

Are Courts Colour Blind to Country? Indigenous Rights, Environmental Law and the Australian Judicial System¹

Section 1: Does the Australian law protect Indigenous cultural heritage?

The Indigenous peoples of Australia maintain one of the oldest continuous living cultures in the world. Indigenous cultural heritage is an 'ongoing part of Aboriginal existence which is vital to Aboriginal well-being'.² The protection of cultural and spiritual landscapes and materials, including sacred sites and artefacts, both past and present, is fundamentally important to maintaining Indigenous culture. Persistent efforts by Indigenous traditional owners, community organisations and academics have led to a greater public understanding, as well as some positive legal reforms. However, legal protection of cultural heritage has often been, and continues to be, ineffective. One of the key reasons for this is a piecemeal approach to protection; one that manifests a distinction between 'the environment' and Indigenous heritage. This seems extraordinary given that 'it is extremely difficult, if not impossible, to protect an [Indigenous heritage] site without also protecting the surrounding environment'.³

This paper focuses on the role of the judicial system in the protection of cultural heritage and asks whether courts can see the *whole* of country, rather than compartmentalising it. It must be acknowledged that the courts alone cannot provide the solution, although historically they have significantly advanced the law and provided protection. In particular, this paper will draw attention to three recent cases, from different Australian jurisdictions, that demonstrate the significant impact courts can have in interpreting legislation relating to Indigenous heritage.

Section 2 - Why is Indigenous cultural heritage not adequately protected by law?

There are five key reasons that contribute to why Indigenous cultural heritage is not adequately protected in Australia. Two are inherently legal: fragmentation relating to

¹ Lauren Butterly and Rachel Pepper, paper presented to the IUCNAEL Colloquium 2016, Oslo, Norway, 22 June 2016.

² Blaze Kwaymullina, Ambelin Kwaymullina and Sally Morgan, 'Reform and Resistance: An Indigenous Perspective on Proposed Changes to the *Aboriginal Heritage Act 1972 (WA)*' (2012) 8(1) *Indigenous Law Bulletin* 7, 8.

³ *Ibid*, 10.

both jurisdiction and subject matter and lack of Constitutional protection. Two are quasi-political: debates about ‘who speaks for country’ and lack of enforcement. The final reason relates more broadly to cross-cultural understanding: a failure to understand what Indigenous cultural heritage comprises. All of these factors impact on how courts interact with, and make decisions concerning, Indigenous heritage.

Legal fragmentation

(a) jurisdiction

Being a federation, Australia has both Commonwealth (national) and State/Territory laws. The powers of the Commonwealth are delineated by the Australian Constitution. Australia’s Constitution does not provide for the recognition of Indigenous peoples as the traditional owners of the lands and waters or protection of their rights to heritage. Further, there is no head of power in the Australian Constitution that specifically relates to Indigenous rights to land, to Indigenous cultural heritage, or to the environment more generally.

However, there has been an expansive interpretation of other Commonwealth heads of power, such as the external affairs power, which has extended their reach into aspects of these areas.⁴ Australian States and Territories also have residual power to legislate. This ‘complex jurisdictional patchwork’ provides challenges for effective environmental regulation and protection of Indigenous cultural heritage.⁵

Australia’s main Commonwealth environmental legislation is the *Environment Protection Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”). This Act provides for assessment and approval of processes for certain matters of national environmental significance, but it is not intended to ‘cover the field’ of environmental regulation. States and Territories have their own environmental, planning and heritage legislation which they administer. This fragmentation has an impact on which courts supervise and enforce such legislation, and the extent of their powers;

⁴ For further discussion of the environmental constitutional setting see: Melissa Perry, ‘The fractured state of environmental regulation’ (2013) 28(2) *Australian Environment Review* 438. In relation to Indigenous lands and heritage, the most relevant heads of power in the *Commonwealth of Australia Constitution Act 1900* (Cth) are s 51(xxvi) (‘race power’) and s 51(xxix) (‘external affairs powers’ - relating to the *International Convention on the Elimination of all Forms of Racial Discrimination*).

⁵ Perry, above n 4, 438.

with the EPBC Act being enforced by the Federal Court of Australia and the State and Territory legislation being supervised mainly by specialist courts, such as the Land and Environment Court of New South Wales. There is also Commonwealth legislation in relation to native title (the *Native Title Act 1993* (Cth)), enacted after the *Mabo (No 2)* decision,⁶ and legislation in most States and Territories dealing with Aboriginal land rights and cultural heritage.⁷

(b) subject matter

It is also evident that there is subject matter siloing across both federal and state jurisdictions.⁸ Different statutes deal with aspects of environmental protection, mining, water, coastal and marine areas, Indigenous land and sea rights and cultural heritage. While the subject matter of all these statutes may have an impact on Indigenous heritage, sometimes the connections are missing.

For example, recent proposed amendments to the *Aboriginal Heritage Act 1972* in Western Australia were rightly criticised because they did not take into account the links between cultural heritage and environmental law.⁹ This is both curious and unfortunate given the link between the protection of Indigenous cultural heritage and planning processes such as conducting environmental impact statements.

The form in which relationships between environment and heritage are recognised must also be carefully considered. It is disturbing that currently in New South Wales

⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁷ In terms of land rights, all States and Territories except Western Australia have enacted specific legislation. Although such fragmentation provides challenges, it should be acknowledged that sometimes the relationship between Commonwealth and State/Territory legislation provides for appropriate 'checks and balances'. For example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) provides a mechanism of 'last resort' where it is alleged that States/Territories are not adequately protecting Indigenous heritage: *Tickner v Bropho* (1993) 40 FCR 165 at [2] per French J (as he then was).

⁸ Also evident is a siloing between law and 'non-law'. Mechanisms that are seen to be outside the legal framework are often not given sufficient attention. An example of this is Sea Country Indigenous Protected Areas. These are not provided for under any legislation, but are an Indigenous community-led approach, based on Indigenous legal and belief systems, that allows for protection of Indigenous heritage through Indigenous management of the marine environment: Lauren Butterly, 'Changing Tack: *Akiba* and The Way Forward For Indigenous Governance of Sea Country' (2013) 17(1) *Australian Indigenous Law Review* 2. As they are seen as non-legal, often lawyers are unaware of their impact or potential. Of course, these 'non-law' mechanisms may be said to be beyond what courts should consider, but this observation in itself is a part of the 'blindness'.

⁹ Ambelin Kwaymullina, Blaze Kwaymullina and Lauren Butterly, 'Opportunity Lost: Changes to Aboriginal Heritage Law in Western Australia' (2015) 8(16) *Indigenous Law Bulletin* 24.

the protection of Aboriginal cultural heritage is dealt with under a statute that regulates 'flora and fauna'.¹⁰

Questions of 'who speaks for country'?

Debates relating to Indigenous lands and waters are often complex and raise the issue of 'who speaks for country?' For example, a recent news article in *The Guardian* about a controversial coal mining project in Queensland stated that traditional owners had voted in favour of allowing the mine, but some from the Indigenous group had 'labelled the vote a sham'.¹¹ Similar issues have arisen in other mining contexts, such as James Price Point in Western Australia where one Indigenous group supported the building of a 'gas hub' off the coast, predominantly for economic reasons, and other Indigenous groups did not support it due to potential environmental damage to places of cultural significance.¹²

The James Price Point example also brought out debate between environmental groups and Indigenous communities; as did another highly politicised example which has become known as the Wild Rivers debate. Broadly, the Wild Rivers debate related to the enactment of conservation legislation that limited certain development activities in particular zones containing 'wild rivers' in north Queensland. Respected Indigenous leader Noel Pearson stated that the legislation had been 'concocted by green groups in Brisbane [the main city in the State] in return for green [election] preferences'.¹³

It has been further observed that conflict between Indigenous groups and environmental groups ('green-black conflict') is a growing feature of Australian

¹⁰ J Kennedy, 'Operative Protection or Regulation of Destruction? The validity of permits to destroy Indigenous Cultural Heritage Sites' (2005) 6(14) *Indigenous Law Bulletin* 20; Rachel Pepper and Sophie Duxson, 'Not Plants or Animals: the Protection of Indigenous Cultural Heritage in Australia' (2014) 29(2) *Australian Environment Review* 26.

¹¹ Guardian staff and agencies, 'Acrimony and legal threat as Indigenous group approves Adani mine', *The Guardian* (online, Australian ed), 17 April 2016, <<http://www.theguardian.com/australia-news/2016/apr/17/wangan-and-jagalingou-indigenous-group-approves-adani-carmichael-mine>>.

¹² Melissa Fyfe, 'Kimberley Aborigines fight for James Price point is now against WA's Premier', *The Sydney Morning Herald* (online), November 23 2013 <<http://www.smh.com.au/national/kimberley-aborigines-fight-for-james-price-point-is-now-against-wa-premier-20131122-2y1f7.html>>.

¹³ Sarah Elks and Rosanne Barrett, 'Wild Rivers Act crushes Aborigines: Pearson', *The Australian* (online), 5 November 2011 <<http://www.theaustralian.com.au/national-affairs/state-politics/wild-rivers-act-crushes-aborigines-pearson/storye6frgczx-1226186208583>>.

politics.¹⁴ These conflicts often relate to self-determination, which in turn relates to the *UN Declaration on the Rights of Indigenous Peoples* – to which Australia is a signatory.¹⁵

Enforcement of protective measures

Historically, there has been limited enforcement of penalties for offences relating to destruction of Aboriginal heritage and those penalties have been, on any view, manifestly too low.¹⁶ This is particularly the case when compared to other offences, for example, environmental offences such as the destruction of wildlife or native vegetation.¹⁷

Moreover, the laws rely upon proper enforcement for their efficacy.¹⁸ But, enforcement by Aboriginal people of provisions that protect cultural heritage is expensive. Judicial review is stultified by the threat of adverse costs orders if the court does not find the litigation to be in the public interest.¹⁹ Legal aid is not available for cases relating to the protection of Aboriginal cultural heritage and recent funding constraints imposed on environmental and local legal centres, such as the

¹⁴ Ciaran O’Faircheallaigh, ‘Green – Black Conflict Over Gas Development in the Kimberley: A Sign of Things to Come?’ *The Conversation* (online), 18 October 2011 <<http://theconversation.com/green-black-conflict-over-gas-development-in-the-kimberley-a-sign-of-things-to-come-3539>>.

¹⁵ *UN Declaration on the Rights of Indigenous Peoples*, Article 3. Self-determination has been described as the ‘cornerstone’ of the UNDRIP: Megan Davis, ‘Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples’ (2008) 9(2) *Melbourne Journal of International Law* 439, 461.

¹⁶ The defendants in the 2007 decision of *Plath v O’Neill* (2007) 174 A Crim R 336, who had been found guilty of deliberate destruction of middens and possible Aboriginal ancestral remains, were fined \$800. In the same year in *Garrett v Williams* (2007) 151 LGERA 92, the defendant was fined \$1,400 for knowingly damaging an Aboriginal object and an Aboriginal place. In *Chief Executive, Office of Environment and Heritage v Ausgrid* (2013) 199 LGERA 1 the Land and Environment Court of New South Wales noted that the maximum penalties for offences concerning the destruction of aboriginal cultural heritage were considerably lower than comparable offences under various environmental and planning statutes: at [46].

¹⁷ Offences by individuals against the *Environmental Planning and Assessment Act 1979* (NSW) attract a maximum penalty of 10,000 penalty units or \$1,100,000, and possibly a further daily penalty of 1,000 penalty units or \$110,000: s 126. Tier 1 offences by individuals against the *Protection of the Environment Operations Act 1979* (NSW) (“POEO Act”) attract a maximum penalty of \$1,000,000 or 7 years’ imprisonment: s 119(b). Tier 1 offences by corporations against the POEO Act attract a maximum penalty of \$5,000,000 for wilful actions and \$2,000,000 for negligent actions: s 119(a).

¹⁸ Pepper and Duxson, above n 10.

¹⁹ See, for example, *Anderson v Director-General of the Department of Environment and Climate Change* [2008] NSWLEC 299. In that case, the Land and Environment Court found that there was insufficient basis to depart from the normal costs rule because, although the proceedings could be described as “in the public interest”, there was disagreement among the Aboriginal litigants as to whether or not a permit should be issued and the case had not been a particularly strong one: at [14].

Environmental Defenders Offices and various Indigenous legal services, further limit the availability of Aboriginal groups to enforce the existing law.²⁰ In short, there exists both a lack of political will and lack of funding.

Failure to understand what Indigenous cultural heritage comprises

Indigenous cultural heritage encompasses ‘tangible and intangible aspects of the body of cultural practices, resources and knowledge systems’ that have and continue to be ‘passed on by Indigenous people as part of expressing their cultural identity...’.²¹ This includes objects such as spearheads, rock art, middens, burial grounds and bark paintings; as well as more inchoate features and elements, such as sites of ancient or recent history, including post-colonial massacre sites, and sites of specific cultural associations²² that tell a story about the area and the people that existed there.²³ This includes birthing sites, traditional routes, song lines which connect sacred places ‘like railway lines’,²⁴ and associations with specific plants and animals.²⁵

Heritage must be understood and acknowledged as living and being lived. Yet some older heritage legislation (particularly Western Australia, Tasmania and New South Wales) is based on outmoded historical social and philosophical views that locate Indigenous peoples and cultures at an earlier time, and gives the legislation a ‘museum mentality’ – that is, that the place for tangible items is in a museum, not as part of a living culture.²⁶ As the next section of this paper demonstrates, a much more nuanced understanding of Indigenous cultural heritage is necessary..

Section 3 – Overcoming colour blindness

There have been, and continue to be, substantial attempts at overcoming some of the problems identified above, commencing with a proper understanding of what

²⁰ The Hon Greg Smith SC MP, *Greater access to justice for disadvantaged*, Press Release, 20 December 2012.

²¹ Terri Janke and Robynne Quiggan, *Background Paper Number 12: Indigenous cultural and intellectual property and customary law*, Law Reform Commission of Western Australia, Perth, 2005.

²² *Ashton Coal Operations Pty Limited v Director-General, Department of Environment, Climate Change and Water (No 3)* [2011] NSWLEC 1249 (*Ashton*).

²³ Lesley Turner, Acting Chief Executive Officer of the NSW Aboriginal Land Council: *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51; (2013) 199 LGERA 1 at [53].

²⁴ Gina Smith, traditional owner, in A Aikman, ‘OM Manganese fined \$150k for desecrating Aboriginal sacred site’, *The Australian* (online), 2 August 2013

<<http://www.theaustralian.com.au/business/mining-energy/om-manganese-fined-150k-for-desecrating-aboriginal-sacred-site/story-e6frg9df-1226690068326>>.

²⁵ *Ashton* at [81].

²⁶ Blaze Kwaymullina, Ambelin Kwaymullina and Sally Morgan, above n 2, 8.

Indigenous heritage encompasses. This knowledge is central to formulating meaningful statutory protections and, in turn, to the courts interpreting and applying these laws in an effective manner.

Legislative initiatives

Notwithstanding the disparate state of Indigenous cultural heritage protection, there exists, within many Australian States, meaningful promulgation and reform of laws protecting cultural heritage.

First, there is presently gaining momentum in Australia a move to recognise Indigenous peoples in the Constitution. Changing the Constitution to recognise the existence of Indigenous peoples and their culture will require the holding of a referendum. The referendum process requires a majority of Australians in a 2/3 majority of the States/Territories to vote in favour of it, for any amendment to the Constitution to pass. Successful referenda are therefore a rarity and generally rely on bipartisan support and a public education campaign explaining the necessity and benefits of the constitutional change proposed.

In 2012, the Prime Minister's Expert Panel on Constitutional Recognition recommended, amongst other things, that a new provision be inserted into the Constitution 'acknowledging the continuing relationship of Indigenous peoples with their traditional lands and waters' and 'respecting the continuing cultures, languages and *heritage* of Indigenous peoples'.²⁷

The consultation process amongst Indigenous and non-Indigenous people is underway. This process has been challenging because it has, and continues to, involve working through complex issues about the meaning of recognition. Concerns about whether consultation with Indigenous peoples has been truly meaningful have been raised.²⁸

²⁷ Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012) <http://www.recognise.org.au/about/expert-panel-report/> (emphasis added).

²⁸ Megan Davis, 'Listening but not hearing' (2016) 51 *Griffith Review* <<https://griffithreview.com/articles/listening-but-not-hearing/>>.

Further, Professor Megan Davis, an Indigenous legal academic and Australia's Member on the UN Permanent Forum on Indigenous Issues, has stated that the Indigenous community will not accept purely symbolic recognition.²⁹

Polling and survey data within the Australian community suggests that the idea of Constitutional recognition of Indigenous Australians has broad support - 'in principle'.³⁰ However, before this 'principle' can be given legal effect, difficult questions of law and politics must be resolved, and in doing so, Indigenous peoples and communities must be heard.

Because the precise parameters of what might be recognised are uncertain, it is unclear what practical legal impact the referendum will, if passed, have on protection of cultural heritage in the future. But, it is more than likely that the normative effect of constitutional recognition, together with the concomitant public education campaign prior to the referendum, will be significant in, at the very least, better educating non-Indigenous Australians as to the complexity of Indigenous cultural heritage. At this stage, it has been suggested that the referendum will be held in 2017. This may be overly optimistic.

At a State level, where no referendum is required, Indigenous peoples and their unique culture have already been constitutionally recognised.³¹,

Second, the enactment of the *Native Title Act* at a federal level in response to the landmark decision of the High Court of Australia in *Mabo (No 2)*, recognising the

²⁹ [Francis Keany](http://www.abc.net.au/news/2015-12-07/referendum-council-member-raises-doubts-over-indigenous-reforms/7006764), 'Referendum Council's Megan Davis raises doubt over Indigenous recognition vote', ABC News (online), 7 December 2015 <<http://www.abc.net.au/news/2015-12-07/referendum-council-member-raises-doubts-over-indigenous-reforms/7006764>>.

³⁰ See, for example, SBS News, 'Majority of Australians support Indigenous constitutional recognition: Survey', SBS News (online), 10 November 2015, <<http://www.sbs.com.au/news/article/2015/11/10/majority-australians-support-indigenous-constitutional-recognition-survey>>.

³¹ As a result of amendments made by the *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW), enacted with bipartisan support, the New South Wales Constitution Act 1902 now provides in s 2(2):

'Parliament, on behalf of the people of New South Wales, recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:

- (a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and
- (b) have made and continue to make a unique and lasting contribution to the identity of the State.'

prior common law native title rights of Aboriginal peoples and soundly rejecting the concept of *terra nullius*,³² together with the enactment of the EPBC Act, have ensured a minimum layer of Indigenous cultural protection across Australia.

Some jurisdictions, such as New South Wales,³³ (have for some time) enacted their own land rights legislation designed to address the dispossession of Aboriginal people in that State. The New South Wales scheme, for example, focuses on whether the land is of a category that is 'claimable' and there is no need for a claimant to prove a traditional connection to the land. If successful, the claimant is awarded title in fee simple.

Among their many objectives, these Acts may be seen as a legislative recognition of the inextricable connection between Indigenous cultural heritage and the country of which it is a part. Recognise and protect the latter, and this will encourage and enable the protection of the former.

Third, at the State and Territory level, various enactments specifically protect Aboriginal cultural heritage and make its destruction an offence.³⁴

Fourth, there have also been attempts in recent years to increase penalties for heritage destruction.³⁵ Accordingly, in the decision of *Ausgrid*, the albeit accidental destruction of an Aboriginal rock carving resulted in a fine of \$4,690,³⁶ the maximum penalty under the *National Parks and Wildlife Act 1974* (NSW) in New South Wales having been increased to \$220,000 for a corporation. Similarly, in the Northern Territory in *Aboriginal Areas Protection Authority v OM (Manganese) Ltd*,³⁷ the defendant was fined \$120,000 for an offence of desecration of a sacred site and \$30,000 for the breach of a condition of its approval causing damage to a sacred site under the *Northern Territory Sacred Site Act 1989* (NT).³⁸

³² That is, that Australia was unoccupied at the moment of settlement.

³³ *Aboriginal Land Rights Act 1983* (NSW).

³⁴ See generally the summary in Pepper and Duxson, above n 10.

³⁵ Prior to the 2010 amendments to the *National Parks and Wildlife Act 1974* (NSW), the maximum penalties in New South Wales for such offences were considerably lower.

³⁶ *Chief Executive, Office of Environment and Heritage v Ausgrid* (2013) 199 LGERA 1.

³⁷ [2013] NTMC 19.

³⁸ Sections 35 and 36 respectively.

Finally, cultural difficulties surrounding Indigenous people giving evidence have been recognised by the Parliament and various provisions have been enacted to ameliorate and facilitate this process. Hence, there are exceptions to the hearsay rule and the opinion evidence rule for the giving of evidence of traditional laws and customs by Aboriginal peoples at both the state and Commonwealth level.³⁹ Further, in conducting native title proceedings, the Federal Court ‘may take account of the cultural and customary concerns’ of Indigenous peoples.⁴⁰

Courts

In addition, the courts are increasingly recognising that cultural heritage comprises of much more than artefacts, but includes landscapes and values. A recent trilogy of cases illustrates the point.

First, in *Darkinjung Local Aboriginal Land Council*⁴¹ the Land and Environment Court of New South Wales upheld objector appeals challenging a project approval application for the continued operation and extension of an existing sand quarry. One of the issues the Court was required to consider was the impact of the expansion of the quarry on the cultural heritage values of the surrounding landscape of the Darkinjung people, particularly by isolating a ‘Woman’s Site’ and the ‘Stone Arrangement Site’ and known engravings. The project had the capacity to destroy or degrade the landscape in which these and other sites exist and compromise the spiritual and cultural connection that the Darkinjung have to land and to the site. This in turn had the capacity to further exacerbate the process of fragmentation of

³⁹ For example, ss 72 and 78A respectively of the *Evidence Act 1995* (NSW) and ss 72 and 78A of the *Evidence Act 1995* (Cth). See generally Diana Eades, ‘Judicial Understandings of Aboriginality and Language Use in Criminal Cases’ in Peter Toner (ed), *Steps to an Economy of Knowledge: Essays in Honour of Ian Keen* (2015, Canberra, ANU Press).

⁴⁰ *Native Title Act 1993* (Cth) s 82(1); *Federal Court Rules 2011* (Cth) r 34.121. Also see Richard Bartlett, *Native Title in Australia* (3rd ed, 2015, LexisNexis) 949. This is despite the fact that the *Native Title Act* used to provide that the Court was not bound by the rules of evidence: Bartlett, 274. This was amended in 1998. Also see Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2006, section 19

http://www.alrc.gov.au/publications/19.%20Aboriginal%20and%20Torres%20Strait%20Islander%20Traditional%20Laws%20and%20Customs/evidence-traditi#_ftn48.

⁴¹ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure; Australian Walkabout Wildlife Park Pty Limited (CAN 115 219 791) as Trustee for the Gerald and Catherine Barnard Family Trust v Minister for Planning and Infrastructure* [2015] NSWLEC 1465.

Aboriginal heritage that had occurred in the area. The destruction of the site was not merely destruction of artefacts, but rather “the erasure of an occupation area which informs the significance of surrounding engravings, and is part of the cultural landscape as a whole”.⁴² While the Court noted that some of the evidence demonstrating the connectedness and relationship between sites and their location in the broader landscape was incomplete, it nevertheless upheld the claim applying precautionary principle and the Burra Charter principles. The Burra Charter is produced by the Australian branch of the International Council on Monuments and Sites and provides a best practice standard for managing cultural heritage places.⁴³

Second, the decision of the Federal Court of Australia in *Tasmanian Aboriginal Centre Inc*,⁴⁴ where Mortimer J held that a proposal to reopen three 4WD tracks in the Western Tasmanian Aboriginal Cultural Landscape by the Tasmanian government, a recognised “place” on the National Heritage List, would have a significant impact on national heritage values protected under the EPBC Act.

Her Honour held that the protection under the EPBC Act included the values of a place, in that instance, Indigenous heritage values. In addition, the protection extended not only to individual sites but to the area as a whole, recognising that the integrity of landscapes in their totality were of value to Aboriginal peoples. The opening of the tracks would damage the whole of the landscape, and therefore, significantly impact upon the Western Tasmanian Aboriginal Cultural Landscape. The Court noted that:⁴⁵

‘... the landscape in the WTACL is one that has been inhabited by Aboriginal people for thousands of years. What survives of their life there is not limited to what survived when a white man visited the area for a few days in the late nineteenth century. The shifting nature of the dunes, the size of the area and the lack of comprehensive surveys means there is no reliable way to ascertain what physical manifestations of Aboriginal life in the area are still there. That may never be completely ascertained. In one sense, as much of the evidence in this proceeding makes clear, it does not matter what is currently visible and what is not because the value to Aboriginal people is in the whole of the landscape. The connection to their ancestors’ way of life

⁴² Ibid at [36(11)].

⁴³ International Council on Monuments and Sites (Australia), *About Us* <<http://australia.icomos.org/about-us/australia-icomos/>>.

⁴⁴ *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* [2016] FCA 168.

⁴⁵ Ibid at [225]. The case has been appealed.

arises as much from the dunes, the beaches, the vegetation, and the sea life as from the artefacts which may be found in dedicated surveys.'

The *Tasmanian Aboriginal Centre* case is also significant insofar as it has, in small part, sought to dissolve the silos that exist in Australia's patchwork protection of Indigenous cultural heritage by considering heritage and the wider environment, or landscape, together, rather than separating 'pieces' of heritage from their country. It is no coincidence that Mortimer J also presides over native title cases.

Third, in the recent Western Australian case of *Robinson*,⁴⁶ Chaney J held that there was no reason why a 'sacred site' must be devoted to 'religious use rather than be subject to mythological story, song or belief'. His Honour emphasised that to suggest that particular rituals or ceremonies are required denies the expression 'sacred site' a separate meaning.⁴⁷

Put another way, protecting cultural heritage ought not be frustrated (unless the text, context and purpose of the legislation otherwise demands it) by recourse to restrictive cannons of statutory construction. This is especially important given that most enactments regulating the preservation of cultural heritage are beneficial in nature, a matter recognised and given effect to by the courts.⁴⁸

Education

Education is critical to understanding not merely the need for the protection of Aboriginal cultural heritage, but also what it comprises, and therefore, how best to protect it.

In a representative democracy such as Australia, the education of the public is clearly central to ensuring that adequate laws are passed to preserve Indigenous cultural heritage. Likewise, the education of those elected and entrusted to enact those laws is essential. As stated above, it is hoped that the national public

⁴⁶ *Robinson v Fielding* [2015] WASC 108.

⁴⁷ *Robinson* at [98]. See Lauren Butterly, 'Update on Aboriginal Heritage in the West: Successful Judicial Review Application and Debate Surrounding Legislative Reform' (2015) 30(4-5) *Australian Environmental Review* 104.

⁴⁸ *IW v City of Perth* [1977] HCA 30; (1977) 191 CLR 1 at 12 and *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* [2014] NSWCCA 377; (2014) 88 NSWLR 125 at [27].

processes and education campaign surrounding the referendum to constitutionally recognise Aboriginal and Torres Strait Islanders in the Australian Constitution will assist in this regard.

Judicial education is also important. It cannot be assumed that judicial officers have much (if any) knowledge about Indigenous cultural heritage, notwithstanding that they may be expected to decide cases concerning this subject-matter.

Initiatives such as the Judicial Commission of NSW's Ngara Yurra Committee, whose aims include the education of judicial officers in New South Wales in respect of Indigenous issues, both civil and criminal, are therefore to be commended, if not replicated in other jurisdictions. Specifically, the Committee raises awareness of cultural heritage issues through visits to sacred sites and presentations by traditional owners, archaeologists and anthropologists.

Section 4: Broader Reflections

The cases of *Darkinjung Local Aboriginal Land Council*, *Tasmanian Aboriginal Centre* and *Robinson* demonstrate the impact that courts can have in interpreting legislation relating to Indigenous cultural heritage. However, courts can only work with what is before them, and moreover within the structures and cultural norms that bind them, both in theory and in practice. Although there have been some legislative improvements, considerably more effort needs to be made into 'bringing together' the current patchwork of legal protection. There is no doubt that this reform is hard, as it involves amendments to multiple statutes and negotiated compromises between various vested interests. Such reform also requires the executive arm of government to work cooperatively across silos and across jurisdictions, and perhaps, political boundaries.

It is also clear that improving the way Australia's legal system as a whole approaches Indigenous cultural heritage requires more, and better, consultation and engagement of all communities, but especially Indigenous communities. Meaningful consultation with Indigenous communities allows for the potential discovery of innovative local solutions that rely on 'bottom-up' governance. Local solutions can

often have more 'buy-in' from the community - both Indigenous and non-Indigenous - as well as having an important educative role. Such solutions can then operate to enhance the protection offered by current legislation, or even, potentially, act as the basis for broad-scale legislative reforms.

Attempts to reform the legal protection of Indigenous cultural heritage are making progress, albeit slowly. However, for Indigenous cultural heritage to be properly protected, the whole of country must be acknowledged and the *whole* of country must be *seen* by legislators and courts alike.