

A legal lacuna: between cultural heritage and native title

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In May 2020, mining giant Rio Tinto attracted global attention for its destruction of caves in the Juukan Gorge in western Australia while blasting in the area as part of its mining operations. The caves contained archaeological treasures evidencing human occupation spanning some 46,000 years. As such, they represent globally significant sites — sites far older than Stonehenge and the pyramids of Egypt. But more than that, the caves held ongoing spiritual significance for the traditional owners of the area, the Puutu Kuntj Kurrama and Pinikura.

To the astonishment of the general public —including a shareholder backlash — in destroying the obviously special caves Rio Tinto did not break the law. It had obtained the necessary permissions to destroy the culturally significant site under the Aboriginal Heritage Act 1972 (WA). The company has since indicated that there was a “misunderstanding” with traditional owners about the future of the site. Misunderstanding or not, the incident highlights a reality that the framing of cultural heritage is not one that comprehends substantive rights for Indigenous custodians and as such, will inevitably leave a miner in charge of decisions concerning land over which it holds an interest.

This article canvasses the standing of Aboriginal and Torres Strait Islander people to speak for their lands within two paradoxically intersecting yet separate legal frameworks: of native title and Indigenous cultural heritage. While recognising the poverty of the common law’s conception of land and its fragmentation¹ in particular relative to First Nations’ holistic conceptions of land,² in light of the Juukan Gorge caves example, this article focuses on tangible, fixed cultural heritage — referred to generally here as “significant sites”. These sites are, for the common lawyer, readily comprehensible as part of the land and serve as a useful case study for the analysis of Indigenous cultural heritage laws within the dominant legal framework. Through this focus, this article contends that in addition to the contingency of rights afforded to Indigenous people within each legal domain, the failure of native title and cultural heritage to mesh together creates a lacuna

within the law that silences traditional owners at the very point their voices would — and should — hold the most authority within the common law.

Native title

Lawyers have long regarded native title as *sui generis*. Yet declaring the unique nature of native title, deriving its content other than from within the common law, has facilitated state control over its recognition and the rights arising from it. For the purposes of comparison with the legal framework of protection of Indigenous cultural heritage, there are two key features of native title that bear scrutiny: the content of native title, and the right to negotiate.

Unlike the extensive and unitary nature of the freehold estate,³ the “content” of native title is particular to each claimant group, derived from the claimants’ own law.⁴ Those rights may be full and exclusive use of land (which includes seas), or they may be particularised including expression as usufructuary rights to undertake identified activities on land. However, in common with the freehold estate, native title excludes rights in minerals which are vested in the Crown.⁵ According to Australian courts, other than rights to ochre there is “no evidence of any traditional Aboriginal law, custom or use”⁶ of minerals.⁷ To the extent that native title holders hold *property* in their lands, these rights are subject to mining rights granted by the state. As is the case for freehold and leasehold title holders, native title holders’ rights are constrained to negotiating the terms of entry rather than any more substantive right such as a power of veto.⁸

In a further limitation to the content of native title, it does not comprehend what might be termed cultural heritage rights. Although native title might include rights of access to sacred sites and ceremonies conducted there, the rights afforded under s 223(1) of the Native Title Act have been interpreted to exclude rights to protect cultural knowledge.⁹ Thus, so far as native title land encompasses a site comprising cultural heritage, that aspect of the land’s characterisation (under the Anglo-Australian legal system) does not fall within the native title framework. In its 2015 Report, the Australian

Law Reform Commission recommended further examination of the potential for cultural knowledge to be considered a native title right,¹⁰ however the Report has not yet been acted on.

The second notable limitation of native title law is the lack of substantive rights afforded to traditional owners. Given that mineral rights are reserved from native title, the grant of mining rights by the state sets up an inherent conflict between traditional owners and miners over the use of the same land. The Native Title Act 1993 (Cth) resolves this interest through affording traditional owners the right to negotiate.¹¹ Importantly, this is not a right of veto. It is merely the right to come to agreement on the use of land held under native title. The resulting Indigenous Land Use Agreement (ILUA) is registered in the National Native Title Tribunal, but its terms are confidential to the parties.

In addition to the terms of the parties' agreement not being in the public domain, it is not unusual for ILUAs to contain confidentiality clauses. Such clauses will prevent traditional owners from speaking out on questions of cultural heritage on their land. In terms of government decision-makers or the wider public comprehending First Nations peoples' concerns about and interests in "cultural heritage", this practical aspect of the ILUA process masks the very voices that might logically, ethically, and definitionally, be expected to hold an intrinsic interest in the future of the relevant site.

While it must be open to First Nations people to determine how they wish to deal with their land, the native title process skews their bargaining power through reserving minerals to the state, denying a right of veto, and privatising the agreement-making process. The capacity to silence Indigenous people's voices concerning cultural heritage represents a "pinch point" in the inevitable overlap between native title (property) and Indigenous cultural heritage.

Indigenous cultural heritage

In Australia, Indigenous cultural heritage is regulated under both state and Commonwealth statutes.¹² There is a range of approaches to regulation including the nature of the "heritage" that is protected, the role of Aboriginal and Torres Strait Islander people in the legislated processes for determining and managing cultural heritage, the objection processes, and the purpose of the protection. Although the jurisprudence of cultural heritage is relatively new and is therefore still taking shape,¹³ it is generally conceived as a regulatory function of the state rather than a private right. In her review of the (then) Commonwealth legislation, Elizabeth Evatt observed that "[p]rotecting Aboriginal heritage is a significant

national responsibility".¹⁴ However, it is not a responsibility overtly undertaken for the benefit of Aboriginal and Torres Strait Islander people.

In *WA v Bropho*,¹⁵ the Western Australia Court of Appeal confirmed that the relevant Act existed "for the benefit of the community — all Western Australians — with a view to the preservation of objects and places" regarded by that community as "being of significance in the context of the traditional cultural life" of Indigenous people.¹⁶ In particular, it does not establish private rights. If not a private right, according to the Anglo-Australian legal system cultural heritage is a public right. On this reading, the purpose of cultural heritage legislation is not to protect sites significant in the eyes of living First Nations people but rather to serve the Australian polity broadly.

Despite the function of cultural heritage (public right) as distinct from real property (private right), including native title, some cultural heritage regimes achieve their purpose by vesting property in the protected object either in Aboriginal or Torres Strait Islander people in the case of objects and human remains, or in the state in the case of things attached to land.¹⁷ Property is further integral to the framing of Aboriginal and Torres Strait Islander cultural heritage in that the object of the protection might be located on land that is privately owned. The Queensland legislation, for example, expressly differentiates the state's property in protected sites forming part of land.¹⁸ In such cases the landholder continues to have a right to the use of the surface of the land, but not in a way that would unlawfully damage or destroy the site.

Of all Indigenous cultural heritage laws in Australia, the West Australian legislation — applicable to the Juukan Gorge caves — is perhaps the most outdated. The Aboriginal Heritage Act 1972 (WA) applies to places of "importance and significance" that is connected with the "traditional cultural life of the Aboriginal people past or present"; and sacred, ritual, or ceremonial sites of special significance.

Under s 18 of the Act, holders of rights in land (such as miners) can give notice to the Aboriginal Cultural Material Committee that they require use of the land contrary to its heritage protection. The Committee must consider the "importance and significance" of the site and make a recommendation to the Minister as to whether they should consent to that use. The Committee is appointed by the Minister and comprises at least one anthropologist and other members who are "suitably qualified" to assist in assessing cultural materials. Of note, there is no aspect of this process requiring consultation with the relevant Aboriginal owners. Indeed, there is no requirement that any Aboriginal person at all is involved in assessing these matters. In failing to include

Aboriginal people within the processes of law, they become objects of the law rather than agentic participants in its operation.

There is a pattern in the history of dispossession of Nunga peoples. For it appears to be in the interest of the state to protect some “indigenous places”, for it is appealing to the tourist, the seeker of the natural and the exotic, the beauty and wisdom of the Aborigine. While out of their sights the ugliness is glaring as the ruwe screams.¹⁹

Despite being on the government agenda for many years,²⁰ it is only recently that the West Australian Government has taken concrete steps to reform its Aboriginal cultural heritage legislation, commencing with consultation as an integral part of meaningful change.²¹ When questioned about the Juukan Gorge caves approval, the West Australian Minister for Aboriginal Affairs flagged that the Act would soon be amended, and the existing process updated.

While reform proposals might appear promising in rectifying an apparent failure of the Act’s provisions to uphold its very purpose,²² the Minister indicated that the impending reforms would “reinforce the need for land users to negotiate directly with traditional owners”.²³ While on the one hand this might seem finally to provide direct involvement of Indigenous people in decisions affecting their significant sites, the experience of private agreement-making in native title should serve as a warning.

Law’s lacuna

Without interrogating the concept of Indigenous cultural heritage law per se — a western model of categorising and regulating the cultural landscape that is subject to significant critique²⁴ — one of the challenges for traditional owners within the existing dichotomous framework is that the taxonomy of the law situates their interests in culturally significant sites in between native title processes and cultural heritage law.

Even on a positive reading of the more contemporary cultural heritage frameworks in Australia,²⁵ cultural heritage at law remains within the purview of the state. While engagement of traditional owners in legal processes involving cultural heritage represents a significant advance on the current law in western Australia, so far as it involves private agreement-making the framework is likely to continue to recognise substantive rights in parties like miners, leaving traditional owners with procedural rights only.

Although on a common law property footing significant sites would fall within conceptions of land,²⁶ they are characterised as other than property by virtue of native title law. Intrinsically connected with traditional owners, the very concept of significant site only has meaning under the law with reference to Aboriginal and

Torres Strait Islander people.²⁷ Significant sites are nonetheless determined as significant through the eyes of the state. It is the state that determines the threshold of significance, and the rules for engagement of Indigenous Australians with their own lands. Only with the imprimatur of the state will the custodians of the land have a seat at the table — and then, it is unlikely to comprise a right of veto.

Custodians are thus situated in a liminal space between multiple processes, none of which affords them substantive rights within the dominant legal framework to speak for their country — and all of which sublimate custodians to state governance. On the one hand, although native title is a property right, it is designed by the courts (and Parliaments) of the conqueror²⁸ to exclude mining rights and cultural heritage. Despite their property interest, native title holders are granted a right to negotiate that is not sufficient to protect the integrity of their land, thus falling short of property as we understand it. Further, their property excludes significant sites. Within such a framework, others’ rights over that the same land are therefore privileged.

On the other hand, although Indigenous peoples’ interests in the cultural landscape are inherent in its declaration as cultural heritage, cultural heritage law brings that landscape within the purview of state authorities and processes, and not those of traditional owners.

The legitimate claims and interests of Aboriginal and Torres Strait Islander people over their land in general, and their significant sites in particular, are construed by the dominant legal paradigm as both outside property and beyond the defining feature of cultural heritage *as Indigenous*. They exist in a lacuna in the law. Either, the law fails to comprehend a pluralist system of rights and interests in land or, in recognising a pluralist system through native title, has circumscribed its “content” to the narrow confines of “native title” articulated in *Mabo v Queensland (No 2)*²⁹ and interpreted since.

This is not to argue that property is the answer to the claims of First Nations people in Australia. Rather, it suggests that property — and the state’s demarcation of it — lies at the heart of a system designed to privilege the substantive rights associated with property, whilst positioning Indigenous claims as defeasible. Before First Nations people are able to reclaim their significant sites — and their land — settler-colonial law must fill the existing lacuna, elevating Indigenous claims to a standing otherwise afforded only to “pure” common law interests.

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Footnotes

- *. I write as a non-Indigenous academic lawyer, and therefore analyse this topic within the framework of the settler-colonial legal system. I cannot speak for or on behalf of First Nations people, and I do not aim to do so. I do, however, seek to expose the shortcomings of the legal system in terms of its own claims to justice.
1. See, eg, N Graham *Landscape: Property, Environment, Law* (Routledge, 2011).
 2. See, eg, I Watson “Aboriginal relationships to the natural world: Colonial ‘protection’ of human rights and the environment” (2018) 9(2) *Journal of Human Rights and the Environment* 119.
 3. K Gray and S F Gray “The Rhetoric of Realty” in Joshua Getzler (Ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths, 2003) 204.
 4. *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 61; (1992) 107 ALR 1, 62ff; [1992] HCA 23; BC9202681.
 5. In Queensland, for example, see Mineral Resources Act 1989 (Qld), s 8.
 6. *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1; [2002] HCA 28; BC200204355, [382].
 7. However, see G Ellwood “The Aboriginal miners and prospectors of Cape York Peninsula 1870 to ca. 1950s” (2018) 16, *Journal of Australasian Mining History* 75.
 8. K Galloway “Landowners’ vs Miners’ Property Interests: The Unsustainability of Property as Dominion” (2012) 37(2), *Alternative Law Journal* 77.
 9. *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1; [2002] HCA 28; BC200204355, [641]–[645].
 10. Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, April 2015) 270.
 11. Native Title Act 1993 (Cth), Pt 2, Div 3, Subdiv P.
 12. Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth); Heritage Act 2004 (ACT); National Parks and Wildlife Act 1974 (NSW); Northern Territory Aboriginal Sacred Sites Act 1989 (NT); Aboriginal Cultural Heritage Act 2003 (Qld); Torres Strait Islander Cultural Heritage Act 2003 (Qld); Aboriginal Heritage Act 1988 (SA); Aboriginal Relics Act 1975 (Tas); Aboriginal Heritage Act 2006 (Vic); Aboriginal Heritage Act 1972 (WA).
 13. K Bowrey and N Graham “The Placelessness of Property, Intellectual Property and Cultural Heritage Law in the Australian Legal Landscape: Engaging Cultural Landscapes” in C Antons and W Logan (Eds), *Intellectual Property, Cultural Property and Intangible Cultural Heritage (Key Issues in Cultural Heritage)* (Routledge, 2018) 137.
 14. E Evatt “Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984” (AGPS, 1996), [3.2].
 15. *WA v Bropho* (1991) 5 WAR 75, 86; 24 ALD 768; 74 LGRA 156.
 16. Above.
 17. See, eg, Aboriginal Cultural Heritage Act 2003 (Qld) and Torres Strait Islander Cultural Heritage Act 2003 (Qld), respectively: ss 15 and 19 in respect of human remains and objects, and s 20 in relation to “other” cultural heritage.
 18. Aboriginal Cultural Heritage Act 2003 (Qld), ss 21, 153.
 19. I Watson “Aboriginal Laws and the Sovereignty of Terra Nullius” (2002) 1(2) *Borderlands* [33].
 20. For a critique of past proposals, see, eg: A Kwaymullina, B Kwaymullina and L Butterly “Opportunity lost: Changes to Aboriginal heritage law in Western Australia” (Jan–Feb 2015) 169(*) *Indigenous Law Bulletin* 28.
 21. B Wyatt MLA, Minister for Aboriginal Affairs “Aboriginal heritage legislation to be reviewed” accessed 9 March 2018 (media statement), www.mediastatements.wa.gov.au/Pages/McGowan/2018/03/Aboriginal-heritage-legislation-to-be-reviewed.aspx.
 22. Aboriginal Heritage Act 1972 (WA), Long Title.
 23. L Allam and C Wahlquist “BHP to destroy at least 40 Aboriginal sites, up to 15,000 years old, to expand Pilbara mine” accessed 11 June 2020, *The Guardian*.
 24. Bowrey and Graham (n 13); M E O’Neill, “‘A Completely New Approach’ to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act” (Jan 2018) 9(1) *The International Indigenous Policy Journal* 1; D McNaughton, M Morrison and C Schill, “‘My Country is like my Mother . . .’: respect, care, interaction and closeness as principles for undertaking cultural heritage assessments” accessed 17 May 2016 22(6) *International Journal of Heritage Studies* 415; L Butterly and the Hon Justice R Pepper “Are courts colourblind to country? Indigenous cultural heritage, environmental law and the Australian judicial system” (2017) 40(4) *University of New South Wales Law Journal* 1313.
 25. See, eg, O’Neill (n 19).
 26. Without cultural heritage law, under the common law maxim *quicquid plantatur solo solo cedit* (whatever is affixed to the soil becomes part of the soil) significant sites belong without reservation to the owner of the real property, including the right to lay them to waste.
 27. See, eg, Aboriginal Cultural Heritage Act 2003 (Qld), s 9 which defines significant Aboriginal area as: “an area of particular significance to Aboriginal people because of either or both of . . . (a) Aboriginal tradition; (b) the history, including contemporary history, of any Aboriginal party for the area.”
 28. Used by the court to describe the American judicial system in *Johnson v M’Intosh* 21 US 543, (1823), 588.
 29. (1992) 175 CLR 1; 107 ALR 1; [1992] HCA 23; BC9202681.