

MANY BOTTLES FOR MANY FLIES: MANAGING CONFLICT OVER INDIGENOUS PEOPLE'S CULTURAL HERITAGE IN WESTERN AUSTRALIA

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This article critically surveys the legal regulation of Indigenous people's cultural heritage in Western Australia and its operation within the framework of a Australia's federal system of government. It also sets out the different ways in which Indigenous cultural heritage is conceptualised, including as a public good analogous to property of the crown, an incidental right arising from group native title and as the subject of private contract. There is no unified legal notion of 'Indigenous cultural heritage' in Western Australian law. Rather, Indigenous cultural heritage is governed by 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.¹

CONFLICT OVER INDIGENOUS CULTURAL HERITAGE IN WESTERN AUSTRALIAN HISTORY

While this article is an analysis of current law rather than a legal-historical analysis, it is important to appreciate that conflict over cultural heritage is not now, and has not been in the past, a dry matter of resiling different views about the use and disposition of land or waters.² Rather, disputes over heritage have proven to be defining moments in the history of relations between the Crown and Indigenous peoples in Western Australia. Notwithstanding enduring cultural stereotypes about the importance of the pastoral industry, it is mining and energy that exercises absolute dominance over the Western Australian economy. Within the political economy of the resources industry in Western Australia Indigenous cultural heritage has proven to be a highly volatile issue because of its potential to impede development.³

An illuminating example is provided by the dispute over the Noonkanbah pastoral station, located southwest of Fitzroy Crossing in the Kimberley, which took place in 1979-80. In 1976, the Noonkanbah pastoral lease was purchased for the Yungngora local Aboriginal community⁴ with the title vested in a statutory entity known as the Aboriginal Lands Trust. Soon afterwards, during the Kimberley minerals rush of the late 1970s, a tenement to conduct exploration for oil was granted to a multinational

corporation which proposed to drill an exploration well in the vicinity of Pea Hill or *Umpampurru* on Noonkanbah station. State investigation revealed that the area in question included a heritage site complex that was significant in both a religious and economic context.⁵

The government rejected the investigation's findings, and decided that drilling would proceed. A protracted conflict ensued, including legal proceedings, street protests, Indigenous blockades of the main highway in to the Kimberley, Union action, the personal involvement of both the Premier of WA and the Minister for Aboriginal Affairs and various efforts at negotiation. All efforts to produce a compromise settlement failed. In August 1980, a convoy of forty-five trucks bearing the drilling equipment left Perth with heavy police escort. It smashed its way through the various protests and pickets. Upon the convoy finally reaching Noonkanbah station, the site was drilled. The exploration uncovered nothing of value.

The Noonkanbah imbroglio galvanised considerable popular political opinion behind Aboriginal people in Western Australia. It was one of the catalysts for the ejection from office of the conservative State Government of Premier Sir Charles Court in 1982. 'Noonkanbah, never again' became a popular rallying cry and the various parties went to some lengths to give the phrase their preferred meaning: the State embarked on legislative change; the Aboriginal people of the region united in a powerful new institution known as the Kimberley Land Council and there was no doubt an increased caution and awareness (if not yet even rhetorical sympathy) in relation to Indigenous affairs on the part of the resources industry. In certain respects, the system for dealing with cultural heritage in Western Australia remains marked by a common view that future Noonkanbah-like conflagrations should be avoided, because of the debilitating human cost to all parties occasioned by that dispute.⁶ Nevertheless, other significant controversies have followed Noonkanbah, including the Swan Brewery,⁷ Marandoo,⁸ Argyle⁹ and Tallering Peak.¹⁰

SOURCES OF LAW: OVERVIEW OF THE FEDERATED DIVISION OF POWER IN AUSTRALIA

The regulation of Indigenous cultural heritage in Western Australia occurs in the context of interplay of Commonwealth and State legal regimes, within the constitutional framework of Australia's federated system of government. The authority of the Crown in Australia is divided between the Commonwealth, which exercises specific powers, and the States, which hold the residual authority. Where there is an inconsistency between a law of the central authority and of one or more of the States, the Commonwealth prevails to the extent of the inconsistency.¹¹ The domestic constitutional structure has long been understood as a key to understanding (and reforming) the shape of Indigenous affairs in Australia.¹² Section 51(xxvi) of the Commonwealth Constitution in its original form gave to the Commonwealth Parliament: 'Power to make laws for the peace, order and good Government of the Commonwealth with respect to... the people of any race, other than the Aboriginal race in any State for whom it is deemed necessary to make special laws.' The section was famously amended in 1967¹³ to rectify the omission of

the 'Aboriginal race' with the result that the Commonwealth now possesses the non-exclusive power to make special laws in relation to Australia's Indigenous population.¹⁴

*Sources of Law I: The (WA) Aboriginal Heritage Act 1972*¹⁵

Indigenous cultural heritage is not the subject of a specific head of power aggregated exclusively to the Commonwealth under the Constitution of Australia and accordingly, the States are free to pass legislation on the subject. Western Australia enacted its *Aboriginal Heritage Act 1972 (WA) (AHA)* in 1972 with the ostensible purpose of protecting places and objects of significance to Indigenous people, on behalf of the community.¹⁶ The manner in which the AHA functions is set out below.¹⁷

The AHA establishes a central source of authority to record and regulate all dealings with Aboriginal places and objects of significance. This central authority has three elements: the relevant State Government Minister,¹⁸ the Aboriginal Cultural Material Committee [ACMC] and the Registrar of Aboriginal Sites. The ACMC is comprised of at least one anthropologist and the Director of the WA Museum is an ex officio member.¹⁹ Otherwise it is made up of 'persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility.'²⁰ The functions of the ACMC include evaluating 'on behalf of the community' the importance of places and objects 'alleged to be associated with Aboriginal persons' and where appropriate, 'to record and preserve' the traditional Aboriginal lore.' The ACMC also has the role of recommending to the Minister places that, in the opinion of the ACMC, are of special significance to persons of Aboriginal descent and should be preserved, acquired and managed by the Minister. In evaluating the importance of places, the ACMC must have regard to certain criteria, including any existing use or significance attributed under relevant Aboriginal custom; any former or reputed use or significance which may be attributed upon the basis of tradition, historical association, or Aboriginal sentiment; any potential anthropological, archaeological or ethnographic interest; and aesthetic values. Any associated sacred beliefs, and ritual or ceremonial usage shall be regarded as the primary considerations to be taken into account in the evaluation of any place or object.²¹ In addition to its more specific functions, the ACMC must advise the Minister generally on the operation of the AHA.²²

The Registrar of Aboriginal Sites must be an officer of the relevant government department and he or she has the function of administering the day-to-day operations of the ACMC. In the fulfillment of his or her duties, the Minister is required to 'have regard to the recommendations of the Committee and the Registrar', but is not bound by them.²³ Some of the Minister's decisions are subject to review by the Supreme Court.²⁴ The AHA refers to various kinds of places of significance that are ascribed different levels of importance. These include 'places of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial object, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present';²⁵ 'sacred, ritual or ceremonial sites, which are of importance and special significance to persons of Aboriginal descent';²⁶ and

any place which, in the opinion of the ACMC, are associated with Aboriginal people and which are of 'historical, anthropological, archaeological or ethnographic interest and should be preserved because of its importance and significance to the cultural heritage of the State.'²⁷ Aboriginal sites of 'outstanding importance' may be made 'protected areas' and thereby accorded the highest form of protection available under the AHA.²⁸

Subject to certain exceptions, the AHA makes it illegal to damage any places or objects of significance, with any transgression rendering the perpetrator liable to prosecution. In proceedings for unauthorised alteration or dealings with any Aboriginal site or object, it is a defence for the person charged to prove that they did not know and could not reasonably be expected to have known, that the place or object to which the charge related was a place or object to which the AHA applies.²⁹ Prosecutions are initiated and conducted by the State, rather than by Indigenous people themselves. In other words, it is at the discretion of Government whether or not to prosecute, a hurdle that may prove not inconsiderable. In any event, even where a prosecution is conducted and is successful, the penalties available under the AHA were, up until recently, very low indeed. However, in 2003 the penalties were substantially increased to a fine of up to \$20,000 and nine months prison for an initial breach by an individual and fines of up to \$50,000 for an initial breach by a corporation.³⁰

The right to excavate or to remove any thing from an Aboriginal site is reserved to the Registrar³¹ unless the owner³² has obtained consent to use the land in a way that would be prohibited without such consent.³³ Thus, while it is generally illegal for non-Aboriginal people to in any way alter or deal with any site or object, such activity can be legalised by the Minister when a land owner makes an application to that effect.³⁴ An application by a land owner to destroy or disturb a site is first considered by the ACMC, which makes a recommendation to the Minister who then may give or decline consent, or provide some conditional sanction.

The AHA makes it the duty of the Minister to ensure that, so far as is reasonably practicable, all places in Western Australia that are of traditional or current sacred, ritual or ceremonial significance to persons of Aboriginal descent should be recorded 'on behalf of the community', and their relative importance evaluated so that the resources available from time to time for the preservation and protection of such places may be co-ordinated and made effective.³⁵ Any person who has knowledge of the existence of any thing in the nature of Aboriginal burial grounds, symbols or objects of sacred, ritual or ceremonial significance, cave or rock paintings or engravings, stone structures or arranged stones, carved trees, or of any other place or thing to which the AHA applies or to which the AHA might reasonably be suspected to apply, shall report its existence to the Registrar, or to a police officer.³⁶ The reporting enterprise extends to Aboriginal cultural material of traditional or current sacred, ritual or ceremonial significance regardless of where it is located.³⁷ The Registrar is required to maintain a register of places and objects that records all protected areas, all Aboriginal cultural material; and all other places and objects to which the AHA applies.³⁸ A partial exception to these rules is that the AHA does not require Aboriginal people themselves to disclose information or otherwise to act

contrary to any cultural prohibition.³⁹ The AHA also establishes a scheme for the regulation of commercial dealing in Aboriginal cultural material.⁴⁰

The AHA then, does not create or recognise rights in cultural heritage vested in Indigenous people and neither does it impose any positive obligation on developers of land to engage with traditional land owners with a view to protecting areas of significance. Rather, the AHA creates a fairly weak regime to regulate what is conceptualised as a public good. The basal principle underpinning the AHA is that there is a broader community interest in the regulation of Indigenous heritage, to be subject to the supervening imperatives of government and private developers. In practice, the administration of the AHA is neither properly resourced nor zealously enforced. The Western Australian Department of Indigenous affairs possesses a negligible investigative capacity and has completed very few prosecutions.

Sources of Law II: Common Law Native Title and the (Cwth) Native Title Act

The common law doctrine of native title was belatedly recognised in Australia in *Mabo & Ors v Queensland (No.2)*⁴¹ (*Mabo*), decided in 1992. However the *Mabo* judgments did not, of course, provide a framework for the integration of native title into the Australian property law system. The Commonwealth Labor Government of Paul Keating was faced with the choice of either taking a national approach, or allowing the various State parliaments and Supreme Courts to adopt separate approaches to the assimilation of native title into existing legal structures. After heated and lengthy public and parliamentary debate, the Commonwealth *Native Title Act* 1993 (Cth) (NTA) was passed in late 1993 in reliance on a number of heads of Federal power, including race and external affairs.⁴² The NTA did not, of course, provide a complete answer to all of the uncertainties arising from the *Mabo* decision, but it did introduce a comprehensive system for regulating dealings between native title claimants and holders and other parties with interests in land. Following the defeat of the Keating Labor administration by the Howard Conservative Coalition in 1996, the NTA was subject to considerable amendment, but the essence of the statutory machinery remained the same.⁴³

Under the NTA, a claimant application for a determination of native title is made to the Federal Court of Australia, which then generally refers the claim off to mediation, which is conducted by the National Native Title Tribunal.⁴⁴ The mediation is between the native title claimants and, potentially, every other party that has an interest in the land and waters covered by the native title claim. All levels of government have standing to be party to the mediation, whilst other parties include resource companies, pastoral leaseholders, developers and fishing interests.⁴⁵ The purpose of mediation under the NTA is to achieve a determination of whether native title exists, if so, who holds it and how it interrelates with other interests within the claim area.⁴⁶ If mediation reaches an impasse, the claim must be concluded before the Federal Court by litigation.⁴⁷

The processes for determining whether native title exists are lengthy.⁴⁸ Mindful of the need for life to go on whilst native title claims remained unresolved, the

Commonwealth Parliament created a second procedural stream for dealing with the immediate tenure needs of governments and third parties. Once a native title claim is lodged with the Federal Court, the Registrar of the National Native Title Tribunal applies a registration test consisting of both formal and substantive criteria.⁴⁹ A claim that passes the registration test obtains valuable procedural rights in respect of non-indigenous parties who wish to perform acts affecting native title on land subject to the native title claim. Chief among the procedural entitlements obtained as a consequence of the registration of a native title claim is the 'right to negotiate'.⁵⁰

Under the NTA a right to negotiate accrues to registered native title claimants in relation to the creation of a right to mine, over the land that is subject to the claim in question. The compulsory acquisition of native title rights and interests by the government is referred to by the NTA as a 'future act'.⁵¹ The native title claimants, the government party and the future act proponent to whom the government is proposing to grant the tenure are required to negotiate in good faith with respect to the proposed future act in question for a minimum period of time. If the negotiations do not result in an agreement then the matter may be referred to the National Native Title Tribunal which, in an arbitral capacity, will decide whether the act can go ahead and, if so, under what conditions. Apart from the right to negotiate, a litany of lesser procedural rights exists under the NTA in respect of other kinds of future acts. The right to negotiate is the strongest procedural safeguard that exists under the NTA, however it does not provide the native title claimants with a right of veto, or impose a requirement on the developer to obtain the traditional owners' informed consent.

The right to negotiate itself is capable of complete abnegation by an 'expedited procedure' if the government is of the view that certain statutory pre-conditions have been satisfied.⁵² In a sense, the term 'expedited procedure' is ill-chosen, because the expression refers to the absence of the right to negotiate, rather than a mere abbreviation. The application of the expedited procedure is signified by the state issuing a notice to that effect because it regards the grant of the tenement in question as satisfying criteria set out in s237 of the NTA. There is then a period in which native title claimant groups are eligible to object to the application of the expedited procedure.⁵³ If there is no objection then the tenement in question will be granted without further delay. Under s 237, an act is one attracting the expedited procedure if it:

- (a) is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders of native title in relation to the land or waters concerned; and
- (b) is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the person who are the holders of native title in relation to the land and waters concerned; and

- (c) is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

The Western Australian government has always considered that all exploration and prospecting licences for mining should attract the expedited procedure and does not exercise any discretion in relation to each individual grant. Prospecting licences have a maximum area of 200 hectares with a term of four years and permit the prospector to extract or disturb up to 500 tonnes of material from the ground. The Minister may approve extraction of larger tonnages. Exploration licences allow for an area of a minimum of 1 graticular block (approximately 2.86 square kilometres or 286 hectares), up to a maximum 70 graticular blocks (approximately 197 square kilometres or 19,700 hectares). The term of an exploration licence is 5 years and the Minister may extend the term in certain circumstances. The holder of an exploration licence may extract or disturb up to 1000 tonnes of material from the ground and the Minister may approve extraction of a greater amount. In the conduct of the exploration or prospecting activity the proponent can drill, excavate costeans, dig test pits, blast, clear overburden, create roads or tracks, clear seismic lines and, if required, build floor camps. Clearly, significant environmental and aesthetic change will occur as a result of the standard activities involved in exploration and prospecting.

If a registered native title claimant group does not accept the exercise of the State's judgment that an act is one attracting the expedited procedure, then an objection may be made to the National Native Title Tribunal acting in an arbitral capacity. The Tribunal will then conduct an inquiry into the objection, proceedings which are adversarial in their nature, with the government, the native title objectors and the tenement applicant (known as 'the grantee party') as parties. If the Tribunal decides that an act does not attract the expedited procedure, then the full right to negotiate will apply to the grant of the tenement in question.

Thus, the expedited procedure directly deals with the interaction of Indigenous peoples and third parties in relation to cultural heritage. Concomitantly, objections to the application of the expedited procedure are often lodged with the protection of heritage being the principle imperative. Objections are most often resolved through an agreement between the grantee party and the native title party, that the grantee party will fund an Aboriginal heritage survey in order to ensure that no archaeological or ethnographic sites of significance are disturbed when exploration or prospecting is occurring.

The purpose of the procedural rights obtained upon the registration of a native title claim is to roughly maintain the status quo until the application can be finally decided with a determination in rem made by the Federal Court. The statutory scheme to maintain the status quo has particular resonance in relation to the preservation of heritage, because of its status as a core native title right. In *Hayes v Northern Territory*⁵⁴ (also sometimes known as 'the Alice Springs Case') it became

clear that a determination of native title could include the right to protect Aboriginal heritage. Indeed, Justice Olney stated that 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.'⁵⁵

NATIVE TITLE AND HERITAGE: TWO SOURCES OF LAW BUT ONE RELATIONSHIP

The operation of the AHA and the law of native title intersect in relation to Indigenous cultural heritage in an uncomfortable overlay of State and Federal legislation. The AHA and the NTA both deal with Aboriginal heritage: but conceptualised in very different ways and administered under separate statutory mechanisms. The elapse in time between the passing of the AHA in 1972 and the NTA in 1993 partially explains the incoherent relationship between the two statutes. The generation between the passage of the NTA and the enactment of the AHA saw vast changes in relation to the place of Aboriginal people in Australian society. Native title is also, in its origins, a creature of common law doctrine now regulated by Commonwealth legislation, whereas the AHA is a beast of statute. Such protection as the AHA offers to heritage is not vitiated by changes in land tenure, or the nature of the local Indigenous people. Native title, on the other hand, is extinguished by inconsistent tenure and will only be recognised to exist where the Indigenous group in question is sufficiently traditional and can satisfy the elements of proof.⁵⁶ Unlike the AHA, which gives a protective role to an external authority, the NTA created the ability for native title claim groups to pro-actively intervene in order to preserve their own heritage. Native title and statutory Aboriginal heritage, even though they partly concern the same subject matter, are markedly different in terms of nature and origin.⁵⁷

The existence of separate cultural heritage and native title laws is often considered to be unsatisfactory by both traditional owners and resource interests. Indigenous people appear to find the arbitrary division of their relationship with their country in to either 'native title' or 'heritage' to be puzzling, perverse and inconsistent with traditional world-views. Resource interests are often frustrated by the requirement that they comply with dual processes, with distinct approval procedures, when dealing with the same Indigenous people in the same area. However, both sets of stakeholders have also, to some extent, managed to adapt to the institutional circumstances in an opportunistic manner. Traditional owners use native title to bolster heritage rights and AHA processes to augment their bargaining power under the NTA. Resource interests use delays arising from native title to 'park' tenements, thereby avoiding any legal obligation to expenses on tenements while still maintainig priority over ground.⁵⁸

MANAGEMENT OF INDIGINEOUS CULTURAL HERITAGE BY PRIVATE ARRANGEMENT

Indigenous cultural heritage only comes under threat when the Government or a third party wants to use or develop land and it is such occasions when there is potential for conflict. The AHA and the NTA both mandate processes for resolving quarrels in relation to Indigenous cultural heritage. However, while parties are required to adhere

to statutory processes, the principal manner in which disagreement over cultural heritage is resolved in Western Australia is by private arrangement. Contracts for the resolution of heritage issues sometimes involve a government party, but most often are simply between a registered native title claim group and an individual resource interest. This section of the paper discusses the role of private contracts in managing Indigenous cultural heritage and containing conflict over competing land uses.

The guiding philosophy underpinning the NTA is that the preferred way of resolving disputes between native title claimants and other interests is by mediation or negotiation leading to agreement. Indeed, there is consensus among all stakeholders that agreement, rather than disputation or litigation is the best way of resolving issues in relation to native title.⁵⁹ As a matter of practice, many hundreds and possibly even thousands of agreements have been reached since the enactment of the NTA.⁶⁰ One of the principal subjects of agreements pursuant to the NTA is Indigenous cultural heritage.

In Western Australia, it is significant that the AHA does not require development proponents to take any positive action. There is nothing in the AHA that requires users of land to undertake an Indigenous cultural heritage survey or any other preventative measure. Nor is there any real suggestion implicit in the AHA that users of land should attempt to reach agreement with traditional owners. The enactment of the NTA in 1993, offered a hitherto unprecedented opportunity to Indigenous people to get land users to enter into negotiations regarding Indigenous cultural heritage with a view to reaching agreement. The common pattern that emerged was that upon the State advertising its intention to grant a prospecting or exploration tenement, one or more registered native title claimants would lodge an objection. The objection would then be withdrawn if the proponent agreed to conduct an Aboriginal heritage survey. Thus, an entire world of quasi-litigation, procedure and agreement-making came into being in response to the inadequacy of the AHA in protecting Aboriginal heritage, to give traditional owners a say in the process.

In 2001, Western Australia's newly elected Labor Government an inquiry into the State's participation in the future act system known as the Technical Taskforce on Mineral Tenements and Land Title Applications. The Taskforce, chaired by Mr Bardy MacFarlane, a Member of the National Native Title Tribunal eventually released a discussion paper. Among the findings of the Technical Taskforce was the recommendation that the State should encourage the development of template agreements, to be negotiated by peak native title and industry bodies acting collectively in a 'Heritage Protection Working Group' (HPWG).

It was a hopeful and ambitious strategy to think that peak industry groups and native title bodies would be able to agree on regional template agreements. The negotiation of the precedent agreements proved to be lengthy, bitter and arduous. The content of negotiations also quickly became markedly regionalised. The NTA provides for the recognition of Aboriginal corporations as native title representative bodies (NTRBs), which function as specialist legal aid service providers to traditional owners. Western Australia is divided between five NTRBs known as the Kimberley

Land Council, Ngaanyatjarrah Council, the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, the Goldfields Land and Sea Council and the South West Land and Sea Council. It is not compulsory for native title claimant groups to be represented by NTRBS, but the majority (in Western Australia at least) do chose that option.⁶¹

Very different heritage protection practices had emerged within each of Western Australia's NTRB regions by 2001 with the five NTRBs adopting dissimilar standards for acceptable minimum procedures. The regional differences in relation to heritage standards were caused by variations in the historical and cultural circumstances of each NTRBs' constituents, the kind of pressures applied to the region by industrial and resource development, professional capacity of the NTRBs and so on. In the Yamatji (Pilbara, Murchison and Gascoyne) region for example, the YMBBMAC had created a stripped down heritage protection agreement, which – at only four pages in length – was designed to be user-friendly to even the small prospector. The guiding ideal behind what became colloquially known as the 'four pager' was to express the essence of heritage protection concisely and bluntly, to be read and signed like a licence application. The four-pager had, by 2001, largely become the norm within the Yamatji region and was widely accepted within industry.

The HPWG process crystallised regional differences and by the middle of 2003, distinct agreements had been concluded for use in four of the five regions.⁶² In each case the template agreement represented a genuine compromise for all parties. Grantees are now required to prove that they have signed the appropriate standard heritage agreement for the region in which they seek tenure, before their tenement application will be submitted to the expedited procedure process under the NTA. If no heritage agreement has been signed by the grantee, then the State will not apply the expedited procedure and the application will go through the NTA right to negotiate process.

The HPWG negotiations largely revolved around what threshold of ground disturbance (bearing in mind the range of activities authorised under exploration and prospecting licences) would necessitate a heritage survey, and what form the heritage evaluation would take. Critically, as there is no accepted industry, statutory or academic standard for Indigenous cultural heritage surveys, the HPWG negotiations were not grounded in any objective standard of reasonableness or proportionality. The two professions involved in the conduct of surveys, anthropologists and archaeologists, are largely unregulated. As a consequence, there is a wide divergence in the kind of methodology that is adopted by heritage practitioners. Broadly speaking, some methodologies are seen to favour Indigenous interests more than others by retaining knowledge for longer and releasing knowledge in incremental fashion. Conversely, methodologies which provide for more information to be given to resource interests on an up-front basis are seen to be more favourable to project proponents. There are a range of Indigenous heritage survey methodologies of common currency in Western Australia:

Work Program Clearance Methodology

As a general rule Working groups prefer to advocate the Work Program Clearance model, where claimants are giving “informed consent” to the use of their land and the exploration working methods to be used upon and over it. The aim of the Work Program Clearance survey is to ‘clear’ a specific Work Plan, which details the exact locations of all ground disturbance activities (eg. Drill holes, access tracks, work camp and other facilities). These types of surveys are suitable for most exploration work, and all development in areas with the exception of actual mining or other activities that require intensive/expansive ground disturbance. This model of survey clears, or otherwise, specific work areas in relation to specific work programs only. Traditional Owners retain the right to withhold cultural information other than that necessary to indicate which areas of a Work Program are cleared, and those which are not.

Work Area Clearance

The aim of this type of survey is to ‘clear’ an entire allocated area in order for development to proceed, without Aboriginal people having to divulge anything but the most rudimentary information. These surveys are suitable for smaller areas of land to be cleared without the need for detailed survey work. In the field this requires an ethnographic survey team working with company representatives to determine on-the-ground areas that are cleared, or some mutually acceptable alternative. It also identifies areas that are not cleared. Sites/cultural features are not recorded in detail and no assessment is made of their significance. Site boundaries or buffer zones, placement of certain infrastructure would normally be recorded. In all other respects the survey method and consultation process is the same as for Work Program Clearance model.

Site Identification Methodology

In this model a survey team aims to record any sites, cultural features or places of special ethnographic interest in a survey area. The recording is of a detailed nature, and aims to give statements of significance on any sites recorded, and record other relevant cultural information and comments regards the survey area. The recording is at a level suitable for section 18 applications under the Aboriginal Heritage Act 1972. Some of this information may be restricted to a closed report. This type of survey is suitable prior to the (proposed) development/mining of large areas, and after initial exploration and Work Program Clearance surveys have been conducted, or for small areas with known sites recorded at Clearance or Avoidance level (as described above).

'Best Fit' or 'Fit for Purpose' Surveys

Often a particular project requires an amalgam of survey strategies. Eg over an expansive area of Work Program Clearance model will be followed, except for one small area in which for, say, engineering considerations, a particular rail link or water pump must be placed in a set location. In that case, for that specific area only, a Site Identification strategy (at section 18 level) may be employed. These are pragmatic strategies to get around the real life world of survey work/development proposals. The decision on these matters may be made by the Working Group for the claimants.

Site Avoidance Survey

This is an ambiguous term, which means different things when used by different people. In general, it just means any type of survey where the proponent agrees to avoid sites, and that recording is therefore minimal. Consequently it could be either Work Area Clearance, or Work Program Clearance, or even a Site ID model (detailed recording with statement of significance), but where the proponent agrees to avoid the site in the short term. Because the methodology is not specified, the term is not really a method, but a concept of "We agree to avoid it, but don't agree how the survey should be conducted".⁶³

There are of course also numerous hybridised versions of Indigenous heritage survey methodologies.

The regional template agreements were negotiated by the NTRBs, not by individual registered native title claim groups. Accordingly, in the Yamatji region for example, once the HPWG template had been agreed at a summit level, it became necessary to present the agreement to each individual group for ratification. When considering whether to adopt the HPWG agreement, most native title claim groups indicated an ongoing preference for the 'four pager', but also agreed that the new template would be acceptable. The HPWG agreements are now in large scale operation throughout the State.

INDIGENOUS LAND USE AGREEMENTS

The NTA contemplates a broader form of agreement known as an Indigenous Land Use Agreement or 'ILUA'.⁶⁴ The ILUA provisions in the NTA are intricate and not specifically concerned with Indigenous cultural heritage. In essence, ILUAs are significant because they give the parties the ability to effectively contract out of the procedures under the NTA, creating what is, in effect if not name, private beneficial legislation. Given their qualities, it is obvious enough that ILUAs can provide a mechanism for dealing with Indigenous cultural heritage on a claim wide or regional basis. The National Native Title Tribunal maintains a register of ILUAs which is open for public perusal.⁶⁵

MAJOR PROJECT AGREEMENTS

Most mineral exploration does not result in the discovery of a commercially viable resource. However, where a company does discover a feasible ore body, or when government seeks to compulsorily acquire land for a development, more complex heritage issues arise. In the exploration phase, resource interests will generally be able to avoid damage to Indigenous cultural heritage. However, where large scale disturbance of land is involved, avoidance will not be possible. So, what happens if a significant Indigenous site is located right on top of the ore body?

The NTA offers the right to negotiate as a means for the parties to resolve any dispute. While it is technically feasible that a mine will not be permitted to proceed under the right to negotiate process, during the 12 years in which the NTA has been in force no project has been halted. Similarly, the AHA does not provide any mechanism to stop a mining project. In the absence of any ability to veto development, registered native title claimants are left with the unenviable choice of pragmatically negotiating the best agreement possible in the circumstances, or fighting the proposed project to a bitter, and almost inevitably unsuccessful, end. Unsurprisingly, most traditional owner groups faced with such dilemmas opt for reaching an agreement.

Major project agreements will usually include some or all of the following elements in relation to Indigenous cultural heritage:

- Surveys to be conducted for the avoidance of Indigenous cultural heritage as far as is possible;
- Payment of compensation;
- Protective arrangements such as fencing and signage;
- Induction practices for employees and contractors designed to achieve respect for heritage;
- Salvation and mitigation work;
- Indigenous heritage monitors on hand for ground-disturbing work;
- Commitments to not apply under s16 or s18 AHA, without prior notice to the registered native title claimants; and
- Establishment of a monitoring and liaison committee.⁶⁶

The payment of compensation to traditional owners has, not surprisingly, proved to be a controversial matter. There is no official rate for compensation for future acts under the NTA and there is no common law guidance as to how damage to native title or Indigenous cultural heritage is to be valued.⁶⁷ There is a voluminous literature that speculates how native title might be valued, but it generally proceeds on the basis of application of principle, rather than the more laissez faire atmosphere that attends future act negotiations. Most negotiations and agreements over major projects are confidential to the parties, so there is not even a developed set of precedents based on actual negotiated outcomes.⁶⁸ In essence, native title claimants

will want compensation to be as high as the project can bear, while the proponent will generally want it to be as little as decently possible.⁶⁹ The actuality of such a dynamic is problematic within the context of popular discourses of the noble and spiritually uncompromising Aborigine, compounded by a general lack of awareness amongst the public of the severe limitations inherent in the right to negotiate.⁷⁰

Perhaps the most famous dispute over Aboriginal cultural heritage in the in Western Australia since *Mabo* concerned the compulsory acquisition of native title over areas of land on or around the Burrup Peninsula near Karratha in Western Australia. The acquisition concerned an area of world-renowned heritage significance, described by some as having the richest concentration of rock art in the world. The land was required for the creation of a multibillion dollar industrial complex. Lacking any capacity to veto the compulsory acquisition, the native title applicants negotiated the best agreement possible in the circumstances, whilst attempting to minimise the impact on their cultural heritage. While the development inevitably involved the mass destruction of cultural sites of significance, it also included very significant provisions for the management and maintenance of what remained, as well as substantial compensation. It was a highly successful outcome in the circumstances, though it attracted considerable controversy. The resulting agreement is one of the most comprehensive and largest scale of any negotiated between Indigenous people and governments in Australia. Unusually, and because the agreement was with the State of Western Australia, its provisions are entirely within the public arena. Ironically though, the Burrup Agreement retains no provisions dealing specifically with Indigenous heritage, simply allowing for the operation of the general law.⁷¹

BREACH OF CONTRACT

Agreements, of course, do not always fulfil the desires of the parties and general law remedies will apply when one party or another breaches a contract in relation to Indigenous cultural heritage. However, agreements with Indigenous people have, on the face of it, proved remarkably likely to command the adherence of the parties. Since 1992, there has been only a single reported instance of a party being sued for breach of an agreement over Indigenous cultural heritage.

The dispute in *Duke v Carriage*⁷² stemmed from an agreement negotiated between a predecessor in title of the defendant known as the Eastern Gas Pipeline Company and various native title claimants on the other part, including the applicant. The subject matter was the Eastern Gas Pipeline, to be constructed along a substantial proportion of the Pacific coast of Australia. Among other things, the agreement between the parties provided that at all stages of construction involving land disturbance (clearing, grading and trenching), the proponent would employ an Aboriginal archaeological consultant and two Aboriginal monitors.

Dispute between the parties was with respect to what constituted a 'land disturbance' and so gave rise to the relevant obligations on the part of the proponent. Specifically, a dispute existed over whether back-filling a trench could constitute a

land disturbance. The Supreme Court of NSW found that there was an arguable case for the plaintiffs, holding that it was clear that damages were not an adequate remedy, because the agreement was an equitable contract⁷³ and the cultural significance of what might be lost could not easily be assessed in money by way of damages.

INJUNCTIONS

The AHA and the NTA together fail to provide traditional owners with the ability to satisfy aspirations to protect Indigenous cultural heritage in all instances. At times, Indigenous parties resort to attempts to obtain injunctive relief. In *Djaigween v Douglas*,⁷⁴ the native title applicants attempted to obtain an interlocutory injunction to restrain the State of Western Australia from granting to the respondent a lease over the land for the purpose of a crocodile farm. In *Bropho v Ball*,⁷⁵ the applicants sought an interlocutory injunction to restrain pile driving work being carried out in the Swan River on the basis that part of the river in question was a sacred area which the construction of a jetty would damage. In each of these instances, the application for an injunction failed. There is no case where a court has yet granted an injunction on the basis that the registered native title applicants may have their sites damaged if some activity goes ahead.⁷⁶

OTHER STATE AND FEDERAL SOURCES OF LAW

The Heritage of Western Australia Act 1990 (WA) allows for the inclusion of sites of cultural heritage significance on to a Register of Heritage Places. The legislation has never been used to protect Indigenous cultural heritage, but appears broad enough to be applied to Aboriginal sites of significance.⁷⁷

The Aboriginal and Torres Straits Islander Heritage Protection Act 1984 (Cth) provides supplementary protection for Indigenous cultural heritage that is considered to be of particular significance and where protection is deemed within the 'national interest'.⁷⁸ The Commonwealth heritage legislation has only been used very sparsely indeed in Western Australia and has not resulted in a single permanent site preservation declaration having been made. *The Australian Heritage Council Act 2004 (Cth)* provides for the Australian Heritage Commission to recommend the protection of certain cultural heritage that is considered to be part of the 'national estate'.⁷⁹ A number of Indigenous sites in Western Australia have been included the Register of the National Estate. A number of other Indigenous sites are recorded for the rest of Western Australia.⁸⁰ However, inclusion of the Register of the National Estate does not entail any further legal protection.

CONCLUSION

Multiple sources of law govern Indigenous cultural heritage in Western Australia, spanning divisions in power between State and Federal authority and between statutory and common law. The inadequacies of the AHA from an Indigenous perspective are bolstered with recourse to the NTA and vice versa, in an endeavour

to create an overall Indigenous bargaining position of greater potency. The law of Aboriginal heritage in Western Australia is comprised of an ill-fitting pastiche of processes with the result that its ambiguities are generally left for individual traditional owner groups and resource proponents to resolve through the negotiation of private agreements. In Western Australia, the ostensibly very public question of how Aboriginal cultural heritage, including the artefacts and regalia of internally sovereign Indigenous societies, should be dealt with at law is largely dominated by inter partes arrangements that are negotiated in private and remain confidential.

ENDNOTES

¹ For a more radical critique see D. Ritter, 'Trashing Heritage: Dilemmas of rights and power in the operation of Western Australia's Aboriginal Heritage legislation' in C. Choo and S. Hollbach (eds), *Studies in WA History: History and Native Title*, University of Western Australia Press, Perth, 2003. I would like to thank Tess Burton for editorial assistance on this article.

² This article does not deal with Indigenous intellectual property rights: see for example J. Gibson, 'Justive of precedent, justice of equity: equitable protection and remedies for indigenous intellectual property', *Australian Indigenous Law Reporter*, 2001 6(4) p1; C. Banks, 'The more things change... the new moral rights legislation and Indigenous creators', *Griffith Law Review*, 2000, 9(2), p334; J. Githaiga, 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge', *Murdoch University Electronic Journal of Law*, 1998, 5(2) and T. Janke, 'Moral Rights and Protecting the Cultural Rights of Indigenous Artists', *Art and Law*, 2003, pp3; 8.

³ As I have commented in an earlier work, 'real power' in Western Australia lies with developers: see Moore, P., 'Aboriginal Heritage and Anthropological Practice: Working as a Consultant in Western Australia' in Toussaint, S., and Taylor, J. *Applied Anthropology in Australasia*, UWA Press, 1999, p107.

⁴ Composed of people of Walmadjari and Nyiginya descent with some Bunapa and Djaru as well. Vincent, 'Noonkanbah' in Peterson, N. and Langton, M., *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra, 1983, p327.

⁵ P. Bindon, 'Museum Report on Noonkanbah Investigations', unpublished and restricted, 14 June 1979, p19.

⁶ S. Hawke and M. Gallagher, *Noonkanbah: whose land, whose law*, Fremantle Arts Centre Press, Fremantle, 1989; E. Kolig, *The Noonkanbah Story*, University of Otago Press, 1987; P. Vincent, 'Noonkanbah' in Peterson, N. and Langton, M., *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra, 1983 and D. Ritter, 'The Fulcrum of Noonkanbah', *Journal of Australian Studies*, 75, 2002.

⁷ See for example S. Churches, 'Aboriginal Heritage in the Wild West: Robert Bropho and the Swan Brewery Site', *Aboriginal Law Bulletin*, 2(56), June, 1992.

⁸ No published academic article exists on this dispute that I am aware of, but see T. Hermann, 'This here's a Mining State: Hammersley Iron, the Media and Marandoo', Unpublished Paper, Law Faculty, University of Western Australia, 2005.

⁹ See for example R.A. Dixon and M.C. Dillon (eds), *Aborigines and Diamond Mining*, University of Western Australia Press, Perth, 1990.

¹⁰ No published academic article exists on this dispute that I am aware of, but on 20 March 2000, the ABC Current Affairs program *Four Corners*, screened episode and episode that featured the dispute called 'Secret White Men's Business'. The transcript is available online at: <http://www.abc.net.au/4corners/stories/s111958.htm>.

¹¹ Local government exists pursuant to State laws, but enjoys no constitutional basis. Similarly, the authority of the self-governments of the Northern and Australian Capital Territories derives only from legislation of the Federal Parliament.

¹² See for example B. Attwood, *Rights for Aborigines*, Allen & Unwin, 2003. The matter came most starkly into issue in cases such as *Mabo v Qld (1)* (1988) 83 ALR 14 and *WA v Commonwealth* (1995) 128 ALR 1.

¹³ See for example B. Attwood and A. Markus, 'Representation Matters: The 1967 Referendum and Citizenship' in N. Peterson and W. Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*, Cambridge Uni Press, 1998.

¹⁴ See A. Reilly, 'Reading the Race Power: A Hermeneutic Analysis. [1999] MULR 19; *Kartinyeri & Anor v Commonwealth of Australia* [1998] HCA 22 (1 April 1998) [1998] ICHRL 52 (1 April 1998); [1998] AILR 15; (1998) 3 AILR 180 and R. French, 'The Race Power: A Constitutional Chimera' in G. Winterton (ed), *Australian Constitutional Landmarks*, Cambridge Uni Press, 2003.

¹⁵ See W. Dix, 'The Aboriginal Heritage Act of 1972' in Howard, M., *Whitefella Business*, Institute for the Study of Human Issues, Phil., 1978; G. McDonald, 'Western Australia', in *Aboriginal Land Rights: A Handbook*, Australian Institute of Aboriginal Studies, Canberra, 1981; K. Clarke, *Environmental Management in Western Australia: Aboriginal Heritage*, University of Western Australia, 1983; E. Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 1996, ch 6 and Appendix VIII: 'Overview and Summary of State and

Territory Laws' and D. Saylor, 'Aboriginal Cultural Heritage Protection in Australia: The Urgent need for Protection', *Aboriginal Law Bulletin*, 3(76), Oct, 1995, p9.

¹⁶ See AHA, long title.

¹⁷ The description contained herein is largely repeated from D. Ritter, 'Trashing Heritage: Dilemmas of rights and power in the operation of Western Australia's Aboriginal Heritage legislation' in C. Choo and S. Hollbach (eds), *Studies in WA History: History and Native Title*, University of Western Australia Press, Perth, 2003. There are, after all, only so many ways to describe a statute's contents.

¹⁸ The Department in its current incarnation is known as the 'Department of Indigenous Affairs'.

¹⁹ Sections 28-29, AHA.

²⁰ Section 28, AHA.

²¹ Section 39(3), AHA.

²² Section 39, AHA.

²³ See section 11A, AHA.

²⁴ See section 18, AHA.

²⁵ See section 5(a), AHA.

²⁶ See section 5(b), AHA.

²⁷ See section 5(c), AHA.

²⁸ See section 19 AHA. See also sections 20-26 AHA.

²⁹ See section 62, AHA.

³⁰ Fines and maximum imprisonment increases for subsequent offences. See (*WA*) *Sentencing Legislation Amendment and Repeal Act 2003* s.35.

³¹ Section 16(1), AHA.

³² "Owner" includes a lessee from the Crown and the holder of any mining or petroleum tenement: s 18(1) AHA.

³³ See section 17, AHA.

³⁴ The interaction of sections 16, 17 and 18 of the AHA, particularly s18(8).

³⁵ See section 10(1), AHA.

³⁶ Section 15, AHA.

³⁷ See sections 10(2) and 38, AHA.

³⁸ See s 38, AHA.

³⁹ See section 7(1)(b), AHA.

⁴⁰ See Part VI AHA, particularly sections 40 and 43.

⁴¹ *Mabo and Others v State of Queensland* (2) (1992) 107, ALR 1.

⁴² See *WA v Commonwealth* (1995) 128, ALR 1.

⁴³ See for example the various articles contained in *Australian Mining and Petroleum Law Journal*, 17(3) October 1998. For general explanations of the native title system in Australia, the two text books are: R. Bartlett, *Native Title in Australia*, Butterworths, 2004 and M. Perry and S. Lloyd, *Australian Native Title Law*, Thompson, 2003.

⁴⁴ See NTA, Pt 4, Div 1B.

⁴⁵ S 84 NTA sets out those persons who are parties to native title proceedings.

⁴⁶ NTA, s86A.

⁴⁷ NTA Pt 4, Div 1A.

⁴⁸ See G. Neate (ed), *Native Title Service*, LexisNexis, North Ryde (NSW), 'Deciding Native Title Claims in the Court: The Role of the Federal Court, Practice and Procedure', para 1701.

⁴⁹ NTA Pt 7.

⁵⁰ NTA Pt 2, Div 3, subdiv P.

⁵¹ NTA, s. 233.

⁵² See NTA s 237.

⁵³ NTA s 32(3).

⁵⁴ (1999) FCA 1248.

⁵⁵ *Hayes v Northern Territory* [1999] FCA 1248, para 51.

⁵⁶ This is not the place for a lengthy exposition of the law of extinguishment. For the basic principles see *Western Australia v Ward* [2002] HCA 28, 8 August 2002.

⁵⁷ The strange intersection of the two is illustrated by the interaction of the application of the expedited procedure process under the NTA and the AHA. See Sumner, C.J., *Guide to Future Act Decisions made under the Commonwealth Right to Negotiate Scheme*, National Native Title Tribunal, Perth, 2001. The leading case on the matter probably remains *Dann v WA* (1997) 74 FLR 391; 144 ALR 1, but note the 1998 amendments to the relevant sections of the NTA. In the latter respect see *Smith v WA* [2001] FCA 19, French J, 19 January 2001.

⁵⁸ The basic philosophy of mining legislation in Western Australia is to encourage ground to be explored or surrendered.

⁵⁹ See C. O'Fairchaellaigh, 'Evaluating Agreements between Indigenous Peoples and Resource Developers' in M. Langton, M. Tehan, L. Palmer and K. Shain, *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, 2004.

⁶⁰ The traditional owners represented by the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation alone have negotiated literally hundreds of agreements.

⁶¹ Corresponding to the native title representative body areas. See Pt 11 of the NTA. Leaving only the Kimberley without an agreement.

⁶² The process has still not been concluded in the Kimberley.

⁶³ These definitions were devised by Mr Nicholas Green and Mr Adrian Murphy and are adopted by the YMBBMAC.

⁶⁴ NTA, Div 3, subdiv. B-D.

⁶⁵ See NTA Div 3, subdiv E. The total number of registered ILUAs in Australia as at 20 June 2005 was 172. ILUAs are public and can be browsed at http://www.nntt.gov.au/ilua/browse_ilua.html.

⁶⁶ For a full discussion of what major agreements involve see C. O'Fairchaellaigh, 'Evaluating Agreements between Indigenous Peoples and Resource Developers' in M. Langton, M. Tehan, L. Palmer and K. Shain, *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, 2004.

⁶⁷ See for example J. Altman, 'Compensation for native title: Land rights lessons for an effective and fair regime', *Land, Rights, Laws: Issues of Native Title*, vol 1, no 20, April 1998; J. Altman J. C. and D. Pollack, 'Native title compensation: Historic and policy perspectives for an effective and fair regime,' *CAEPR Discussion Paper*, Centre for Aboriginal Economic Policy Research, ANU, Canberra, 152/1998; D. Campbell, 'Economic issues in valuation of and compensation for loss of native title rights', *Land, Rights, Laws: Issues of Native Title*, vol 2, no 8, October 2000; M. Lavarch and A. Riding, 'A new way of compensating: Maintenance of culture through agreement', *Land, Rights, Laws: Issues of Native Title*, vol 1, no 21, April.; G. Neate, 'Compensation for native title: Some legal issues', in G. D. Meyers (ed), *In the wake of Wik: Old Dilemmas: New directions in native title law*, National Native Title Tribunal, Perth, pp170-254 and D. Smith, 'Valuing native title: Aboriginal statutory and policy discourses about compensation', *CAEPR Discussion Paper*, Centre for Aboriginal Economic Policy Research, Canberra, 222/2001.

⁶⁸ Though see C. O'Fairchaellaigh, 'Evaluating Agreements between Indigenous Peoples and Resource Developers' in M. Langton, M. Tehan, L. Palmer and K. Shain, *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, 2004.

⁶⁹ See for example J. Altman, 'Economic Development of the Indigenous Economy and the Potential Leverage of Native Title' in B. Keon-Cohn (ed), *Native Title in the New Millennium*, AIATSIS, Canberra, 2001.

⁷⁰ Principally that it contains no capacity for veto.

⁷¹ See F.N.A. Flanagan, 'The Burrup Agreement: a case study in future act negotiation' (Paper presented to the Native Title Conference: Native Title on The Ground, Alice Springs, 2-5 June 2003); summarised in 'Burrup Peninsula' in W. Jonas, *Native Title Report 2003*, Human Rights and Equal Opportunity Commission, Sydney, 2004, pp84-7. A rather facile version of events is presented in National Native Title Tribunal, *Native Title Stories: Rights, Recognition, Relationships*, Canberra, 2004 which can be ordered free on VHS or DVD at www.nntt.gov.au/Information and Publications/, email publicaffairs@nntt.gov.au, or phone (freecall) 1800 640 501.

⁷² [2003] NSWSC 239 (10 March 2000).

⁷³ That is, one party to the contract could not sue the other party at law for damages. What happens here is that under section 41 of the NTA, there is some sort of deemed contract. The original pipeline constructor received the benefit because of that deemed contract, the person assigned the contract to the defendant and the assignee in such circumstances takes not only the benefit, but also the burden of the contract of which it was aware at the time: *De Maccos v Gibson* (1859) for De G and J 276; 45 ER 108. It is also a type of contract where the full benefit has already been gained by one side, so that equity is more likely to enforce it by specific order and would be the case in an executory contract: *Green v West Cheshire Railway Company* (1871) LR 13 Eq 44.

⁷⁴ (1994) 48 FCR 535 ; NTS [60,100].

⁷⁵ (Fed C of A, Carr J, No 16/97, 1 February 1997, BC9700113, unreported) ; NTS [60,190].

⁷⁶ See also *Fejo v Northern Territory* (1998) 156 ALR 721 ; NTS [60,395] ; *Lawson v South Australia* [1999] FCA 22 ; BC9900064 ; *Denniss v Minister for Land and Water Conservation* (1999) 91 FCR 228 ; *Kennedy v Victoria* [1999] FCA 659 ; BC9902587 ; *Harris (on behalf of the Gurubana Gunggandji People) v Great Barrier Reef Marine Park Authority* [1999] FCA 202 ; BC9900820 ; *Holt v Manzie* [2000] FCA 1857 ; BC200007805 ; NTS [60,660] ; *Turrbal People v Queensland* (2002) 194 ALR 53 ; BC200205157 ; [2002] FCA 1082 ; NTS [60,905]

⁷⁷ See s.47.

⁷⁸ C Culvenor, 'Commonwealth Heritage Protection Legislation', *Indigenous Law Bulletin*, 2000, 5(3).

⁷⁹ See s.22.

⁸⁰ The register can be searched at <http://www.ahc.gov.au/register/>.