as far as is practicable, equal numbers of men and women are to be appointed (AHA (SA) s. 7(3)).⁷¹ There was thus, under the AHA (SA), a requirement for consultation with members of the Aboriginal community but no requirement that such consultation have an effect on decision-making.

The passage of the NTA in 1993 was of major relevance to the management of Aboriginal heritage, especially due to its future act provision, which placed Aboriginal heritage within the power of the NTA, but more generally through its recognition that Indigenous rights and interests may have survived the

⁷¹ Eligibility criteria include being a South Australian Aboriginal person; aged over 18 years; active in community on local heritage matters; and able to commit to attend meetings every six weeks (SAHC n.d.).

colonial process and are capable of recognition at common law. With it there were new opportunities and new mechanisms through which to assert knowledge and demand control over heritage matters. Some of the lineaments of these processes are explored in the rest of this chapter. Key heritage contestations, such as the Hindmarsh Island Bridge matter, were pursued throughout the early years of native title and under a shadow of orchestrated fears about white Australia's backyards.

Some key interventions

With the introduction of the NTA, Aboriginal heritage in South Australia became an unstable pivot point at which state and federal legislation and the incompatibilities of provisions in the NTA and the AHA (SA) met. Predictably, the introduction of this new heritage regime was not without difficulties. Especially in the years 1994 to 2002, a series of events ushered in a period of adversarial and oppositional relations between some Aboriginal groups and the state, which was seen at this time to effect a dismissive approach toward Aboriginal cultural matters. Emblematic of those difficulties were the *Hindmarsh Island Bridge case* and the De Rose Hill native title claim (the first native title claim in South Australia to go to litigation).

As the first native title claims were lodged in South Australia, the state closed access to a variety of repositories concerning Aboriginal people and heritage while, on adversarial principle, they checked files for 'legal professional privilege'. In some cases, this denied Aboriginal people access to information provided by them or about them. This had the effect of closing records from the very people, or descendants of the people, who in an effort to protect their heritage had provided that material to the state in the first place.

Hindmarsh Island (Kumarangk)

The *Hindmarsh Island Bridge case* publicly interrogated Aboriginal heritage claims in a state royal commission. Developers in the case subsequently pursued a case in the Federal Court under the *Trade Practices Act 1974* (Cth), which then regulated trade and commerce. The matter is a complex set of legal, media and cultural occurrences and has been examined in detail elsewhere (see Simons 2003), but the following discussion focuses on key interventions that highlight fragmentation and conflict in the state's handling of Aboriginal heritage during this period.

In 1993 the AHA (SA) failed to protect an area of significance claimed by Aboriginal women at the end of the River Murray in Ngarrindjeri country. The women's claims challenged the building of a bridge, on which an extension to a marina on Hindmarsh Island was contingent because of South Australian Government planning requirements.

Frustrated by the failure of state legislation to deal with their concerns, the so-called 'proponent' Aboriginal women seeking protection for their heritage took their claim to the Australian Government under the *Aboriginal and Torres Strait Island Heritage Protection Act 1984* (Cth) (ATSIHPA).⁷² A short-term s. 9 emergency declaration was made by federal Minister Tickner in order to allow the claims by Ngarrindjeri women to be investigated. A subsequent declaration was made to prevent building of the bridge for 25 years (see Fergie 1996). Court cases and a royal commission ensued to reverse that declaration and discredit the proponent women.

The ATSIHPA, importantly, is not so materially oriented as the AHA (SA), takes cultural knowledge seriously, and enables protection not only of discrete 'sites' but also broader areas of significance to Aboriginal people. The material bias, failure to fully incorporate Aboriginal people in the administration of an Act to protect their heritage and the ultimate politicisation of the AHA (SA) were laid bare in the *Hindmarsh Island Bridge case* controversy. In a case in which Aboriginal cultural knowledge (not material culture) was at issue, Aboriginal voices were overridden by an AHA (SA) s. 23 ministerial decision to authorise damage or destruction of an Aboriginal site, despite Indigenous community consultation which made clear that this was against the will of the majority of Aboriginal people consulted. The state government instigated a punitive state royal commission (the Hindmarsh Island Bridge Royal Commission) in 1995 and ultimately facilitated the building of a bridge. The failings of this process were pointed out by von Doussa J in a civil suit about the case (*Chapman v. Luminis Pty Ltd (No. 5)* [2001] FCA 1106 (*Chapman*)) that did not find that the knowledge claimed by Aboriginal women was fabricated (*Chapman*, [1]–[21]).

During this time, relationships with the state were at a low point, especially for Ngarrindjeri people, whose cultural knowledge was at issue. It also represented

⁷² Because the Commonwealth has power over Aboriginal affairs under the so-called 'race power' of the Constitution, a provision or even a ministerial act under the ATSIHPA should take precedence over the AHA (SA). This was one of the legal issues rehearsed in the Hindmarsh Island Bridge dispute.

a low point in heritage protection and management for the state as a whole (Wiltshire & Wallis 2008, p. 111):

Following the [Hindmarsh Island Bridge] Royal Commission, developers were essentially given an ‘open ticket’ to do what they wanted in the State with little regard for the provisions of the AHA[SA] 1988. The latter is perceived by development interests as being complex and unworkable, perhaps due to the potential power it has to prevent development were the State government willing to administer and resource it in line with the spirit in which it was drafted.

This ‘potential power’ has hardly ever been realised, as respondents to the AHA (SA) review have noted (Roughan n.d., p. 20).

The effects of the Hindmarsh Island Bridge dispute, and the closure of ‘government’ records of Aboriginal heritage as the state built cases against Aboriginal interests, cast a dark and chilling shadow across South Australia in the very years in which the NTA was being established.

De Rose Hill

The De Rose Hill native title claim (lodged in 1994) went to court between June 2001 and February 2002⁷³ (*De Rose v. South Australia* [2002] FCA 1342 (*De Rose Hill*) and was energetically opposed by the state government. For example (Agius et al. 2002, p. 5):

for the Federal Court hearings held in the De Rose Hill pastoral lease native title claim in 2001 (the De Rose Hill case), part of the SA Government’s initial case (the preparation of which was allocated nearly \$5 million in the 1999/2000 budget), was that all native title was extinguished in SA by historical Acts of British Parliament which authorised establishment of the colony.⁷⁴

73 Compare the Hindmarsh Island Bridge civil case (*Chapman*) at trial, December 1999 to February 2001.

74 ‘However, during the course of the trial, counsel for the State announced that he had been instructed to inform the Court that the State would no longer pursue that argument’ (*De Rose v. State of South Australia* [2002] FCA 1342, [237]). In the outcome of this case, O’Loughlin J found that a determination of native title was potentially available to the claimants since native title had not been extinguished by the tenure history but that the claimants had lost the required connection to the claim area in the period since 1978, when the last of the Aboriginal stockmen left the property (Agius et al. 2002, p. 12).

The claimants faced unprecedented government and pastoralist opposition in the court. The native title claim was initially lost, but eventually succeeded on appeal in *De Rose v. South Australia (No. 2)* [2005] FCAFC 220.⁷⁵

After *De Rose Hill* there was a concerted attempt in South Australia to move native title determinations out of the litigious arena of the court, where they had the potential to drain vast amounts of time, money and personnel, threatening the resources and willpower of both Native Title Representative Bodies (NTRBs) and the state. Through multi-pronged negotiations between all stakeholders (including the establishment of state-wide Indigenous Land Use Agreement (ILUA)⁷⁶ negotiations as a way of fostering native title agreements and avoiding costly court processes (Agius et al. 2002; AHRC 2006), a consent determination process emerged to facilitate less adversarial and litigious processes of claim settlement (CSO 2004, which explains the process by which the state will seek to resolve native title claims by agreement). Essentially, the state now took on board assessment of the evidentiary basis for a claim and, when satisfied, sought the Federal Court to make a determination of those rights and interests with the consent of all parties to the claim — that is, a consent determination. This facilitation role was the absolute opposite of the state's position in *De Rose Hill* and ushered in a new era of claim management based, where possible, on cooperation, negotiation and mediation.

This became the major way of dealing with the raft of native title claims that were lodged in South Australia following the 1998 (10 Point Plan) amendments and the 're-registration' these required, including the Edward Lander Dieri Native Title Claim (NNTT SC97/004, Federal Court SG6017/1998), which reached consent determination in May 2012 (*Lander v. South Australia* [2012] FCA 427) and to which we now turn as a brief case study.

Agreements and work area clearances

Finding workable (non-adversarial) ways forward has resulted in a number of innovative responses that have empowered particular Aboriginal groups, especially

⁷⁵ *De Rose v State of South Australia (No. 2)* [2005] FCAFC 110. The full Federal Court determination, delivered on 8 June 2005, found that native title exists in relation to De Rose Hill, being held by Aboriginal persons who are *nguraritja* according to the relevant traditional laws and customs of the Western Desert Bloc.

⁷⁶ ILUAs have proved an alternative, as well as an adjunct to, the legal recognition of Aboriginal connection to land and waters through a Federal Court determination of native title rights and interests. The ILUA provisions of the *Native Title Amendment Act 1998* (Cth) have been widely acknowledged as one of the very few positive outcomes of the Howard government's amendments to the NTA.

those with independent legal advice. Here we outline two case studies that speak to the capacity that some groups have garnered to work largely independently of state regimes and state bureaucracy. This has been achieved through the use of native title provisions and claim determination processes as leverage on heritage protection, most especially in relation to ‘future acts’ in resource development. This has seen the joint assertion of heritage responsibility and native title capacity as a pivot of resurgent identity and power.

Lake Eyre Basin

In the early 2000s it became clear to petroleum exploration companies, the South Australian Department of Primary Industry and Resources (PIRSA)⁷⁷ and Aboriginal groups themselves (often through their lawyers) that the AHA (SA) was incapable of providing orderly mechanisms to manage future acts in respect of developments in the areas of registered native title claims (not surprisingly, as this need had not been anticipated when the AHA (SA) was drafted).

PIRSA administered petroleum exploration licences (PELs) in South Australia. PELs ordinarily brought with them obligations to conduct hundreds (perhaps even thousands) of kilometres of seismic survey and to drill exploratory wells during the life of a petroleum licence. The obligations of a PEL are considerable. The criminal and financial penalties contained in the AHA (SA) for damaging or destroying Aboriginal sites, objects and remains were clearly a concern for exploration companies. But, arguably, risks to reputation as well as significant costs of delayed or stymied projects were also relevant in company and state industry assessments. By the end of the 1990s a more ‘pragmatic’ approach to the balancing of ‘development’ and ‘heritage protection’ prevailed following the long-fought, bruising, no-win battles of Hindmarsh Island Bridge and De Rose Hill. The challenge was generally construed as how to manage complex, high-cost projects undertaken in very remote settings while also staying within the letter and the spirit of the future acts provisions of the NTA; the criminal, financial and reputational risks of the AHA (SA); and the contractual requirements of PELs under the *Petroleum and Geothermal Energy Act 2000* (SA).

Through agreements, heritage management was entwined with state and federal legislation and with aspirant native title claims. In this same way,

⁷⁷ During 2011–12 PIRSA’s focus shifted with the machinery of government changes announced in October, when the Minerals and Energy Division transferred to the new Department of Manufacturing, Innovation, Trade, Resources and Energy (DMITRE). The name of PIRSA changed from Primary Industries and Resources to Primary Industries and Regions.

however, heritage survey and recording was distanced from the bureaucracy that administered the AHA (SA) (most recently the AARD, DPC). Aboriginal heritage in its work area clearance (WAC) guise entered the domain of ‘in-confidence’ business planning, but also became the ‘work’ of Aboriginal corporations that were seeking native title, as well as a source of data to support the assertion of that title. Aboriginal heritage was quickly part of a much bigger, more contested, more legalistic and more commercially sensitive field.

In our view it is significant that the lawyers representing the native title groups involved were private lawyers employed by native title groups themselves (some of whom had been involved in the Hindmarsh Island Bridge Royal Commission), rather than employees of the NTRB⁷⁸ and that state public servants employed by PIRSA, rather than those administering the AHA (SA), were used to administer heritage in respect of petroleum exploration and production.

A significant practical solution to the conundrums of protecting Aboriginal heritage, retaining Aboriginal knowledge of sites, not blocking the development of resources and (from companies’ perspectives) managing the risk of damage and disturbance to their business plans resulted in what are known as the Cooper Basin agreements. The Cooper Basin agreements are tripartite agreements between the state government (but here, importantly, through its arm of PIRSA),⁷⁹ exploration companies⁸⁰ and native title claim groups.⁸¹ An ancillary agreement between the explorers and an Aboriginal corporation formed a part of the agreement as a whole and outlined a process through which the corporation could assist the explorers in ensuring that proposed operations would not interfere with, damage or destroy areas of significance to Aboriginal people. According to the ancillary agreement (ATNS 2001), an area of cultural significance was:

any site on the License Area of cultural, social or spiritual significance to the Native Title Party of those areas and includes any ‘Aboriginal site’ as defined by the *Aboriginal Heritage Act 1988* (South Australia) and any ‘significant Aboriginal

⁷⁸ The native title unit of the Aboriginal Legal Rights Movement (ALRM) and later South Australian Native Title Services (SANTS).

⁷⁹ In doing this the agreements effectively bypassed the Aboriginal Heritage Branch of AARD.

⁸⁰ Initially these included Australian Crude Oil Co. Inc., Stuart Petroleum NL, Beach Petroleum NL, Strike Oil NL and Australian Gasfields Ltd, Liberty Petroleum Corporation, Magellan Petroleum (NT) Pty Ltd and Tyers Investments Pty Ltd.

⁸¹ The Edward Landers Dieri, Yandruwandha/Yawarrawarrka and Wangkangurru/Yarluwandi peoples.

areas' as defined in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Commonwealth).

The agreement 'establish[es] processes to protect Aboriginal heritage before and during field operations, and to provide payments for the interference with the enjoyment of the native title rights of the claimants' (ATNS 2001).

The Cooper Basin agreements (starting in 1998) established definitions of Aboriginal heritage drawn from both the AHA (SA) and the ATSIHPA (which had been used in the *Hindmarsh Island Bridge case* when the AHA (SA) failed to protect the claimed sites). This broader definition of Aboriginal heritage was operationalised and refined through the conduct of WACs across a vast area of the Lake Eyre Basin in South Australia. Important features of WAC protocols under the agreements were that the Aboriginal group would provide a party of 'qualified' representatives to survey the area of proposed works and appoint one or two 'specialists' to assist the group in the field and provide a report to the company on the process; and the company (or companies) would provide a representative in the field who could properly inform the Aboriginal representatives of the nature and impact of the proposed works. If the Aboriginal group chose to do so, the company representative would accompany their group on a survey of the seismic, road and well building or other works. Costs were sometimes minimised by combining the work of more than one company, using the same representatives, who were undertaking works in PELs within range of each other.

By and large companies chose to work with the same representatives over time as the Aboriginal groups chose to work with the same specialists over time. Good working relationships were cultivated and developed among many involved. Indeed, some companies sought other ways to develop their relationships with groups, providing scholarships, work opportunities and other forms of cooperation and assistance. Work under these agreements also provided Aboriginal groups with an income stream, some of which supported lawyers who were independent of the state and some of which facilitated the development of governance structures that (in the case of the Dieri claim at least) became central to their pursuit and management of native title. The Cooper Basin agreements (ATNS 2001) generated three-stage payments for aspirant native title groups:

- (1) Sign on: For Licences relating to the first round of Cooper Basin gazettal Block (CO98), the native title claimant groups received a 'one off' fixed payment per Licence. In the event a Licence area straddling two claim areas the fixed sum was shared between the two groups on a 'pro rata' area basis. Funding was shared between the government and the Licensees

- (2) Annual Administration Fees: The Licensees paid a fixed annual fee for each of the first five years of each Licence to contribute to each Aboriginal Association's costs for administering the agreement.
- (3) Compensation for Disturbance to Land Due to Oil or Gas Production: Claimant groups were paid a percentage of well head value (as defined in the SA Petroleum Act) of production. Licensees paid these funds to the government, which deposited them with the relevant claimant group's Association.

This income stream was essential for getting people back on country, financing the expert reporting required to demonstrate native title through heritage responsibility and building the organisational structures required to participate in the complex corporate, jural and administrative world of native title. It also paid for lawyers' fees. Such income was central to the ability of the Aboriginal groups involved to step away from the state and its bureaucracy and find new ways of speaking for and caring for heritage. Several Aboriginal groups in the far north-east of the state have done this with gusto.

The Cooper Basin agreements also built on an approach to heritage assessment and protection managed by Aboriginal groups themselves, able to operate under the AHA (SA) and the ATSIHPA, but (so far) beyond the direct surveillance of the state bureaucracy.

WAC methodology was first developed by the Pitjantjatjara Council in order to protect areas of Anahgu cultural significance adjacent to the Anangu Pitjantjatjara Yankunytjatjara (APY) lands.⁸² Now applied more broadly, the methodology relies upon the proponent of proposed mining or other activities providing details of that work within the context of a specific, geographically defined area. Then expert Aboriginal custodians conduct a physical inspection of the area and assess the program of work in accordance with their knowledge of the cultural values of that area, with 'specialist' assistance. Where that assessment is that the proposed work will not adversely impact upon the cultural values of the area, approval is given (often called 'clearance'), subject to such conditions as may be necessary. Where the

⁸² In the early 1980s a French-owned company named Afmeco sought to explore for uranium on pastoral property to the east of the APY lands. According to Toyne & Vachon (1984, p. 112), 'The council had neither the time nor resources...to conduct a survey of Afmeco's huge exploration lease...The company agreed to outline the proposed work areas of its exploration and re-imburse the council for the anthropological fieldwork, and it accepted that its contractors would only work in those areas defined as 'safe' by the council. No site locations would be disclosed.' This remains the basis of WAC practice.

work is judged to threaten sites or cultural features, approval is withheld without the necessity for details of those sites or values to be disclosed.

Under such arrangements, what is ‘cleared’ is limited to the works and areas specified by the proponent of the activities and is subject to the statements about how the works will be undertaken provided by the company in their written request, supporting documentation, and in their face-to-face communications with members of the WAC team via their field representative. This process does not require the disclosure of Aboriginal knowledge about the area to a developer or government. The approval for specific works does not necessarily imply that the area of impact lacks cultural values or that the area is ‘clear’ of specific places of cultural significance. Rather, it is approved, or ‘cleared’ for the proponent to pursue the specific activity that has been proposed for assessment.

The authors of this chapter and interdisciplinary consultancy team Locus of Social Analysis and Research (LocuSAR)⁸³ became involved in this broad regime from 2002, when the Ngayana Dieri Karna (NDK) (later the Dieri Aboriginal Corporation (DAC)) sought our assistance both as ‘specialists’ under the Cooper Basin agreements’ protocols for WACS and as expert anthropologists to assist with the preparation of their native title claim.⁸⁴

When the NTRB for greater South Australia⁸⁵ decided not to fund the advancement of the NDK/DAC native title claim, we sought to combine heritage surveys under the Cooper Basin agreements with native title research. In consultation with the NDK and DAC we developed an approach to Aboriginal heritage protection which entailed solid desktop and archival research as preparation for on-country surveys, rigorous fieldwork and ethnographic recording on country. We also produced comprehensive documentation of the information presented in writing and in person by the company to inform the

⁸³ A small interdisciplinary team working out of the School of Social Sciences at the University of Adelaide.

⁸⁴ The initial Cooper Basin access agreements were made between three native title claim groups (the Edward Landers Dieri, Yandruwandha/Yawarrawarrka and Wangkangurru/Yarluwayndi peoples), seven different exploration consortiums and the South Australian Government. The agreements established processes to protect Aboriginal heritage before and during field operations and to provide payments for the interference with the enjoyment of the native title rights of the claimants (ATNS 2001). The Cooper Basin C098 Native Title Agreement was signed by the Ngayana Dieri Karna (now the Dieri Aboriginal Corporation) in 2001 and extended to other explorers as ‘C099’ (see DPI 2001).

⁸⁵ Until July 2008 the native title unit of the ALRM, which was superseded by South Australian Native Title Services, a stand-alone organisation.

decision-making of Aboriginal people and carefully documented ‘conditions of clearance’ agreed between the Dieri people and company representatives. During WAC trips we carried out other standard tasks of native title research: eliciting genealogies, documenting people exercising their rights and interests in the country they claimed and documenting Dieri people practising their culture together (and, in native title terms, acting normatively).

Between 2003 and 2010 LocuSAR provided more than 100 WAC reports to the NDK and DAC in respect of petroleum works on country claimed by the Dieri. Over that period we also presented the Aboriginal group with a number of reports on key native title questions that together were considered as a basis for a consent determination of native title in 2011.⁸⁶

WAC work can lead to intensive and exhaustive physical survey — as anyone who has driven a 3D seismic grid can attest — that has the potential to generate a great number of ‘hits’, mostly stone artefacts, other archaeological remains, sometimes historical camps with personal or historical connections, and occasionally ‘sacred sites’ of mythological or ritual significance. What this has meant is unprecedented recording — in minute detail — of highly circumscribed areas of country determined by a developer’s interests. On the one hand, this has resulted in a greater recording of heritage — most particularly in its physical form — than has ever been achieved before in northern areas of the state. On the other hand, this ‘data’ tends to remain just that: the recording of multiple ‘incidences’ but usually with no time or resources for their analysis. These form the basis of clearance ‘conditions’ — restricted areas, variations to works, deviations to routes and so on — that are reported without details for their reasons.

Significantly, the resulting expert reports went to the South Australian Department for Manufacturing, Innovation, Trade, Resources and Energy (DMITRE)⁸⁷ under the terms of a developer’s exploration licence conditions, not

⁸⁶ In 2014 the DAC commissioned the authors to prepare two books for them, including one which will form a publishable ‘connection report’ that might be presented in support of a determination of native title (litigated or by consent).

⁸⁷ The Department of State Development (DMITRE) was responsible for administering and regulating the state’s mineral resources under the *Mining Act 1971* (SA) and its associated Mining Regulations. It administers land access agreements, which are agreements between the landowner and explorer authorising access and entry to land for the purpose of conducting exploration operations; native title claimants and holders are recognised as ‘landowners’ for the purpose of such agreements. Relations with native title holders are specified in Part 9B of the *Mining Act 1971* (SA). Part 9B sets out what procedures must be undertaken prior to the conduct of mining activities on native title land. It became

AARD, which administers the AHA (SA). Rarely, in our experience, have these data been revisited as part of a professional or regional study or have these ‘instances’ of heritage been further logged or archived into a heritage data system, such as the state’s Register of Sites and Objects. There are a number of reasons for this: the instances themselves are often not assessed for their value (for the discipline or for a broader research agenda); they can be small or isolated finds; and the duty of identification and protection, on the ground or behind the bush, has been fulfilled and there is little incentive (or means) to do more. More importantly, the inhibition about disclosing explorers’ plans, details of operations and favoured locations meant that such heritage data became more restricted as it was enveloped by commercial and legal sensibilities. We ourselves have been instructed by lawyers and companies not to disclose the location of heritage items to any other parties, including the state. While unprecedented recording has gone on, the results, we suggest, have become increasing inaccessible and tied to other agendas — legal, commercial and native title — in ways that were not anticipated by the state’s heritage legislation or bureaucracy. This feeds concerns about the comprehensiveness of the state’s Register of Sites and Objects and the duty of care that developers and others might have if details of sites are not recorded there or otherwise available.

In our own and in other researchers’ native title reports that we have reviewed, WACs have played a key role in demonstrating ongoing connection to country. This has been the case particularly for those areas of the state in which native title claimants are not usually resident — the north-east deserts and the Gawler Ranges being two such examples. In such settings, WACs have been a major way of getting Aboriginal people onto country and have provided the most prominent contemporary vehicle for expressing, practising and teaching others about connections to country. They are also means by which the authority derived from an acknowledged connection to place is asserted and others act in response to such assertions.

In the Lake Eyre Basin, Aboriginal people have used WACs to:

- access country
- assess impacts on and changes to flora, fauna, water sources and landscapes
- revisit sites, significant areas and living places with which people have an especially strong emotional attachment
- identify (and in some cases use) traditional resources such as water, firewood and medicinal plants and food, including, amongst other things, fish, lizards, *yelka/yaua, nuli, kulumpa* and *munyeroo*

operational on 17 June 1996 and has been touted as a successful alternative state scheme to that offered under the Commonwealth’s NTA.

- locate stone and mineral resources, such as ochre, gypsum and quarry sites
- impart cultural knowledge about places and their history
- exercise traditional forms of respect and seniority
- talk in an Aboriginal language in a context that is deemed culturally meaningful and appropriate
- take younger people (often senior people's own children and grandchildren) onto country to learn about the places from which they came and which embody their personal and genealogical history
- bring as many people as possible onto the country.

Such opportunities have often been the prime expression of Aboriginal political, territorial, linguistic and emotional connections to country. It is in this way that heritage and native title have become entwined in contemporary practice and cultural heritage surveys have become integral to living cultural practice.

It is true that the activities of WACs — circumscribed as they are by agreements, legislation, commercial interest and contemporary infrastructure and machinery such as roads and four-wheel drive vehicles — were not likely to have been anticipated by traditional law and custom. Certainly Aboriginal people today value artefacts, middens, scarred trees and other remains in ways that their ancestors might not have, as pointed out by Olney J in *Members of the Yorta Yorta Aboriginal Community v. Victoria* [1998] FCA 1606.⁸⁸ But these have been major vehicles for getting people back on country and demonstrating the enactment of their rights and responsibilities. Management of cultural heritage has been a common assertion of native title rights and interests in claims across the state.

WACs are evidence that an asserted right to maintain and protect places of cultural, historical and sentimental value continues to inform contemporary Aboriginal practice. These activities, together with the principles that underpin their culturally

⁸⁸ With regard to some current practices of Yorta Yorta people, which, it was said on behalf of the appellants, were traditional customs, Olney J concluded that, 'There is no doubt that mounds, middens and scarred trees which provide evidence of the indigenous occupation and use of the land are of considerable importance and indeed, many are protected under heritage legislation, but there is no evidence to suggest that they were of any significance to the original inhabitants other than for their utilitarian value, nor that any traditional law or custom required them to be preserved' (*Members of the Yorta Yorta Aboriginal Community v. Victoria* [1998] FCA 1606 (*Yorta Yorta*), [122]). In this view, the contemporary practice of considering such sites 'sacred' and actively working to preserve or manage them was not a form of traditional custom. Olney J found that the lack of any mention of sacred site protection, care or management in Curr's writings was proof that the Yorta Yorta people did not observe such practices in the 1840s (*Yorta Yorta*, [122]).

appropriate conduct, are often the most compelling evidence that members of a native title claim group presently acknowledge and observe laws and customs in respect of their land. Such activities embody a right to make decisions about the use and enjoyment of country — for example:

- negotiating with non-native title parties (such as explorers and resource development companies) regarding activities conducted, or sought to be conducted, in the claim area
- reviewing the works already undertaken by resource developers in the claim area
- consulting with resource developers in protecting sites in the claim area
- consulting with resource developers in respect of damaged sites, including measures for their restoration or future protection.

Such activities can also be seen to manifest a right to control the access of others based on ‘ownership’ according to Aboriginal principles. This is implicit in the actions that Aboriginal people have undertaken to determine where resource developers may conduct certain works, including where petroleum wells have been located, where pipelines may traverse the land, where evaporation ponds can be sited, where ‘oil-haul’ roads can go and so on. In this manifestation of ownership as the right to control access to country, such heritage work has been central to the recognition of native title in parts of South Australia.

In the case of the Dieri people of the Lake Eyre Basin, for example, the ability to control developers’ use and enjoyment of the area’s resources (by way of consultation, site protection and site preservation) is, in our opinion, evidence of a right. It does not arise from some other source (such as superior strength, for example) but from recognition on the part of others (signatories to the Cooper Basin ancillary agreement) of an obligation and a responsibility to protect Aboriginal heritage on what they acknowledge to be Dieri land — that is, an assertion of Dieri ownership impacts upon and is reflected in the obligations of non-Dieri to act in particular ways. This asserted ownership and native title right has the demonstrable capacity to restrict, limit and exclude the actions of others on Dieri land (to the extent that a native title right cannot be exclusory in nature).

On these bases we have been able to demonstrate in a consent determination context that, when contemporary Dieri people have been able to get onto their own land, they have expressed, demonstrated and practised key dimensions of Dieri sociality and political action. We have successfully argued that these dimensions form the ‘traditional’ basis of Dieri law and custom, and indeed

of Dieri culture itself. To this extent there has been maintenance of beliefs and practices that resonate with the earliest record of Dieri society. These beliefs and practices are grounded in systematic principles that can be abstracted in terms of politics, territoriality, language and embodiment. These dimensions are the basis of rights and obligations that are manifested today in the conduct of persons when they are on country and operating in terms of cultural codes of knowledge, respect and facilitation.

The overarching management of such access to country (via the Aboriginal corporation)⁸⁹ is itself a political process that resonates with the earliest records we have of a ‘traditional’ politics focused on reconciling geographically dispersed ‘mobs’ identified in the idiom of ‘families’. On this basis we have successfully argued that there is a demonstrable continuity of a system of law and custom giving rise to native title rights. WACs, in short, are a legitimate contemporary manifestation of a traditional concern for, and management of, cultural places and of the organisation of people and families around such places. WACs have therefore been a powerful way of articulating Aboriginal heritage with native title interests in large parts of South Australia.

Thus heritage protection is realised in practice through direct negotiation between Aboriginal corporations and resource developers. The state and its legislation form part of this arrangement but are significantly backgrounded in practical terms. This backgrounding is perhaps reflected in the negatively pitched ‘informality’ with which such practices are described in the state’s scoping paper for a review of the AHA (SA) in 2008 (DPC 2008, p. 10):

The current informal practices of ‘clearance survey’ and ‘monitoring’ are widespread but have no legislative basis. Most of the agreements for clearance and monitoring do not meet the requirements of Heritage Agreements under the current Act.

We take ‘agreements’ here to mean those arrangements arrived at between clearance teams and developers in response to the survey of specific projected works (that is, clearance conditions). Such processes are glossed as ‘sporadic’ and ‘short-term’ in their engagement of Aboriginal groups (DPC 2008). Again (DPC 2008, p. 12):

⁸⁹ Compare French J’s acknowledgment of the role of the Bardi Council and Bardi Association in both the maintenance and adaptation of claimants’ attachment to their lands in *Sampi v. Western Australia* [2005] FCA 777 [718].

[There is] a tendency for Aboriginal parties and developers to enter into informal heritage clearance survey agreement. Where there is a subsequent objection or where relations break down, the negotiation process defaults to the formal processes of the Act. This ‘dual process’ creates uncertainty and substantially adds to the time taken for authorization applications to be approved.

It is stressed that ‘the informal processes that are widely used cannot be enforced under the AHA[SA]’ (DPC 2008, p. 12).

What is highlighted here is a significant decentralisation of heritage recording and management, which we agree can be highly troubling from the state’s point of view as well as lacking in transparency and quality control. There is considerable scope for poorly educated or inexperienced heritage ‘practitioners’ to conduct such work, as has occurred across the state for the lifetime of the AHA (SA). Little wonder that the AHA (SA) review process canvasses a rationalised, more central structure of governance, information flow and accountability, including the establishment of a (projected) Independent Aboriginal Authority (Roughan n.d., pp. 49–51). Nonetheless, this pushes against a decade-long tide of alternative practice that, given its political and monetary benefits, will not be given up easily.

Ngarrindjeri — Kungun Ngarrindjeri Yunnan

In the south of the state, Ngarrindjeri people have been prominent in their use of agreements to manage relations with government, non-government organisations, developers and other interest groups in respect of heritage (and the health and wellbeing of land and waters more generally). For example, as described by Wiltshire & Wallis (2008, p. 111):

When development work at Goolwa uncovered the burial of a Ngarrindjeri woman and child in September 2002, work ceased under the AHA[SA] 1988. Having attempted to use legislation to protect heritage in the Kumerangk case and failed, Ngarrindjeri people were understandably wary about attempting to use the AHA[SA] 1988 for the purpose of heritage protection again. Instead they used the opportunity to develop a landmark agreement — ‘Kungun Ngarrindjeri Yunnan’ — with the Alexandrina Council, thus going beyond the limitations of legislation to achieve their heritage protection aspirations.

Ngarrindjeri have used the humiliation and disrespect they received at the hands of the Australian judicial system during the Hindmarsh Island Bridge dispute to galvanise a more politically active defence of law, custom, intellectual property and *ruwe* (country, both land and water). They have adopted a discourse of resistance, political activism,

agency and transformation, forcing government to address them as equals rather than as an irritant or as a marginal player (Hemming, Rigney & Pearce 2007, pp. 218, 221):

Since the Kumarangk issue, Ngarrindjeri leadership has developed new strategies and tactics for pursuing justice in relation to lands and waters. These involve day-to-day tactical responses as well as longer-term strategic planning. At the beginning of the twenty-first century, Kungun Ngarrindjeri Yunnan agreements have become a strategic foundation for formal recognition and true partnership-building between the Ngarrindjeri nation and non-Indigenous bodies.

They have explicitly rejected what they see as a colonial legacy in which ‘protectionist’ law and archived cultural knowledge can be used against their contemporary interests and aspirations (Hemming, Rigney & Berg 2010, p. 94):

Ngarrindjeri have, as a matter of priority, pursued recognition and protection of their interests through negotiation and specific contractual arrangements rather than reliance on legislative protection...Avoiding the trap of negotiating interests through past-oriented, traditionalist constructions of cultural heritage has been a key part of the Ngarrindjeri strategy since Kumarangk (Hindmarsh Island).

Ngarrindjeri have developed a coalition of Aboriginal leaders (initially Tom, George and Ellen Trevorow, Matt Rigney and others), a ‘grassroots’ Ngarrindjeri research group (Matt Rigney, Steve Hemming) and a lawyer (Shaun Berg) to institute sophisticated strategising around legislation and heritage protection under the umbrella of the Ngarrindjeri Regional Authority.

In 2002, just months after the von Doussa J decision in *Chapman* effectively overturned the findings of the Hindmarsh Island Bridge Royal Commission in the Federal Court, Ngarrindjeri leaders Tom Trevorow and Matt Rigney contributed to a Murray-Darling Basin Commission report on the closure of the Murray River mouth. A strong case was also made for recognition of Ngarrindjeri interests in Ngarrindjeri *ruwe* and a just partnership between the Ngarrindjeri nation and Australian governments in the management of the Coorong, Lake Alexandrina and Lake Albert Ramsar sites (Hemming, Rigney & Pearce 2007, p. 222). From these actions flowed a strategy to get Ngarrindjeri funded for the infrastructure required to manage the boom in natural resource management (NRM). Statements on the ‘cultural’ effects of the Murray River mouth closure were withheld, as Ngarrindjeri leaders made it clear that this was primarily Ngarrindjeri business (Hemming, Rigney & Pearce 2007, p. 224):

In 2005 Ngarrindjeri leadership approached the South Australian Government with a proposal to integrate natural and cultural resource funding (federal and state) associated with Ngarrindjeri Ruwe. This proposal was designed to provide a better capacity for the resourcing of Ngarrindjeri leadership advisory committees such as the Ngarrindjeri Natural Resource Management Committee, and to engage Ngarrindjeri and non-Indigenous expertise in developing plans and strategies and providing advice on NRM, land and cultural heritage issues. It is clear that the Ngarrindjeri nation needs significant resources to develop an integrated approach to natural and cultural resource management.

Also in 2005, Ngarrindjeri people had their traditional ownership recognised in a Kungun Ngarrindjeri Yunnan agreement (see Trevorrow & Hemming 2006) with the Department of Water, Land and Biodiversity Conservation (Hemming, Rigney & Pearce 2007, p. 224). This agreement meant that their interests had to be recognised and they had to be consulted before any decisions were made that concerned them (Hemming, Rigney & Pearce 2007, p. 224). By way of such agreements, the Ngarrindjeri (who, at October 2015, still do not have a native title determination) have sought to bind native title, heritage and natural resource management into a package they control. This — in line with the scoping paper for the review of the AHA (SA) (DPC 2008) — explicitly seeks to expand the definition and work of Aboriginal heritage under a rubric that is Indigenous controlled: ‘The standard heritage survey focusing on archaeological sites was not considered appropriate by the Ngarrindjeri leadership’ (Hemming, Rigney & Pearce 2007, pp. 224–5); ‘The task of Ngarrindjeri leaders is to shift...understandings from an archaeological prison — forever frozen in time — to a creative, economically, political and socially active First Nation with unique knowledge and connection to Ngarrindjeri Ruwe’ (Hemming, Rigney & Pearce 2007, p. 226).

Such mechanisms for taking charge of and managing heritage come with their own difficulties. Aboriginal people are required to form themselves into groups capable of success in the domains of corporate governance, specialist knowledge and NRM: ‘What is being expected of Ngarrindjeri people is a transformation into new corporate, governance structures — to become business-oriented community organisations and experts in a complex, growing integrated NRM culture’ (Hemming, Rigney & Pearce 2007, p. 226). They find themselves on a plethora of committees, which is essential for making and keeping their voices heard (Hemming, Rigney & Pearce 2007, p. 228). The interrelation of heritage and NRM — of bureaucracy and regulation — grows ever more complex and demanding on people’s time to

administer its requirements. Aboriginal organisations require resources, capacity building, long-term planning and assured financing. Most PBCs with which we have worked struggle in at least one, if not many, of these dimensions.

Entangling heritage and native title

As is already evident, Aboriginal heritage and native title have been entangled since soon after the passing of the NTA. To our knowledge, most heritage survey work in South Australia since the mid-1990s has involved Aboriginal individuals and groups who have been native title claimants or members of applicant groups, whether or not a determination of native title has been made. The Cooper Basin agreements under which the authors of this chapter have worked, for example, were expressly and exclusively made with groups who had formally applied, and been registered, for a native title determination.

The entry of native title groups (either claimants or holders) has added new layers to the field of Aboriginal heritage in South Australia. While there have been benefits in the form of alternative pathways to negotiation (via ILUAs and other agreements),⁹⁰ a number of specific problems have also emerged. Here we draw upon experiences across the state to highlight some of the difficulties of entangling native title and Aboriginal heritage.

Competing native title applicant groups — Dieri Mitha and Ngayana Dieri Karna

Complications arising from the incidence of competing native title applicant groups have emerged in South Australia, sometimes dramatically and with consequences for human life. In the far north-east of the state it has been alleged that a Dieri Mitha Council was set up and supported by Western Mining Corporation (WMC) to deal with interests in artesian water resources to the east of its Olympic Dam site. This grouping provided WMC with Aboriginal consultants and heritage ‘authorities’ with whom to negotiate on heritage matters; by this means, others with traditional

⁹⁰ Mining exploration ILUAs are currently in place with Antakirinja Land Management Aboriginal Corporation (commenced 2004), Ularaka Arabunna Association Incorporated (commenced 2004), Gawler Ranges Native Title Group (commenced 2006), and the Adnyamathanha Traditional Lands Association (Aboriginal Corporation) Registered Native Title Body Corporate (commenced in 2012). These are agreements reached between the native title groups, the state government, the South Australian Chamber of Mines and Energy and Aboriginal Legal Rights Movement (or, latterly, South Australian Native Title Services) (see DSD 2014).

interests in the area, including Barngarla, Kuyani, Arabunna and Kokatha people, were sidelined, with tragic consequences (Whyte & Marks 1996):

WMC has signed a co-operation agreement with the Dieri Mitha Council for areas of land in which WMC has an interest, Borefield B and the pipeline corridor through Finniss Springs. [Friends of the Earth Australia] believes that WMC has provided money and supplied the Dieri Mitha Council with vehicles. The Dieri Mitha Council currently has a native title claim over Finniss Springs Station.

It is also alleged that Dieri Mitha Council members were supported to bring people from the Northern Territory to hold a ceremony near Marree in January 1995.⁹¹ This was an attempt to demonstrate that Dieri Mitha members were custodians and still traditionally linked to the land — proof of which was needed to support a native title claim and bolster authority to make heritage decisions. The Dieri Mitha Native Title Claim (SG66/1998) overlapped with the Edward Landers Dieri Native Title Claim (SG6017/1998) and also with the Arabunna Peoples Native Title Claim (SAD6025/98).⁹² Amid this complexity, the Dieri Mitha Council entered into agreements that provided WMC with heritage approvals for pipeline work, a new borefield (Borefield B) and test bores scattered across the country. Other Aboriginal people from this area who see themselves as custodians maintain that the Dieri Mitha Council did not have the relevant traditional knowledge or authority to provide such ‘clearances’ and that traditional sites may have been violated or compromised as a result.

91 Actions resulting from that event (such as assault occasioning actual bodily harm and accidental death) were the subject of criminal charges and a court hearing, and are thus a matter of public record. Jennings J, the primary trial judge, noted in his reasons for verdict that a dispute over whether the land on which a ceremony took place was traditionally Arabunna or Dieri land, together with the cultural propriety of a ceremony taking place there at all, were key issues at stake in the serious violence that followed. See *R v. Gregory Warren, Anthony Ross Coombes, Percy Gordon Tucker, David Forrest, Mark Malbunka, Terrence Kenny Malthouse and Martin Brown* [1996] SASC 5543 (unreported, District Court of SA (Criminal), Jennings J, 6 October 1995, [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/sa/SASC/1996/5543.html?stem=0&synonyms=0&query=title\(R%20and%20Gregory%20Warren%20\)%20#disp2](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/sa/SASC/1996/5543.html?stem=0&synonyms=0&query=title(R%20and%20Gregory%20Warren%20)%20#disp2)). Significant levels of grief, hurt and trauma resulting from these events still affect the community and its conduct to this day.

92 A strike-out application in the Federal Court resulted in the two Dieri groups joining to form a new group — the Dieri Aboriginal Corporation (DAC). The (combined) Dieri Native Title Claim (SAD6017/98) became known as Dieri #1.

What this highlights is the difficulties that have arisen when competing native title groups assert their rights to speak for and manage Aboriginal heritage under current legislative possibilities. There are presently no obvious mechanisms in place to reverse such decisions or the works and infrastructure that have been put in place on their basis, so Borefield B and the Hindmarsh Island Bridge are not removed as a consequence of other judicial decisions — a new finding or a native title determination — that reflect differently upon Aboriginal decision-making and contested matters of heritage (see Saunders 2003). The case also highlights the ongoing difficulties of identifying and deploying the ‘right’ Aboriginal people — a key and persistent issue that is identified in the review documents for the AHA (SA) and was naturally a focus of public consultations (see Roughan n.d.)

Different systems; different principles

Significant disparities of principle and system exist in a line the divides South Australia from north to south. These differences in land tenure, concomitant social organisation and types of responsibility for sites manifest at the interface of Western Desert and Lakes groups areas.⁹³ There are areas of South Australia where Dreaming tracks extend beyond the desert, beyond native title claim boundaries and across other claim groups’ areas. In the eastern Western Desert specifically (among Antikirinja and Kokatha people, for example), a person’s primary affiliation to land was not to a bounded territory so much as to a ‘line’ of Tjukurrpa sites, some of which might be in other people’s country.

Difficulties arise when these different systems of esoteric knowledge and tenurial principles are overlaid. Desert principles allow for an assertion of interest anywhere along a Dreaming track with which one has primary associations (by birth or ritual induction). When that track traverses an area claimed by a group that does not traditionally recognise or observe such a principle of extension of ownership tied to Dreaming knowledge then tensions arise and negotiations get

⁹³ The distinction was created by Elkin (1931) as a categorisation of kinship/social organisation, generating a ‘Western’ (or ‘Desert’) grouping and an ‘Eastern’ (or ‘Lakes’) group, the latter covering the area from Lakes Torrens and Frome to the north-east corner of South Australia. The delineation of culture ‘blocs’ or groupings in South Australia is longstanding in the literature, along with their associated land tenure principles (see Hamilton 1982). We note, however, that the issue of the ‘abutment’ of cultural blocs, as well as movement across them, which we know from the ethnohistorical record to have occurred, and the ensuing cultural accommodations have been almost entirely neglected in the anthropological literature.

complex. To whom do developers go for authoritative advice on heritage matters in such an area? A straightforward answer may be both groups, but this may not satisfy either and may even risk escalating tensions over areas that are now enclosed by definitive claim boundaries.

An assertion of heritage rights and responsibilities in such a context quickly becomes embroiled in a more complex politics of community control and representation. Although put abstractly, the authors of this chapter have observed (and sometimes participated in) such negotiations around the head of Spencer's Gulf and south of the Gawler Ranges, but similar tensions can arise anywhere on the interstices between Lakes and Desert cultures in South Australia — as between Antakirinja Matu–Yankunytjatjara and Arabunna at the Breakaways that also entailed the mingling and crossing of different Dreaming tracks, for example.⁹⁴ In becoming entwined, native title has made it more difficult to negotiate what were once more fluid boundaries (where one group's site is encompassed by another's native title claim, for example).

Native title group versus traditional owner

Here we include some reflections prompted by an experience in South Australia's mid-north that suggests that there are problems to do with the definition of groups and individuals who need to be consulted about heritage protection. In particular, the native title process has resulted in claimant (and later corporate) groups that have recognised rights and responsibilities that might include heritage protection, but the AHA (SA) itself employs an older trope of 'traditional owner'. Groups and individuals may not automatically align neatly under these labels. Traditional owners may include individuals who are not members of a PBC or a claimant group, may not be in accord with members of such bodies or for some other reason are not aligned with the appropriate organisation but are still recognised as having authoritative heritage knowledge. Alternatively, individuals may make assertions of heritage value that are not afforded credence or precedence by Aboriginal organisations. The 'doubling' of native title and heritage domains — and the potential gaps between them — has the power to generate much conflict and hurt, dividing communities as much as native title forces them together.

⁹⁴ The identity of, and responsibility for, sites and Dreamings was at issue in an overlap between the Antakirinja Matu–Yankunytjatjara Native Title Claim (SAD6007/98) and the Arabunna People's Native Title Claim (SAD6025/98) that was the subject of mediation in 2008.

Part of having native title rights is a concomitant responsibility for sites — that is, for all sites within the determination area collectively. Aboriginal Registered Native Title Bodies (RNTBs), once they have come into existence, are naturally enough of the view that their rights and responsibilities have been determined and they now need to be facilitated to do their work. AARD is seen as one obvious source of that facilitation. However, AARD is not always able to meet such expectations for a variety of reasons. In one case, an RNTB saw itself as the only appropriate corporate body through which such engagements with the state should be exercised, while the ‘traditional owners’ did not see themselves as adequately represented by the organisation. In investigating the possible damage to an Aboriginal site (and therefore a breach of the AHA(SA)), the RNTB refused to engage with the state in consultation because a focus on individual ‘traditional owners’ was seen not to afford it appropriate political recognition and commercial recompense.

A key thread in this particular case was the strategy of the RNTB (also a PBC) to control as much of the heritage process as possible through the management of WAC and survey procedures, reporting protocols and mediation through private lawyers. Cooperation with the state was refused on a number of bases, including refusal to pay Aboriginal consultants for their time. (This was justified on the basis that the state could not pay people for information when they may be required to give evidence should the matter subsequently go to court.) This resulted in a tense situation in which individual Aboriginal people worked with non-Aboriginal specialists against the advice of their PBC and its committees and sometimes in the face of opposition from their own relatives. Such dilemmas — for heritage processes, for Aboriginal individuals and for native title holders collectively — are now, we propose, intrinsic to the heritage domain post-native title.

In particular, there is no straightforward reconciliation between native title holders who quite rightly claim that they have responsibility for the entirety of a determined area and its heritage and those individuals who might be identified as traditional owners for a specific site. The disparity between collectivity and individualism between the AHA (SA) and the NTA has significant implications for their continuing operation. In particular, it has been a source of conflict within Aboriginal communities and there is no current way to curb this potential.

Analysis of the community consultation process for the review of the AHA (SA) found ‘a significant degree of confusion over the membership and role of the Prescribed Body Corporate, and how this might operate with regard to heritage matters’ (Roughan n.d., p. 29). As was our experience in the mid-north, confusion

was rife: ‘How do we recognize who speaks for country? If the NTA does this, how does the AH Act do it?’ (Roughan n.d., p. 29).

Issues concerning the complementarity of (a redrafted) heritage Act with the NTA are recognised in the state’s 2008 scoping paper (DPC 2008, p. 4):

Aboriginal heritage and native title are separate, but related areas. Aboriginal heritage protection may comprise some of a claimant group’s native title rights and interests, but native title encompasses more than Aboriginal heritage, as defined by the AHA[SA]. Conversely, the AHA[SA] applies to the whole of South Australia, including to freehold land and other tenure where native title has been extinguished. Additionally, it is also important to note that while Aboriginal heritage is protected under South Australian (state) legislation, native title is protected under Commonwealth legislation.

These mismatches of legal coverage and responsibility, crossing Indigenous and non-Indigenous domains of ‘law’ (see Tan, Chapter 2), are of considerable concern, puzzlement and conflict in a number of Aboriginal groups with whom we have worked. The state likewise recognises that the NTA has created new groups that have a clear interest in heritage management and protection (DPC 2008, p. 5), but six years of review and redrafting do not seem to have resolved the difficulties that this has thrown up.

Conclusion

Recognising Aboriginal custodianship of cultural heritage is the first guiding principle of South Australia’s review of the AHA (SA). We have argued that, in various explicit ways, South Australia’s Aboriginal people have been seeking charge of this custodianship for the two decades since the passing of the NTA. While complicating the management of Aboriginal heritage, the entanglements of heritage and native title have opened up new opportunities for Aboriginal groups to effectively take charge of their cultural heritage in unprecedented ways. This control of cultural knowledge has gained ground in parallel to an increased capacity to use heritage surveys and management procedures (especially WACs) to extract other benefits, including financial benefits, from a direct relationship with resource developers. This, we argue, has shifted the balance of power in respect of heritage from the state and its legislative and bureaucratic structures to an emergent Aboriginal-focused governance that has been demanded by the native title regime. The convergence of native title and heritage protection — which many native title claims rely upon in any case — has resulted in a reworked heritage environment in which new relationships between the state and

Aboriginal people have been enacted, often through Aboriginal agency and through the deployment of private lawyers, using the state's legislation as a last recourse but effecting a shift of power that cannot be reversed.

Recent attempts (through legislative review) to promote a rationalised, more central structure of governance, information flow and accountability is actually counter to the major trends of the past two decades and do not, on the face of it, address the various ways in which Aboriginal groups have sought to circumvent the role of the state in controlling their heritage.

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Chapter 9

SACRED BODIES AND ORE BODIES: CONFLICTING COMMODIFICATION OF LANDSCAPE BY INDIGENOUS PEOPLES AND MINERS IN AUSTRALIA'S NORTHERN TERRITORY

Gareth Lewis and Ben Scambary

Looking back over the history of mining activity and Aboriginal sacred site protection in the Top End of Australia's Northern Territory, numerous contests between Aboriginal sacred sites and mining projects are evident. Beyond the immediate effects of such contests, investigations have rarely examined the detailed nature and extended duration of the impacts experienced by Aboriginal people. This chapter focuses on the landmark 2013 prosecution of a mining company in the Northern Territory for the desecration of a sacred site at the Bootu Creek manganese mine, along with a series of historic cases of sacred site damage in the Northern Territory, to demonstrate the profound, enduring and multigenerational impacts of such events. Rallying in response to some of these conflicts, an emergent theme of Aboriginal discourses and action of cultural survival, revival and resistance is explored. In conclusion, we note the convergence of streams of impacts on and reactions from Aboriginal people and draw the inevitable conclusion that preventing damage through effective sacred site protection mechanisms is the only way to avoid the devastation generated by site damage and to achieve socially sustainable development projects in and beyond the Northern Territory.

Introduction

On 2 August 2013 OM (Manganese) Ltd, operator of the Bootu Creek manganese mine located 150 kilometres north of Tennant Creek, was convicted in the Northern Territory Magistrates Court of offences under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (NTASSA). Magistrate Sue Oliver convicted the company of one count of desecration of a sacred site and one count of contravening an Authority Certificate and fined them \$120,000 and \$30,000 respectively.

This landmark case represents the first time that a charge of desecration of any kind has been contested and proven under an existing legislative framework in Australia. It comes after more than 30 years of Aboriginal land rights and legislated sacred site protection in Australia's Northern Territory — a jurisdiction unique for its remoteness from Australia's more heavily populated south, its comparatively high population of Aboriginal people, its mineral prospectivity and its form of governance by both Northern Territory and Commonwealth parliaments. This chapter analyses the *Bootu Creek case* and its implications within this Northern Territory jurisdiction. The discussion reveals a consistent pattern of resource contestation between Aboriginal people and miners.

This pattern of conflicting interests demonstrates how such contests have commonly focused on and been articulated around matters of Aboriginal sacred sites. They have involved the collision of interests where areas of geological and mineralogical significance in the form of mineral deposits and ore bodies coincide with places of cultural significance to Aboriginal people in the form of sacred sites. In most cases the connection is direct: the mineralisation sought by miners is regularly identified by Aboriginal people as linked to or part of the spiritual essence of the creation ancestors who shaped the world and gave it form and meaning. Within this resultant contested space of often incompatible worldviews, ore bodies and sacred bodies have collided, with impacts on all parties.

While much has been written about mining and Aboriginal people in and beyond the Northern Territory,⁹⁵ examinations of the nature and extent of the impacts of mining on Indigenous peoples have tended to focus on socioeconomic impacts and the nature of agreement making under various legislative mechanisms. Little has been written about the sociocultural impacts of mining where there have been physical impacts on areas of cultural significance (see Figure 9.1). As Weiner (2004, p. 1) notes, many preceding studies leave largely unexamined the Indigenous

⁹⁵ See, for example, Altman (1997), Berndt (1982), Kaufman (1998), Rumsey and Weiner (2004) and, more recently, Scambary (2013).

epistemological and discursive processes that result from contestation over mining. We argue here that wherever mining impacts on sacred sites, the impacts are reflected by Indigenous experience and discourses of enduring loss, personalised injury and social imbalance or rupture. We also note that these contests can be generative of rallying points or transformative impacts where themes of rupture merge and blend with themes of revival, survival and resistance within Aboriginal discourses, initially relating to particular sacred sites and their associated traditions but often extending into broader epistemologies and expressions of cultural survival and political power.

The phrase 'sacred bodies' is used here with the intent of drawing focus onto the physical, and very much bodily, relationships that exist between place and people in Aboriginal Australia as well the cultural, emotive and religious systems and

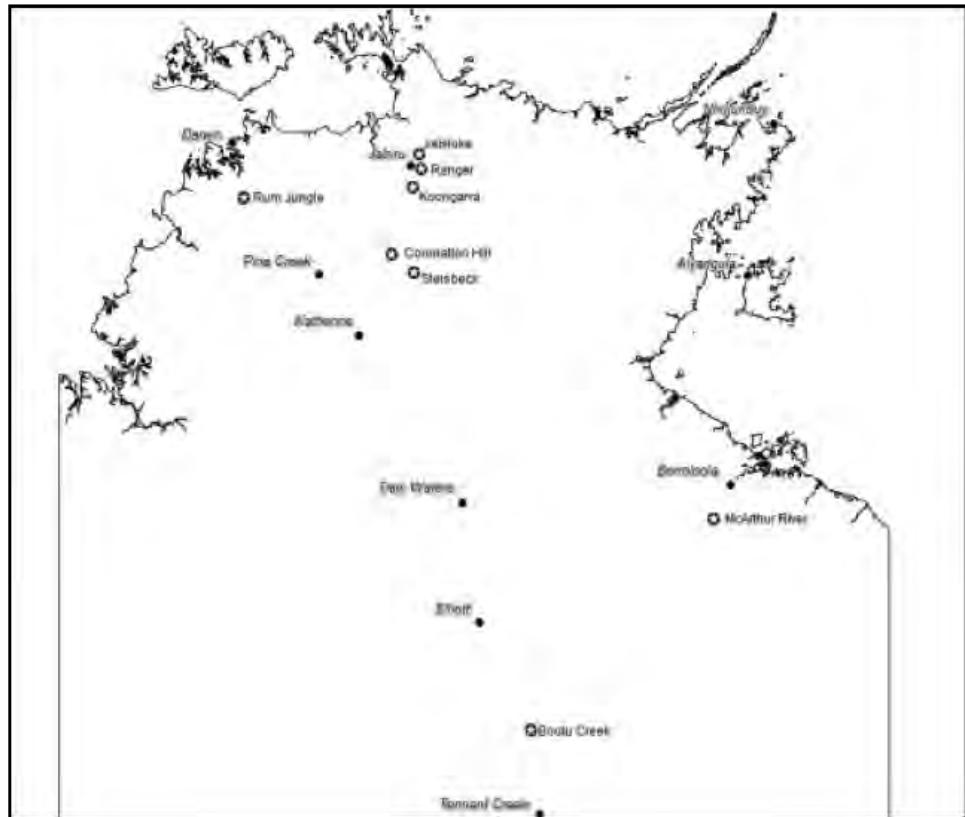


Figure 9.1: Map of northern regions of the Northern Territory with locations of mine sites discussed

traditions that underpin these relationships. We consider that such an emphasis is reflective of Aboriginal discourses about the impacts of damage to sacred sites. A range of past contests where mining has occurred on and in the vicinity of sacred sites is used in order to demonstrate the inevitability of such contests and to show how the impacts for those Aboriginal people involved have been profound and enduring across generations.

The dramatic and graphic desecration of the sacred site at Bootu Creek provides a contemporary opportunity to examine what Aboriginal people impacted on by the case have experienced. The insights gained, reinforced by the legacy of previous cases, provide lessons for and warnings about the need for greater vigilance in agreement making and in sacred site and cultural heritage protection processes. Combined, these insights demonstrate how the literal undermining of Aboriginal sites damages individuals, tears at the fabric of their societies and undermines the very ability of already vulnerable cultural groups to reproduce their traditions and thereby themselves.

The advent of land rights and sacred site protection measures as restorative social justice in the Northern Territory was initiated as part of a broader ethos of pluralism and self-determination for Aboriginal people that grew from the 1960s into the 1970s. Inherent in such policy was the recognition that Aboriginal people had the right to practise and maintain their distinctive cultures and, wherever legally possible, the right to control and determine the pace and nature of development on their land and sacred sites (see Toohey 1984).

The current climate of Australian and Northern Territory government interventions into Aboriginal peoples' lives in the Northern Territory, and the increasingly corporate intervention into Aboriginal people's lives, often in the form of mutually beneficial agreements with resource companies in many parts of Australia, raises concerns that economic and other pressures on Aboriginal people to accede to mining both now and in the future are increasing with the risk of further conflicts over and damage to Aboriginal sacred sites. The intergenerational impacts of heritage loss already experienced by many Indigenous people could be replicated and accelerated, with incalculable social and moral costs. This, then, raises questions about the long-term impacts of current public policy and corporate action in the Indigenous sphere — how a development agenda is activated and coerced around aspirations for tangible economic benefits and 'closing the gap' rhetoric with little or no consideration for long-term cultural or social sustainability.

Contested mapping of country

Across Aboriginal Australia, sacred sites are commonly places associated with the actions and presence of various creative ancestors. Features of the landscape are often instantiations of the bodies, bodily essences or ‘shades’ of such creative ancestors, or the product of their actions and labour.⁹⁶ The ancestral nature of the relationships of Aboriginal people with these creative ancestors, and therefore with land and sacred sites, is a well-documented phenomenon in most parts of Australia. Classical anthropological models of Aboriginal land tenure systems, albeit with their limitations, provide generalised patterns where modes of descent, social organisation and religious belief define individual and group connections to, and responsibility for, land and associated sacred sites. Such systems embody people with the landscape and its creative forces, with ceremonial and ritual performance acting to maintain the relationships to these forces and their enduring sentience within and across the landscape.

The ancestral nature of these relationships is epitomised by the collective term for creation ancestors in the Gunwinjku language of west Arnhem land — *Nahhiyunggi* — which translates literally as ‘first people’.⁹⁷ These first people as creation ancestors moved through the landscape, giving it form and meaning, preparing it for human habitation and, most importantly, imparting and depositing their spiritual essence into the landscape — a lasting and vibrant presence known in West Arnhem Land languages as *djang*, in neighbouring Jawoyn language as *ngangmol* and elsewhere in numerous other similar ways.

Myers (1986, pp. 49–50) describes a ‘theory of existence’ amongst the central Australian Pintubi:

Frequently known as totemic ancestors in the anthropological literature, the mythological personages of The Dreaming travelled from place to place, hunted, performed ceremonies, fought, and finally turned to stone or ‘went into the ground’, where they remain. The actions of these powerful beings — human, animal and monster — created the world as it now exists...Places where exceptionally significant events took

⁹⁶ See Povinelli’s (1993) use of the concept of labour as an investment of Aboriginal people’s efforts to conceptualise, know, engage with and live on a sentient country. This is reflected in Aboriginal people’s belief systems, which describe how creation ancestors’ movements and actions (that is, the creation ancestors’ labour) on country invest the country with shape and meaning, which is reproduced and maintained by current generations through an ongoing presence and effort (even replication) of labour.

⁹⁷ Or ‘the first inhabitants’ or ‘those who were here first’: see Berndt and Berndt (1970, p. 15); Chaloupka (1993, p. 45).

place, where power was left behind, or where the ancestors went into the ground and remain are special sacred sites (*yartayarta*) because ancestral potency is near.

The ancestral and personal connections for individuals to their totemic, conception and/or Dreaming sites are direct. People are incarnations of the ancestor who made the place, providing a primary basis of identity with, ownership of and responsibilities for sites and land. The words of Mussolini Harvey, former long-term chair of the Aboriginal Areas Protection Authority (AAPA) (AAPA 1991, p. 2), reinforce this point:

These sacred sites were put down in the Dreamtime when the old people travelled through the land. Those dreamings travelled like human beings and their spirit is still there in the country. We talk to them as our own relations and we believe their spirits come back into our families in the new generations that are born. That is how we know our totems and our sacred ceremonies. These things belong to Aboriginal people from the Dreamtime and that will never change.

This inscription of meanings about and into the physical environment began with the first people moving through, learning about and conceptualising or *knowing* country. As *Nahhiyunggi* these first peoples were themselves transformed into creation heroes, and their discoveries, knowledge and wisdom transmitted across generations via the mnemonic processes and practices of ritual, song and myth. Such forms of conceptualising the world produce a cosmography that Bainton, Ballard and Gillespie (2012, p. 23) describe in the Papua New Guinean context as a ‘moral topography’. This is also an apt description of the Australian context, reflecting how moral codes for kinship, marriage, law and order and other social behaviour are maintained and reproduced through myth, song and ceremony, which are in turn embedded in the landscape and sacred sites. In Aboriginal Australia this process utilises a socially mediated form of mythopoesis, which manifests as discursive maps rooted in the ancestral past but subject to dialogic adaption where revision and reinterpretation allow for the incorporation and appropriation of the demands of the present. Weiner (2012, pp. 10–11) describes such a cosmology of emplacement where an active dialogic cosmology acts to maintain the ancestral past in the present, interpreting the impacts of change wrought by real-world events, power imbalances and intrusions.

The earliest non-Aboriginal arrivals in the Top End undertook their own cultural mapping, recording suitable harbours and ports, settlement sites and agricultural potential as well as making geological observations and looking for signs of mineral prospectivity. McIntosh (2004, pp. 18–19) details the introduction

of iron implements by Maccassans along the Arnhem Land coast. While noting that there is no record of mining, smelting or tool production on the Australian coast by Macassans, there are records of Maccassan prospectors investigating and sampling tin, quartz, ironstone and manganese resources. The later arrival of Europeans along Australia's north coast dramatically and irrevocably expanded these processes of ascribing and mapping new meanings and interests as they established themselves and accessed territory that was new to them. Povinelli (1993, pp. 220–1) describes the transformative power of both forms of mapping (Indigenous and European) and their ability to impart a sense of timelessness to their inscriptions:

Contour maps with productive values etched in geographical space coax the countryside into being in a certain form: they are the Euro-Australian equivalent of Aboriginal 'songlines,' the *durlg* tracks that caused the countryside to have its present shape.

Inevitably, early European mapping exercises in the Northern Territory initiated the process of re-recording of places previously mapped by Aboriginal people. While it was based on the same fundamental need for a strategic, economic and aesthetic understanding of landscape, this European gaze, driven by its own imperatives as a small colonial outpost seeking to establish its viability, was particularly focused on identifying economic potential through agricultural as well as mineralogical resources. The *Northern Territory Times and Gazette* of 19 March 1887, on page 2, reported on a mineral vein or reef at Mindil Beach, now the site of popular tourist markets in central Darwin and a traditional Larrakia and Tiwi burial ground:

Tin is visible on the surface in the neighbourhood, and has been known to the natives for many years past under the Larrakeeah name of *Tappilanda*.

Likewise, in 1895 references from government geologist HYL Brown (1895, pp. 6–7) to quartz veins at Talc Head and other locations in Darwin Harbour refer to features of sacred sites already known to Larrakia people of the area and embedded into the mythopeia of their ancestral traditions, unbeknownst to the geologist. In 1869, to the immediate south of Larrakia lands on country associated with the Warai and Kungarakan people, Surveyor General GW Goyder reported on iron oxide and gold deposits near Giant Quartz Reef — a feature now known as Giant's Reef — with this new knowledge of the significance of the location overlaying its significance in local Aboriginal tradition as a sacred site.

Earlier mining operations in the Northern Territory from 1870 to 1946 were small in scale and any resource conflicts around such operations were either not understood or written about, or were simply subsumed by the broader devastations of frontier violence and disease.⁹⁸ After the Second World War, mining operations in the Northern Territory stepped up in the rush for uranium, gold, iron ore and base metals. During this time, before any form of beneficial sacred sites or land rights legislation, many mines in the Top End were opened in areas of cultural sensitivity to Aboriginal people.

Rum Jungle, located some 120 kilometres south of Darwin on the traditional lands of the Warai and Kungarakan people, was the site of Australia's first major uranium mine, which operated between 1950 and 1971. The mine is located within Area 4 of the Finniss River Land Claim — an area recommended for grant to an Aboriginal land trust by the Aboriginal Land Commissioner in 1981 but still in abeyance because of the mine legacy of environmental contamination and failed rehabilitation efforts. During the land claim the area was noted for its sacred sites and associations with both closed women's traditions and a leprosy or sickness tradition (Toohey 1981, p. 36). The contemporary location of sacred site *Angurukulpum* (White's Open Cut) has a spatial reference point located in the middle of White's Open Cut — the major abandoned and toxic mine pit at Rum Jungle along the course of the original East Finniss River, which was the site for the wholesale dumping of mining equipment and waste at the cessation of mining. There are no features of the sacred site remaining.

The upper Katherine and upper South Alligator river valleys were explored and mined primarily for uranium and gold in the 1950s and 1960s. This region became known as the Jawoyn Sickness Country or, to Jawoyn and their neighbours, as *Bulademo* or *Buladjang* country. The area is associated with the creation ancestor Bula, and numerous interconnected sites are associated with his travels, actions and places where he entered the ground. These sites have strict access restrictions based on gender, knowledge and age, and the country as a whole has numerous prohibitions on access and behaviour. If Bula is disturbed at any one of his sites, Aboriginal people fear that apocalyptic consequences will ensue, including earthquakes, floods and fire (Gray 1996, p. 28). This significance was neither understood nor relevant to the small-scale mining projects of the day, which were

⁹⁸ Jones (1987) describes in detail the early mining history of the Northern Territory and, while Jones refers to violence between miners and Aborigines, no interpretation of these conflicts was attempted by either Jones or his primary sources.

in direct and inexorable conflict with Aboriginal beliefs, as became evident during the Coronation Hill conflict in the early 1980s.

Another notable conflict over the Gove bauxite mine at Nhulunbuy in eastern Arnhem Land escalated from 1963 onwards into the *Gove land rights case* in 1970. While the case was unsuccessful in its goal of seeking legal recognition of Indigenous land rights, it directly led to the establishment of the Aboriginal Land Rights Commission under Justice Woodward in 1973 and eventually to the introduction of federal land rights legislation in the Northern Territory. Complementary legislation to protect Aboriginal sacred sites was then enacted by the Northern Territory Government in the form of the NTASSA.

The clash between uranium mining and Aboriginal people was at the forefront of earliest land rights claims in the Alligator Rivers region from the late 1970s, with the Ranger, Jabiluka and Koongarra uranium deposits all being located on the western edge of the Arnhem Land plateau, within but excised from current-day Kakadu National Park. All three deposits have been the subject of long-running and well-publicised conflicts between the mining industry and Aboriginal people over a 30-year period. The Ranger Uranium Environmental Inquiry,⁹⁹ which commenced in 1975, merged an early environmental impact study for the proposed Ranger uranium mine with a proposal for a new major national park and the first Aboriginal land claim made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). This inquiry considered the necessary stand-off distances for mining activity at Ranger that would be required to protect nearby Djitbi Djitbi and Dadbe, two *djang andjamun* (sacred and dangerous) sites at Mount Brockman associated with the regionally powerful Rainbow Serpent (Almudj or Ngalyod) and king brown Dreamings (Fox, Kelleher & Kerr 1977, pp. 283–4). Various proposals were considered, with the miners seeking access to an ore body known as Anomaly 2 located in close proximity to these sites. In evidence to the inquiry, Professor RM Berndt and Dr CH Berndt (1970) noted that:

A particular site does not consist simply of the place associated with a mythic event or where a particular mythic being or *djang* was metamorphosed, but extends all around that site. Any alien activity within its vicinity should be regarded with utmost concern.

⁹⁹ The report of the inquiry is often referred to as the Fox report after its primary author.

Ultimately the inquiry resolved to set the limits of disturbance at custodian Peter Balminidbal's boundary and, in doing so, noted (Fox, Kelleher & Kerr 1977, pp. 283–4):

This boundary will mean that it will not be possible to explore or develop Anomaly 2 any further. This is in our view an unfortunate but necessary result of its location close to Mt Brockman.

The *Gove case* ushered in the land rights era, which has seen over 30 years of applied anthropology in the Northern Territory and extensive ethnographic mapping with Aboriginal communities in order to further land claims, native title claims and the protection of sacred sites. This work has seen a convergence of mapping paradigms with ethnographic data collected from Aboriginal informants, drawing from their traditional knowledge, being stored in increasingly specialised databases and reproduced using topographic maps and geographic information systems (GIS). When analysed with non-Indigenous layers in a GIS, the culturally distinct interpretations of country become apparent and points of conflicting interest can be identified.

Using the AAPA sacred site data for the Northern Territory in this manner, the overlaying of the Indigenous sacred landscape with non-Indigenous interpretations of landscape and land usage is possible. Whilst the AAPA site data has been collected predominately in response to development pressures and is therefore spatially skewed to coincide with towns, roads and infrastructure, it nonetheless demonstrates the density and potential incompatibility of sites located in close proximity to development. Such incompatibilities range from divergent place names to complete and total conflicts of interests, such as mines and other developments that would result in damage to or the destruction of sacred sites. The developing and notably incomplete map of recorded and registered sites in the Northern Territory from the AAPA database in Figure 9.2¹⁰⁰ demonstrates the density of sites in the northern half of the Northern Territory and overlays this sacred site data with historical mines and currently granted mining tenure (that is, mineral leases and associated titles rather than exploration).

100 It is critical to note that these maps exhibit a skewed distribution of sacred sites which reflects the history of site recording and research by AAPA in response to development and sacred site clearance processes rather than constituting any form of complete coverage of sacred sites. Areas without apparent site recordings may in actuality have many sites, development pressures or other factors may not have generated research opportunities in such areas or resulted in custodians seeking out site recording by AAPA.



Figure 9.2: Map of AAPA site records, mines and mining tenure in the northern regions of the Northern Territory

This work has regularly demonstrated that many of the Northern Territory's mining projects have a legacy of conflict where Aboriginal people associate the minerals being extracted with the spiritual essences of their creation ancestors. For older mines developed before the late 1970s, many such collisions of interests have only become apparent, understood and voiced when more recent conditions of new mining technologies, suitable market conditions and Aboriginal people's rights have combined.

For example, the iron ore resource at Frances Creek that was mined in the 1970s is now understood, as a result of site clearances in the mid-2000s for a reworking of the same resource, to have also exhibited oxides and red ochres that formed part of a Jawoyn and Wagiman tradition about a pair of frill-neck lizard creation ancestors. Bemang (Jawoyn language) or Jaben (Wagiman language) travelled through the area collecting and using the ochre from a sacred site associated with

these ochres that was destroyed by the initial mining in the 1970s at Frances Creek's Hellene open-cut pit.

The Coronation Hill (Guratba) conflict was triggered by a proposal to recommence mining in the mid-1980s. Although earlier mining activity had occurred at Coronation Hill, it was from this point that the extent and apocalyptic nature of the Jawoyn Sickness Country was fully recorded by anthropologists and made apparent to a broader audience. The polemic contest between mining and sacred sites that ensued traversed a Resource Assessment Commission Inquiry, a s. 10 inquiry under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the Jawoyn (Gimbat) land claim under the ALRA, site registration processes under the NTASSA, academic and media debates, and ultimately political brinkmanship at the highest level before a decision to prevent mining was made by the Hawke federal government.

Ritchie (1999, pp. 273–4) notes that one of the most controversial aspects of the Coronation Hill dispute was the association of mineralisation with spiritual essence:

one of the most controversial aspects of the documented significance of the area was the assertion by senior custodians that the traces of gold and other mineralisation observed in the core samples shown to them as part of the mining operation were manifestations of the blood or essence of the ancestral being associated with the area.

Reaction from the mining industry about the implications of such associations and the decision to prevent mining at Coronation Hill were also controversial. Hamilton (1996) quotes the most extreme reaction from Hugh Morgan, then managing director of Western Mining Corporation (Morgan 1991, quoted in Hamilton 1996, p. 15):

The decision on Coronation Hill is not merely bizarre, it is resonant with foreboding...

[T]his decision will undermine the moral basis of our legitimacy as a nation, and lead to such divisiveness as to bring about political paralysis...The implications of it will, inevitably, permeate through the entire body politic, and cause, imperceptibly, like some cancerous intrusion, a terminal disability...Like the fall of Singapore in 1942, Coronation Hill was a shocking defeat.

Similarly, at Rum Jungle it was proposals in the late 1990s to re-mine the area that saw opposition to the project emerge on the basis of sacred site concerns

long held by Aboriginal custodians of these areas. At the Redbank copper mine on Wollogorang Station in the Northern Territory's Gulf country, a short-term operation in the early 1990s to mine copper has left an environmental legacy where copper and heavy metal contamination has flowed into watercourses and impacted upon downstream sacred sites. The striking blue and green coloured copper oxides present at the mine are considered by local Garawa and Waanyi people to be *Miran* — the excretia of Budjimala, the Rainbow Serpent (Dymock 1991, p. 135). Garawa custodian Jacky Green has captured the damage at Redbank in his 2012 painting reproduced in Figure 9.3. His notes on the painting detail the damage and some of the impacts (Green 2014, p. 3):

In the centre of the painting is the mine site. You can see the pollution that is coming out of the mine into the feeder creek on the left-hand side of the painting and flowing into Settlement Creek. The copper makes the creek go a bluey-green colour.

On the left-hand side and at the bottom of the mine site are figures. These represent Garawa women and kids. On the right-hand side are four figures holding spears and boomerangs. These men are worried about a sacred site, a burial place, near



Figure 9.3: J Green, *Redbank*, acrylic on linen, 2012

the mine. There are bones that have been stored there. We can't go near the burial site when we want to but have to seek permission from the mine.

The sun is going down and the sky is black. The blackness represents the way we feel about what's happening to our country. It's gettin' sick and we are really worried.

In the Kakadu region, Sutton (1981) recorded in his field notes for the Northern Land Council a description of Koongarra from senior Badmardi man the late Nipper Kapirrigi:

Djang made the uranium there, *andjamun* [sacred and dangerous].

Kapirrigi went on to describe a 'uranium Dreaming' connecting all of the Kakadu region's uranium mines and prospects, from Nabarlek (an earlier uranium mine located 50 kilometres east of Kakadu into West Arnhem land) to Djarr Djarr (a billabong near the Jabiluka uranium mine), to Djitbi Djinbi (Mount Brockman, immediately south of Ranger mine) and to Koongarra (Sutton 1981, p. 11). Kapirrigi also linked the *djang* at these locations to each other, noting that the various reptilian Nahhiyunggi being Boiwek (knob-tailed gecko) at Jabiluka; Djinbi Djinbi (king brown snake) at Ranger; and Gurri (blue tongue lizard) at Koongarra) made the *djang* and thereby the uranium at each of these sites.

In the late 1990s and 2000s at Jabiluka, just north of Ranger, the Mirarr Gundjeihmi traditional owners' opposition to mining was taken to the world stage in an unprecedented campaign that was able to strategically engage in local, corporate, federal and international levels of politics. While a complex set of issues surround this project, a key element of Mirarr opposition to mining at Jabiluka was the collision between mineralisation and *djang*. The Jabiluka uranium ore body sits below the Jabiluka outlier — an area of escarpment and stone country split from the Arnhem Land plateau by the East Alligator River system. For Mirarr the ore body is *djang*. Almudj, the Rainbow Serpent, travelled from a rock shelter in the outlier, transforming itself into Boiwek, the knob-tailed gecko, and creating the area of Mine Valley below the mine site before entering into the ground and creating a permanent spring or waterhole on the Magella Creek floodplain at the western end of this valley. The uranium and gold mineralisation of the area is considered by Mirarr to be the *djang* in

the form of bodily essences and excreta: ‘deposits in the ground made by the dreaming ancestor’.¹⁰¹

The association by Mirarr between the *djang* and the ore at Jabiluka became a key element of their high-profile opposition to the Jabiluka project and was encapsulated in one of their campaign slogans used in posters and various media: ‘Stop Jabiluka! Don’t dig the life out of the knob-tailed gecko dreaming’.¹⁰²

The Bootu Creek case

In 2011 OM Manganese (OMM), the operators at the Bootu Creek manganese mine located on Banka Banka pastoral lease, mined to within metres of a sacred site known as Two Women Sitting Down. This site was identified and protected by conditions within an Authority Certificate (or sacred site clearance) issued to the project developers in 2004. The project was developed under the auspices of both the AAPA-issued Authority Certificate and an Indigenous Land Use Agreement (ILUA) executed under the *Native Title Act 1993* (Cth) (NTA). The relative weakness of NTA ILUAs should be noted here, as they are negotiated from the bargaining position of a right to negotiate rather than a right to grant or withhold consent as afforded by the mining provisions in relation to Aboriginal freehold land under the ALRA. During the prosecution case custodians asserted that their forebears had never wanted mining to proceed at Bootu Creek but had entered into the ILUA process purely to enhance their ability to protect their sacred sites.

The Two Women Sitting Down sacred site comprises a distinctive outcrop of dark red/black rock at the southern end of a small hill (see Figure 9.4). A key feature of the site was a prominent rock pillar with a distinctive horizontal arm. Evidence tendered in the court case suggested that blasting occurred between 30 and 100 metres from the sacred site as part of the construction of the Masai pit. On or about the 20 March 2011 the horizontal arm fell off the rock pillar and in early July 2011 OMM noticed cracking on the western wall of the Masai pit to the north of the sacred site. Mining activity in close proximity to the site continued as cracks on the crest of the bullnose around and to the rear of the sacred site appeared. Such cracks generally indicate the imminent failure of the pit wall, and precautionary steps were taken to build a safety bund at the base of the pit in front of the bullnose and the sacred site to protect workers in the pit (see Figure 9.5).

101 Senior Mirarr traditional owner Yvonne Margarula, quoted in ECITARC (1999, p. 46).

102 Gundjehmi Aboriginal Corporation (1999).



Figure 9.4: Sacred Site 5760-21 viewed from the west prior to damage, c.2004 (photo: AAPA)



Figure 9.5: Sacred Site 5760-21 viewed from the west after damage, December 2011
(photo: Gareth Lewis, AAPA)

On 22 July 2011 the tensile cracks opened up and the pit face began to collapse. Over a period of an hour or two, slabs of pit wall and ore progressively failed and fell into the Masai pit. When the collapse had finished, it left the sacred site split in two by a crack big enough to drive a bus into, with the side of the sacred site closest to the pit slumping some 5 metres below where it had been. It is estimated that some 17,000 bulk cubic metres of the sacred site collapsed into the pit (see Figure 9.6).

The construction of the Masai pit began in March 2011, cognisant of AAPA's 2004 certificate conditions. The design for the pit was aggressive and tailored to maximise ore extraction in the vicinity of the site. OMM flagged with two custodians and a Northern Land Council field officer its intention to mine to both the north and south of the site, leaving a bullnose around the site that would protrude into the pit.

The design plan put to the custodians allowed for a steeper angle of mining at 55 degrees for the pit wall in front of the bullnose, whereas the rest of the pit wall was to be mined at a standard angle of 36 degrees. This design maximised the amount of ore that could be recovered from the pit below the sacred site,



Figure 9.6: Sacred Site 5760-21 split by the collapsed wall of Masai pit, viewed from the east mine, August 2011 (photo: Gareth Lewis, AAPA)

whereas a continuation of the standard 36-degree angle around the site would have ‘sterilised’ some 280,000 tons of ore.¹⁰³ The language is interesting and has been used in the past to mean that the existence of sacred sites sterilises ore and thereby devalues the economic potential of mining. Inquiries into the Ranger and Jabiluka uranium mines in northern Kakadu and into Coronation Hill in southern Kakadu all heard these sorts of arguments in debates about Djitbi Djitbi and Dadbe at Ranger mine, Guratba at Coronation Hill and the Almudj-Boiwek site complex at Jabiluka, all highlighting the incompatibility of Indigenous belief systems and state sovereignty over minerals in the late 1990s (Scambray 2013, p. 123).

With minerals remaining the property of the Crown or state in Australia regardless of land tenure, it is the state that permits, controls and benefits from the extraction of these minerals. The state has also enacted legislation to protect sacred sites (as well as other aspects of the environment), meaning that it has effectively inserted itself into the midst of this ontological as well as political conflict where it is tasked with balancing economic development and cultural maintenance. In the cases discussed in this chapter, where the mining resource is the *djang* or the sacred site, by statutory reckoning the resource was never available to be exploited.

Magistrate Oliver noted in her reasons for judgment in *Aboriginal Areas Protection Authority v. OM (Manganese) Ltd* (unreported, Court of Summary Jurisdiction of the Northern Territory, Oliver SM, 2 August 2013, [22]) (AAPA v. OMM) that the company, by seeking the approval of two custodians for the steeper mining angle in isolation from the processes available under the agreement and the NTASSA, was ‘either a cynical or a naïve exercise on the part of the Defendant’.

She stated that they had no individual authority to approve a mining plan that posed a risk to the integrity of the sacred site and neither of the custodians present had any experience or expertise to make a judgment about such risk in relation to the design plan. In her sentencing remarks, Magistrate Oliver qualified her view by stating, ‘I’m not prepared to accept that it was simply naivety associated with the conduct.’

¹⁰³ The figure of 280,000 tonnes compares with OMM’s figures of 414,000 tonnes of ore mined for the December 2011 quarter and 1.67 million tonnes of ore mined for the whole of 2011 (OM Holdings Ltd, 2012, p. 3)

This case marks the first time that a charge of desecration has been contested and proven in the instance of the horizontal arm falling off the rock pillar. Magistrate Oliver (*AAPA v. OMM*, [32]) stated that:

the offence created by s35 of desecration of a sacred site was intended to go to the heart of what was recognised by the legislation, that is, the sacred or spiritual nature of a site. If that character should be insulted, diminished or removed, it may interfere with or cause to be lost, the belief systems associated with a site including damaging the sacredness of a site...the offence of desecration is aimed not so much at the physical integrity of the site but as to whether what has occurred in relation to it has violated the sacred symbols or beliefs that it represents.

Importantly, she disagreed with the defence argument that desecration entails an attitude or disposition such as contempt (*AAPA v. OMM*, [32]):

an act of desecration is not limited to an intentional act but extends to a circumstance where diminishment or destruction of the sacred nature or spiritual significance of a site is foreseen as a possible consequence of [the] conduct.

In other words, she contended that the question was whether an ordinary person in the same situation and with the same knowledge would have made the decision to proceed with the activities that caused the horizontal arm to fall off the rock pillar within the sacred site. Her answer was a resounding ‘no’, and in finding the company guilty of desecration she stated (*AAPA v. OMM*, [74]):

The evidence discloses that the defendant company made decisions that involved the Sacred Site that favoured business and profit over the obligations they had under the Authority Certificate.

Reinforcing this view was documentation of plans for the Masai pit supplied by the company, which stated that a collapse at the bullnose was anticipated and that this would occur when the pit reached a mining depth of 45 metres. Such anticipation demonstrated a calculated understanding of the risk of damage to the site associated with the pit design — a risk that OMM decided to take and that eventuated in the collapse of the bullnose when mining reached a depth of 25 metres.

Impacting sites, impacting bodies

Bootu Creek provides a striking and contemporary case of long-established pattern of sacred bodies and ore bodies colliding. Warlmanpa and Warrumungu people of the area associate the dark rock outcrop features of the desecrated sacred site, along

with other nearby sites on the same Dreaming track, with blood spilled in a fight between two female creation ancestors. For the miners, the dark-rock outcrop is the surface expression of the large manganese ore body being targeted for extraction by their operation. The collapse of the rock formation that comprises the site has been experienced as direct physical and spiritual injury to the creation ancestors and to the lineages of their descendants through to current and potential generations. In this sense, the site damage incident has seen the physical, temporal, spiritual and social realms merging and interacting in a variety of ways within the local and regional Aboriginal community.

At Bootu Creek the impacts of the incident have been broad and profound, with a direct kinship relationship between the site and the custodians that essentialises the creation ancestors as ongoing and enduring entities within the social present. In this case, the subsection classifications or ‘skins’ *Namakili* and *Nungarrayi* that are ascribed to the pair of creation ancestors place the ancestors and thereby the site into a direct kinship relationship with past, current and (ideally) future custodians, allowing for statements to the effect of ‘that site is my mother’ or ‘that site is my grandmother’.

In preparing for the court case against OMM, the regular visits by AAPA staff to the region to meet with site custodians and inspect the sacred site at Masai pit (as well as others on the mineral lease potentially at risk from mining) generated much discussion amongst custodians about the impacts of the damage. Commonly expressed themes were the profound sense of loss, grief, anger and betrayal. Custodian Gina Smith, in her statement tendered in the Bootu Creek site desecration case, likened the damage to the sacred site to the ripping out of a page in an inherited book, noting that the current generation of custodians will never be able to show their children or grandchildren that site the way it was shown to them, leaving a permanent gap in the narrative and tradition.

Site damage can also heighten social tensions around causality in what otherwise would be unrelated events. Negative or unexplained events such as deaths, illnesses or injury, unexpected or unusual behaviours such as fights between friends, arguments or unusual drinking behaviours, or irregular environmental phenomena, such as unseasonal floods or fires, which occur in the aftermath of an incident of site damage are often attributed to the site damage, regardless of the likelihood of other causes. At Bootu Creek some months after the site damage incident, two notable incidents occurred which custodians attributed to reprisals from the Dreaming: first, an unattended mining truck that caught fire in a pit near the sacred site; and second, the untimely death of a former Northern Land

Council staff member who had worked with custodians in forging their relationship with the mine.

The complementary affiliation form of social organisation relevant at Bootu Creek and ongoing and vital in many parts of the Northern Territory means that the tensions and accountabilities which arise from incidents of damage to sacred sites are directed primarily internally within the Aboriginal community. Even where causality is clearly external and has nothing to do with Aboriginal people, the 'owners' of country (*kirda*) will still be held to account by their 'managers' (*kurtunggurru*).¹⁰⁴ Internal processes of punishment in physical and/or compensatory forms will often be meted out by managers on owners who are considered to have failed in their obligations to look after sites. At Bootu Creek this situation has been worsened by a history of depopulation and succession to the Dreaming estate associated with the area. The ILUA process in the mid-2000s required the formal identification of native title holders, and this was the source of considerable dispute among competing groups and individuals. While the issue was resolved at the time of the ILUA, the site damage incident more than five years later created a new point for debate across the regional community. Some individuals who were disaffected by the earlier ILUA process have used the site damage incident to challenge the legitimacy of those in *kirda* and *kurtunggurru* roles, blaming them for the damage despite their enormous efforts to pursue the case with AAPA. Such opportunistically resurgent claims of ownership rights and succession to the Dreamings at the mine have generated great stress within the regional Indigenous community.

The impacts of these resource conflicts across the Top End have predominately been negative, destroying or leaving physical impacts on country and sites that may or may not be remediable and generating enormous less tangible impacts at the social level which are experienced individually and collectively in a complex social dialectic. Palmer and Williams (1990, p. 13) note how critical the inviolability of land and sites is to the validity of Aboriginal belief

¹⁰⁴ Complementary affiliation involves the transmission of rights in country along lineages of patrilineal descendants who are considered to be 'owners' of an estate of land and its sites and Dreamings. Complementary rights are transmitted via matrilineal connections to the same estate with matrifiliates being considered to be 'managers' or 'police', whose role it is to ensure that the owners are caring for their country, sites and ceremonies appropriately. In Central Australia the common terms are *kirda* and *kurtunggurru*, while further north the common terms are *minirringgi* and *jungayyi*.

systems in the context of the Argyle diamond mine in the Kimberley region of Western Australia:

The destruction or modification of places of spiritual significance does not merely constitute a violation of a place the Aborigines consider to be in some way sacred... The destruction, or threats of destruction, of land sites is...a threat to Aboriginal abilities to order their social and cultural relationships...

Ritchie (1999, p. 269), drawing on Myers' work with the Pintupi, notes how:

a story may be attached to an object [read place] when a narrative tradition is invoked. Thus transformed, the object [read place] then may be considered by Aboriginal custodians to authenticate and validate the tradition.

We would argue that, in cases of damage to sacred sites, the opposite applies: the transformation is undone either totally or partially and the narrative is interrupted and/or offended, undermining the relevant tradition. As noted earlier in Gina Smith's statement, the ability to maintain and transmit the tradition is undermined.

Also, in cases of site damage, the damage is commonly expressed in terms of bodily impact on or destruction of the relevant creation ancestor and in terms of impact on the social authenticity and the physical/bodily wellbeing of the Aboriginal custodians of the relevant place or Dreaming.

At Rum Jungle, narratives attribute the 1949 discovery of uranium to a Malak Malak woman who was credited with having shown non-Aboriginal prospector Jack White uranium-bearing coloured rocks in the vicinity of sacred sites at Angurukulpum. Her incursion into these sacred sites with White was considered a transgression for which she was punished by the Dreaming. Her contracting leprosy and spending her remaining years at Channel Island leprosarium near Darwin was cited as evidence of her transgression.¹⁰⁵ Mining has rendered the Rum Jungle area environmentally and physically unsafe despite the expenditure of some \$12 million during the 1980s on rehabilitation of the mine, which was broadly considered to have failed. Anthropological fieldwork in the area remains contentious and stressful for many Aboriginal custodians, with some individuals linking negative aspects of their personal health to the damage to sites for which they have responsibility. The area is considered to be culturally unsafe, with gender restrictions and associations with a dangerous

¹⁰⁵ T Kenyon, pers. comm., c.2001.

king brown snake Dreaming. Senior male custodians refused to exit vehicles at specific locations in the area due to their concerns that the transformed landscape contained uranium and radiological hazards, which they considered to be manifestations of the king brown snake in the form of venom.¹⁰⁶ This venom is considered to be the source or cause of the leprosy that afflicted the Malak Malak woman after 1949.

For Jawoyn Sickness Country, agronomist and occasional anthropologist Walter Arndt first recorded the distress and impacts of exploration and mining activities in the Sleinbeck area on Jawoyn people during the 1950s. He noted a near-fatal outbreak of hookworm anaemia in the work camp he was supervising in Katherine, which was attributed by local Aboriginal people to uranium exploration and mining activity, which were disturbing the 'Sickness Dreaming Place' at Sleinbeck (Ngartluk) (Arndt 1962, p. 299). *Ngartluk*, like other focal Buladjang or Bulademo sites, is strictly off limits to women and to men unequipped with the requisite knowledge. The features of the site include a rock shelter where Bula is considered to have entered the earth to remain underground, burials, highly restricted rock art, and ceremonial bone and stone arrangements. These features and their traditions combine to afford this and other Bula sites the highest order of sensitivity and prohibition amongst Jawoyn and their neighbours. By way of contrast, uranium explorer Ross Annabell (1971, p. 108) reported the locating of the *Ngartluk* sacred site in the 1950s with images and textual descriptions of ochred skulls, ceremonial objects and sacred paraphernalia which can only be described now as offensive and belittling. *Ngartluk* is now one of a series of large sacred site areas registered under the NTASSA within the Jawoyn Sickness Country.

These examples of contestation and conflict demonstrate the social ramifications of loss when sacred sites are damaged: the social transformation, labour and interpretation of a sentient and ancestral landscape is ruptured or undone by physical damage, which in turn impacts on social order and balance. In certain cases, notably those that occurred prior to or in the earlier stages of the era of land rights and beneficial sacred site protection legislation, damage or unauthorised access to sacred sites by non-Indigenous people was met with highly fatalistic views from Aboriginal people undergoing radical change in their lifestyles and facing unprecedented challenges to their established social order and belief systems. Christensen (1990, p. 96) commented in part of a 1983

106 T Kenyon, pers. comm., c.2001.

submission to the Western Australian Aboriginal Land Inquiry in relation to mining company CRA's interference with sacred sites at the Argyle diamond mine in the eastern Kimberley:

What this damage has given rise to is a profound sense of loss, a sentiment which has not lost force over the years...For example, personal and social troubles (including the flooding which has occurred during the past two wet seasons) are attributed to desecration of the Barramundi site. The perceived complicity of some Aboriginal people in the destruction of this site is, in turn, the cause for continuing tension and ill-feeling within the Aboriginal community. More broadly, and perhaps more insidiously, the damage to this site has reinforced a sense of powerlessness and alienation within the community, and undermined the fragile movement previously in train towards increasing self-confidence and autonomy in managing community affairs. It is impossible to quantify these changes, but they are no less real for this fact.

At the individual level, site damage is generative of emotional distress and grief and is often associated with physical illness and death. This is particularly notable among senior custodians of sites and/or those individuals with particular affiliations with or responsibilities for a site, such as those with personal names derived from a site or those with shared classificatory kinship relationships to a site and/or its creation ancestor. In circumstances of damage, grief is likened to the death of a close relative or loss of or injury to a bodily part or function. Such impacts, being emotive and psychological as well as physiological, are, as Christensen noted above, difficult to quantify and poorly understood.

So, at the collective level, site damage incidents constitute events of social rupture and imbalance. They may result in temporary or permanent cessation of ceremonial activity associated with a site and even the destruction of associated ceremonial paraphernalia. In turn, individuals may lose the opportunity to achieve ceremonial maturity and therefore social legitimacy and authority, which ultimately limits their group's ability to culturally reproduce itself. At both individual and collective levels, site damage often results in shame — that powerful social force of humiliation where custodians lose face for failing to protect their sites, regardless of cause, blame or ability to prevent damage. Complementary affiliation acts to formalise this shame into public discourse about correct behaviour of *kirda* as mediated by their *kurtunggurrлу* and forms of penalties or fines levied on *kirda* who fail in their obligations.

Such rupture is difficult if not impossible to repair, as it primarily involves non-Indigenous agents of corporate and state-sanctioned power who cannot be

made accountable by the Aboriginal community using their normative systems of law. Compared with modern threats of potentially catastrophic damage from mining and other large-scale developments, existing Aboriginal normative systems reflect their originating traditions of managing transgressions at sacred sites that were more likely to have been associated with unauthorised access, damage or some other form of inappropriate behaviour or activity undertaken by individuals or groups.¹⁰⁷

The duration of projects discussed above as case studies has meant that Aboriginal people involved in them have been living with resource conflicts in many cases for three to four generations. Mining activities cease and over the years, as governments change and time moves on, different companies and agencies emerge to deal with these legacy mines. Aboriginal people, with their enduring connections to these areas, relate that the ensuing years of engagements with developers, governments, representative bodies and others meld into a legacy of environmental, social and cultural impact.

At Rum Jungle the environmental, social and cultural impacts of mining are still being mitigated 60 years after mining commenced, and Warai and Kungarakan still await the return of title. The uranium mines in the Jawoyn Sickness Country have taken almost as long to have been successfully rehabilitated, with no adult Jawoyn from the pre-mining era surviving. In northern Kakadu, Ranger continues to operate after more than 30 years, while Mirarr have achieved a stand-off in the fight against Jabiluka in the form of a long-term care and maintenance agreement which prevents further mine development without Mirarr consent. At neighbouring Koongarra, the Koongarra Mineral Lease has been revoked, with the area being incorporated into Kakadu National Park with the repeal of the *Koongarra Project Area Act 1981* (Cth) in February 2013 — more than 30 years after its enactment. At Redbank, Garrawa await the rehabilitation of the legacy mine in their midst, with the anticipated reduction of downstream contamination likely to take generations.

For Bootu Creek the longer-term impacts lie in the future. The previous incidents described for other mines in the Northern Territory point to these impacts being intergenerational. Remediation works have progressed at Masai pit in the form of a buttress built around what remains of the sacred site. Despite this buttressing, regular reporting on geotechnical monitoring of the site and

¹⁰⁷ See Smith (2001, pp. 8–9) for a discussion of the effects of religious and physical trespass, sacrilege and damage, and the implications for compensatory systems under native title.

surrounds by the company has noted sporadic but ongoing movement. Related to this movement have been further collapses of what remains of the rocks which comprise the main feature of the site. For custodians involved in ongoing dealings with the company through the ILUA, revisiting the site and watching its continual degradation in the aftermath of the original incident is highly distressing and represents a continuation of all of the impacts described above.

Reaffirmations and reinscriptions

McIntosh (2004, pp. 20–1) notes how iron production was incorporated as a part of Yolngu oral history and songs in Eastern Arnhem Land. Quoting from his informant, Burrumarra:

Birrinydji used the ‘red rock’ from the beach, not bauxite, that’s only for Gunapipi. [The red rock is] called ‘rratjpa’...and comes from Djang’kawu [a Dhuwa moiety ancestral figure]...Red rock is intelligence for all mankind, the source of wealth and power of Balanda and Yolngu — from it comes all the technology — axes, knives and hammers.

Similar views were implicit in Kapirrigi’s uranium power Dreaming, noted earlier, which connects the West Arnhem and Kakadu uranium mine sites. They are also evident in the other case studies from the region. Unlike the *rratpa* of East Arnhem, the *djang* associated with the Kakadu and West Arnhem mines and its equivalent at Rum Jungle are linked directly with uranium mining and the radiological hazards of its mining, processing as well as the applications of its products. The proximity of uranium ore bodies and other mineralisation to *djang andjamun* (sacred and dangerous) sites has generated Aboriginal discourses within this region, which reaffirm the Dreamings and their salience to Aboriginal people as well as their potential danger to Aboriginal and non-Aboriginal people alike. Within these discourses the attraction of non-Aboriginal people to uranium as a source of wealth, power and danger in itself confirms the power of the *djang*. This is exemplified by the western Arnhem Land people’s adaptation of their Bininj Gunwok word *gunwarrde*, which translates as ‘stone’, ‘rock’ or ‘stone country’, to include its application to currency or money. This reflects not only the realisation of the economic wealth sought by Europeans through mining but also the spatial focus of mining interests in the region within the ‘stone country’ of the western Arnhem Land plateau and its outliers. It is within these striking landscapes that the creative activities of the Nahhiyunggi were most prolific and

the density of *djang* sites most intense, creating a realm that is revered and that provided the context for Kapirrigi's uranium Dreaming described earlier.

The correlation of traditional cosmologies of sickness or poison country with uranium mining at Rum Jungle and the Upper South Alligator River valley are striking. The undercurrent here is that Aboriginal people have understood and managed the dangers of these places through traditional knowledge systems, cosmologies and practices, which served to limit access and control behaviour in these areas well before the advent of non-Aboriginal miners. The incursion of miners into these areas has profoundly disturbed the established social and cosmological orders achieved by Aboriginal people. Not least of the impacts on Aboriginal people of such incursions has been and continues to be the fear of repercussive action by creation ancestors, which represent real and indiscriminate dangers to Aboriginal people and miners alike. This extends the theme identified by Weiner (2004, p. 8) where:

the confluence of apocalyptic imagery and territorial or 'world' transformation, the manner in which capitalism and Christian eschatology are appropriated within the local mythopoieia of mineral deposits.

For the uranium mines in the Kakadu and Rum Jungle regions, Aboriginal people have added to Weiner's list anti-nuclear and environmental 'eschatologies' into their local mythopoieia. This has yielded local discourses with powerful blends of emerging themes, including resistance to the corrosive elements of capitalism, often expressed in sentiments about the social harm, disruption and disputes generated by mine-derived royalties, as well as an anti-nuclear discourse appropriated by Aboriginal people from the Green movement and linked to the cultural wellbeing of Aboriginal people and the physical safety of all people. Critical to such invocations of Indigenous identity against mining as a threat to cultural autonomy (Scambary 2013, p. 233), we would argue, is the belief that only Indigenous people, and then only the 'right' Indigenous people, have the ability and rights, authorised by means of descent, lived experience and transmission of associated cultural knowledge, to understand, control and contain or ameliorate the *djang* — the cultural power of the sentient landscape about them.

A powerful example of such discourse is contained in a letter to UN Secretary General Ban ki-Moon from Yvonne Margarula, senior Mirarr Gundhjeihmi traditional owner, in April 2011, expressing her sympathy to the Japanese people following the 2011 earthquake and tsunami and her dismay that uranium from

the Ranger uranium mine in the Kakadu area had been exported as fuel for the Fukushima nuclear power plant (Margarula 2011, p. 2):

There is *Djang* associated with both the Ranger mine area and the site of the proposed Jabiluka mine. We believe and have always believed that when this *Djang* is disturbed a great and dangerous power is unleashed upon the entire world. My father warned the Australian Government about this in the 1970s, but no one in positions of power listened to him.

At Redbank, where sacred billabongs have been contaminated by copper and other metals from the abandoned project, Garawa traditions provide an obvious connection between narratives from the past and present. This series of sites is associated with the creation ancestor Bubanga — a possum who was gifted a bundle of cycad seeds (*munya*). These seeds are naturally high in toxins and, in order to be consumed, they must be wrapped in paperbark and placed under-water in a creek for a sufficient period of time in order to leach out the toxins. The narrative for Bubanga sees the possum gifted a bundle of cycad seeds wrapped in paperbark, indicative of them having been leached. Babunga is deceived and consumes the cycad seeds, which had only been wrapped and not leached. He becomes seriously ill, vomiting up the seeds. Boulders in the first sacred waterhole downstream from the mine are considered to be instantiations of these regurgitated seeds from the narrative. The mine contamination has encrusted the boulders and rendered this and other waterholes devoid of any fish life. For Garawa, mining has disturbed the status quo, unearthing the power associated with the Miran, the excretia of Budjimala, the Rainbow Serpent, damaging nearby country and generating stress among custodians. Yet, ironically, the damage has reinforced pre-existing understandings and traditions, with the Dreamings revealing themselves in new ways as salient and enduring and requiring the attention of Garawa custodians, who are actively fighting for remediation and restoration works to be undertaken in the area.

At Bootu Creek there is a different sense of purpose emerging from custodians of the Two Women Sitting Down sacred site. Reflective of a discourse about the history of the ILUA being an unwanted but necessary means to seek protection of country and the sense of betrayal by the mining company that, entrusted to work on their land, desecrated their site, custodians are seeking to utilise mine-derived income to secure as far as possible ownership and control over their traditional estate and thereby economic and cultural autonomy and security. During the sacred site desecration case, an ever-present tension was the need for custodians

to maintain a formal working relationship with OMM while also working closely with AAPA to seek legal address for the damage. The ILUA has delivered, and continues to deliver, significant economic income and employment benefits managed via the Manungurra Aboriginal Corporation to the Kunapa custodians and broader Aboriginal community. As noted by Gina Smith (2014), Manungurra seeks to maximise the long-term benefits to the Kunapa groups and others:

The vision of our directors and members of Manungurra is to create a liveable and sustainable future for our lands. To build on the courage and strength of our fathers and mothers, our grandparents and the ancestors. This vision is of living full lives in the modern context drawing on the strength of the Kunapa ceremonial and ritual links to land culture and ceremony.

Among future plans of the Kunapa group at Bootu Creek is the securing of the mine camp and infrastructure after mine closure for new economic and employment initiatives, including horticulture projects utilising the vast water storage created by mine pits.

The Two Women Sitting Down sacred site, in its greatly reduced and damaged form, will quite possibly take on a new vitality serving as a reminder of what can happen, the traps of ILUAs and the limitations of site protection regimes in redressing such incidents. More significantly, and despite the social rupture caused by the damage, the remnant site is likely to increasingly symbolise the resilience and veracity of those custodians who fought the case. The desecration, its impacts and the legal case are already becoming incorporated into local narratives and discourse, and it is in this sense that the site and its story, with its contemporary elements, may ultimately be reinscribed into the local mythopoeia of the Kunapa people and the regional community.

Conclusion

In this chapter we have sought to highlight that the intersection between sacred sites and mining is a historically common occurrence in the Northern Territory. The *Bootu Creek case* has demonstrated all of the hallmarks of the historical cases presented, with the clear conclusion that, when sacred sites are damaged as a result of mining activity, the consequences for Indigenous people are far-reaching, catastrophic and intergenerational.

The use of beneficial Western legislative frameworks within the Northern Territory, such as the NTASSA, the ALRA and the NTA, has served to change awareness of issues associated with the protection of sacred sites. However, the

landmark *Bootu Creek case* also highlights that the capacity of legislative regimes to seek redress in such matters is limited and reinforces that site protection and prevention of damage should clearly be the more desirable strategy.

Magistrate Oliver noted in her sentencing remarks that the damage to the sacred site at Bootu Creek represents ‘not just a loss for the traditional owners of that area, it is a loss — a genuine loss of heritage for the country as a whole’. This is a timely reassertion of the inherent importance of the cultural beliefs of Aboriginal people, particularly in the context of ever-increasing development and political pressure on Aboriginal people to adhere to imposed notions of statistical equality. For, as we have sought to demonstrate in this chapter, to destroy the symbols of culture is to damage and break knowledge systems and to create social dysfunction. The ability of Aboriginal groups to rebuild and reaffirm themselves and their traditions in the face of such massive social upheavals as those caused by the incidents of site damage discussed throughout this chapter is testimony to their resilience.

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Chapter 10

FROM WEEBO TO WALMADAN: MAKING SENSE OF ABORIGINAL HERITAGE PROTECTION (DE)EVOLUTION IN WESTERN AUSTRALIA

Liz Vaughan

Aboriginal people's right to protect sites has been recognised federally under native title legislation; however, Aboriginal people have faced sustained difficulty in preventing damage to heritage sites in the face of Western Australia's economic development. In Western Australia the principal legal mechanism for protecting Aboriginal sites is the Aboriginal Heritage Act 1972 (WA). This legislation has long been criticised as being ineffective in the face of Western Australia's heavy reliance on an extractive economy, and the legislation is currently up for review with the introduction of the Aboriginal Heritage Act Amendment Bill 2014 (WA). This chapter is therefore a timely examination of the Aboriginal heritage issues Western Australia has experienced under this legislation, from the influential Weebo case in 1969 to the Walmadan (James Price Point) case in 2011. This chapter explores the evolution of government-led heritage protection in Western Australia in the context of the state's wider socioeconomic environment. A discussion of the recent government administrative changes to Aboriginal heritage protection since 2011 is presented along with a critique of the 2014 Amendment Bill.

Introduction

In Australia the *Native Title Act 1993* (Cth) (NTA) provides for the recognition of Aboriginal people's rights to protect places of significance under Commonwealth law; however, the principal legislation for protecting and managing such places in Western Australia is the *Aboriginal Heritage Act 1972* (WA) (WAAHA). Over the 43 years during which the WAAHA has been in operation, the socioeconomic landscape of Western Australia has changed dramatically — notably in terms of population growth, which has more than doubled since 1971 (DTWD 2013, p. 10), and industrial expansion. In 1970 the value of the Western Australian mining industry was \$1.14 billion (DMP 1984, p. 10). This has expanded a hundredfold to \$113.7 billion in 2013 (DMP 2013). Today, active mine tenements in Western Australia cover 534,571 square kilometres — 24 times the 1984 area of 22,137 square kilometres (DMP 2014a, 2014b). Western Australia has generally been regarded as the engine room of the Australian economy in the last few decades, with the two largest contributing industries being mining and construction (ABS 2014).

The WAAHA was, for its time, pioneering and of national significance as legislation that recognised the legitimacy of another worldview within the Western hegemony of mainstream Australia. Additionally, the Anthropological Society of Western Australia (ASWA) — in particular, the eminent anthropologist Professor Ronald Berndt — had significant influence in the enactment of the WAAHA, suggesting the academic pursuit of recording, preserving and studying what were seen as idiosyncratic cultural artefacts of a bygone era was also a motivation for the legislation (Berndt 1969; Robinson 2006). However, with the increase in competition for land use in Western Australia since the WAAHA's genesis, the legislation has become cumbersome and ineffective.

History attests to numerous examples of heritage destruction to allow for developmental interests in Western Australia, despite these being places the WAAHA was designed to protect. Highly publicised instances of development trumping heritage conservation include:

- Noonkanbah in 1980 (Hawke & Gallagher 1989)
- the excision of a portion of mineral-rich land at Marandoo in the Karijini National Park from the protection of the WAAHA with the passing of the *Aboriginal Heritage (Marandoo) Act 1992* (Scambary 2013, pp. 64–5).
- the Old Swan Brewery redevelopment in 1995, which was subject to extensive litigation by Noongar man Robert Bropho (Chaloner 2004; Vinnicombe 1989)

- the lifting of the protected area status on the Woodstock Abydos art complex in 2004–05 for the building of a railway line by Fortescue Metals Group Ltd, which was later subject to a Corruption and Crime Commission of Western Australia (CCC) investigation on lobbying (Roberts-Smith 2009)
- the removal of 900 rock engravings on the Burrup Peninsula by Woodside Energy Ltd (Woodside) to make way for their liquefied natural gas (LNG) project in 2006–2007 (WALC 2007)
- damage to Aboriginal archaeological sites by Buru Energy at the Ungani oilfields operations in the Kimberley in 2013 (Prior 2012; Vaughan 2015, pp. 95, 127).

There have been critical reviews of the operation of the WAAHA since 1984, including sustained criticisms (Barnsby 2013; Casey 2007; Chaloner 2004; Evatt 1996; Ritter 2003; Seaman 1984; Senior 1995;). Since the acceleration of mining and development in Western Australia in the 1960s, Aboriginal heritage of significance to Aboriginal people and others has been impacted on or destroyed by development (see, for example, DMP 1984; Webber 2012).

Through s. 18 of the WAAHA a developer may make an application to impact on a site. That application is subsequently reviewed by the Aboriginal Cultural Materials Committee (ACMC), which forms an opinion on whether there is an Aboriginal site on the land, evaluates its importance and significance, and provides a recommendation to the minister, who consents to the land use or refuses the application. The ACMC is a statutory body appointed to assess Aboriginal sites under the WAAHA on behalf of the Western Australian community. Data from 2002 show that 957 applications to destroy Aboriginal sites have been lodged via the s. 18 process since the WAAHA's inception in 1972, with the minister refusing zero applications during this time (WALC 2002). From 2008 to 2013, the Western Australian Department of Aboriginal Affairs (DAA) (the regulator) received 646 s. 18 applications to destroy sites, of which only one was refused (Wyatt 2014).

The WAAHA has been amended twice in the past — in 1980 and 1995. A recent resurgence of reviews and public debate about the WAAHA and cultural heritage management has been induced by the release of the Aboriginal Heritage Act Amendment Bill 2014 (the 2014 Bill) for public comment in June 2014. The 2014 Bill was introduced to the Western Australian Parliament the following November; however, at this stage it is yet to be debated. The introduction of the 2014 Bill has stirred rigorous discussion in heritage, political and Aboriginal and Torres Strait Islander circles, with arguments presented by some that the 2014

Bill does not adequately recognise the rights and responsibilities of Aboriginal people to their heritage and facilitates an increase in political control of ‘heritage decisions’ (Bennetts 2014; Laurie 2014; Long 2014; LSWA 2014; Viner 2015; YMCA 2014a).

Central to the ineffective protection of Aboriginal sites in Western Australia is the somewhat overlooked consideration of who has the right to *define* what ‘Aboriginal heritage’ is under the WAAHA. Therefore the issue is not reduced to a simple dichotomy of heritage management versus economic development. Rather, it is a much more complex web that involves defining and valuing Aboriginal heritage across different cultures, scales, demographics and times — and subsuming these often disparate values into practical protection through Western legislation.

Former Perth native title lawyer David Ritter has described the division between the NTA and the WAAHA as an ‘incoherent relationship’ that is ‘logically and culturally absurd’ (2003, p. 203). Despite the Australian Government’s recognition of native title in Australia, mechanisms within the WAAHA that allow for the legalised destruction of Aboriginal sites under state law can be carried out without notifying the relevant Aboriginal party. As Ritter (2003, p. 204) observes: ‘This strange disjunction means that heritage, shielded by a common law right to protect heritage as an incident of native title, can be obliterated under state heritage legislation without even the courtesy of notice.’

The WAAHA was implemented 20 years before the landmark decision in *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1 (*Mabo*) that overturned the legal fiction of *terra nullius*. In most jurisdictions in Australia, Indigenous heritage legislation was introduced as ‘relics’ Acts, with the view that Indigenous heritage would become extinct or be assimilated into mainstream Australian society (Schnierer, Ellsmore & Schnierer 2011; see also Tan, Chapter 2). Current administration of the WAAHA by the state government has highlighted the difficulties of Aboriginal people asserting their right to protect sites under Western Australian law when it is the definitions made by the dominant culture that are applied and accepted (Woodley & Davies 2011; Laurie 2014). An examination of the origins and evolution of the WAAHA from 1959 to the present informs our understanding of current government changes and possible future outcomes.

Western Australian anthropology, the Weebo affair and the origins of the Western Australian Aboriginal Heritage Act

The Western Australian anthropological discipline and the Western Australian Museum (WAM) were seminal influences on the drafting of the WAAHA as professional bodies active in the Aboriginal heritage management space. In 1959 the ASWA was approached by the Australian Academy of Science for a list of Aboriginal sites to be recorded as part of a nationwide survey (ASWA 1960). Anthropologists as well as non-specialists across Western Australia responded and a list of 66 sites was produced as the first attempt to document the variety of Aboriginal sites in the state (Crawford 1979, p. 461). By 1968 the list had expanded to 500 sites and by 1979 the registrar of the Aboriginal Sites Department in the WAM held 4000 entries (Crawford 1979, p. 471). This list was the genesis of the Register of Aboriginal Sites, which is now managed by the DAA and holds listings for 14,365 sites.¹⁰⁸ As of 2013, there was a backlog of 6234 Aboriginal heritage places lodged with the DAA that are yet to be assessed by the ACMC as required by statute under the WAAHA (WALC 2013). Herein is evident a foundational problem built into Western Australia's heritage management regime in that the system was not built on the realities of Aboriginal heritage in Western Australia. It was believed that significant Aboriginal sites in Western Australia could be neatly demarcated, registered and protected, and developers would know which areas to avoid (Vaughan 2015, p. 126). Not until heritage sites were continually confronted with development as Western Australia expanded economically was the true scale of Aboriginal heritage in Western Australia realised — hence, without substantial changes to how the government manages heritage since 1972, the antiquated system is groaning under a large backlog of sites that cannot be managed (Vaughan 2015, pp. 82–3).

By 1965 the WAM had established itself as the role of adviser to the state government on Aboriginal heritage protection (Crawford 1979). An assessment of the basic range of site types in the state had been made and the threats to their preservation identified. Archaeological sites required assessment before destruction, and some outstanding places such as Wilgie Mia¹⁰⁹ ochre mine and site complex were assessed as needing to be permanently protected (Crawford 1979, p. 473). There

108 T Butler, Registrar of Aboriginal Sites, pers. comm., 12 March 2015.

109 In 2014 the Wajarri Yamatji Aboriginal people of the Wilgie Mia site in the Weld Range agreed on exclusion zones around sites of significance with iron ore miner Sinosteel Midwest Corporation Ltd (YMAC 2014b).

was great concern surrounding Aboriginal sites of contemporary significance that were at risk of destruction as well as vulnerable the removal and sale of cultural moveable objects, including secret and sacred objects, on the international market for large sums of money (Vaughan 2015, p. 48). The WAM expanded in 1969 to better conduct its responsibilities to Aboriginal people, the public and the government. Naturally, the WAM was responsible for the administration of the WAAHA when it was passed in October 1972 (Crawford 1979, p. 461).

In 1969 a confrontation over land use at the sacred Aboriginal site of Weebo in the Goldfields region of the state highlighted the fact that Western Australia had no way of protecting places that were significant to Aboriginal people (Berndt 1969). This confrontation was instigated when a prospector was given permission by the Western Australia mining warden to excavate an unusual patterned stone that outcropped at the Weebo site — a stone that was traditionally used in connection to sacred rituals (Crawford 1979, p. 473; Ride et al. 1969). This decision caused much public outcry and there were demonstrations nationwide calling for the protection of sacred sites (see, for example, Thomas 1969a, 1969b). A call in Parliament for action to protect sites of importance to Aboriginal people was received with bipartisan support in the House (Robinson 2006). A cabinet committee was established, which found that the Aboriginal claims of site significance at Weebo were legitimate and recommended that the site be protected (Ride et al. 1969). The Weebo affair influenced the drafting of the WAAHA in 1972 — the definition of a ‘site’ in s. 5 and the values to be considered by the ACMC in s. 39 reflected the evidence that emerged from the *Weebo case* on what was important to Aboriginal people (Robinson 2006, p. 4). In addition to affording protection to places of importance or special significance to persons of Aboriginal descent, a significant objective of the WAAHA is reflected in s. 5(c), which declares that the Act applies to ‘any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State’. Notwithstanding the original intent of the WAAHA, the legislation has become problematic in modern Western Australia.

The *Weebo case* at this early stage had begun to provoke discussions about the government’s responsibility for protecting ‘Western Australian heritage’ in the face of the enormous mineral exploration of the 1960s, with criticism of the outdated *Mining Act 1904* (WA) (Thomas 1969b). It was argued that the *Mining Act* gave the ‘Government an opportunity of favouring the quick-profit interests

of big companies ahead of the preservation of flora, fauna and Aboriginal sites' (Thomas, 1969b, p. 2). Interestingly, the 'sacredness' of the Weebo site was clearly translatable into significance of Western equivalence, as the mining warden Mr Kaye himself (who granted permission for the site to be mined for the stone) said that the loss of the tribal grounds would be regarded in the same way that the 'RSL would regard someone knocking over the State War Memorial' (Thomas 1969b, p. 2). The mining warden's observation, while empathetic, characterises a significant cross-cultural misunderstanding that is central to the issue of protecting Aboriginal sites as aspects of a living culture — that is, it conceptualises Aboriginal heritage as something of the past to be memorialised rather than something contemporary that is utilised, shared and revitalised.

The WAAHA was introduced to the Western Australian Legislative Council by the Tonkin Labor government in April 1972 (Chaloner 2004, p. 44). In his second reading speech on the WAAHA in 1972 the Hon. WF Willesee stated (WALC 1972a, pp. 471–2):

The preservation of sites and objects of Aboriginal origin is now recognised throughout Australia as an important aspect of providing Aboriginal citizens with the social environment that they need when they still retain partly or wholly their traditional religious beliefs. These sites, whether they are sacred or otherwise culturally significant, are regarded by Aborigines as being of supreme importance and connected with their traditions concerning the history of the land and its people...Their preservation is regarded as a matter of world concern.

Aboriginal heritage was underlined as being significant not just to Aboriginal people but also to wider Australian cultural heritage. It has been stated in critiques of the WAAHA that the legislation was well meaning but paternalistic in its tone (see, for example, Chaloner 2004), with the Bill somewhat a reflection of protective policies of the day and rooted in the scientific concepts of Aboriginal heritage (Chaloner 2004, p. 41). However, on further detailed analysis of the parliamentary speeches in 1972, attitudes on the most part in fact reflect genuine and sophisticated understanding and value of Aboriginal people and culture. Further, parliamentarians from both sides of the House spoke strongly on the centrality of Aboriginal heritage to Western Australia's historical narrative and identity, and played up its additional scientific value to humanity. As the Hon. William Withers said when addressing the House, 'it is very necessary that we protect the objects of heritage of the Australian Aborigines. Many of these objects are interesting not only to the Aborigines but to white laymen as well as anthropologists and archaeologists' (WALC 1972b, p. 837).

By examining the evolution of the WAAHA from its genesis through to contemporary administration within its socioeconomic context, we are well placed to understand the WAAHA as a product of its history. Despite positive beginnings of the WAAHA, patterns and trends over time are elucidated, demonstrating a successive watering-down of heritage protection over the last 43 years and the attempted sidelining of Aboriginal voices in defining and managing their heritage. Through a historical contextualisation of the WAAHA it is possible to understand the politics and practices in the current Aboriginal heritage arena in Western Australia and the reasons why the proposed 2014 Bill is proving so controversial.

Weakening of heritage protection by statute and administration

The WAAHA has been amended twice in its history — in 1980 and 1995 — and has been subjected to attempted amendments in 1990 and 1992 that failed to pass. In 1980 the scope of the WAAHA was narrowed as it was amended from covering all Aboriginal sites to only sites of ‘importance’ and ‘significance’. This introduced a philosophical change to the WAAHA, as it now required subjective decisions to be made on what was important and significant (Senior 1995). This has been criticised because value-based assessments are ethnocentric, and judgments were not necessarily made by the Aboriginal people themselves (but rather by the trustees of the WAM or later by the ACMC and minister) and were often made in the context of a proposed development of the site (Senior 1995) (see also Lewis & Scambary, Chapter 9, for a discussion of how Aboriginal sites are valued). The amendments increased ministerial control and direction, with the minister having the power to direct the registrar, WAM, the trustees and ACMC in any task for the purposes of the WAAHA (Senior 1995). The minister could now decide whether an Aboriginal site could be used for any other purpose, having regard for the general community. The amendments also gave the minister the direct power to revoke or vary a protected area on the application of an aggrieved person (Senior 1995). Section 58 of the original WAAHA was repealed, which removed the considerable penalty of suspension or forfeiture of any right, title or interest of a person who committed an offence under the WAAHA knowingly for the purpose of gain.

These amendments occurred in the politically charged atmosphere of the Noonkanbah dispute. This dispute, which was one of Western Australia’s most well-known stoushes between Aboriginal rights proponents and mining interests, climaxing in 1980, became synonymous with Aboriginal heritage and land rights issues in the face of mining. In 1976 the Australian Government purchased the

Noonkanbah Station in the Kimberley for the Yungngora people, to help them meet their traditional and cultural needs after they walked off the station in 1971 in protest against poor wages and conditions (Chaloner 2004, p. 63). In 1978 American company Amax Iron Ore pursued an oil exploration permit on the Noonkanbah property against the wishes of the Yungngora people (Chaloner 2004, p. 64). The test drilling for oil would directly affect sacred sites on the land to which the WAAHA applied. Despite this, the Charles Court Liberal government backed Amax in its pursuit of drilling an exploratory well at the site complex of Umpampurru (Pea Hill) against the recommendations of the ACMC and the WAM's advice that the site should be protected (Chaloner 2004, pp. 78, 80; Ritter 2002). There was a groundswell of public support for the protection of the sites as well as protests by the Aboriginal community; however, the government used large numbers of police to ensure the drilling went ahead (Chaloner 2004, p. 85; Plater 2010). Ultimately, the Western Australian Government used s. 11(2) of the WAAHA to instruct the WAM to consent to the Amax's land use. Despite the large public and Aboriginal opposition to the oil drilling, and the 'very, very slim chances' of even finding oil (Hawke & Gallagher 1989, p. 138), the Court government insisted on forcibly enabling the oil exploration, arguably on ideological grounds — 'Premier Court wanted it as a matter of principle, that no one could assert that just because a site existed that it was to be preserved' (Vaughan 2015, p. 129).

The attempted 1990 amendments arose principally from the frustration the Lawrence Labor government was experiencing with continued litigation during 1980 and 1990, especially in connection with the Old Swan Brewery redevelopment on the Swan River (Senior 1995, p. 17). In his 1995 review, Perth lawyer Clive Senior states 'there is little doubt that the 1990 Bill was principally aimed at restricting the legal rights of Aboriginal people to have access to the courts in seeking to protect their heritage' (Senior 1995, p. 17). Senior reports that the Bill was heavily flawed — it sought to provide that the WAAHA would bind the Crown; clarify procedures under s. 18, including a landowner's right to appeal under this section; and validate the exercises of powers delegated to the ACMC by the trustees of the WAM (who at the time administered the WAAHA). However, these amendments failed to pass.

Two years later, under the same Labor government, the draft 1992 amendments came out of a ministerial council committee to review the WAAHA, as part of a strategy to ensure early resolution between mining companies and Aboriginal and environmental groups following a profusion of disputes on heritage matters. It was proposed that the long title of the WAAHA be changed 'to

preserve Aboriginal heritage not only on behalf of the community but, in particular, the Aboriginal community' (Senior 1995, p. 22). It was also proposed that the definition 'traditional custodian' be changed to 'Aboriginal custodian' to define a person with 'traditional ownership of, or particular cultural, social or spiritual affiliations with and responsibilities for, a place or object to which this Act applies' (Senior 1995, p. 23). Further, it was proposed that the definition of Aboriginal 'site' under s. 5 be changed to give primary emphasis to sacred, ritual and ceremonial sites while removing the requirement of '*special significance*' introduced in the 1980 amendments (Senior 1995). Section 5 was to be extended to include a place where Aboriginal remains were located (Senior 1995, p. 23). Penalties were to be increased, the time within which to prosecute was to be extended to two years, and publishing photographs of sacred places without permission for personal gain was to become an offence. An Aboriginal heritage authority was proposed to administer a permits system to replace the s. 18 process, with Aboriginal people and developers given avenues of appeal. The Bill appears to have proposed many positive amendments; however, Chaloner (2004, p. 188) argues that the seemingly benign changes were an attempt to weaken heritage protection by increasing political control. However, the Bill was never introduced to Parliament. Perhaps counter-intuitively, these apparently positive amendments were proposed in the same year by the same government that was successful in passing the *Aboriginal Heritage (Marandoo) Act 1992*. Marandoo — a portion of mineral-rich land in the Karijini National Park — was Hamersley Iron's chosen location for an iron ore mine. At the time, the Karijini Aboriginal Corporation (KAC) challenged the formation of the Marandoo mine and the destruction of cultural sites. The KAC were unsuccessful, however, as Hamersley Iron was granted consent under s. 18 of the WAAHA to work in the area. Subsequently, the mineral-rich region of Marandoo was successfully excised from the protection of the WAAHA by the passing of the *Aboriginal Heritage (Marandoo) Act 1992* (Edmunds 2013, pp. 199–200).

In 1995 the WAAHA was amended to provide for the transfer of the responsibilities of its administration from the WAM to the DAA, effectively politicising heritage decisions. Prior to that, during the 1980s the trustees of the WAM had purported to delegate their recommendatory function under s. 18 of the WAAHA to the ACMC, but in *Bodney v. Trustees of Museum* [1989] WASC 7959 it was held that the delegation had not been effective because of the lack of a written instrument of delegation as required by the WAAHA. There has been

criticism that the ACMC is hampered in making legitimate heritage assessments due to political and bureaucratic pressure:

[S]ince the administration of the WA Act moved from the museum, it lost its independence. The ACMC was a professional well-trained body, which included Aboriginal people, who knew their stuff. It was to be an independent body of review that would then make recommendation to the trustees, but that structure has dissolved, and it has increasingly been seen as a rubber stamp for government policy.¹¹⁰

The most recent specialist anthropologist on the ACMC, Michael Robinson, eventually quit the committee because of a disagreement with the chair of the ACMC and the Chief Heritage Officer (both were asserted to be political appointments with no background in heritage) over the definition of a ‘sacred site’ (see Bennetts 2014).

In the same year as these amendments, the 1995 Review of the *Aboriginal Heritage Act 1972* (the Senior review) was conducted. The Senior review was commissioned by the Richard Court Liberal government and resulted in a comprehensive report of some 300 pages (Vaughan 2015, p. 58). It was intended that the report would be publicly released after the finalised date of 30 June 1995; however, it was not tabled until 19 December 1995 — some months after the government introduced its amendments on 11 May 1995. Chaloner, in her 2004 report, reassessed the pre-empting of the Senior review’s release by the amendments as political, as the Senior review’s findings were unfavourable to the government’s pro-development agenda (Chaloner 2004, pp. 204–6).

An examination of the history of the WAAHA reveals a long record of attempted and passed amendments that have had (perhaps with the exception of the 1992 failed amendments) the objective of moulding Aboriginal heritage protection around development. This has been done by increasing political control of heritage management, raising the bar of heritage significance, subjectifying decisions about what a ‘site’ is under law, and even by excising a portion of mineral-rich land with Indigenous heritage values from the WAAHA under the *Aboriginal Heritage (Marandoo) Act 1992*. Further, every amendment or attempted amendment to date has been catalysed by an act of Aboriginal resistance and government frustration. This pattern continues to the present 2014 Bill

¹¹⁰ J Stanton, Adjunct Professor of Social Anthropology, University of Western Australia, pers. comm., Perth, 11 February 2015.

proposed amendments to the WAAHA. Very public and controversial heritage mitigation issues are characterised by cases such as the James Price Point and Yindjibarndi disputes from 2009 to 2012 and the lesser known Lake Yindarlgooda dispute from 2011 to 2012. The intent for administrative and legislative reform of the WAAHA can been traced back to a cabinet decision made in September 2008 by the newly elected Barnett government (DPC 2008), which then instigated an Industry Working Group (IWG) to workshop solutions to the heritage approvals process (Jones et al. 2009). The reinterpretation of what a sacred site is under the legislation and the subsequent decrease in registration of sites as well as removal of some sites from the register can be directly linked to the James Price Point dispute, discussed further in this chapter.

The 2009 Industry Working Group

The IWG was formed in 2009 by the Western Australian Department of Mines and Petroleum with the purpose of identifying problems with the development approvals processes in Western Australia and seeking remedial solutions. The IWG recommended immediate implementation of administrative changes to the heritage approvals system. It was put forth by the IWG that the complexity, uncertainty and resultant delays associated with native title and Aboriginal heritage were detrimental to mineral and petroleum activity and timelines (Jones et al. 2009). Efficiency through administrative reform was recommended, including through clear guidelines and structures for Aboriginal heritage surveys, strategic reform for s. 18 procedural transparency, a review of the Register of Aboriginal Sites and training of departmental staff. Administrative reforms have been made since these recommendations — for example, through the introduction of the Aboriginal Heritage Due Diligence Guidelines, changes to the site recording forms (Barnsby 2013), a consolidation of the Register of Aboriginal Sites¹¹¹ and 70-day turnaround targets for s. 18 processing (WALC 2013). The reinterpretation of what a ‘site’ is under s. 5 of the WAAHA has led to the removal of some sites from the register and a 74 per cent decrease in the number of sites registered between 2011 and 2014, demonstrating that interpretation is more powerful than statute. Some of these reforms presumably are contained within normal departmental improvements and management; however, there is great concern about the decrease in heritage protection caused by the reinterpretation of the s. 5 definition

¹¹¹ It is statutorily required for the registrar of the DAA to maintain a list of all reported Aboriginal sites.

of ‘site’ — an issue that is examined in detail later. Aboriginal stakeholders have made complaints that there has been insufficient consultation with them on the proposed amendments (see, for example, GMIC 2014; KLC 2014; KMAC 2014) — a concern echoed by heritage professionals (Stevens 2014). Considering this, it seems imbalanced that industry had an early and targeted input into changes to the WAAHA.

The 2014 Aboriginal Heritage Act Amendment Bill

In May 2011 the Western Australian Government engaged Dr John Avery, former Director of Indigenous Heritage Law Reform at the federal Department of Sustainability, Environment, Water, Population and Communities, as an independent consultant on reforms to the WAAHA (Collier 2012a). In April 2012 the Western Australian Government publicly proposed changes to the WAAHA, and a discussion paper was circulated with a call for submissions (Collier 2012b). The discussion paper proposed that the WAAHA be regulated and amended for improved clarity, compliance, effectiveness, efficiency and certainty (Collier 2012b). An exposure draft of the amendments was released for public comment two years later. However, the exposure draft’s omission of persistent themes raised in the 2012 round of submissions and previous reports on the WAAHA was criticised by some (Chapple 2014).

Notably, submissions in response to the discussion paper came from heritage practitioners, Aboriginal corporations and individuals, politicians, industry, local government departments and legal practitioners.

Prominent themes of concern raised in submissions in response to the discussion paper were:

- a delegitimisation of Indigenous concepts of ‘intangible’ heritage in the administration of the WAAHA
- processes that are inconsistent with Indigenous cultural protocols regarding the ‘secret and sacred’ and Aboriginal knowledge dissemination
- administration that places excessive burdens of proof on Aboriginal informants who wish to register a site
- unequal appeal rights that favour non-Indigenous land use
- inconsistent and non-transparent decision-making processes.

There have been strong displays of opposition to the government’s amendments, as has been seen from a number of activist movements and professional statements that have been made. In September an on-country meeting, organised by Yamatji Marlpa

Aboriginal Corporation (YMAC) and attended by 200 people, was held at the Yule River to discuss the proposed changes to the WAAHA. The meeting notice stated that the changes do not empower traditional owners and there had not been proper consultation before the amendments were drafted (YMAC 2014c). Overwhelmingly, attendees voted to reject the proposed changes to the WAAHA and to send representatives from Pilbara Aboriginal language groups to Perth (Bell 2014).

In November 2014 more than 60 traditional owners, representing all regions in Western Australia, rallied at Parliament House in Western Australia and presented National and Labor MPs with a petition, containing more than 1600 signatures, to reject the proposed changes (Long 2014). There have been sustained criticisms of the proposed changes by the Australian Anthropological Society (Houston et al. 2015), the Australian Archaeological Association (AAA 2014), the Australian Association of Consulting Archaeologists Incorporated (AACAI 2014) and the Law Society of Western Australia (LSWA 2014). In addition, the changes were censured by Greens and Labor politicians. It has also emerged the government's Coalition partners, the National Party, do not support the proposed amendments in their current form, in part due to the party's large Aboriginal constituency. The National Party member for the Pilbara, the Hon. Brendon Grylls, stated that he would not support the 2014 Bill in its current form due to concerns raised by traditional owners in the north-west (Moodie 2015). Former federal Minister of Indigenous Affairs, the Hon. Ian Viner AO QC, has issued advice stating, 'the amendments are truly offensive; bad legislation and bad administrative practice; and fundamentally destructive of Aboriginal culturalheritage protection' (2015, p. 1).

The proposed 2014 amendments are the second and by far most comprehensive set of changes sought to be made to the WAAHA since the introduction of the NTA (beside the 1995 WAAHA amendments). However, the proposed changes include minimal reference to native title holders. Under the amendments Native Title Body Corporates are given only an advisory role to the ACMC, the ACMC's function at any rate is proposed to be severely downgraded. References to the NTA are only included in Part V of the 2014 Bill, which outlines the functions of the ACMC. The ACMC has no primary role in assessing whether there are sites in a particular area under the 2014 Bill, but provides an assessment of a site once it is first indentified by the chief executive office of the DAA. In the subsequent assessment, the ACMC may seek the advice of the registered Native Title Body Corporate.

The 2014 Bill instates a chief executive officer (CEO) who has ultimate discretionary power over administration of the WAAHA. The CEO's role includes the following functions (Vaughan 2015):

- evaluating the importance and significance of sites and objects of 'alleged' Aboriginal origin
- deciding the information that will be entered or deleted from the Register of Aboriginal Sites and Objects (ASO register) (s. 50B)¹¹²
- replacing the minister as ultimate decision-maker without legislative requirement to have the same regard for the ACMC and registrar (under the current regime, the minister as the ultimate decision-maker is required to have regard for the ACMC and the registrar under s. 11A)
- determining and declaring Protected Areas under s. 19 (currently a role for the ACMC)
- directing the registrar in conducting their responsibilities regarding the Register of Aboriginal Sites (the registrar is obligated to comply as soon as practicable)
- delegating powers to others as the CEO sees fit
- giving the registrar prior approval to delegate the registrar's powers in accordance with s. 12(4).

Stakeholders who wish to use land in a way that may impact on an Aboriginal site (that is, developers) are given appeal rights and rights to notification. There are no similar appeal rights for Aboriginal people who may be aggrieved at a decision to declare a place as being devoid of Aboriginal sites or to permit an act that may impact on an Aboriginal site (Vaughan 2015, p. 65).

Here it is argued that the proposed legislative changes were framed not with the aim of protecting heritage sites, but rather to streamline the approvals process for industry. This fits the pattern of heritage protection erosion by statute and administration since the Noonkanbah dispute of 1980, examined earlier in this chapter. Western Australia recognised the rights and responsibilities of Aboriginal people to their heritage sites 20 years before the NTA, yet over the lifespan of the WAAHA we have seen an apparent reversal of government-administered heritage protection policy (Viner 2015). Now Western Australia has a system that does not support Aboriginal

¹¹² The ASO is a continuation of the registration provided by s. 38 of the current WAAHA.

peoples' rights to define or manage sites; rather, the state emphasises the value of incompatible non-Indigenous land use, often undermining heritage protection.

Political and industrial influence on heritage protection

Information from the last five years obtained from the DAA under freedom of information (FOI) laws demonstrates that the Aboriginal heritage management regime is closely tied to political and industrial influences. These external influences directly affect the preservation of Aboriginal sacred sites and also influence how Aboriginal sites are defined. This is explored in the James Price Point and Lake Yindarlgooda case studies below.

James Price Point heritage protection case study

Walmadan is the traditional name given to James Price Point after Walmadany, the tribal man who lived there at the beginning of the 20th century (Goolarabooloo 2011). This area, 60 kilometres north of Broome, was the chosen site for a gas hub by Woodside and the Western Australian Government. The proposal to disturb the area saw intense community opposition based on environmental, social and cultural grounds and involved sustained protests, media campaigns, litigation and the formation of a plethora of community activist groups. The Goolarabooloo¹¹³ people, as custodians of the James Price Point area, rejected the gas hub on grounds that it would damage the Ullolong song cycle that ran down the coast as well as related heritage. The Goolarabooloo and Jabirr Jabirr people launched a native title claim in 1994. Their claim, registered in 1999, gave the claim group procedural rights under the NTA (Holmes 2008). In 2010 the Goolarabooloo and Jabirr Jabirr split their joint claim, reportedly due to divergent views (Mortimer 2010), and a determination has yet to be made for both claims (DPC 2014).

The anthropological and archaeological significance of the Ullolong song cycle has been well documented since 1989 (Bradshaw & Fry 1989). The significance of the area was accepted by the government's own ACMC, which determined in 1991 that 'no exploration activities should occur within the areas defined as the song

¹¹³ James Price Point was part of a joint native title application of the Goolarabooloo and Jabirr Jabirr people, and held cultural interests for other Aboriginal groups of the Dampier Peninsula and surrounds — for example, the Yawuru, Bardi, Jawa and others.



Figure 10.1: Aboriginal man removed by police during a community protest to prevent Woodside Energy Ltd from accessing James Price Point to commence vegetation clearing, north of Broome, Western Australia (photo: Rod Hartvigsen)

cycle path¹¹⁴. In 1991 the ACMC recommended to the minister that these areas should become temporarily protected areas to safeguard them against exploration activities by those who held mining rights¹¹⁵. Further, in January 2011 the Western Australian Department of State Development (DSD) had been sent a brief from the DAA outlining the heritage values of the James Price Point area that was considered for the gas hub (DIA 2009; Vaughan 2015, p. 163).

In July 2011, Woodside's clearance work threatened a previously unreported secret men's site connected to the Ullolong song cycle and the Northern Tradition (Cane 2012). DAA officers were dispatched to the site to investigate, and they recorded and lodged the site for assessment as 'LSC11'.¹¹⁶ On 6 July DAA's compliance officer advised Woodside that its clearance work was likely to disturb a previously unreported site.¹¹⁷ Two days later Woodside was directed to immediately stop works, as the site was in danger of being impacted on. Woodside ignored this advice. Woodside was then further informed that, if it continued work, it may risk committing an offence under ss. 17 and 54 of the WAAHA.¹¹⁸

On July 25 the DAA compliance officer issued Woodside with a notice directing the cessation of activities within an area outlined on an accompanying map until the status of the site could be determined.¹¹⁹ In reply to this letter, Woodside wrote to the deputy director-general of DAA (then known as the Western Australian Department of Indigenous Affairs) requesting the advice and map issued to Woodside on 25 July

114 Letter from Registrar of Aboriginal Sites, V Novak, to Executive Director of the Kimberley Land Council, P Dodson, entitled WA Museum on the report of the ethnographic survey of Exploration Licence Applications E04/645 E04/646 and E04/647 in the West Kimberley, 18 July 1991.

115 Letter from Registrar of Aboriginal Sites, V Novak, to Premier and Minister for Aboriginal Affairs, entitled 'Temporarily protected areas: Aboriginal Heritage Act 1972–1980 Cape Latouche Treville, Willie Creek and Quondong Point, Broome locality.'

116 DAA (formerly identified as the Department of Indigenous Affairs in 2011) site recording form lodged by DAA senior heritage officer and Joseph Roe on 27 July 2011, obtained under Freedom of Information (FOI) from DAA.

117 Emails between J Cook, the Department of Indigenous Affairs senior compliance officer, and Woodside Energy Ltd, 6 July 2011, obtained under FOI from DAA.

118 Letter between J Cook, the Department of Indigenous Affairs senior compliance officer, and Woodside Energy Ltd, 8 July 2011, obtained under FOI from DAA.

119 Letter between J Cook, the Department of Indigenous Affairs senior compliance officer, and Woodside Energy Ltd, 25 July 2011 and accompanying map, obtained under FOI from DAA.



Figure 10.2: The proposal for a gas hub to be built at Walmadan saw extended community protests, intensifying in 2011 as Woodside brought machinery onto country (photo: Rod Hartvigsen)

be withdrawn.¹²⁰ The deputy director-general acquiesced to Woodside's request by recalling the map and letter provided on 25 July, overriding the advice of his own officers in doing so. The deputy director-general offered Woodside a more refined map with a dithered boundary and an explanation that the site in question was culturally sensitive, making information about it available only to initiated males.¹²¹

Woodside replied that they 'had no basis on which to consider that credible new "site information" exists in relation to a "possible site" anywhere, let alone across the extent of the area proposed by the [refined map]' (Vaughan 2015, p. 70). Woodside requested the second letter and map be withdrawn and that any new heritage site information be given to Woodside to review before it was given to the ACMC for

120 Letter between Woodside Energy Ltd and the Department of Indigenous Affairs deputy director-general, 3 August 2011, obtained under FOI.

121 Letter between the Department of Indigenous Affairs deputy director-general and Woodside Energy Ltd, 8 August 2011, obtained under FOI.

consideration.¹²² These events demonstrate the influence of industry on the regulator. That influence is substantiated by similar industry pressure that was exhibited in the Lake Yindarlgooda dispute, where mining companies were successful in influencing the regulator to remove Lake Yindarlgooda from the Register of Aboriginal Sites (Vaughan 2015, p. 70).

The site and its significance related to the practice of men's law in the region, and the DAA recording officer assessed it as meeting all the site significance criteria under s. 5(a)–(d) of the WAAHA. DAA officers assessed the site type as including artefact, ceremonial, midden, quarry, repository/cache, fish trap, skeletal material/burials and mythological components. The gender restrictions of the site were noted on the form.¹²³ The Aboriginal informant made clear that the significance of the site in question was integral to its connection to the Ullolong song cycle, which was one continuous site, stating that mapping individual sites as places that did not join had the effect of segmenting the significance.¹²⁴ This assessment is reflected in *A management report for the Lurujarri heritage trail, Broome, Western Australia* (Bradshaw & Fry 1989) and the 1991 report written by anthropologist Nicholas Green, locally known as the 'Terrex report' (Green 1991). The Terrex report was produced for the purpose of documenting the ethnographic significance of parts of the Dampier Peninsula after the company Terrex applied for an exploration licence for mineral sands in the area (the application was rejected by the Wardens Court, where Nicholas Green presented as an expert witness) (Howard 1991).¹²⁵

The difficulty of attempting to subsume Aboriginal definitions of 'site' and concepts of significance within the mechanisms of the WAAHA is stark in consideration of the James Price Point evidence. Traditionally a large yet definable portion of the landscape was culturally significant, containing nodes of connected yet discrete sites. The WAAHA was not designed to account for large landscape

122 Letter between Woodside Energy Ltd and the Department of Indigenous Affairs deputy director-general, 5 September 2011, obtained under FOI.

123 DAA (formerly called the Department of Indigenous Affairs) site recording form lodged by DAA senior heritage officer and Joseph Roe on 27 July 2011, obtained under FOI from DAA.

124 Brief by senior heritage officer about a large area that may be a site covering registered sites in the James Price Point area, 19 July 2011, obtained under FOI from DAA.

125 *In the Matters of Applications for Exploration Licenses E04/645, 646 and 647, between Terrex Resources N.L. and Bidyadanga Aboriginal Community, Kimberley Conservation Group, Broome Botanical Society, Kimberley Land Council on behalf of Goolarabooloo Aboriginal Community and Boonaroo Pastoral Pty Ltd*, Wardens Court of Western Australia, transcript of proceedings, Broome, 24 July 1991.

sites such as the Ullolong song cycle; therefore, despite the value of the area being known and accepted, discrete sites within the song cycle were left unprotected (see Lewis & Scambary, Chapter 9, for an explanation of site and moral topographies). In the James Price Point case, Woodside was able to leverage the disjoint between Aboriginal definitions of significance and applicability of Western law to deny the existence of the site. As a result, Woodside was effectively able to ‘define’ what an Aboriginal site was, while the Aboriginal custodians were unable to protect their sites as they define them in the context of broader cultural landscapes: ‘The damage started in early May 2011 and continues to this day. My most important cultural responsibility as handed down to me from my Lulu (late grandfather) is to look after these sacred sites’ (Roe 2011, p. 1).

DAA, as the regulatory body, was also an arm of the government, which in turn was a proponent of the James Price Point gas hub. It appears likely that there was commercial motivation for Woodside to achieve its outcomes, which incentivised the DAA to smooth the heritage approval process. Despite the verifiable body of evidence on the significance of the Ullolong song cycle, LSC11 has been determined by DAA not to be a site and therefore it does not have legal protection under the WAAHA. The great traditional cultural significance of this heritage site as Aboriginally defined was left unprotected through the Western legislative instruments of native title and heritage laws.

Lake Yindarlgooda heritage protection case study

Similarly, FOI documents surrounding the Lake Yindarlgooda dispute illustrate the influence of industrial lobbying in removing legal protection from Aboriginal sites, thus sidelining Aboriginal rights to protect heritage. Lake Yindarlgooda was registered in December 2011 after the ACMC found that s. 5(b) of the WAAHA, which applies to sacred, ritual or ceremonial sites, applied to it. After three months it was removed from the Register of Aboriginal Sites by the Chief Heritage Officer (CHO) after the director of Aruma Resources complained about the effect of the registration on the 16 tenement holders proximal to the lake. Subsequent events would ensure that the lake was not put back on the register.

In November 2012 the CHO would override the advice of a departmental officer that the lake was a men’s site, claiming that mythological sites were not applicable to the WAAHA.¹²⁶ This case would mark the beginning of a swathe

¹²⁶ Email between the DAA chief heritage officer, A Rayner, and DAA senior heritage officer, S Keenan, on 19 November 2012, obtained under FOI.

of site deregistrations based on the interpretation that mythological sites are not sacred and therefore do not have the protection of the WAAHA (Vaughan 2015, pp. 70–1). It is apparent that sites are not being assessed on their inherent value alone but also on their relative value to surrounding geological and environmental assets.

Importantly, these value judgements under law are not made by the Aboriginal custodians of the heritage in question but by a government body that represents the Western Australian community at large. Therefore, the heritage value in comparison to the other values the land may hold (for example, economic value) can be overlooked or diminished by other assessors in the community. For example, the Western Australian Minister for Aboriginal Affairs stated in a letter to Integra Mining that ‘the views of individuals or companies who may be affected by the registration of a site will be considered when determining whether or not Lake Yindarlgooda is an Aboriginal heritage site to which the [WAAHA] applies.’¹²⁷

What is an Aboriginal ‘site’? Changing interpretations under Western Australian law

Statistics (Figure 10.3) attest to the dramatic changes made to the administration of the WAAHA in the last four years. In the first half of 2011, 80 per cent of heritage places assessed by the ACMC were determined to be sites to which the WAAHA applied; by 2014 this number had dropped to six per cent. Reasons for this dramatic decrease in the legal recognition of sites are discussed below.

Section 5(b) of the WAAHA applies to ‘any sacred, ritual or ceremonial site which is of importance and special significance to persons of Aboriginal descent’. This is the only part of s. 5 (‘Application to places’) that must be of ‘importance’ or ‘special significance’ to Aboriginal people only. However, it is this section that has caused contention in recent years as the DAA reinterprets the definition of the term ‘sacred’ for the purposes of the WAAHA.

Since November 2011, some registered sites consequently afforded legal protection began to be deregistered. These deregistrations occurred after new guidelines to s. 5 of the WAAHA were implemented based on advice received from the State Solicitor’s Office (SSO) (Vaughan 2015, p. 72). This advice was sought by the chair of the ACMC in August 2012 and was subsequently applied

¹²⁷ Letter between Minister Peter Collier of Aboriginal Affairs and Integra Mining on 24 April 2012, obtained under FOI.

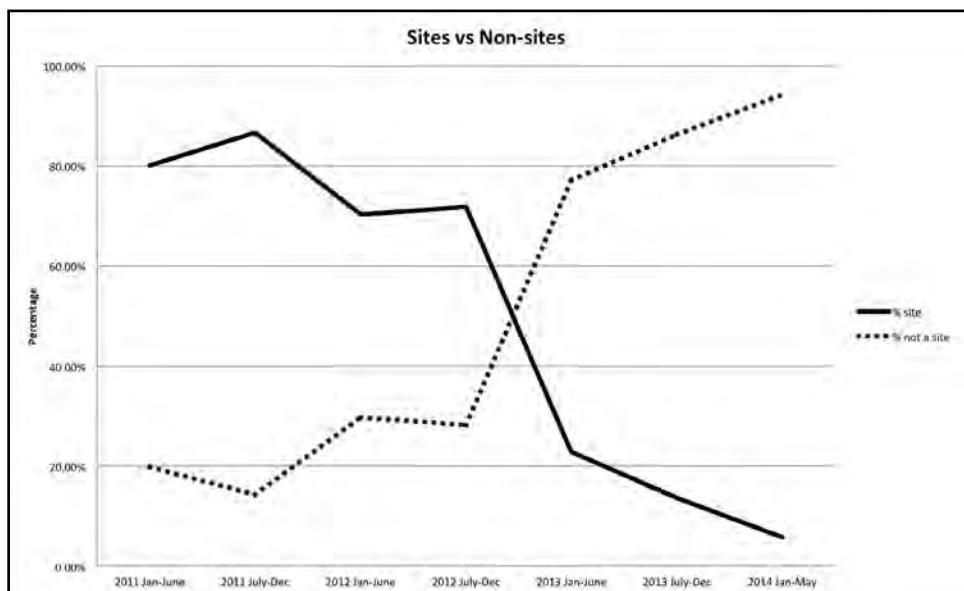


Figure 10.3: Statistics from January 2011 to May 2014 express a 74 per cent decline in the number of heritage places the ACMC has accepted as sites under the WAAHA as a percentage of the number of heritage places assessed

and tabled by the ACMC on 21 November 2012 (Vaughan 2015, p. 72). Based on this advice, at least 36 sacred, ritual or ceremonial sites (under s. 5(b)) have been deregistered (WALC 2015a, 2015b). Thirty-four out of 36 of these deregistered sites (96 per cent) were subjected to actual or proposed development (WALC 2015b, 2015c). During this period a further 16 heritage places that were reported to the DAA were determined by the ACMC not to qualify as ‘sacred’ under the WAAHA (WALC 2015a). This SSO advice was sought after a s. 18 notice was received from Woodside for work at James Price Point, as the ACMC anticipated it would have to form an opinion as to whether or not to register the song cycle that formed part of the land subject to Woodside’s s. 18 notice (WALC 2015b).

A challenge was mounted over the removal of Marapikurrinya Yinthia (Port Hedland Port) from the Register of Aboriginal Sites in the Perth Supreme Court in December 2014, which resulted in the DAA’s new interpretation of s. 5(b) being invalidated (Perpitch & Gartry 2015). In *Robinson v. Fielding* [2015] WASC 108, Chaney J found the ACMC had fallen into ‘jurisdictional error’ in its interpretation of the legal definition of an Aboriginal ‘site’ (Vaughan 2015, p. 71). Further, it was established that ‘by requiring evidence of specific religious

use, the ACMC did not have regard to associated sacred beliefs as the primary consideration as required by s 39(3)' (Vaughan 2015, p. 40).

In his decision, Chaney J found that the question of specific activities taking place on the land was not relevant to the question of whether or not the area concerned was a 'sacred site' but subsequently 'may be relevant to the assessment of the level of importance or special significance [of the site]' (*Robinson v. Fielding*, [88]). Further, Justice Chaney reasoned that, for legislation dealing with Aboriginal culture, 'the word "sacred" must necessarily contemplate spiritual and mythological purposes' (*Robinson v. Fielding*, [87]). It follows that, if the land or water is associated with some kind of spiritual or religious belief, that area can be a 'sacred' site under s. 5(b) (*Robinson v. Fielding*, [88]). Additionally, Chaney J reasoned that there was no justification in ascribing 'sacred' no meaning beyond ritual or ceremonial (*Robinson v. Fielding*, [98]). Justice Chaney on this basis concluded that the ACMC acted upon a misconception of s. 5(b). How Aboriginal sacredness is viewed through the lens of a separate culture will not alter the emic Aboriginal perceptions of significance. It undermines any genuine application of Aboriginal heritage legislation to deny protection to places that are significant as Aboriginally defined. Despite s. 5(b) stating that it applies to sites of importance and special significance to persons of Aboriginal descent, in practice this role of defining what is important has been appropriated by the DAA.

The case of *Robinson v. Fielding* has demonstrated that the ACMC and DAA acted contrary to Australian law as well as Aboriginal custom in its interpretation of 'sacred' site. In this instance, Australian law has upheld the validity of Aboriginal definitions that were stated previously by those who drafted the WAAHA in 1972. *Robinson v. Fielding* is likely to have flow-on effects to other 'sacred' or 'mythological' sites that have been removed from the Register of Aboriginal Sites as the ACMC considers the judgment. However, sites such as Lake Yindarlgooda that were removed from the register over two years before the *Robinson v. Fielding* decision were left vulnerable to a lack of practical protection.

The proposed amendments to the WAAHA will give a significantly enhanced role to the CEO of the DAA in determining whether a site exists and whether to permit damage or alteration to a site which the CEO is satisfied is not 'significant' (LSWA 2014). This is problematic if definitions of 'significant' heritage of the assessor (currently the ACMC and proposed to be the CEO of the DAA) differ from those of Aboriginal people and the wider community, as was seen at Lake Yindarlgooda, James Price Point and Marapikurrinya Yinthia. Arguably the regulator should not have the role of *defining* what is worthy of protection. Rather,

it holds the role of enforcing and regulating the protection of places defined as being significant to Aboriginal people in particular and the Western Australian community more broadly.

However, protection of sites through enforcement of the law when correctly applied is also in jeopardy. In the 2011 report *Ensuring compliance with conditions on mining*, the DAA was criticised by the Western Australian Auditor-General (Murphy 2011) for being a poor regulator. It was found the DAA did not actively monitor compliance of mining companies with the WAAHA and, when it found instances of non-compliance, it failed to act. This has possibly resulted in Aboriginal sites throughout Western Australia suffering damage without the state acting or knowing (Murphy 2011). Further, based on the evidence available from FOI documents on the James Price Point and Lake Yindarlgooda heritage disputes obtained from the DAA, I argue the DAA is susceptible to external political influences and industrial lobbying. This has been exacerbated by the exploitation by government of the variable conceptions of what Aboriginal ‘heritage’ is and who should be defining it in order to privilege developmental interests in instances where developments may be threatened by the existence of Aboriginal heritage sites. Demonstrably since 1972 there has been a radical shift in the way the WAAHA has been administered — from an instrument that sought to encompass the multiple values attached to Aboriginal heritage to a ‘statutory mirage’ that has in many cases been powerless to prevent or prosecute the destruction of cultural heritage against the wishes of traditional owners, heritage professionals, conservationists and the wider public (Chaloner 2004).

Aboriginal site protection under Western law and values

The Western Australian mining boom kept Australia in an enviable global position throughout the global financial crisis. Australia’s mineral extraction has contributed to the country having the highest median per capita wealth in the world (Keating et al. 2013). Western Australia’s resource extraction is economically important to the nation, with Western Australian exports of minerals and petroleum accounting for 47 per cent of the national total (ABS 2014). Western Australia’s growth has augmented ahead of the national average during the resource boom and per capita gross state income has grown to about 50 per cent above the national average in 10 years (BCEC 2014, p. 10).

The importance of Western Australia’s development to national prosperity is greatly valued by government, often trumping the perceived value of heritage

conservation. In this system of dominant values it can be difficult for Aboriginal people to assert their cultural rights and conservation practices if they are incompatible with alternative land use. As a result of Western Australia's economic expansion and successive governments' predisposition towards developmental interests, Aboriginal heritage places of importance and significance to Aboriginal people, scientists and Australia more generally have been impacted on or destroyed by development. The significance of this normalised incumbency is magnified because of Australia's social history of colonial domination, with its legacy of Indigenous disadvantage and cultural subjugation that continues into the present (Vaughan 2015).

Heritage sites may be valued for their cultural values, including their association with stories and tradition; for their archaeological and scientific values; and for their aesthetic values. In Western Australia the real, yet often subliminal, issue is: who has the right to *define* what a 'site' is and therefore what is protected under law? The WAAHA seeks to preserve 'important' and 'significant' sites on behalf of the community, yet community views on what is important and significant do not always align. This is problematic from the outset if it is accepted that Aboriginal people have a special interest in the preservation of their sites. Under s. 39 of the WAAHA the ACMC, as the statutory government advisory body, must 'evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons'. In other words, the ACMC acts as 'the community' in assessing the significance to Aboriginal people of a place or object. The minister, as the final arbiter under s. 18(3), must have regard to 'the general interest of the community' in deciding whether to consent to excavation, destruction, damage, concealment or alteration of a site. This decision is usually made in the context of an application for an alternative land use proposal (for example, mining). Thus the decision necessarily is reduced to a choice of what will most benefit the Western Australian community: the protection of heritage or the destruction of heritage for development.

As population and development continue to grow in Western Australia, it is recognised that not all heritage places can be preserved and a balance must be struck between preservation and the need to accommodate development for future prosperity. Hence, with the WAAHA up for review, there is an opportunity to reform the existing system so that it is a more transparent and fair process.

Conclusion

In 1972 the drafters of the WAAHA in effect acknowledged the authenticity of Aboriginal traditional law and custom that would be legally recognised with

native title legislation 20 years later with the *Mabo* decision. Since its venerable beginnings, Aboriginal heritage protection has devolved to the phantasm applied at Walmadan (James Price Point) in 2011.

Demonstrably there are in fact multiple ways by which Aboriginal peoples' inherent rights to protect sites are undermined by current state government heritage laws and policy frameworks in Western Australia. The government regulator is susceptible to political and industrial lobbying and may also be considered to be in conflict of interest given that the government is often a proponent of the development project, as was the case at James Price Point. Contentious definitions of what constitutes a 'site' have been implemented by the DAA, yet they are incongruous with Aboriginal definitions, as illustrated by the Lake Yindalgooda and Marapikurrinya Yinthia cases. Compounding this, the DAA has also been found to not regulate or act upon instances of site disturbance. The multifarious nature of cultural heritage protection failure is symptomatic of a system that gives the role of 'heritage protector' to the state rather than to Aboriginal people. As has been demonstrated here, the state's role of 'heritage protector' often cannot be reconciled with its other roles, such as ensuring economic development and state development (Lewis & Scambary, Chapter 9).

Despite the demonstrably negative impacts that recent administrative changes have had on heritage protection on Western Australia and the arguably detrimental proposed reforms to the legislation, the fact that the WAAHA is finally on the public policy agenda is a rare opportunity. Substantial public discourse continues to surround the amendment of the legislation, raising the profile of Aboriginal heritage in the wider community. It is my recommendation that any considerations of legislative change should review and make use of previous rigorous, taxpayer-funded reports on the WAAHA such as the 1995 Senior review, which I believe is still relevant in many of its recommendations. In particular, I advocate for the inclusion of provisions that define a statutory role for the voice of Aboriginal people in the legislation that was recommended in the 1995 Senior review and in many of the 2014 submission received by the government (for example, McIntyre 2014). A review of the WAAHA should be referred to a parliamentary select committee, as prominent legal, political and heritage specialists (for example, Viner 2015) have called for, so that the substantive issues embedded within the proposed 2014 Bill can legitimately be reviewed.

Striking a fair and balanced solution to Western Australia's long-contested heritage management system will create more certainty, serving to benefit all heritage stakeholders in Western Australia, including industry. Western Australia

is long overdue for a legislative overhaul in this space, and communities of interest are hopeful the state can capitalise on the political attention currently being paid to this issue. With the current significant grassroots advocacy for positive change, Western Australia is well placed to learn from the history of the WAAHA from Weebo to Walmandan and to build a functional system that can serve the state's cultural assets into the future.

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Chapter 11

MURUJUGA NATIONAL PARK: CO-MANAGEMENT OF CULTURAL HERITAGE THROUGH A FUTURE ACT AGREEMENT

Jo McDonald

The Dampier Archipelago (or Murujuga, as it is known to the local Aboriginal communities) contains one of the world's largest collections of rock art, which has national heritage significance. The Ngarluma and Yindjibarndi native title determination resulted in native title being granted across the majority of the claim area (Daniel v. Western Australia [2003] FCA 666), but the Ngarluma and Yindjibarndi peoples effectively ceded their claim to the archipelago. Overlapping claims by Yaburara, Mardudhunera and Wong-Goo-TT-Oo were not successful. Instead of native title over this place, the Ngarluma-Yindjibarndi — and Yaburara, Mardudhunera and Wong-Goo-TT-Oo — were party to the Burrup and Maitland Industrial Estates Agreement. This chapter discusses the current governance structure and the implications for heritage management resulting from this negotiated outcome.

Introduction

The Dampier Archipelago consists of 42 islands on the Pilbara coast near the Tropic of Capricorn (see Figure 11.1). Located around 1200 kilometres north of Perth, this archipelago has become one of the largest industrial hubs in the north-west, with Dampier being a railhead for Pilbara iron ore — a port providing access to ships which export this iron ore (as well as salt and liquefied natural gas (LNG)) and a processing plant for LNG for the North West Shelf.

In 2007 the rock art and stone arrangements of the Dampier Archipelago (including Burrup Peninsula) were listed on the National Heritage List because of the place's outstanding values (meeting criteria a, b, c, d and f under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) — see Commonwealth of Australia 2007). This chapter identifies the tensions between community aspirations, social significance, heritage values and mining interests in a landscape that has been contested since its earliest historic encounters between European settlers and Aboriginal people. Early interactions arising from pearling and pastoral interests resulted in the Flying Foam Massacre (Gara 1984; Monument Australia n.d.) — a sustained effort to annihilate the Yaburara speakers.

In the more recent past, the quest for a Pilbara resources boom by the state government and federal interest in encouraging international mining agreements have engulfed native title rights and interests. This chapter also explores how the management of cultural heritage — for both its cultural and scientific values — has fared in this contested landscape.

A brief history of the Dampier Archipelago

Aboriginal people from this region (the Ngarda-Ngarli) believe that their country was created by ancestral beings and that they have lived in this area since time immemorial (Mardudhunera Yaburara, Ngarluma Yindjibarndi and Wong-Goo-TT-Oo 2004; Tindale 1974). The first European to visit the archipelago (in 1699) was William Dampier, and this place was named after him. He encountered no Aboriginal people during his brief landfall on an outer island, which he named Rosemary Island based on mistaken identification of a perennial bush growing there. Almost 120 years later, Captain Phillip Parker King explored the north-west coastal rivers of Australia. He made landfall on the Dampier Archipelago and noted that the 'tracks of natives and their fire-places were everywhere visible, and around the latter the bones of kangaroos and fishes were strewed' (King 1827, p. 37). King's party encountered the archipelago's inhabitants both in the water and on land and, in 'consequence of the communication that we had with these natives' (King 1827, pp. 48–9), he named several of the inner islands near Dampier the Intercourse Islands.

Francis Gregory's estimation of millions of acres of land suitable for grazing in the Pilbara region and the possibilities of a pearling industry led to the establishment of a port at the mouth of the Harding River in 1863 (Earls 2012). Pearling and shore-based whaling industries were established

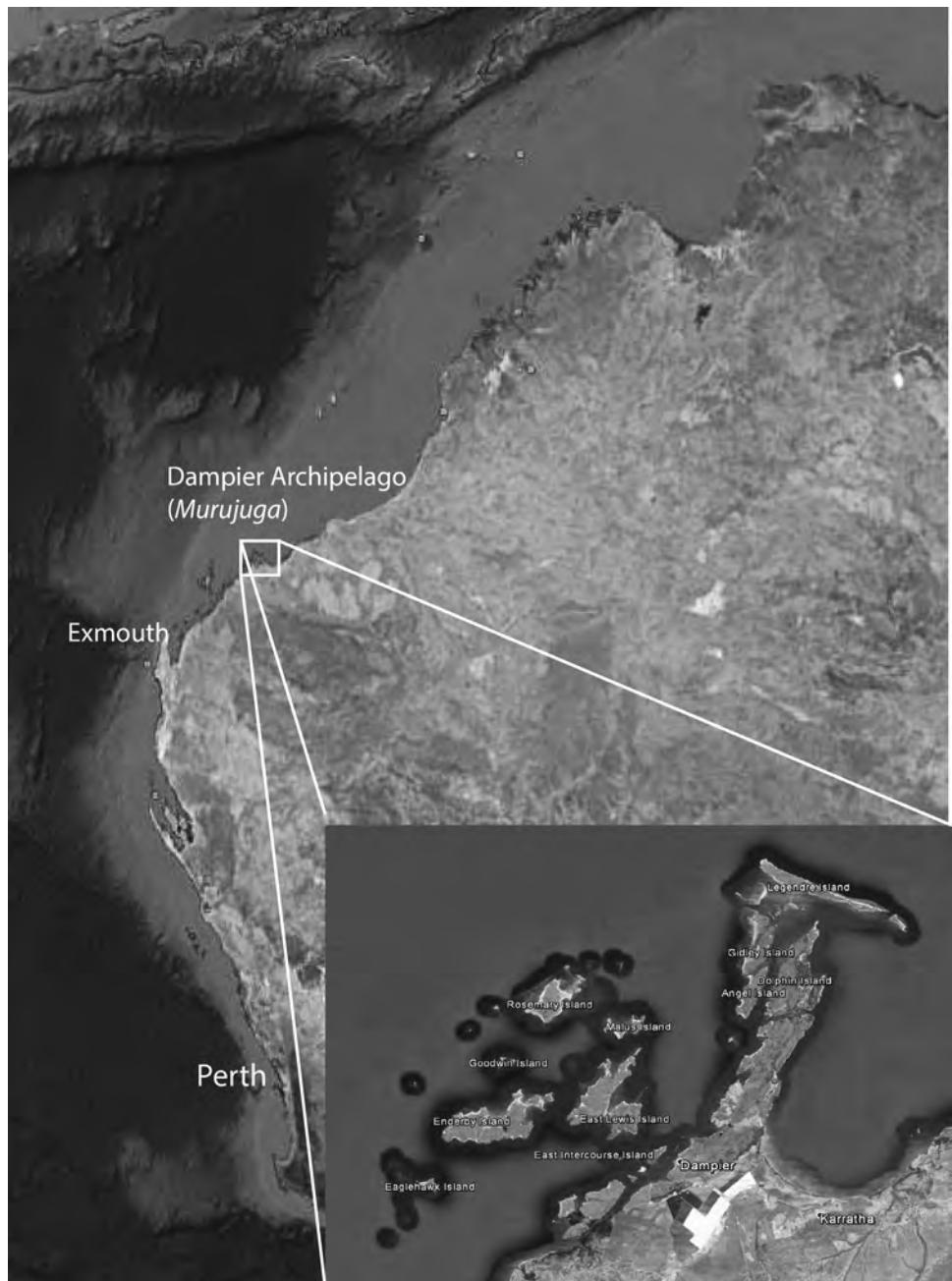


Figure 11.1: The Dampier Archipelago on the coastal Pilbara

in the area soon after and, while Cossack was the main port for the pearling industry, the fleet also established small stations at various locations around the Dampier Archipelago (Forrest 1996). Aboriginal people of the Pilbara played a significant role in both the pearling and pastoral industries (Figure 11.2), but these industries and shore-based whaling began the processes of Aboriginal dispossession.

In 1868, Constable Griffis arrested Coolyerberri, a local Aboriginal man, for stealing flour. Griffis had earlier abducted Coolyerberri's wife. Griffis and two companions were killed when Coolyerberri was rescued by a group of Aboriginal people. The Government Resident responded by swearing in 19 special constables who, over several days, attacked the Aboriginal camps on the Burrup Peninsula and islands to the north (Gara 1983). Records vary but indicate that between five and 40 Yaburara men, women and children were killed during what has become known as the Flying Foam Massacre (Gara 1983).



Figure 11.2: An Aboriginal engraving of a pearling lugger on the pastoral station Inthanoona (photo: Alistair Paterson)

A deep-water port to serve the Pilbara has been a major economic issue since the region's mineral wealth was first discovered. Depuch Island was an early candidate (in 1908), with an early scheme for a railway between Marble Bar and the coast. In the 1960s Depuch Island was again considered for this port. However, because of the island's documented exceptional Aboriginal heritage values — its extensive rock art galleries and place on a significant Aboriginal Dreaming track (McCarthy 1961; Palmer 1977; Ride & Neumann 1964) — it was decided that the port should be built elsewhere (Bednarik 2006, p. 25; Vinnicombe 2002, p. 6;). Despite having no knowledge about its Aboriginal heritage values, in 1963 the Western Australian Government decided to develop the town and port of Dampier. The town was constructed by 1966.

In 1970 the Department of Aboriginal Sites was established at the Western Australian Museum. In 1972 the *Aboriginal Heritage Act 1972* (WA) (WAAHA) was passed, offering legislative protection for the first time (under s. 5; see also Vaughan, Chapter 10) to:

- (a) any places of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
- (b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
- (c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;
- (d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

As Vaughan (Chapter 10) also discusses, this legislation was preceded by the Weebo dispute (in 1969), which highlighted the fact that Western Australia had no way of protecting Aboriginal heritage (it was also part of a national groundswell of recognition given to Aboriginal heritage after the 1967 referendum, which finally acknowledged Aboriginal people as citizens of Australia (Behrendt 2007)). This heritage legislation explicitly recognised the role of traditional

custodians (WAAHA pt II, s. 9) and broadly strengthened Aboriginal people's legal standing in relation to their own cultural heritage in Western Australia. It granted unprecedented power in negotiations with developers over heritage protection (see Martin, Sneddon and Trigger, Chapter 6).

But this new legislative protection for Aboriginal heritage coincided with significant mineral and gas finds in the Pilbara and on the North West Shelf and it postdated the construction of the iron ore and salt-shipping facilities at Dampier, which were merely the beginning of infrastructure development on the Burrup. The Clough (1978) report on port and land planning on the Burrup Peninsula concluded that there was no serious conflict between industrial needs and conservation requirements despite a report from Bruce Wright (then Registrar, Department of Aboriginal Sites) identifying the high scientific value and specifying the need for consultation with Aboriginal people (Wright 1980). The Western Australian Government adopted the Clough report as a guideline for future development on the Burrup, and Withnell and King bays were chosen for the onshore LNG (Liquefied Natural Gas) treatment plant for North West Shelf Gas. A program to salvage Aboriginal heritage impacted on by the LNG began in 1980 (Vinnicombe 1987a). This 12-month field program, employing up to 10 archaeologists at any one time, resulted in the systematic recording of 720 sites in an area of 13.4 square kilometres (Vinnicombe 2002).

In 1984 three areas on the Burrup were declared Protected Areas under s. 19 of the WAAHA 'in recognition of their outstanding importance'. These Protected Areas were the Dampier Climbing Man Panel near Withnell Bay; part of the northern Burrup containing a number of important sites; and the Skew Valley and Gum Tree Valley site complexes in the Dampier salt leases (Western Australia 1984a, 1984b). These sites were also listed on the (then) Register of the National Estate.

The Pilbara 21 final strategy report (Pilbara 21 1992) proposed a 'blueprint' for different land use needs on the Burrup and in the wider Pilbara. This earmarked the western third of the peninsula for industrial uses and a transport corridor to Legendre Island. The industrial zone also included the southern Burrup (between Hearson and Cowrie coves). No conservation zones were identified; rather, 'minimum use' zones indicated areas where less impact was envisaged. Heritage areas were identified in this land use plan, although these did not conform to known boundaries of registered sites and the plan did not acknowledge the absence of a systematic survey (cf. Veth et al. 1993, p. 22). Indeed, the systematic survey was done across a 20 per cent sample of the northern Burrup under the National Estate Grants Program and completed

by a team of experienced archaeologists and with more than 30 traditional owners from Roebourne (Veth et al. 1993, acknowledgements) and was the first major involvement of Aboriginal people in the documentation of their heritage in this place — (although Michel Lorblanchet's excavations in Skew and Gum Tree valleys in 1977 did involve visits to these sites by senior local custodians (for example, Coppin Dale, David Daniels and Herbert Parker) and efforts to elicit anthropological insights into contemporary values (Ward & Mulvaney forthcoming). Subsequent work, mostly led by Pat Vinnicombe (2002) and that done by Elizabeth Bradshaw (1995) involved more traditional owners being involved in survey work focused on documentation of Aboriginal heritage. The Pilbara 21 final strategy report noted the importance of the engravings and the associated archaeological record, if not the contemporary significance of the area to Aboriginal people (Pilbara 21 1992, pp. 1, 69):

The cultural values of the area are immense as it is one of the richest petroglyph (rock art) sites recorded. This is accompanied by intensive midden areas, camp sites, quarry sites shelters and ceremonial stone arrangements...The Pilbara region is a major Australian rock engraving area containing a greater number and variety of figures than any other part of the continent.

Throughout the 1990s and into the new millennium, numerous further mining, port and related infrastructure developments have resulted in additional large-scale and small-scale survey work — and site destruction — on approximately 16 per cent of the total Burrup Peninsula landmass (McDonald & Veth 2009). Regulated heritage practice in Western Australia has meant that the majority of this more recent work has been done with the involvement of traditional owners. With the arrival of the native title era and the complex set of social relationships in this landscape, this often has meant that multiple surveys of each development have been completed, with each of the groups having surveys completed by their own selected heritage practitioners (see below).

Native title

The *Native Title Act 1993* (Cth) (NTA) introduced a new era of complex social contestation on the Burrup Peninsula. The first native title claim lodged to cover the Dampier Archipelago was that of the Ngarluma and Yindjibarndi in 1994. The rapidity of this claim's lodgement after the NTA is remarkable, and this was the first Pilbara claim to be determined (ATNS 2005). Yaburara, Mardudhunera and Wong-Goo-To-Oo claims were lodged in 1996 and 1998 respectively. In

January 2000, before any of these cases had been decided, the State of Western Australia notified its intention to acquire land for the construction of heavy industrial estates on the Burrup Peninsula and adjacent Maitland area. It also signalled its intention to acquire any native title rights and interests that the native title parties may have had (ATNS 2003). Under the NTA (ss. 29, 30, 61(2), 75, 253) all four native title claim groups (Ngarluma and Yindjibarndi combined for this hearing) had the right to negotiate with the Western Australian Government.

During this compulsory acquisition of native title/future act agreement negotiations over the Burrup Peninsula, one of the jointly named applicants on the Ngarluma Yindjibarndi claim, Mr David Walker, refused to sign the agreement. The future act agreement could not be finalised without Mr Walker's signature (NNTT 2015); hence, orders were sought to remove him (and three others, now deceased) from the group named as the applicant. This claim became the first in history to have the applicants successfully replaced under NTA s. 66B. It was argued (under s. 66B(1)(a)(i)) that Mr Walker was no longer authorised by the native title claim group to make the claimant application and deal with matters arising in relation to it (Glaskin 2004). The seniority of this man in the Ngarluma Yindjibarndi group, and his objection to this denial of connection to this place, was silenced through legal argument about 'the community of interest'. It is interesting to ponder what the outcome might have been if cultural and traditional mechanisms within this community had been allowed to prevail, the legal process were not so protracted (with three other senior claimants dying before the claim was heard) and the financial stakes were not so high.

Because the state had commenced arbitral proceedings in the National Native Title Tribunal under s. 35 of the NTA, the s. 66B application was brought on as a matter of urgency, and a determination was sought that the proposed acquisition should proceed unconditionally.

The Ngarluma and Yindjibarndi native title case continued without Mr Walker, and on 3 July 2003 (with further reasons given in December that year) its successful determination was reached (in *Daniel v. Western Australia* [2005] FCA 536 (*Daniel*)). The parallel and overlapping claims by the Yaburara, Mardudhunera and Wong-Goo-TT-Oo were also heard at this time. As a result of the negotiated agreement with the state, the Ngarluma and Yindjibarndi people effectively ceded their claim to the Burrup Peninsula and the surrounding islands (referred to as the Burrup) and this area was excluded from their successful claim

(as were the offshore waters and Depuch Island: *Daniel* [2(a)–(c)]). The Yaburara, Mardudhunera and Wong-Goo-TT-Oo claimants asserted that the area was inhabited by the Yaburara people, but their claim was not upheld by the court (which determined that Yaburara was a coastal extension of Ngarluma: *Daniel*, [24]). The Wong-Goo-TT-Oo claim was dismissed on the grounds that the native title claim group in that application was not, and had never been, a ‘society’ for the purposes of s. 223(1) of the NTA. There have been a number of appeals by Yaburara, Mardudhunera and Wong-Goo-TT-Oo against these decisions (see NNTT 2009), and the native title outcomes continues to create divisions within the broader community.

The Burrup and Maitland Industrial Estates Agreement

The compulsory acquisition of any native title rights and interests in land on the Burrup Peninsula and two future act determination applications for the Burrup Industrial Estate, Intercourse Islands and the Maitland Industrial Estate resulted in the Burrup and Maitland Industrial Estates Agreement (BMIEA). The BMIEA is between the State of Western Australia, the Western Australian Land Authority and the Ngarluma, Yindjibarndi, Wong-Goo-TT-Oo, Yaburara and Mardudhunera peoples (Department of Premier and Cabinet 2005; Flanagan n.d.). In exchange for the surrender and permanent extinguishment of native title on the Burrup and Maitland estates industrial land, these native title parties received substantial financial benefit, including freehold title to the industrial and non-industrial land and co-management of the non-industrial land. As noted, the signing of this agreement pre-empted any native title determination made by the Federal Court in relation to any of the three native title claims. The benefits contained in the agreement were intended to endure regardless of whether or not the Federal Court determined native title to exist here, but the effect of the signing of the agreement ceded the native title rights for this place. In July 2003, the Federal Court found that non-exclusive native title rights still existed over the Ngarluma Yindjibarndi claim area but that native title no longer existed over the Burrup Peninsula (see above — *Daniel*, [24]). Given the success of the Ngarluma Yindjibarndi claim more widely, one has to ask what would have happened to the Burrup Peninsula had David Walker not been removed from the claim because he objected to the exclusion of this area from the claim and the community of interest refused to sign the BMIEA. Given the exclusion of other key mining areas from this claim (for example, the Hamersley Ranges area: *Daniel* at [2d]), it is possible that it would have fallen within the ‘Total extinguishment area’

(*Daniel*, sch 1), which is defined as areas, land and waters which were subject to a range of existing interests. However, the compulsorily acquisition of any native title rights and interests in land on the Burrup Peninsula and two future act determinations pre-empted the court's finding. It also provided certainty to a state government balancing multiple proponents' multibillion-dollar investment proposals (Flanagan n.d., p. 1).

The BMIEA Implementation Deed is a consolidation of the implementation deed and the BMIEA. The BMIEA is unusual in that it does not contain any confidentiality clauses, making details available to the public (ATNS 2003). The agreement makes passing reference to the fact that the Burrup Peninsula contains the world's largest collection of rock art. Its main focus, however, is on the land holdings in the Burrup Peninsula industrial estate (15 square kilometres); the proposed Maitland industrial estate (33 square kilometres); and residential and light industrial land in and around Karratha (4 square kilometres). The agreement provides for the benefits discussed below.

Burrup non-industrial land

Freehold title to the Burrup non-industrial land, which consists of 4.9 square kilometres of land to the high water mark, was conditional on existing easements and other interests, including roads; the land being leased back to the state for 99 years (with a 99-year option); an agreement between Ngarluma Yindjibarndi and the Western Australian Department of Parks and Wildlife (then the Department of Conservation and Land Management) to manage the land in accordance with a management plan; and a promise by the native title parties on the title that there cannot be any buildings on the coastal strip, except for recreational purposes.

The BMIEA included agreement to commission and fund (\$500,000 over 18 months) an independent study to develop a management plan for the conservation estate in accordance with specified terms of reference and advised by an advisory committee. Management funding of \$450,000 per annum over five years was promised for management of the land. It was envisaged that a visitors/cultural/management centre to the value of \$5.5 million would be erected on the land and that infrastructure funding to the value of \$2,500,000 would also be given.

Flanagan (n.d., pp. 10–12) indicates that this outcome was reached under extreme time pressure (the negotiations were completed over four months and included 30 community meetings) without the benefit of a separate economic and social impact assessment but after Pilbara Native Title Services negotiated a counter-offer

document making a political and moral case for the negotiation of a comprehensive agreement with the Ngarluma and Yindjibarndi, with measures and benefits including land, cultural heritage and environmental protection, financial compensation, residential and commercial land, improved roads, housing, education, employment and training that would represent ‘just terms’ compensation for the acquisition of native title (following Smith 2001).

National heritage listing

Subsequent to the native title and BMIEA outcomes, between July 2003 and March 2004 the Australian Government received three nominations for listing the Burrup Peninsula (as part of the Dampier Archipelago) on the National Heritage List. One of these nominations came from the Aboriginal community, one came from the National Trust of Australia (WA) and the third was from the International Federation of Rock Art Organisations (IFRAO), lodged by Robert Bednarik (Bednarik 2006). The Australian Government commissioned an assessment of the nominated place’s scientific values against the criteria defined under the EPBC Act. Two reports documenting these values were completed (McDonald & Veth 2005, 2006). Based on the findings in these reports, the Australian Heritage Council recommended to the minister that the place met multiple criteria under the EPBC Act. In September 2007, the place was gazetted on the National Heritage List by the then Minister for the Environment, the Hon. Malcom Turnbull MP.

The summary of the relevant national heritage values can be found on the federal Department of the Environment website (DoE n.d.). The main identified values were described as follows:

The Dampier Archipelago (including the Burrup Peninsula) contains one of the densest concentrations of rock engravings in Australia with some sites containing thousands or tens of thousands of images...At a national level it has an exceptionally diverse and dynamic range of schematised human figures some of which are arranged in complex scenes. The fine execution and dynamic nature of the engravings, particularly some of the composite panels, exhibit a degree of creativity that is unusual in Australian rock engravings.

The different degrees of weathering of particular types of faunal engravings on the Dampier Archipelago provide, in the national context, an unusual and outstanding visual record of the Aboriginal responses to the rise of sea levels at the end of the last Ice Age. The different degrees of weathering of some complex

scenes provide exceptional visual evidence for the antiquity of depictions of complex scenes of human activity. The deeply weathered ‘archaic faces’ are an exceptional demonstration of the long history of contact and shared visual narratives between Aboriginal societies in the nominated place and inland arid Australia.

There is a high density of stone arrangements...[that] include standing stones, stone pits and more complex circular stone arrangements. Standing stones in the Dampier Archipelago range from single monoliths through to extensive alignments comprising at least three or four hundred standing stones. Some of these standing stones are associated with increase ceremonies, *thalu*, others were used to mark particular places with scarce resources, such as seasonal rock pools, and were also used to mark sites of traditional significance. The densities of stone arrangements on the Burrup Peninsula, and the wide range of types of stone features found in the Dampier Archipelago, are exceptional by Australian standards.

The listed area included all areas of the Dampier Archipelago above the water line not already impacted on by industrial, infrastructure or mining development. It excluded the Dampier township, the port and other active mine and gas processing areas, and Woodside’s Pluto areas A and B (then proposed for further development of the LNG). A land use impact assessment, undertaken using aerial photographs from August 2004, estimated that high levels of impact had occurred on only 16.4 square kilometres of the Burrup Peninsula (roughly 14 per cent of that 118 square kilometre landmass (McDonald & Veth 2006, p. 34)). Outside of these impacted areas the natural and cultural heritage of the Dampier Archipelago and its surrounding waters was assessed as being in good condition. The National Heritage List place excludes approximately 16 square kilometres of land with existing impacts but includes the 15 square kilometres of land on the Burrup Peninsula which are zoned industrial and which are covered by the BMIEA. The listed areas are shown in Figure 11.3.

Conservation agreements as a management outcome in the place

One outcome of the national heritage listing was the legally binding conservation agreements (CAs) signed by the two largest leaseholders of industrial land on the Burrup Peninsula. Rio Tinto Iron Ore (including Dampier Salt) (RTIO) and Woodside (Pluto LNG) entered into agreements with the federal government under s. 305 of the EPBC Act (Australian Government 2007). These agreements relate to the ‘Class of Actions inside and outside the National Heritage place for

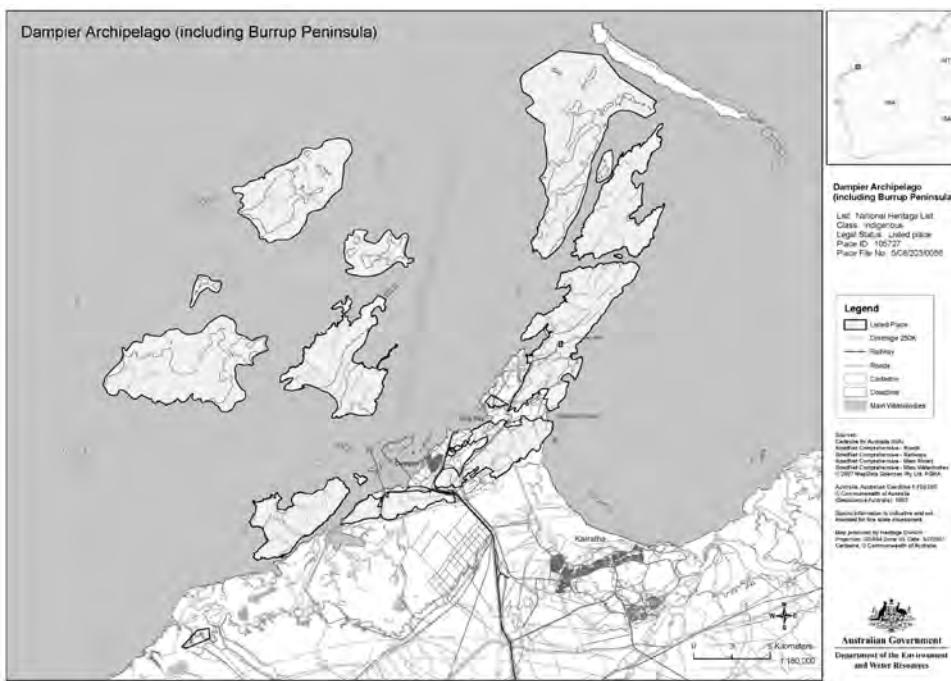


Figure 11.3: The Dampier Archipelago (including Burrup) national heritage listed area

the recognition, protection and conservation of the National Heritage Values'. Among other things, these agreements were designed to fund the following activities (Australian Government 2007):

- identifying sites with National Heritage Values (cl. 7.1.1)
 - presenting and transmitting information about the national heritage values (cl. 7.1.2)
 - managing the national heritage values to ensure the values are conserved for future generations (cl. 7.1.3)
 - researching and monitoring the national heritage values (cl. 7.1.4)
 - consulting with Indigenous people with rights and interests in the national heritage place (cl. 7.4.2)
 - contributing a significant amount of money to be spent on the display and curatorship of rock art through the construction of a rock art display and curator centre (cl. 7.5), with this figure to be matched dollar-for-dollar by government

- Woodside / RTIO making the CA funds available over 10 years for specifically identified and viable delivered projects that will ‘benefit the indigenous heritage of the area on the condition that such projects will...survey and research, present, monitor and manage the National Heritage Values of the area’ (cl. 7.6).

Pluto LNG (Woodside) allocates funding on the advice of its Rock Art Foundation Committee, constituted by an independent chair (currently an anthropologist, Dr Mary Edmunds), an Australian Government representative and a Woodside representative. RTIO similarly has a steering committee (of which this author is a member) to oversee the allocation of CA funds. This chapter does not aim to describe in detail the nature of these specific arrangements (details can be found on the websites of all three organisations) but does note that these CAs provide significant financial capacity in addition to those provided by the BMIEA outcomes as acknowledgment of the heritage values of this place.

RTIO’s CA contribution has included the funding of the endowed Rio Tinto Chair of Rock Art Studies at the University of Western Australia as well as the funding (to date) of five annual rock art field schools involving students at the university and the Murujuga Aboriginal Corporation Rangers (since their inception in 2012). These field schools have resulted in the recording of over 10,000 motifs in several areas on the Burrup. These recorded areas have been either inside the national heritage listed area and RTIO lease or in BMIEA lands just outside the boundary of the national heritage listed area. This latter area was surveyed on the request of the Murujuga Aboriginal Corporation, which indicated its interest in using this area for tourism opportunities and its further interest in realigning the boundaries of the Murujuga National Park to better reflect heritage values. RTIO also funds the salary of Dr Ken Mulvaney to manage the National Heritage List values within the RTIO leases and has published or contributed to the publishing of numerous publications on engraving sites (for example, Durlacher 2013; Lorblanchet forthcoming; Mulvaney 2013, 2015).

Woodside, on the other hand, has funded several major community projects in Roebourne (for example, Big hART and the Murujuga *Hip bone sticking out* opera). The endowment of a PhD scholarship at the University of New England (the Pat Vinnicombe scholarship) (of which archaeologist Ken Mulvaney was the recipient (Mulvaney 2010)) is the major research outcome directly focused on understanding the values of the place resourced by the Woodside CA. Dating work by Brad Pillans of the Australian National University (see, for example,

Pillans & Fifield 2013) is further research related specifically to rock art and its values, and the Woodside CA has also resourced a Commonwealth Scientific and Industrial Research Organisation (CSIRO) committee charged with investigating the potential effect of industrial emissions on the rock art. The ongoing running of the Murujuga Aboriginal Corporation's Ranger program is currently funded significantly by Woodside's CA, not the BMIEA;¹²⁸ recently RTIO has also entered into an agreement with the Murujuga Aboriginal Corporation to contribute to funding of the Ranger program.¹²⁹ At this point, the CA funding is providing much-needed capital input into the governance of the Murujuga National Park and Ranger program that is not sufficiently provided by the BMIEA or other state funding to resource co-management.

Murujuga National Park co-management

On 17 January 2013 Murujuga National Park was declared the state's 100th national park (ORIC n.d.). It is the first Aboriginal freehold land in Western Australia to be leased back to the state and jointly managed as a national park, with formal protection under the *Conservation and Land Management Act 1984* (WA). In accordance with the BMIEA provisions, the national park includes only non-industrial land on the Burrup Peninsula — around 4913 hectares (DEC 2013, p. 3). This conservation outcome represents around 48 per cent of the Burrup landmass listed on the National Heritage List (McDonald & Veth 2006, Table 6). The majority of the national heritage listed place across the archipelago is not within the conservation estate. The remainder of the national heritage listing on the Burrup falls within industrial leases (including those covered by the BMIEA) and an estimated 141 square kilometres of islands above the low tide mark and the intervening waters (which are gazetted as a marine conservation park: see Figures 11.3 and 11.4) have a (largely unknown) cultural signature (McDonald 2009a, table 8).

The Murujuga National Park Management Plan was prepared by the Western Australian Department of Environment and Conservation Planning Unit on behalf of the Murujuga Park Council (DEC 2013; see also DEC 2006). Completed in consultation with the Aboriginal community, this management plan provides for joint management of the park's national heritage listed cultural and natural values and has provision for access, visitor facilities and education and interpretation of the

128 R Critchley, Chief Executive Officer of Murujuga Aboriginal Corporation, pers. comm., 2014.

129 K Mulvaney, pers. comm., 2015.

The right to protect sites

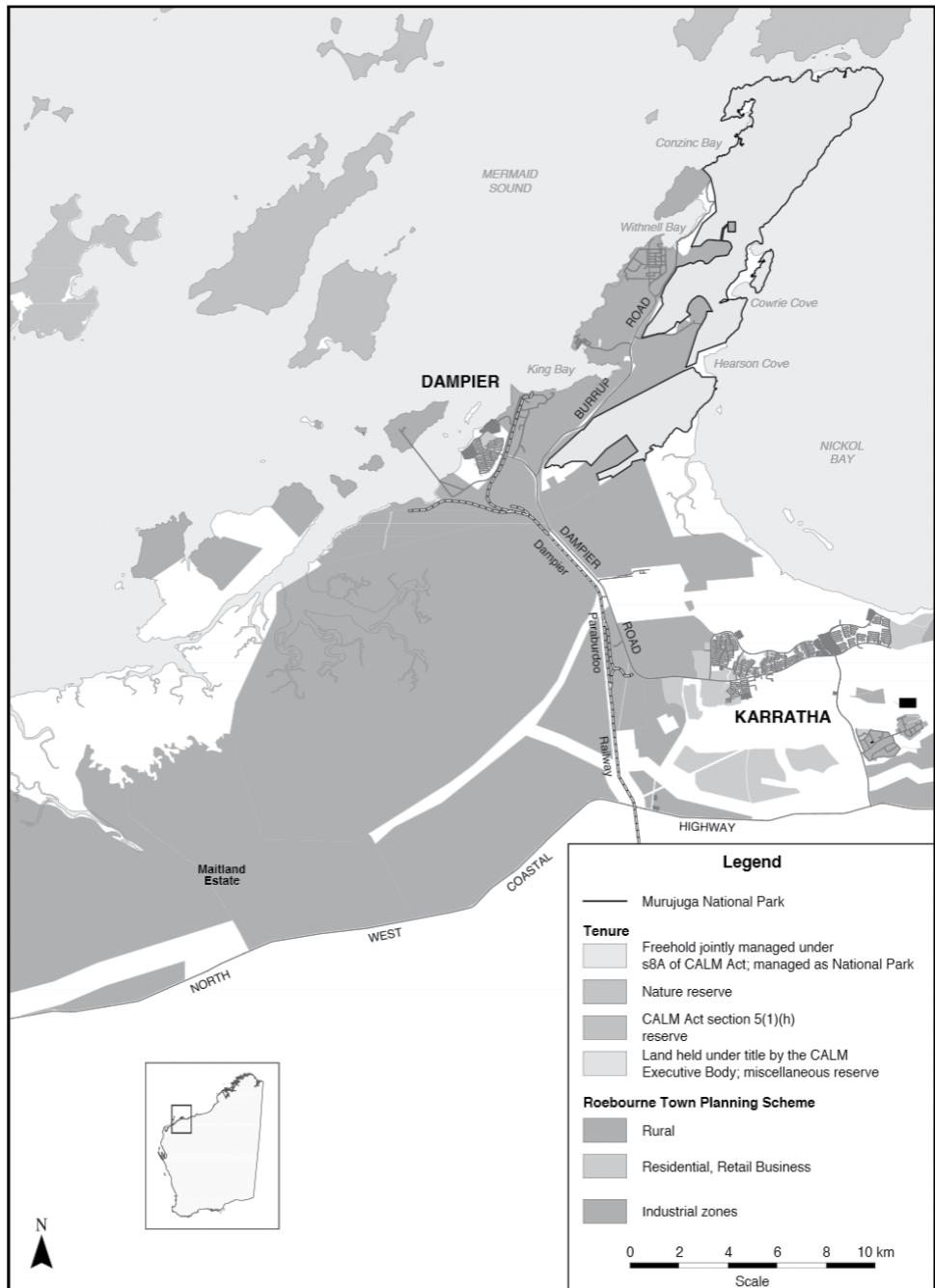


Figure 11.4: The Murujuga National Park showing land tenure (DEC 2013, Map 1)

cultural values of the Burrup Peninsula. The vision for Murujuga National Park is stated (DEC 2013, p. ii) as follows:

[It] is recognised internationally as an outstanding example of human expression, innovation and survival. A lasting partnership between Aboriginal people and the broader community that balances the protection of its ancient and living heritage with the sustainable use of the region's natural resources.

Aboriginal people have occupied, used and managed the Burrup Peninsula for hundreds of generations. This is recorded on country, its special places and rich archaeology. This long history of occupation, ownership and management was broken by European colonisation, and for over 150 years local Aboriginal people had no control over the land. Through this management plan, Ngarda-ngarli and their joint management partners will seek to ensure the protection of the area and to revive Ngarda-ngarli knowledge, associations and responsibility. Ngarda-ngarli welcome visitors to their land. Visitors are encouraged to enjoy the country, to look around, and appreciate and learn from the country and its people.”

The national park is co-managed by the Murujuga Aboriginal Corporation and the Western Australian Department of Parks and Wildlife (formerly the Department of Conservation and Land Management and the Department of Conservation). The Murujuga Aboriginal Corporation includes representatives of all BMIEA parties and was formed in late 2005. It was registered as a charity in 2006 and has 11 traditional owner directors and a chairperson and a non-Aboriginal CEO (Mr Ron Critchley). Aboriginal rangers trained and employed by MAC report to the Murujuga Park Council, which is made up of both corporation and department representatives.

The Murujuga management plan outlines the basis for the joint management and the formulation and funding of the Murujuga Aboriginal Corporation. The corporation has responsibility for the equitable distribution of benefits between the parties to the agreement and ‘discretion over allocation and distribution of monies for the general welfare of the contracting claim groups including cultural development, education, medical services, community and social infrastructure’ (DEC 2013, p. 8).

The Murujuga Parks Council is administered by the Department of Environment and Conservation and comprises six representatives of the Murujuga Aboriginal Corporation (two from each of the contracting parties), three representatives of the department and one representative appointed by the

Western Australian Minister for Aboriginal Affairs. Aboriginal ownership and participation in all levels of management represents recognition of ‘the rights, knowledge and responsibility of Aboriginal people to manage and protect the natural and cultural values of their land’ (DEC 2013, p. 9).

At present the Murujuga Aboriginal Corporation’s capacity to participate in this management regime is funded by Woodside’s (and more recently RTIO’s) CAs with the federal government (described above). The corporation trains Aboriginal men and women (mostly from the Pilbara) as rangers to manage the park alongside the Department of Parks and Wildlife personnel (Woodside Energy Ltd n.d.). The Department of Parks and Wildlife has no identified funding stream to employ rangers within this national park.¹³⁰ The pilot ranger program is building capacity within the Murujuga Aboriginal Corporation to manage the park area as a natural and cultural place. Funding so far has provided employment, equipment purchases, training and administrative support.

The groundwork and management framework was devised by the BMIEA to enable the Ngarda-Ngarli to have control over the management of their natural and cultural resources within this co-managed regime. Yet, while this appears to be a panacea in terms of governance, there are several underlying factors that endanger a successful outcome for heritage management on these lands, which have had such a perilous management journey thus far.

As well as establishing industrial and conservation areas, the BMIEA committed the state government to establishing and resourcing an effective, inclusive management regime to protect the natural, cultural and recreational values for the area now designated as the Murujuga National Park. Under the BMIEA, systematic surveys (to a high standard) were to be conducted over the conservation estate and areas proposed for future industry use. In 2008, the then Department of Indigenous Affairs commissioned a report to determine an appropriate methodology for heritage inventory studies to guide future heritage survey and recording work in the archipelago’s conservation estate (McDonald 2009a). The heritage inventory methodology (HIM) report identified that current best practice for managing heritage places involved four fundamental steps (Pearson & Sullivan 1995, pp. 8–9):

1. Location, identification and documentation of the resource;
2. Assessment of the value or significance of the place to the community or sections of the community;

¹³⁰ A Bowlay, Department of Parks and Wildlife, pers. comm., 2014.

3. Planning and decision making to produce a management policy that aims to conserve cultural significance. This involves weighing the values of the place against a range of other opportunities and constraints; and
4. Implementation of decisions covering the future use and management of the place.

The HIM report identified that a program of heritage inventory studies across the archipelago would achieve the first of these four identified steps and assist future land managers by providing systematically collected data on the cultural heritage resource of this place. This baseline data was identified as imperative to achieving appropriate management of the cultural heritage values of Murujuga and a precursor to the successful implementation of any future management plan. The HIM report recommended that a 20 per cent sample of representative landscapes across the conservation estate and the various islands (taking into account geology, island size and proximity to the current coastline), surveyed systematically, would provide this baseline data. The recommended area to be covered by these surveys was around 40 square kilometres (McDonald 2009a, Table 12). This labour-intensive task was estimated to require around 12 months of systematic, intensive fieldwork by a skilled archaeological team.

To date, only one such heritage inventory survey has been funded by the state: the Deep Gorge survey, which yielded more than 3200 motifs from 42 recorded sites (in a 2 kilometre by 200-metre transect) south of Hearson's Cove (McDonald 2009c). This survey has achieved 0.1 per cent of the target coverage across the archipelago. An earlier survey of the northern Burrup (funded by the National Estate Grants Program) achieved a 20 per cent sample of the northern Burrup (Veth et al. 1993), achieving the accurate identification and location of sites but not detailed art recording. Surveys within the BMIEA industrial lands on the Burrup have been completed, as have surveys of other industrial lands (see Table 11.1), and these indicate a variable but consistently high-density heritage resource. The two systematic surveys completed within the National Park (McDonald 2009a; Veth et al. 1993) cover a total of 9.3 square kilometres, equating to an approximate 18 per cent survey sample within Murujuga National Park. Over 600 archaeological sites have been identified by these two surveys, but only 42 of them have been recorded in detail (McDonald 2009c). Detailed rock art recording work is required in the northern Burrup, particularly in the identified site complexes, to complete the inventory work there. Further survey and recording is required in the national park south of Hearson's Cove to bring the site location baseline data up to par. The potential resource within the national park is immense given the relatively small sample surveyed and documented to

date. The successful management of the heritage values within the national park requires the Murujuga Aboriginal Corporation and its rangers to have a broad skill-set for both natural and cultural resource management — they have to monitor site condition and manage tourist expectations and other pressures, as well as reacquainting their Aboriginal rangers with country that is outside of their traditional lands. The expectations of managing a heritage resource which has national and (arguably) world heritage values (Lawrence 2011) requires ongoing financial support, input and direction from the state's heritage regulators.

Table 11.1: Site densities and petroglyph site densities from systematic survey on the Burrup

Survey area (pre-national heritage listing surveys)	Total area surveyed (km²)	Sites recorded	Petroglyph sites recorded	Site density (sites/km²)	Petroglyph site density (sites/km²)
Woodside (Vinnicombe 1987a)	13.5	720	544	53.3	40.3
∞NEGP (Veth et al. 1993)	8.78	498	156	56.7	17.8
South West Burrup (Vinnicombe 1997a)	2.5	111	79	44.4	31.6
King Bay–Pearson Cove (Vinnicombe 1997b)	10.9	373	111	17.4	10.2
West Intercourse (Vinnicombe 1997a)	3.4	204	132	60.0	38.8
Pluto A (ACHM 2006a)	0.65	80	72	123.1	110.8
Pluto B (ACHM 2006b)	1.38	129	89	93.5	64.5
Mid-West Intercourse (Vinnicombe 1997a)	0.5	22	17	44.0	34.0
Parker Point (Gunn 2004)	2.1	38	38	18.1	18.1
Subtotal	43.71	2175	1238	40.5	28.3

(cont.)

Survey area (pre-national heritage listing surveys)	Total area surveyed (km²)	Sites recorded	Petroglyph sites recorded	Site density (sites/km²)	Petroglyph site density (sites/km²)
BMIEA survey areas (surveys of industrial leases within the national heritage listed area)					
Burrup South (AIC 2006a)	3.38	30	4	8.9	1.2
Lot 575 (AIC 2007)	0.33	36	32	109.1	97.0
Withnell East (AIC 2006b)	1.54	23	15	14.9	9.7
Subtotal	5.25	89	51	17.0	9.7
Surveys for heritage inventory ⁿ or assessment of significant impacts ^b within the National Heritage place					
Cemex ^b (McDonald 2009b)	0.0275	7	6	254	218
∞Deep Gorge ⁿ (McDonald 2009c)	0.52	42	28	80.8	53.8
Main Road ^b (McDonald 2010)	0.153	25	23	163	150.3
Subtotal	0.7005	74	57	105.6	81.4
Total	49.66	2264	1289	45.6	26.0

∞ Surveys within boundaries of Murujuga National Park; ⁿ Surveys for heritage inventory;

^b assessment of significant impacts.

Surveys within the national heritage listed place, funded by a range of sources other than the state government (cf. McDonald 2009c) have resulted in the cumulative recording of less than 40 hectares (see Table 11.2): a minuscule proportion of the recommended baseline survey coverage for the effective management of the heritage values across the national heritage listed place.

Table 11.2: Motif density recorded by saturation recording in national heritage place locations (from McDonald 2010; CRAR+M Pilbara rock art database)

National Heritage Place location	Area surveyed (ha)	No. of motifs	Density motifs/ha
Burrup Main Road	15.3	128	8.4
Cemex	2.75	30	10.9
Deep Gorge	3.84	3,215	837.2

(cont.)

National Heritage Place location	Area surveyed (ha)	No. of motifs	Density motifs/ha
Queen Vic Valley*	5.8	3,842	662.4
Totals	40.39	13,136	325.2

*Funded by RTIO CA: University of Western Australia / RTIO / Murujuga Aboriginal Corporation student field schools 2010–14.

So there is still much to do.

Without additional resourcing, the Murujuga Aboriginal Corporation will not have the capacity to undertake this baseline survey work to achieve the stated objectives of the management plan (DEC 2013, p. 11):

1. Murujuga National Park will be managed to the highest standards that meet the expectations of the Australian community for protection of cultural, heritage and natural values.
2. Cultural, heritage and natural values will be conserved, protected and promoted.
3. Ngarda-ngarli will meet their obligations to country and satisfy their people's aspirations to benefit from land ownership.
4. Members of [Murujuga Aboriginal Corporation] will together make shared, informed, consistent, transparent and accountable decisions.

Now and the future

Since the national park's inception in early 2013, the Murujuga Aboriginal Corporation has been developing strategies to manage its portfolio. It has been developing its own conservation management plan (with the assistance of planning consultants) and a ranger training program. The corporation has recently engaged the services of a community archaeologist and database specialist to assist in this program development. There are discussions underway with architects to develop the Living Knowledge Centre on the Burrup in fulfilment of both the BMIEA and Woodside CAs for a visitors/cultural/management centre on the Burrup. Momentously, late last year, the infamous 'compound' on the Burrup — the fenced enclosure where salvaged engraved boulders from the original 1980s LNG project had been housed — was rehabilitated by traditional custodians in consultation with the Department of Indigenous Affairs, the Murujuga Aboriginal Corporation, Woodside and the Western Australia Museum (DAA n.d.). It is

reported that the project took over three months — following almost 20 years of debate about the ethics of this type of management strategy (see, for example, Bednarik 2006; Morgan, Kwaymullina & Kwaymullina 2006) — and around 1700 engraved boulders were relocated. The Department of Aboriginal Affairs claims this to be one of the biggest Aboriginal heritage restorations projects in the state's history, with its success largely attributed to participation and cooperation of the senior Aboriginal men.

There is also groundbreaking progress with the recent (2014) awarding of an ARC Linkage Project called Murujuga: Dynamics of the Dreaming. This is the first collaboration by a consortium of Aboriginal community, academy and industry on the Burrup, working together to increase knowledge about the scientific and Aboriginal values for this place. Researchers from the Centre for Rock Art Research and Management at the University of Western Australia, partner organisation RTIO and collaborating organisation Murujuga Aboriginal Corporation will research the deep time and contemporary social values of this place (Figure 11.5). Given the great success of the Canning Stock Route Linkage



Figure 11.5: Murujuga Aboriginal Corporation circle of elders, Rangers and Land and Sea personnel and University of Western Australia researchers during consultation on country in the Dampier Archipelago (photo: Ken Mulvaney 2014)

Project (Veth 2012), we have high hopes for similar groundbreaking outcomes for the Aboriginal community now charged with the governance of this place.

The Australian Heritage Council (Lawrence 2011) recognised that this place meets the Outstanding Universal Values criteria of the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage List but noted that more research was required about both its antiquity and its contemporary social context. This collaborative project is designed to address these gaps. Its research aims are twofold: to better understand the diversity, abundance and social context of Murujuga rock art production in deep time; and to explore contemporary social connections to this place back to first contact with historical seafarers and colonial settlers. These two foci at opposite ends of the timescale will allow us to understand better the complete spectrum of human use of Murujuga from its initial occupation (presumed to be more than 30,000 years ago: Mulvaney 2015) through the last ice age and subsequent amelioration with sea level rise to the current day, with Indigenous co-management of this rock art estate. At the modern end of the time spectrum we will chronicle current community connections to this place. A historical and anthropological focus will be on people's Dreaming stories and open songs (*Taabi*) and current aspirations for managing the rock art and its heritage values and engaging with sustainable tourism.

Collaboration between researchers, Murujuga custodians and the Murujuga Aboriginal Corporation Rangers will develop a dialogue between Western ontologies and Indigenous viewpoints. The corporation will bring contemporary social values and traditional knowledge to the project. The archaeologists and anthropologists working with the Murujuga Aboriginal Corporation Rangers will develop new knowledge about the cultural resources of the place and impart training and skills that will contribute to sustaining the corporation's cultural tourism initiatives and upskilling during ranger training. The project will provide baseline information for management and interpretative materials that are needed for the proposed Living Knowledge Centre and local tourism. It will also provide research training in fieldwork and analysis for Indigenous rangers. Using a geographic information system (GIS) predictive landscape modelling approach, we will test a predictive model (McDonald & Veth 2009; McDonald 2015) to understand the different distribution of sites through time across the archipelago. This information will be shared via a web-enabled database (Smith et al. 2015), with the Murujuga Aboriginal Corporation to ensure that knowledge transfer is of immediate benefit to its ranger training and heritage management programs.

Conclusions

This chapter has traced the history of contested encounter on Murujuga from initially peaceful interactions on the Intercourse Islands through early pearling and pastoral industries to a period of bloody conflict and retribution with the Flying Foam Massacre — doubtless resulting in the diminished ability of groups to prove connection in the native title era. The ceding of native title through the BMIEA has resulted in a historic co-management arrangement in a Western Australian national park. The state-driven desire for resources exploitation has coloured the management of this place since before the enactment of heritage or native title legislation, and heritage values have generally been unrecognised in the decision-making processes that have shaped the industrial landscape today. However, there are great opportunities for cultural heritage management in the non-native title regime which has eventuated through the BMIEA.

It must be questioned whether the community benefit that was negotiated through the BMIEA is sufficient — for example, compared with royalty agreements which have resulted elsewhere as part of the native title process (for example, RTIO Ngarluma Indigenous Land Use Agreement (ILUA): see ATNS 2011). But then, the absence of identified mineral wealth beneath this place and hence the types of royalty agreements being negotiated elsewhere within the Ngarluma Yindjibarndi claim area would never have occurred here. The ongoing industry pressure at Murujuga results from the need to process and export the resources being mined inland and offshore — hence this can be seen almost as recompense for collateral damage. But the damage to the heritage resources of this place is real, and the state's desire to fulfil their regulatory responsibilities here is vastly outweighed by their rapacious desire to facilitate resources and infrastructure development.

Enthusiasm for the opportunities that are delivered by the Murujuga co-management arrangement must be tempered by recognising the enormity of managing one of the world's most outstanding rock art provinces. There is also inherent complexity introduced by the different federal and state conservation and legislative regimes combined with ongoing pressure from industry. National heritage listing delivers significant heritage protection while introducing additional management layers and compliance requirements through the EPBC Act. These complexities are onerous for any heritage management regime, let alone a fledgling Aboriginal corporation without training or expertise in these matters.

cont.

There is potential for the place to be world heritage listed (Lawrence 2011), although at this point the state government has indicated that it would not support such a nomination. There will be pressures brought to bear on managing cultural values in the BMIEA industrial lands, given the expectations of financial benefit which should flow to the community should their industrial value be realised. That is, to benefit from aspects of the BMIEA, the Murujuga Aboriginal Corporation will need to acquiesce to a range of heritage impacts in these lands. Given the fact that government has signalled its intention to continue industrial expansion within the industrial zoned lands across the national heritage listed place (see Figure 11.4), this point of conflict will no doubt soon be realised. Further financial support will be required to achieve the sustainable management of heritage values across Murujuga after end-of-life (in 2017) of the CAs between Woodside and RTIO. Not least in this review is the inescapable fact that the state government has not honoured its funding promises made through the BMIEA to resource an increased understanding of the heritage resources of this place as well as to ensure a sustainable economy in this joint governance agreement.

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Chapter 12

ABORIGINAL CULTURAL HERITAGE PROTECTION IN TASMANIA: THE FAILURE OF RIGHTS; THE RESTORATIVE POTENTIAL OF HISTORICAL RESILIENCE

Emma Lee

Tasmania is more than just a physical island; it is a confined space for understanding and implementing Indigenous rights. Histories of genocide have determined the fractured pathways for conserving heritage, leaving contemporary Tasmanian Aboriginal peoples to navigate an inconsistent and unfair statutory regime that has remained unchanged since 1975. Yet Tasmanian Aboriginal peoples have been more fruitful in gaining rights on an international stage. With success overseas and a morass at home, the paradox of the Tasmanians is linked to an historical assemblage of actors who continue to influence current thinking around heritage management. Local government policy, much to the detriment of Tasmanian Aboriginal peoples, still frames people within the past, located ‘elsewhere’ in time and space, and reveals tensions in dealing with the ‘Aboriginal problem’.

Introduction

To contemplate Tasmania within a heritage narrative is both a study in 200 years of historical, archival and academic riches and a comparative drought of useful, contemporary data. There have been no successful native title claims or even current applications in Tasmania, nor any joint management or Indigenous Land Use Agreements, yet the lifetime scholarship of both Plomley's and Ryan's historical research is unlikely to be rivalled for meticulous dedication to the singular study of Tasmanian Aboriginal peoples (Plomley 1966; Ryan 1996). Illustrative of the tensions underlining the nature of heritage management and Aboriginal land ownership in Tasmania, there seems to be a whole lot going on and very little to show for it.

The dedication to elucidating Tasmanian Aboriginal history and colonial policy has not directly translated into native title gains. No claim to land or activities has been proven; and the Tasmanian Government is not keen to promote the rights and benefits deriving from the national frameworks. Yet the *Aboriginal Lands Act 1995* (Tas.) was created in the immediacy of post-*Mabo* (*Mabo v. Queensland* (No. 2) (1992) 175 CLR 1), demonstrating that, while the state could dampen native title aspirations, it was not immune to national shifts in Aboriginal affairs.

I use a chronological and thematic approach to explore a variety of historical conditions that have contributed to the current Tasmanian heritage and land return legislative assemblage. Some of these conditions are anchored in the colonising atrocities carried out on Aboriginal peoples. Others lie, for example, in the legal manoeuvring of the early colonies of New South Wales to exclude Aboriginal peoples from common law as much as from customary law. None is more traumatic than that of the supposed 'extinction' of the Tasmanian Aboriginal peoples with the death of Trucanini in 1876.

Much of the heritage framework in Tasmania is predicated upon the death of Trucanini, where, according to the *Aboriginal Relics Act 1975* (Tas.), Aboriginal culture, people and relics are not acknowledged post-1876. The flaws in this interpretation have created a cascade of negative effects for Tasmanian Aboriginal peoples in the struggle to find a native title or heritage foothold. When contemporary cultural practices are not legally recognised under heritage protection statutes, it becomes difficult to extend rights for land returns and conservation of heritage sites, places and objects. At the same time, though, native title in Tasmania has been poorly managed by Aboriginal peoples through ill-conceived claims.

Tasmanian Aboriginal peoples have many tools in their arsenal for progressing issues of land returns and cultural rights. The techniques to gain equity include the use of petitions for over 150 years, international court cases, foundational papers, and protests that have impacted upon Australian constitutional law. Yet these impressive movements have not translated into real advantages on the ground; only approximately 1 per cent of the Tasmanian landmass has ever been returned to Aboriginal peoples. This is the paradox of the Tasmanian Aboriginal peoples — intelligent, strategic action has not been rewarded with meaningful engagement in heritage management and land returns.

One morning the sun did not rise (or how Aboriginal people became separated from their lands)

Between the confirmation of the newly founded Van Diemens Land (VDL) in 1803 and the renaming of the colony as Tasmania in 1855, Tasmanian Aboriginal peoples became legally and physically separated from their lands and cultural practices. In 1787, the first governor of the colony of New South Wales, Arthur Phillip, received instruction from the British Privy Seal that the new establishment should have regard for the treatment of Aboriginal peoples (Watson 1914–1925a, vol. 1, pp. 13–14). For Tasmanian Aboriginal peoples, these same instructions were issued to David Collins — an officer under Phillip and first Lieutenant Governor of VDL — in February 1803 for a proposed settlement ‘intended to be formed in Bass’s Streights’ (Watson 1914–1925a, vol. 4, p. 10). Collins never raised the first official flag in VDL; that achievement was effected by Lieutenant John Bowen. In September 1803, under hastily written instructions from the New South Wales administration that made no provisions at all for Aboriginal peoples, Bowen sailed up the Derwent River to land at Risdon Cove and plant the British flag (Watson 1914–1925a, vol. 4, p. 152). However, Collins did assume administration of the colony in late 1804, promptly moving the whole operations further south along the Derwent River to present-day Hobart. He also took with him Phillip’s replicated three sentences of instructions for Aboriginal peoples, ensuring it was the responsibility of the colonisers to ‘open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness’, punishing those who cause harm ‘according to the degree of the offence’ (Watson & Australia Parliament Library Committee (eds) 1914–1925a, vol. 4, p. 12).

The general and generic nature of these instructions is surprising given the long pre-1788 history of the British negotiating treaties with other Indigenous

peoples,¹³¹ particularly in the Americas (MacLeitch 2011). Brevity of instructions suited the British Colonial Office, however: a lack of instructions can allow manipulation of peaceable intent. The New South Wales colony would be, for the application of British law, a ‘settled colony, that is, one uninhabited by a recognised sovereign or by a people With [sic] recognisable institutions and laws’ (ALRC 1986, p. 29).¹³² Yet there was a sovereign people in the colonies and their ‘Aboriginal commonality’ (Sansom 1982, p. 117) — the cultural constructions that internally and externally legitimate a people — formed a basis of customary law. However, the initial settler ignorance, followed by abhorrence, of customary law, coupled with the need to stamp out such practices, does not negate their existence. Aboriginal customary law became displaced as the legitimate authority over lands as Aboriginal peoples became ‘subjects’ upon bestowal of British common law. These very sparse beginnings of the lexicon of colonial instructions regarding Tasmanian Aboriginal peoples concealed a well-established history of British empire-building that began with ‘amity and kindness’ but became a focused gaze of ever-lengthening proclamations and general orders that led to dispossession.

The first of these proclamations regarding Tasmanian Aboriginal peoples was made in June 1802 by the new Governor of New South Wales, Philip Gidley King. All Aboriginal peoples, regardless of which colony they were found in, were now considered ‘His Majesty’s Subjects’ and equal within British common law (Watson 1914–1925a, vol.3, p. 592). This proclamation was expected to be read by Collins in 1804 ‘respecting the Security and Protection afforded to the Natives of New South Wales in their Persons and Property’, but Collins had not opened any ‘dialogue’ with Tasmanian Aboriginal peoples and was waiting ‘until my Numbers are increased, where I shall deem it necessary to inform the whole, that the Aborigines of this Country are...under the Protection of the Laws of Great Britain’ (Watson 1914–1925b, vol. 1, p. 281). In January 1805, Collins published general orders instead of reading the proclamation, stating that Aboriginal peoples were now in the ‘King’s Peace’ and it ‘cannot then be doubted that the immediate Inhabitants of this Colony are equally entitled to the same Protection’ (Watson 1914–1925b, vol. 1, p. 529). By the time Collins finally made good with the orders, King’s position on Aboriginal equality under British law had shifted. In July 1805, New South

¹³¹ Terminology used in this chapter will use ‘Aboriginal’ to describe peoples of mainland Australia, including Tasmania, and ‘Indigenous’ to describe Aboriginal and other similar peoples in the global context of colonised peoples (Shaw, Herman & Dobbs 2006).

¹³² For further debate regarding whether Australia was settled as a colony or the spoils of a frontier war, see ALRC (1986, ch. 5).

Wales Judge-Advocate Atkins provided King with an opinion on the ‘Treatment of Natives’, whereby leniency over rigour was considered the most lawful path ‘for the evidence of Persons not bound by any moral or religious Tye [sic] can never be considered or construed as legal evidence’ (Watson 1914–1925a, vol. 5, p. 502). In summation, Atkins’ object (Watson 1914–1925a, vol. 5, p. 504) was to:

Impress the Idea that the Natives of the Country (generally speaking) are at present incapable of being brought before a Criminal Court, either as Criminals or as Evidences; that it would be a mocking of Judicial Proceedings, and a Solecism in Law; and that the only mode at present, when they deserve it is to pursue and inflict such punishment as they may merit.

The legal separation of Aboriginal people from both customary and British law then became a *fait accompli*. In just over 15 years, between Phillip’s 1787 instructions for the new colony to Atkins’ opinion, the legitimate right of Aboriginal peoples to practise customary law was subsumed in the first instance under the banner of British legal equity for newly minted subjects and later through alienation from those same laws. With the removal of Aboriginal peoples from the common law, the actions surrounding later proclamations and the imposition of martial law in Tasmania were seen as wholly justified within the colonial mentality.

It is no surprise to see that exclusion from the common law preceded rapacious land grants in the VDL colony. In 1823 alone, settlers were granted just shy of 500,000 hectares of land — a tenfold increase from 1821 allocations (Morgan 1992, p. 169). Beginning in 1826, the Tasmanian Aboriginal response to the increased pressure of loss of land and food resources was to fight a ‘desperate guerrilla war’ against the British (Madley 2008, p. 172). These tactics drove the settlers of the now separate VDL colony to such fear that, by April 1828, a proclamation was issued that required Aboriginal peoples to be physically separated from their lands. Governor Arthur, the new administrator, called for (*Hobart Town Courier* 1828, p. 1):

[A] Legislative Enactment of a permanent nature, to regulate, and restrict the intercourse between the White and Coloured Inhabitants of this Colony: and to allot, and assign certain specified tracts of land to the latter, for their exclusive benefit, and continued occupation.

To enact this separation of Aboriginal peoples from both lands and the colonial state (*Hobart Town Courier* 1828, p. 1):

a line of Military Posts will be...established along the confines of the settled districts, within which the Aborigines shall and may not...penetrate, in any manner, or for any purpose...And I do...order all Aborigines immediately to retire, and depart from, and for no reason, or on no pretence...to re-enter such settled Districts, or any portions of Land cultivated...on pain of forcible expulsion.

Of this proclamation, Boyce writes that it 'provided the first official sanction for the use of force against Aborigines for no other reason than that they were Aboriginal... [A]ny Aborigine could be killed for doing no more than crossing an unmarked border that the government did not even bother to define' (2008, pp. 264–5). This proclamation was the precursor to Arthur's declaration of martial law in November 1828 (Calder 2010, p. 175), which unleashed government-sanctioned acts of arbitrary killing. Governor Arthur's decisions both legitimised the suspension of common law in favour of martial law and the military actions that exhorted for 'bloodshed be checked as much as possible' (BPP 1831, p. 12). By 1830 two further 'policies' were advocated to physically remove people from lands: in February 1830 a capture and reward bounty (children worth £3 less than adults); and later, in October, the failed Black Line campaign (BPP 1831, pp. 18, 71).¹³³

Complete physical separation, however, did not occur until the close of 1834 — two years after the end of martial law (Ryan 2010, p. 41). The negotiated removal of the remnant Tasmanian Aboriginal population from the entirety of their lands was conducted through George Augustus Robinson's six government-sponsored conciliation missions to bring the people into safety in exchange for downing the spears of war. These missions began in 1830 and ended in 1834, with approximately 200 people exiled at the Wybalenna Aboriginal Establishment on Flinders Island in the Bass Strait (see Plomley 1966). Robinson shared Governor Arthur's anti-slavery views (D'Arcy 2010, p. 55.1) and demonstrated a keen response to the 1829 government notice, which called for applicants to help 'ameliorate the condition of the aboriginal [sic] inhabitants' (Plomley 1966, p. 51). Robinson responded with a 'strong desire to devote myself...and believing the plan...to be the only one where this unfortunate race can be ameliorated', later acting on the understanding that the plan would consist of civilising behaviours and Christian teachings (Plomley 1966, pp. 51, 56). This plan failed at the juncture of

133 The Black Line campaign was a physical march stretching across VDL to finalise Arthur's policies of removal, and 'was the largest force ever assembled against Aborigines anywhere in Australia. Comprising more than two thousand soldiers and civilians...its purpose was to drive four of the nine Tasmanian Aboriginal nations from their homelands to another part of the island' (Ryan 2013, p. 3).

sharp differences between ‘an established discourse of *amelioration*, based on the reform of captive, enslaved people, and the conciliation and *protection* of a defiant indigenous population’ (Lester 2012, p. 1478). But there was some benefit to the Aboriginal peoples in being schooled in the way of British systems. Partitioned, but still defiant, the people amply demonstrated the level of amelioration that was collectively tolerable, specifically through the production of the February 1846 petition to Queen Victoria (CDO 18466).

On initial appraisal, the petition is a plea against the return of the previously dismissed Wybalenna superintendent, Dr Jeanneret, whom La Trobe (the acting Administrator of VDL) referred to as ‘not quite sane’ (Plomley 1987, p. 156). Between 1842 and 1844, having suffered at the cruel hands of Jeanneret, the people of Wybalenna appealed his imminent return by crafting ‘a petition so unique...and in every respect genuine’ (CSO 1846a, p. 7). The opening salvo of the petition was written to a ‘formula designed to reassure Queen Victoria, and all who governed in her name, that the petition was not a proclamation of rebellion’ (Van Toorn 2006, p. 122). Mostly, though, it represents signatory Walter George Arthur’s ‘commitment to his people...[as] arguably the first Aboriginal nationalist’ (Reynolds 1995, p. 23). The petition is, conceivably, the first Aboriginal land rights document (Reynolds 1995) and its powerful opening statement (CSO 1846a, pp. 13–14) is significant for the self-recognised Aboriginal status under British law. According to the Wybalenna people:

The humble petition of the free Aborigines Inhabitants of V.D.L. now living upon Flinders Island, in Bass's Straits &c & &c.

Most humbly sheweth,

That we Your Majesty's Petitioners are your free Children that we were not taken Prisoners but freely gave up our Country to Colonel Arthur then the Gov. after defending ourselves.

Your Petitioners humbly state to Y.M. that Mr. Robinson made for us & with Col. Arthur an agreement which we have not lost from our minds since & we have made our part of it good.

Your Petitioners humbly tell Y.M. that when we left our own place we were plenty of People, we are now but a little one.

Your Petitioners state they are a long time at Flinders Island & had plenty of Sup^{ds} & were always a quiet and free People & not put into Gaol.

The petition had effect as ‘an invocation of moral values espoused by English abolitionists’ and was positively received, somewhat for its curiosity value (Van Toorn 2006, p. 122). While Jeanneret was returned to Wybalenna in December 1846, he was once again dismissed in May 1847 (Plomley 1987, pp. 157, 160). Partly in response to the petition, Jeanneret’s dismissal cleared the way to close Wybalenna for financial reasons but also as a governmental control over shared Aboriginal and non-Aboriginal communities and maritime economies (Cameron 2011; Ryan 1996, p. 202). The governor did not consider releasing the Aboriginal people from captivity to be an option and a new Aboriginal mission was chosen at the abandoned penal station at Oyster Cove (Ryan 1996, p. 205), close to where Collins first proclaimed in 1805 that the people were of the ‘King’s Peace’.

While failing to prevent Jeanneret’s return, the petition worked to better the immediate conditions of the people on two levels. First, the Wybalenna people were able to return to lands in 1847, whereby physical removal and exile from ‘our Country’ was reversed. Even though legally the peoples were still excluded and physically partitioned from the general populace, it was still culturally significant to return to the mainland of VDL. The mainland is the permanent home — the proper country — and holds a high importance for the cultural security of the people. Second, the Wybalenna people engaged a common law space through the production of the petition that ‘conformed so strictly to norms of process, presentation, tone and language. In these regards the petition bears the stamp of government, administrative and legal institutions within which it was produced and put to work’ (Van Toorn 2006, p. 121). Walter George Arthur and the seven other signatories inserted themselves neatly within the colonial discourse of representation and legitimised their position as subjects worthy of the ‘Protection of the Laws of Great Britain’. The Wybalenna people created their own terms of engagement within rules of play not of their making.

The hope and dignity enjoyed as a response to the petition, however, was pyrrhic. Joy became despair upon realisation that Oyster Cove was wholly inferior in construction and administration, and the ill-health of the people was a ‘symptom of the complete neglect to which the Aborigines were subjected’ (Plomley 1987, p. 213). This profound neglect saw Oyster Cove as perhaps the only Australian Aboriginal mission or reserve that was unsupervised, with a visiting magistrate turning up once a week for inspections and the catechist, Robert Clark, being the most senior permanent resident (Ryan 1996, p. 207). The timing of the petition coincided with a period of great social change in the colony — one that negated any sense of moral obligation by the settlers to the Tasmanian

Aboriginal peoples. By the mid-1850s, the end of convict transportation, the creation of a state-elected parliament and a name change from VDL to Tasmania saw the colony slough off its establishment phase (West 1981). As a consequence, Aboriginal peoples would possess prime historical space among the debris of shameful beginnings.

This abandonment of Aboriginal peoples upon physical return to country — what the ‘government thought about its “aboriginal [sic] problem” at this time’ (Plomley 1966, p. 187) — is crystallised in the death of Trucanini in 1876. Trucanini was hailed and mourned as the supposed ‘last’ of the Tasmanian Aboriginal people and was subsequently defiled through public display of her remains in the Tasmanian Museum and Art Gallery from 1904 until 1947 (Frost 2001). The ‘problem of the Aborigines’ then becomes not one of conciliation or amelioration but imagined extinction. Moral neglect, reinforced by extinction myths, created a discursive space where all kinds of interpretations, overlays and assumptions could be made without any expectation of response from those so easily dismissed. Some laments are sympathetic and groundbreaking — for example, HG Wells’ novel, *War of the worlds* (1898), which explicitly stated that the story was a metaphor for what occurred to Tasmanian Aboriginal peoples under colonial rule. Raphaël Lemkin, in the 1940s, likewise used the Tasmanian Aboriginal experience as a case study to define his newly-coined term ‘genocide’ (Curthoys 2005). However, research into the Tasmanian Aboriginal peoples has, in the main, been ‘pityingly patronising and belittling’, even under scrutiny (Lehman 2006).

Wrong way law, but we still care for country

The myths of extinction have vastly influenced the ways in which the Tasmanian Government accommodates Aboriginal peoples and their culture. There are only three pieces of direct legislation applicable to Tasmanian Aboriginal cultural rights: three printed pages’ worth of the *Native Title (Tasmania) Act 1994* (Tas.); the *Aboriginal Lands Act 1995*, which promotes land returns through reconciliation principles; and heritage legislation under the *Aboriginal Relics Act 1975*, unamended since inception. The narrow range of state legislature in Tasmania to which Aboriginal peoples can turn to is bleak; however, this is somewhat balanced by access to international treaties, conventions and obligations to which the Commonwealth is signatory, such as the United Nations Declaration on the Rights of Indigenous Peoples (United Nations General Assembly 2007). The Tasmanian Government’s legal and moral abrogation is obvious in the ways in which Aboriginal peoples are

required to justify their existence, post-Trucanini, to make claims for protection of heritage items or use Commonwealth legislation for rights in the absence of local protection mechanisms.

Trucanini's death did not represent the last of the Tasmanian Aboriginal peoples, but it did become one of the benchmarks against which Tasmanian Aboriginality was measured.¹³⁴ For example, the *Aboriginal Relics Act 1975* includes in the definition of a relic (s. 2):

- (c) the remains of the body of such an original inhabitant or of a descendant of such an inhabitant who died before the year 1876 that are not interred in...

Tasmanian Aboriginal human remains were considered relics for the purpose of allowing unfettered scientific and archaeological research (Lennon 2000, p. 113), and 1876 represented the line of what was judged as authentic. Yet the Tasmanian Government has obliquely made some redress in the issue of human remains and research by being the only Australian state, under the *Museums (Aboriginal Remains) Act 1984*, to legislate for remains held in museums to become the property of the Crown. This allows for the government to remove statutory barriers for return and to request museums to deliver remains to the Aboriginal community directly, being 'at least partial recognition...of traditional rights in regards to...Aboriginal remains' (Davies & Galloway 2008–09, p. 154). However, this recognition of rights has had no wider influence on the *Aboriginal Relics Act*, as it only relates to human remains held in museums and repositories.

The term 'relic' implies little of the significance and importance of human remains, let alone rock art, middens, stone arrangements and fire-managed landscapes that represents 40,000 years of occupation in Tasmania. Rather, these items are considered 'cultural heritage'. However, the *Aboriginal Relics Act* (s. 2) is very clear as to what does not constitute a 'relic' and the criterion is solely judged upon Trucanini's death:

¹³⁴ Tasmanian Aboriginal identity is highly contested (Marks 2013). Historical factors including genocide, exile, Aboriginal and non-Aboriginal marriages, and the Stolen Generations, have created internal legitimacy issues that reflect on the ways in which rights are advocated. While Tasmanian Aboriginality is an important issue within the political decision-making environment, it has not been pursued in this chapter. This is due to the weighting of Tasmanian Aboriginal common and communal actions to further rights, particularly recognition rights, regardless of the internal dynamics and eligibility arguments therein.

(4) No object made or created after the year 1876 shall for the purposes of this Act be treated as a relic, and no activity taking place after that year shall for those purposes be regarded as being capable of giving rise to such a relic.

Section 2 thus alienates contemporary populations from the only piece of government legislation that directly manages Aboriginal heritage. The logic of the Act is built upon the basis that relics are associated with a pre-contact population, and a firm distinction of when those behaviours (and people) supposedly ended is with Trucanini's death in 1876. Therefore, contemporary Aboriginal interests cannot be protected, managed or acknowledged within the production of continuing cultural practices (Lennon 2000, p. 112). All defences toward protecting heritage must, then, be framed within a distant and unreachable past, leaving contemporary people as ticket-holders to the spectacle of their own history. The stagnant views of this Act are mirrored by the government's inactivity to secure one amendment or word change in the intervening 40 years to rectify a troubling historical fallacy.

The *Aboriginal Relics Act* still allows the 'ignorance' clause to give a free pass to people damaging sites.¹³⁵ The regulatory framework, managed by Aboriginal Heritage Tasmania, is therefore constrained in compliance of 40-year-old legislation and allows little leeway to protect heritage, beyond rubber-stamping permits to destroy and registering site details within a database system. A review of the *Aboriginal Relics Act* was first mooted in 1998 with the release of a discussion paper but was immediately delayed due to impending changes to the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (RPDC 2002, p. 39). Consistent delays and frustrations have been the key feature of the review over the intervening 15 years; a new Aboriginal Heritage Protection Bill was finally introduced into the Tasmanian Parliament House of Assembly in November 2013. However, a change in state government in early 2014 has seen the Bill stalled again (Legislative Council Sessional Committee 2013). The current situation is a return to the 'drawing board' to assess the previous government-proposed legislation before its reintroduction to parliament.

The *Aboriginal Relics Act* failed to support the protection of a 40,000-year-old site from the Brighton Bypass highway construction (near Hobart), resulting in the Tasmanian Government's European *Historic Cultural Heritage Act 1995* (Tas.) being tested as a vehicle for sole Aboriginal site registration in 2010. The Tasmanian

¹³⁵ 'It is a defence in any proceedings for an offence against this Act in relation to a relic that the defendant did not know, or could not reasonably be expected to have known, that it was a relic' (*Aboriginal Relics Act 1975* (Tas.)).

Aboriginal Centre (TAC) and two non-Indigenous members of the public made application together in the Tasmanian Supreme Court that the *Historic Cultural Heritage Act* was discriminatory in not accepting the Aboriginal heritage site nomination for the Jordan River site (*Reynolds v. Tasmanian Heritage Council* [2011] TASSC 6). The dismissal of the test case was then framed as a defeated David against Goliath (EDO Tas. 2014; *Koori Mail* 2011). However, in politically charged and reactive cases, preparation time is usually lacking and thus factual issues can become confused. In this case, the respondents were dismissed due to a ‘misinterpreted section...an error of law...[and] rather tortured interpretation of the section’ relating to the *Historic Cultural Heritage Act* (*Reynolds v. Tasmanian Heritage Council* [2011] TASSC 6). Unfortunately, good intentions have had the perverse effect of cementing the status quo in the separation of European and Aboriginal heritage in Tasmania and prevented a future avenue to bolster Aboriginal heritage protection mechanisms.

Applications for recognition of property rights under the Commonwealth native title legislation have also suffered the consequences of poor preparation and misinterpretations. The *Native Title (Tasmania) Act 1994* is minimalist legislation that provides for all acts pre-1994 to be validated and, if native title was to be found existing, compensation arises from this validation. There have been a total of four native title applications lodged in Tasmania and each has failed on procedural grounds. Three claims were lodged in 1995 and one further claim was lodged in 2000 — only three of the applications were from Aboriginal peoples. The claimants in 2000 were able to proceed to a registration decision, which was not accepted, and the application was soon discontinued (TC00/01 2002). The other two Aboriginal claims were rejected in the first instance and did not extend past the application stage. In all cases, the National Native Title Tribunal decisions were correctly judged by multifaceted standards. Supportive evidence was so deficient that ‘a claim is *prima facie* unable to be made out because it is impossible to assess what the claim actually is’ (TC95/01 1995, p. 4) or the evidence was ‘so ill-defined and amorphous it is incapable of being made out in any meaningful way’ (TC95/03 1995, p. 2), while the third application did not constitute a claimant group at all (TC00/01 2002, p. 20).

The case of Hollier’s claim is extraordinary. A non-Indigenous man, Hollier, lived on Deal Island in the Bass Strait for three years, employed as an environmental scientist through the Australian Government. He used those circumstances to lodge a claim for ‘native title’ in 1995 (Gelder & Jacobs 1998, p. xv):

[The claimant] wanted to authorise his occupation...through an uncanny procedure whereby it was impossible to tell whether he was ‘Aboriginalising’ his

whiteness or whitening legislation which is specifically Aboriginal. It spoke both to enthralment...and disdain.

In 1996, the claim was found to be ‘frivolous and vexatious...so clearly untenable that it cannot possibly succeed’ (TC95/02 1996, pp. 3–4). This did not stop the claimant filing an appeal, which was heard and dismissed in the Federal Court (*Hollier v. Registrar of National Native Title Tribunal* [1998] 82 FCR 186 (*Hollier*)).

The most serious attempt at using native title legislation, however, was not for land returns but under recognition of traditional activity rights. In *Dillon v. Davies* [1998] TASSC 60 (*Dillon*) a native title claim for fishing rights was made in regard to the possession of unlicensed abalone. No dispute was made in regard to possession or that the family had, for generations, been fishing in the same area, but the case hinged upon whether a traditional activity right was exercised in taking it (O’Neill, Douglas & Rice 2004, p. 675). Justice Underwood, in his reasons for upholding the original decision to deny the claim, stated (*Dillon*): “The existence of a right is not sufficient *per se* to establish native title’ and quoted the original judgment that there was “no requirement for any particular ritual or ceremony to be attached to the custom, and in fact, the custom could be quite an ordinary activity, the custom must be capable of definition. The nature of the custom must be known.”¹³⁶

Dillon did not prove the nature of the custom, only proving that eating abalone ‘was something that had been done by Aborigines for a very long time’ (*Dillon*). Thus the basis on which the appeal rested was found to be insufficient, as traditional laws and customs associated with the right were not demonstrated. This decision contrasts with the decision in *Karpany v. Dietman* [2013] HCA 47, where it was found that the taking of fish in contravention of the *Fisheries Act 1971* (SA) was not inconsistent with native title rights and interests.

In the long wake of *Dillon*, the Tasmanian Government implemented a policy for ‘Aboriginal Cultural Activities’, setting down the conditions under which Aboriginal people could engage in the taking of marine resources (DPIPWE 2012). Essentially, the policy restricts Aboriginal people to the same rules as recreational fishers; the exemption applies only to necessity of having a permit. Fishing tags are then managed and distributed by particular Aboriginal organisations that hold responsibility for the administration under which the individual can be exempt. However, the policy is no clearer on the linkages between the cultural custom and the acceptable conditions under which marine resources may be used. Instead,

¹³⁶ The judgment is available at <<http://www.austlii.edu.au/au/cases/tas/TASSC/1998/60.html>> (accessed 20 February 2016).

the argument over cultural custom is deflected onto who may be considered Aboriginal for the purpose of the exemptions (DPIPWE 2012).

The *Living Marine Resources Management Act 1995* (Tas.), however, does provide the closest implicit recognition of traditional activity rights under the companion Schedule 3A ‘Prescribed fish for definition of Aboriginal activity’ of the Fisheries (General and Fees) Regulations 2006 (Tas.). This exemption list comprises shells and marine plants (but no fish) that are routinely used in the making of Tasmanian Aboriginal shell necklaces, which Norman states are a ‘potent signifier of Indigenous culture and identity’ (2013, p. 284). Remarkably, the government agency links the exemption of shells as a cultural activity specifically to ‘manufacture artefacts for sale’ (DPIPWE 2014). Shell necklaces are bound within a commercial framework for the purposes of the exemption and this appears to be a more acceptable exemption activity than those of contemporary cultural practices. Nonetheless, recognition of Aboriginal traditional rights — as one might conceive would represent a native title right — is given within the context of shell collecting and stringing but not explicitly in the area of fisheries.

However, these traditional activity rights are not protected elsewhere, either under the *Aboriginal Relics Act* or the *Aboriginal Lands Act*. The *Aboriginal Lands Act* deals with land return only, being created to ‘promote reconciliation with the Tasmanian Aboriginal community by granting Aboriginal people certain parcels of land of historic or cultural significance’, whereupon the government transferred 12 parcels of lands into Aboriginal ownership on commencement (*Aboriginal Lands Act*, sch. 3 and 4). A further six land parcels were added in 1999 and 2005. Where they are found on mainland Tasmania (such as Risdon Cove), the parcels are mostly less than 500 hectares, while the vast majority of acreage is tied to land returns within the Furneaux Group of islands in the Bass Strait, such as Cape Barren, Chappell and Badger islands. A total of 55,617 hectares of land from government transfers is now vested with the Aboriginal Land Council of Tasmania (ALCT), although this is just over half the targeted 90,000 hectares that was a Tasmania *Together*¹³⁷ benchmark for achievement by 2010 (DPAC 2011, p. 94). Across the slim statutory domain, there is a clear inconsistency in the regulatory regimes for the recognition of traditional rights and interests. On the one hand, Aboriginal women’s cultural economic activities surrounding shell harvests have recognition and land

¹³⁷ Tasmania *Together* was a 20-year plan released in 2000 as a government initiative to increase democratic, state-wide planning processes and disbanded in 2012 with the repeal of the Act governing the Tasmania *Together* Board.

has been returned to the peoples under reconciliation principles; on the other hand, the Tasmanian Government is reluctant to acknowledge the bundle of heritage rights within a native title framework.

Gaining ground: spaces for asserting heritage

Land transfers through the *Aboriginal Lands Act* may be a closed option for future returns due to the Crown Land Assessment and Classification project of 2006 as part of the Tasmanian Community Forest Agreement (TCFA 2007). This project assessed over 100,000 hectares of unallocated Crown land, did not consider Aboriginal rights under legislative tests and recommended that some 78,000 hectares become reserved under the *Nature Conservation Act 2002* (Tas.) (TCFA 2007, p. 3). A consequence of the reservation of unallocated Crown lands is the formation of legislative barriers to land returns. Criteria for the burden of proof are increased when Aboriginal cultural significance must enter into contest against nature conservation values that normally precludes reservation (Lee 2015).

With diminishing availability of Crown lands, the Indigenous Land Corporation (ILC) may be a more attractive agency to assist in building assets for intergenerational land tenure security and heritage protection. The ILC is an Australian Government statutory authority, created in 1995 to help Aboriginal people to buy or manage lands that support cultural, economic and environmental initiatives. The ILC was an Australian Government initiative post-*Mabo* — a mechanism to support those Aboriginal people who would find it difficult to prove continuous association with lands as central to demonstrating native title (ILC 2014, p. 71). In Tasmania, the ILC has either purchased outright or share-purchased 18,536 hectares in eight parcels since 2001 (AIATSIS 2015 p. 10). These parcels are roughly split between working properties that retain heritage values of high significance, such as Murrayfield on Bruny Island, and acreage set aside for a range of conservation and cultural values in their entirety, such as Gowan Brae in the Central Highlands of mainland Tasmania. The ALCT holds title to some of these properties; others are vested with local incorporated Aboriginal associations or with the ILC itself. The ILC purchases are the only explicit benefit of native title for Tasmanian Aboriginal peoples, being a support for heritage and economic rights, particularly where state legislation has failed to import social justice.

Aside from purchases or returns, the only other space for engagement in land management is through protected areas. By late 2014, 44 per cent of Tasmania's landmass — just over three million hectares — comprises the reserve estate of formal, private and informal reserves, with the greater majority being solely government

managed (CAPAD 2014). In recent years, almost 200,000 hectares of further marine and estuarine reserves have been declared (DPIPWE 2013). None of these terrestrial or marine reserves is co-managed with Aboriginal peoples. Aboriginal joint management is specifically encouraged under Schedule 1, ‘Objectives for management of reserved land’, of the *National Parks and Reserves Management Act 2002* (Tas.), yet the administrative drivers and supports to enable joint management are non-existent. It is not surprising, however, that joint management agreements have not been formalised or even explored if we simply equate a dollar value with effort towards engagement. For example, out of an approximate annual budget of \$7 million (shared equally between the Commonwealth and the state) to manage the Tasmanian Wilderness World Heritage Area¹³⁸ (TWWHA), the baseline funding for managing the three Aboriginal cultural Outstanding Universal Values is only \$40,000 (Australian Government 2012, pp. 9, 23). The rest is reserved for management of the four natural Outstanding Universal Values.

Aboriginal peoples have little power to participate in heritage protection through the Tasmanian reserve estate given the overt focus on ‘wilderness’ and natural values in exclusion of cultural values (Lee 2015). The Australian Government Indigenous Protected Area¹³⁹ (IPA) program offers an alternative to localised joint management agreements, where tenure security and multiple governance relationships are the key feature rather than the traditional, single partnership arrangements, such as between an Aboriginal community and a Parks and Wildlife Service. There are eight IPAs declared in Tasmania — encompassing lands returned under the *Aboriginal Lands Act* — with a total landmass of only 11,174 hectares, comprising 524 hectares in one site on the west coast of Tasmania, 120 hectares in two sites near Hobart and the rest composed of Furneaux Group islands (AIATSIS 2014, p. 20). The scope for large-scale investment in tourism, for example, and good heritage protection governance arrangements is slim across the Tasmanian IPA portfolio due to issues such as lack of diversity in funding arrangements, size, remoteness and accessibility, and low levels of infrastructure. Tasmanian IPAs could be seen as tokenistic given the low levels of capacity within the Aboriginal management bodies and lack of government and non-government engagement in developing beneficial opportunities. This is particularly stinging when half of

¹³⁸ The TWWHA comprises one-fifth of the Tasmanian landmass and is one of only two global World Heritage Areas that fulfil the most criteria for Outstanding Universal Value.

¹³⁹ The Australian Government defines an IPA as including ‘areas of land and waters over which Aboriginal and Torres Strait Islanders are custodians, and which shall be managed for cultural

the Tasmanian landmass is available for joint management and capacity-building for Aboriginal cultural and economic equity but no invitation has been extended beyond a bolt-on mention in the National Parks and Reserves Management Act.

Big efforts for little reward

The effort that Tasmanian Aboriginal peoples have expended in progressing rights is not reflected in either the state legislation for heritage protection or the meagre land returns. However, Tasmanian Aboriginal peoples possess a great capacity for resilience in generational rights campaigns. One of the tools that has been consistently used is petitions. The success of the 1846 Wybalenna petition was incorporated into the activism that the people of the Furneaux Group later adopted to protect lands and keep cultural economies afloat. A petition in 1866 was sent to the Tasmanian governor for exclusive mutton-birding rights on Chappell Island (Ryan 1996, p. 227) with another following in 1878 requesting Flinders Island be set aside also for the same purpose (Harman 2013, p. 749). In 1973 a petition from the Aboriginal Information Centre (now the TAC) was submitted to the Woodward Aboriginal Land Rights Commission.¹⁴⁰ Calls were made for the return of Cape Barren Island; exclusive rights over Furneaux Group islands for mutton-birding and cattle grazing; all relics and remains; and cash compensation for occupation of tribal lands (Mollison 1974, s. 5.1.1).

This petition was further honed in December 1976, being sent to the prime minister of Australia and premier of Tasmania, and followed up with another in 1977 attaching dollar values for mutton-bird industries (Daniels 1995, pp. 39–40). There were direct claims made for Cape Barren Island and return of Crown lands; ownership over all sacred sites, such as Wybalenna, but also including rock art; returns of sacred lands, including massacre sites such as Cape Grim; and compensation for dispossession of land (Kirk n.d.). The Aboriginal activist Michael Mansell personally petitioned Queen Elizabeth II on a state visit in December 1977 (McKenna 2004, pp. 75–6). He was also the subject of the 2012 petition presented to Charles, Prince of Wales, also on a state visit (*Koori Mail* 2012, p. 6):

biodiversity and conservation, permitting customary sustainable resource use and sharing of benefit' (Hill et al. 2011, p.1).

¹⁴⁰ It is not clear whether the petition was received, as Woodward notes that, of the few direct Aboriginal submissions received, mostly were from 'community councils asking me to visit them for talks' (1973, p. 1). However, a submission was received from 'J. Luck, Trefoil Island, Tas.' (Woodward 1974, p. 149), and this may have been the petition.

Our grandfather, Walter George Arthur petitioned your great grandmother, her Majesty, Queen Victoria in 1846 to honour the promise made. Tasmanian Aborigine, Michael Mansell petitioned her Majesty, Queen Elizabeth II in 1977. We now call on you to honour the promise made by your forebears.

Over time these petitions have been a legitimate means of engaging with common law and have been foundational for successful land returns, such as the entirety of Cape Barren Island in two statutory transfers in 1995 and 2005 and other Furneaux Group islands (AIATSIS 2014, p. 12). Culturally, they reflect the nodes of engagement between opposing ideologies through generational kinship ties. Curthoys and Mitchell state that Aboriginal petitioners ‘learned where power lay, and they never lost sight of those authorities closest to them, seeking to draw them into patterns of mutual and personal obligation’ (2011, p. 198) — hence the emphasis on generational reciprocity and relationships in, and through, petitions to the British monarchy and federal and state governments to gain favourable decisions.

Tasmanian Aboriginal peoples have demonstrated extraordinary courage and leadership in engaging with court cases that have had international ramifications. These cases have been both an arena to demonstrate arguments about Aboriginal modes of modernity and the site of global Indigenous rights. For example, the 1983 *Tasmanian Dam case* (*Commonwealth v. Tasmania* [1983] HCA 21) to save the Franklin and Gordon rivers from submersion under a Tasmanian hydro-electric scheme influenced Australian constitutional law and is the benchmark case for environmental law (Byrnes 1985). Of the four parts to the decision handed down, the second relates to the protection of Aboriginal heritage and the unlawfulness of dam construction under the *World Heritage Properties Conservation Act 1983* (Cth) to destroy significant places of the TWWHA (*Commonwealth v. Tasmania* [1983] HCA 21). Whilst the archaeological values underpinned the factual issues of the case, the judgment explicitly recognised and acknowledged that contemporary Tasmanian Aboriginal peoples existed and held values regarding significant heritage places (Smith 2004, p. 186). The savvy activism of the Tasmanian Aboriginal peoples to capture contemporary cultural space within the environmental and archaeological discourse converged in Langford’s 1983 seminal paper ‘Our heritage — your playground’. Highlighting Aboriginal disempowerment through poor heritage management borne of Western scientific subjectivity, Langford stated that the issue was ‘control’ and, as such, heritage ‘is ours to control and it is ours to share’ (1983, p. 2). This

position was buttressed by demands that Aboriginal and Torres Strait Islander communities will no longer tolerate being ignored and future relationships with the archaeological community depended upon whether they are 'our guests or our enemies' (Langford 1983, p. 6).

For a time in the late 1980s and early 1990s Tasmanian Aboriginal peoples developed benchmark standards to gain a measure of control over heritage, helpfully aided by Langford's leadership. In 1995, Tasmanian Aboriginal peoples won an important court case against the La Trobe University for return of archaeological material from the TWWHA dating back 35,000 to 10,000 years and held under expired research permits (Pritchard 2006, pp. 91–2). Some sections of the archaeological community furiously argued against the contemporary Aboriginal position of connection to these materials (Allen 1995). However, the returns were court ordered and (Smith 2004, p. 174):

[It] signalled such a significant change in power relations between archaeologists, Aboriginal people and governments, that some archaeologists declared that it was the 'death' or 'end of archaeology' in Tasmania, while also issuing 'warnings' about the threats posed nationally to archaeological 'science' and research.

The Tasmanian Aboriginal peoples made it clear in the court case that the material would be reburied as part of the cultural reclamation process, which further goaded the archaeological dissenters (McNiven & Russell 2005, p. 211–12). Reburial is an important practice that has been recognised in Tasmanian Aboriginal-initiated court cases to return human remains from local and overseas institutions. A shared understanding between the Tasmanian Government and Aboriginal peoples regarding the significance of human remains can be traced to the sustained campaign for the 'de-accession' of Trucanini from the Tasmanian Museum and Art Gallery, particularly after she was removed from display in 1947. Trucanini was subsequently cremated in 1976 and the spreading of her ashes in the D'Entrecasteaux Channel was exclusively an Aboriginal affair agreed upon by the Tasmanian Government (Cove 1995, p. 153).

The local successes for the dignified return of human remains, together with a history of the government and the Tasmanian Aboriginal communities working together on this singular issue, meant that international 'collections' could then be targeted for homecoming (Petrović-Šteger 2013, p. 49):

[That the] first set of ancestral remains was repatriated to Tasmania, out of all the countries or regions to have petitioned the British Museum, is unsurprising in

light of the protractedness and pertinacity of the Tasmanian Aboriginal struggle for repatriation.

During the same period of international negotiations in 2006–07, the TAC was supported by a Commonwealth contribution of \$100,000 towards the legal fund in their other case against the British Natural History Museum, once again becoming the first Indigenous organisation to receive human remains from their repositories (Petrović-Šteger 2013, p. 52). It is due to Tasmanian Aboriginal advocacy — a ‘pertinacity’ paired with a staunch defiance against existing conditions and Leviathan institutions — that has seen human remains being repatriated from multiple repositories to Indigenous peoples across the world. It has also occurred within a localised environment of an outdated heritage legislative framework that explicitly denies contemporary cultural engagement.

The academic and institutional push-back against Tasmanian Aboriginal court cases regarding tangible and moveable heritage items highlights issues of who are the beneficiaries from current Australian legislation. Tasmanian Aboriginal heritage is considered of such academic value that it must be protected at all costs, but only within a framework devised by non-Aboriginal people. Of the heritage that has been exhumed, studied and fought over, and of the human and economic resources invested in knowledge-gathering, there has been a lack of corresponding advocacy for Aboriginal rights by the research community, even when shamed within the court room. There is a huge gulf between being researched peoples and the reciprocity of ensuring some benefit as a result. The Tasmanian Aboriginal history appears to be globally important; contemporary people, culture and rights are not regarded with the same legitimacy.

Conclusion

It is a thin and bitter soup for Tasmanian Aboriginal peoples at the heritage protection table. Native title legislation has had little positive impact; in the aftermath of *Hollier* it may seem an embarrassing avenue to pursue. Yet the ILC purchases and the creation of the *Aboriginal Lands Act* have all the hallmark whispers of native title influencing the Tasmanian Government decision to enjoin a common understanding of the connections that Aboriginal people hold to country. Regrettably, the momentum for equity had not spilled over to other arenas, such as the *Aboriginal Relics Act*, and joint management has not found tenure either. An environmental ideology holds huge sway in Tasmania, evidenced by almost half the landmass being reserved as a protected area and the renaming of Aboriginal country as the TWWHA (Lee 2015). The Tasmanian Government has legislated for joint management to occur but it has

never been established, as resourcing and governance partnerships have not found the champions to drive the process. The only IPAs declared in Tasmania are those lands that Aboriginal peoples had returned under the *Aboriginal Lands Act* and the majority of the acreage is located within the Furneaux Group of islands.

Tasmanian Aboriginal peoples have been viewed as the harbingers of doom to scientific research, even though court cases have compelled fair and proper regard to contemporary people and cultural practices. Yet these cases have not resulted in amendments to outdated heritage legislation. It is unsettling that in 1975 an Act is created that allows human remains to belong in a domain of scientific research, yet in 1976 the government agrees to the cremation of Trucanini under Aboriginal ceremony without acknowledging contemporary culture under potential legislative changes.

Although ground has been clawed back in gaining legal rights and progressing land returns, it is the low-hanging fruit that has been picked — for example, the return of the Furneaux Group of islands and rights to harvest shells to sell the iconic necklaces. However, what the government will not engage in is the ‘hard’ rights associated with lands and heritage. These include intangible and immoveable heritage, joint management and Indigenous rights to practise culture unfettered. These issues could generously be seen as a reflection of Tasmanian historical ambivalence and tension towards the ‘Aboriginal problem’, expressed as a ‘slippage’ in the understanding of genocide and extinction (Taylor 2013) and how to articulate Aboriginal survivorship in what was supposedly a clear-cut case of extermination (Breen 2011).

However, there is another lens through which to view the Tasmanian Government’s array of rights and legislation. The positioning of existing rights in land returns and heritage has been a duplication of colonial policies aimed at shifting the places and terms of Aboriginal engagement away from the centre to the margins. Aboriginal culture, land returns and rights are concentrated upon the Furneaux Group of islands and can be seen as a residue of colonial thinking about where the ‘Aboriginal problem’ is located. Trapped in the Wybalenna mythology of physical exile, Aboriginal peoples have moved on, literally, by returning to the Tasmanian mainland, but the government has remained fixed. Tasmanian Aboriginality has legitimacy, but it is geographically attached to the Furneaux Group and attendant cultural practices, such as fishing licence exemptions, mutton-birding industries and shell collecting, which are acceptable as authentically Indigenous. The Tasmania Government continues to rebuff Aboriginal attempts to engage in joint management agreements and heritage rights on the Tasmanian mainland, apparently because Aboriginal culture is located ‘over there’ on the islands.

While other factors, such as extinction myths and environmental ideologies, continue to impact upon Tasmanian Aboriginal rights, the role of the government should not be to reinforce the cumulative, negative impact of historical decisions. The current legislation cannot assist in securing benefits for Tasmanian Aboriginal peoples under native title conditions while contemporary peoples and cultural practices are poorly acknowledged. Perhaps it is an advantage that native title does not exist in Tasmania, as the narrow confines and conditions of the legislation lock Aboriginal people into further tropes of authenticity that do not reflect the cultural reinvigoration of genocide peoples. This, however, should not preclude reassessing the spaces in which joint management can operate and heritage protection can thrive.

What springs to light, however, is one positive outcome to the paradox of the Tasmanians. In arriving at a position that legitimacy is conferred to certain Aboriginal practices, the underlying and overlooked truth is that the Tasmanians have shifted from being ‘extinct’ to being recognised Indigenous peoples. The *Aboriginal Lands Act* is a simple, yet insufficient, proof of contemporary recognition, stemming more from the sustained social justice era of native title induction into the Australian statutory landscape than a dedicated underpinning of Tasmanian Aboriginal equity. However, while attendant rights have been hard fought and/or poorly resourced, Tasmanian Aboriginal peoples *are* formally acknowledged through land returns and traditional activity exemptions. The social terrain of Tasmania has moved, albeit into an uncertain stage of how best to accommodate working together, but the drought, perhaps, is starting to break.

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