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## ARE COURTS COLOURBLIND TO COUNTRY? INDIGENOUS CULTURAL HERITAGE, ENVIRONMENTAL LAW AND THE AUSTRALIAN JUDICIAL SYSTEM

LAUREN BUTTERLY\* AND THE HON JUSTICE RACHEL PEPPER\*\*

### I INTRODUCTION

The protection of cultural and spiritual landscapes and materials is fundamentally important to maintaining Indigenous culture. Indigenous cultural heritage is an ‘ongoing part of Aboriginal existence which is vital to Aboriginal well-being’.<sup>1</sup> In recent years, the advocacy work of Indigenous traditional owners, community groups and academics has led to greater public awareness of the importance of Indigenous cultural heritage, as well as some positive legal reforms.<sup>2</sup> However, legal protection of cultural heritage has often been, and continues to be, ineffective. One of the key reasons for this ineffectiveness is a piecemeal approach to protection of Indigenous cultural heritage. Such an

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\* Lecturer, UNSW Law, Centre Member UNSW Indigenous Law Centre and Honorary Fellow, UWA Law School. Corresponding author: l.butterly@unsw.edu.au. Paper presented to the IUCNAEL Colloquium, Oslo, Norway, 22 June 2016. A shorter version of this article, with a more international audience in mind, will be published in Christina Voigt and Zen A Makuch (eds), *Courts and the Environment* (Edward Elgar Publishing, forthcoming 2018).

\*\* Judge, New South Wales Land and Environment Court.

1 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.

2 See, eg, the provisions in the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Aboriginal Heritage Act 2006* (Vic) that are identified in Ambelin Kwaymullina, Blaze Kwaymullina and Lauren Butterly, ‘Opportunity Lost: Changes to Aboriginal Heritage Law in Western Australia’ (2015) 8(16) *Indigenous Law Bulletin* 24, 25 nn 13–19. However, although these provisions are a significant improvement on what had existed, there still need to be ongoing efforts to ensure they are operating effectively. See, eg, the commentary in Graham Atkinson and Matthew Storey, ‘The *Aboriginal Heritage Act 2006* (Vic): A Glass Half Full...?’ in Pamela Faye McGrath (ed), *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title* (AIATSIS Research Publications, 2016) 111 and, relatedly, the *Aboriginal Heritage Amendment Act 2016* (Vic).

approach 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’.<sup>3</sup> Further, what the State recognises or defines as cultural heritage worthy of protection and recognition does not necessarily accord with what Indigenous peoples consider to be their cultural heritage. Importantly, Indigenous worldviews emphasise holistic relationships, rather than reductionist approaches.<sup>4</sup>

In light of a number of significant recent cases, this article focuses on the role of the courts in the protection of Indigenous cultural heritage. The courts are the place where cultural heritage and related legislative provisions are being tested, and judicial understandings of cultural heritage can make a substantial difference in outcomes. The purpose of this article is to provide both a judicial and academic perspective on these issues. In asking whether courts are ‘colourblind to country’, we are asking whether courts can see the *whole* of country, rather than compartmentalising it in line with Eurocentric ideas and artificial legal constructs.<sup>5</sup> We are also suggesting that courts (both collectively and individual judicial officers) can reach across jurisdictional boundaries to enhance their understandings of Indigenous cultural heritage.

In particular, this article will draw attention to three recent cases that demonstrate the significant impact courts can have on heritage protection in interpreting legislation relating to Indigenous heritage.<sup>6</sup> These three cases come from different jurisdictions – from the New South Wales Land and Environment Court, the Federal Court of Australia (including an appeal to the Full Federal Court) and first instance in the Supreme Court of Western Australia. The three cases demonstrate the highly varied areas of law in which Indigenous cultural heritage issues can arise in litigation: environmental impact assessment under New South Wales (‘NSW’) law, the assessment of heritage values pursuant to Commonwealth environmental law, and the listing of Aboriginal heritage sites on a heritage register under Western Australian (‘WA’) law. In different statutory, geographic and cultural contexts, each Court has grappled with similar complex cultural understandings. The cases emphasise both the recurrent challenges faced by courts in this area and the novel and insightful approaches that judicial officers are taking to construing relevant statutes.

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3 Kwaymullina, Kwaymullina and Morgan, above n 1, 10.

4 See, eg, Ambelin Kwaymullina and Blaze Kwaymullina, ‘Learning to Read the Signs: Law in an Indigenous Reality’ (2010) 34 *Journal of Australian Studies* 195.

5 For an Indigenous perspective of the term ‘country’ and its importance, see Megan Davis and Marcia Langton, ‘Introduction’ in Megan Davis and Marcia Langton (eds), *It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 1, 1–2.

6 *Darbinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465 (‘*Darbinjung*’); *Robinson v Fielding* [2015] WASC 108 (‘*Robinson*’); *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment [No 2]* (2016) 337 ALR 96 (‘*Tasmanian Aboriginal Centre [No 2]*’) (and the related appeal: *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Inc* (2016) 244 FCR 21).

Plainly, the courts cannot provide the solution to protection of Indigenous heritage. Yet, a curial determination is often the culmination of a long-term, complex and hard-fought dispute on these issues. Further, court decisions on Indigenous heritage often have impacts beyond the immediate disputes and can also demonstrate new judicial understandings in that field. It must also be acknowledged that problems as to the extent to which Australian law is able to recognise and respect Indigenous legal and cultural paradigms are enduring, and occur in many different contexts. It is clear that deeper, more sweeping and more innovative reforms led by Indigenous peoples are required to address these issues. However, the aim of this article is to suggest that courts are not so much unwilling to understand Indigenous cultural heritage issues, but are blinded and cannot see the full extent of its complexity and reach into others areas of law (and life). Nevertheless, judicial officers are finding ways to overcome this myopia, even within the ‘confines’ of the court.

The article is divided into two parts. Part II identifies why Indigenous cultural heritage is not adequately protected by law and how this limits the courts in terms of what they engage with when making decisions. Part III suggests ways of overcoming the courts’ ‘blindness’ to country. These solutions range across a wide base – from legislative reform to judicial education – but the particular focus is on what can be learned from three recent cases.

## **II WHY IS INDIGENOUS CULTURAL HERITAGE NOT ADEQUATELY PROTECTED BY LAW AND HOW DOES THIS LIMIT THE COURTS?**

It is widely acknowledged by Indigenous peoples and Indigenous and non-Indigenous academics and lawyers that Indigenous heritage is not adequately protected by Australian law.<sup>7</sup> The Commonwealth Department of Environment and Energy’s 2016 State of the Environment Report concluded that ‘Australia’s Indigenous heritage remains inadequately documented and protected, and incremental destruction continues ...’.<sup>8</sup> There are five key reasons that contribute to why Indigenous cultural heritage is not adequately protected in Australia. Two are inherently legal: the fragmentation relating to both jurisdiction and subject matter (including subject matters such as environment and native title). Two are quasi-political: debates about ‘who speaks for country’ and a lack of enforcement of existing laws. The final reason relates more broadly to cross-cultural understanding: a failure to understand what Indigenous cultural heritage comprises that concomitantly affects how cultural heritage is defined and interpreted. As is expanded on below, Indigenous heritage can be viewed using

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7 See, eg, Pamela Faye McGrath and Emma Lee, ‘The Fate of Indigenous Placed-Based Heritage in the Era of Native Title’ in Pamela Faye McGrath (ed), *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title* (AIATSIS Research Publications, 2016) 1.

8 Richard Mackay, ‘Australia State of Environment 2016: Heritage’ (Report, Australian Government Department of Environment and Energy, 2017) iv <<https://soe.environment.gov.au/sites/g/files/net806/f/soe2016-heritage-launch-v27march17.pdf?v=1488844294>>.

two different approaches: the first, focussing on the ‘past’ and archaeological aspects, and the second, as part of a living culture.<sup>9</sup> It is this second approach that is consistent with Indigenous worldviews.<sup>10</sup> All of these factors impact on how courts interact with, and make decisions concerning, Indigenous cultural heritage.

### A Legal Fragmentation: Jurisdiction and Subject Matter

Laws relating to Indigenous heritage and the environment can be made at both Commonwealth and state/territory level. This ‘complex jurisdictional patchwork’ provides challenges for protection of Indigenous cultural heritage and effective environmental regulation.<sup>11</sup> As is known, the *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 specific head of power in the *Constitution* that 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.<sup>12</sup> Mason J (as he then was) also noted in respect of the ‘race power’ (s 51(xxvi)) that:

the cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers power to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage.<sup>13</sup>

The complex and multifaceted discussion about Indigenous constitutional recognition and reform that is currently ongoing must, however, be acknowledged.<sup>14</sup> With respect to cultural heritage in particular, 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

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9 Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (Oxford University Press, 2006) 265.

10 Terri Janke, ‘Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights’ (Report prepared for Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Michael Frankel & Company, 1998) 7.

11 Melissa Perry, ‘The Fractured State of Environmental Regulation’ (2013) 28 *Australian Environment Review* 438, 438.

12 For further discussion of the environmental constitutional setting, see *ibid.* In relation to Indigenous lands and heritage, the most relevant heads of power in the *Australian Constitution* 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*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)). See also Graeme Neate, ‘Power, Policy, Politics and Persuasion – Protecting Aboriginal Heritage under Federal Laws’ (1989) 6 *Environmental and Planning Law Journal* 214, 215; Boer and Wiffen, above n 9, 95–100.

13 *Commonwealth v Tasmania* (1983) 158 CLR 1, 159.

14 See, eg, Davis and Langton (eds), above n 5; Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia – Theories and Comparative Perspectives* (Federation Press, 2016).

and heritage of Indigenous peoples'.<sup>15</sup> Since this recommendation was made, a historic Indigenous-designed and -led deliberative process of Indigenous communities has taken place in the form of regional dialogues. These regional dialogues culminated in presentation of the 'Uluru Statement from the Heart' in May 2017, which included the following:

We seek constitutional reforms to empower our people and take a *rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country. We call for the establishment of a First Nations Voice enshrined in the Constitution.<sup>16</sup>

As yet, the Commonwealth Government has not indicated how it will receive the Uluru Statement, but such a voice to Parliament would clearly have the ability to raise Indigenous heritage concerns. It would seem this would be particularly important at the Commonwealth level given the relative weakness of the Commonwealth legislation that we now turn to consider.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('*ATSIHP Act*') was enacted to be used 'as a last resort' if protection under state or territory laws was inadequate.<sup>17</sup> In considering a judicial review application of a decision under the *ATSIHP Act* relating to the old Swan Brewery site in Perth, French J (as he then was) stated in *Tickner v Bropho*<sup>18</sup> that '[i]n Australia these conflicts in respect of Aboriginal heritage are complicated by the existence of State and Commonwealth Governments which may have differing perspectives and priorities in their resolution'.<sup>19</sup> There has been strong criticism of the lack of efficacy of the *ATSIHP Act*.<sup>20</sup> This article does not intend to cover that ground as the trilogy of decisions that we are focussing on do not relate to the *ATSIHP Act*. However, it is a part of the framework and has led to courts considering Indigenous cultural heritage in controversial cases such as *Kartinyeri v Commonwealth* ('*Hindmarsh Island Bridge Case*').<sup>21</sup>

Each state and territory also has legislation that applies to protection of Indigenous heritage.<sup>22</sup> Most states have separate and discrete legislation in this area, but NSW has offensively included Aboriginal heritage provisions in the

15 Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution' (Report, January 2012) xviii.

16 Referendum Council, 'Uluru Statement from the Heart' (Statement, First Nations National Constitutional Convention, 26 May 2017) <<https://www.referendumcouncil.org.au/event/uluru-statement-from-the-heart>> (emphasis in original).

17 *Tickner v Bropho* (1993) 40 FCR 183, 211 (French J). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1984, 2129–33 (Allan Clyde Holding, Minister for Aboriginal Affairs). For a detailed overview of the *ATSIHP Act* and its history, see Neate, above n 12.

18 (1993) 40 FCR 183.

19 Ibid 211.

20 See, eg, Elizabeth Evatt, 'Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)' (Report, 22 August 1996).

21 (1998) 195 CLR 337.

22 *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); *Aboriginal Heritage Act 1988* (SA); *Aboriginal Relics Act 1975* (Tas); *Aboriginal Heritage Act 2006* (Vic); *Aboriginal Heritage Act 1972* (WA).

broader *National Parks and Wildlife Act 1974* (NSW).<sup>23</sup> The NSW Office of Environment and Heritage recently released a report entitled: ‘A Proposed New Legal Framework: Aboriginal Cultural Heritage in NSW’.<sup>24</sup> In that report, they acknowledged that: ‘regulating Aboriginal cultural heritage under flora and fauna legislation is outdated, offensive to Aboriginal people, and out of step with approaches in other states’.<sup>25</sup> As we will return to consider below, the Tasmanian, WA and NSW Governments are at various stages of reform to their legislation. The WA legislative reform process has been particularly impacted by one of the cases we will consider below: *Robinson*.<sup>26</sup> However, not all heritage issues relate to heritage specific legislation and other substantive areas of law are relevant.

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. One of the cases discussed in this article, *Tasmanian Aboriginal Centre [No 2]*,<sup>27</sup> involved consideration of whether a proposal by the Tasmanian Government to reopen three 4WD tracks in the Western Tasmanian Aboriginal Cultural Landscape (a recognised ‘place’ on the National Heritage List) would have a significant impact on national heritage values protected under the *EPBC Act*. This is a clear and recent example of the link between Indigenous cultural heritage and environmental law.

States and territories also have their own environmental, planning, mining, petroleum and (non-Indigenous) heritage legislation which they administer. This fragmentation has an impact on which courts supervise and enforce such legislation, and the extent of their powers; with the *EPBC Act* enforced by the Federal Court and the state and territory statutes enforced by the state courts or by specialist courts, such as the NSW Land and Environment Court. There is also Commonwealth legislation in relation to native title (the *Native Title Act 1993* (Cth) (‘*Native Title Act*’)) and legislation in most states and territories dealing with Aboriginal land rights.<sup>28</sup>

It is evident that there is subject matter siloing across both federal and state jurisdictions. Different statutes deal with aspects of environmental protection,

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23 Justice Rachel Pepper and Sophie Duxson, ‘Not Plants or Animals: The Protection of Indigenous Cultural Heritage in Australia’ (2014) 29 *Australian Environment Review* 26.

24 NSW Office of Environment and Heritage, ‘A Proposed New Legal Framework: Aboriginal Cultural Heritage in NSW’ (Report, September 2017) <<http://www.environment.nsw.gov.au/topics/aboriginal-cultural-heritage/legislation/draft-aboriginal-cultural-heritage-legislation-2017-consultation>>.

25 Ibid 1.

26 [2015] WASC 108. See also Lauren Butterly, ‘Update on Aboriginal Heritage in the West: Successful Judicial Review Application and Debate Surrounding Legislative Reform’ (2015) 30 *Australian Environmental Review* 104.

27 (2016) 337 ALR 96.

28 In terms of land rights, all states and territories except WA have enacted specific land rights legislation. For a comparative analysis of the various statutory Aboriginal and Torres Strait Islander land rights schemes (and related statutory schemes) around Australia, see Ed Wensing, *The Commonwealth’s Indigenous Land Tenure Reform Agenda: Whose Aspirations, and for What Outcomes?* (AIATSIS Research Publication, July 2016) 31–5 <[http://aiatsis.gov.au/sites/default/files/products/report\\_research\\_report/the-commonwealths-indigenous-land-tenure-reform.pdf](http://aiatsis.gov.au/sites/default/files/products/report_research_report/the-commonwealths-indigenous-land-tenure-reform.pdf)>.

mining, water, coastal and marine areas, Indigenous land and sea rights, and cultural heritage. Lee Godden draws on Clifford Geertz to suggest that legal categories are only one way of ‘imagining the real’.<sup>29</sup> Godden then relates this quote to Indigenous heritage and further notes the Eurocentric distinctions between the ‘natural’ and the ‘cultural’ within which Indigenous heritage must ‘fit’.<sup>30</sup> The imposition of such legal categories is arguably a ‘form of post-colonial repression’.<sup>31</sup> Relationships to country are not divisible and such legal categories suggest that they can, and should, be.

Further, even on a simplistic level, connections between different pieces of legislation are absent. For example, recent proposed amendments to the *Aboriginal Heritage Act 1972* (WA) were rightly criticised because they did not take into account the connection between cultural heritage and environmental law.<sup>32</sup> This is both curious and unfortunate given the link between the protection of Indigenous cultural heritage and land use and environmental planning processes, such as preparing environmental impact statements and conducting environmental impact assessments. However, the form in which relationships between the environment and Indigenous cultural heritage are recognised must also be carefully considered. It is, to say the least, deeply disturbing that in NSW, the protection of Aboriginal cultural heritage is dealt with under a statute that regulates ‘flora and fauna’.<sup>33</sup>

Another example of missing connections is the disjunct between native title law and Indigenous heritage laws. The fact that the *Aboriginal Heritage Act 1972* (WA) has not been significantly amended since 1972, well before *Mabo v Queensland [No 2]* (1992) 175 CLR 1 and the *Native Title Act*, plainly indicates this. The native title and Indigenous cultural heritage legal regimes came about in different eras and have very different ‘theoretical origins, legal characteristics and limitations’.<sup>34</sup> Carolyn Tan identifies that cultural heritage law was designed to protect and preserve heritage for the public; whereas native title was framed more around ‘private’ (albeit collective) rights of groups.<sup>35</sup> Clearly, heritage laws and native title also find their source in different places, with native title rights being derived from traditional laws and customs of native title holders (as noted by Tan, native title ‘is not something created by Parliament or in the interests of the wider public’).<sup>36</sup> The ‘public’ nature of laws protecting Indigenous heritage is

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29 Clifford Geertz, *Local Knowledge: Further Essays in Interpretative Anthropology* (Basic Books, 1983) 163–74, quoted in Lee Godden, ‘Indigenous Heritage and the Environment: “Legal Categories Are Only One Way of Imagining the Real”’ (2002) 19 *Environmental and Planning Law Journal* 258, 258.

30 Godden, above n 29, 258–9.

31 Ibid 258.

32 Kwaymullina, Kwaymullina and Butterly, above n 2, 25.

33 Joseph Kennedy, ‘Operative Protection or Regulation of Destruction? The Validity of Permits to Destroy Indigenous Cultural Heritage Sites’ (2005) 6(14) *Indigenous Law Bulletin* 20, 20; Pepper and Duxson, above n 23, 26.

34 McGrath and Lee, above n 7, 5. See also Carolyn Tan, ‘The Different Concepts and Structures for Heritage Protection and Native Title Laws: The Nature and Pitfalls of Public Heritage and Private Rights’ in Pamela Faye McGrath (ed), *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title* (AIATSIS Research Publications, 2016) 26.

35 Tan, above n 34, 26–8.

36 Ibid 37.

problematic in itself, as the focus is on the broader community rather than the traditional owners or even the Indigenous community. Tan explores whether native title rights could provide a way to protect heritage sites and notes that the ‘content of rights to protect sites has not been tested in litigation’.<sup>37</sup> She concludes that, from her perspective, native title, as it currently stands, is ‘not well placed to protect sites, mainly because native title rights are vulnerable to extinguishment and to being prevailed over by validly granted tenure’.<sup>38</sup> However, she suggests there are opportunities for ‘creative and flexible formulations of native title rights’ to give some protection to important places.<sup>39</sup> Similarly, the links between cultural heritage legislation, land use planning and Aboriginal land rights legislation are also ‘missing’, however, an exploration of these important and complex issues is beyond the scope of this article.

There is also siloing between law and ‘non-law’. Mechanisms that are seen to be outside the legal framework are often not given sufficient attention by lawyers and legal academics. One example of this is Indigenous Protected Areas and, in particular, 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 allow for community-based recognition of Indigenous heritage through Indigenous management of the marine environment.<sup>40</sup> As they are seen as non-legal, lawyers may be unaware of their impact or potential. Of course, these ‘non-law’ mechanisms may be said to be beyond what courts can or should take into account, but this observation may in itself be perceived as a part of courts’ ‘blindness’ in this space.

## B 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?’. As was noted by Norman Laing and Kellyanne Stanford, there is ‘no single identifier or legal definition for “who speaks for Country”’ and ‘identifying “who speaks for Country” in most geographical areas in NSW is not a simple undertaking’.<sup>41</sup> In a very public way, we have seen issues arising in mining contexts, such as James Price Point in WA, where some Indigenous groups 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.<sup>42</sup>

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37 Ibid 44.

38 Ibid 46.

39 Ibid 47.

40 See Lauren Butterly, ‘Changing Tack: *Akiba* and the Way Forward for Indigenous Governance of Sea Country’ (2013) 17(1) *Australian Indigenous Law Review* 2.

41 Norman Laing and Kellyanne Stanford, ‘Who “Speaks for Country” in NSW?’ (2015) 2 (December) *Law Society of NSW Journal* 88, 88.

42 Melissa Fyfe, ‘Kimberley Aborigines’ Fight for James Price Point Is Now against WA’s Premier’, *The Sydney Morning Herald* (online), 23 November 2013 <<http://www.smh.com.au/national/kimberley-aborigines-fight-for-james-price-point-is-now-against-was-premier-20131122-2y1f7.html>>. See also, eg, Lily O’Neill, ‘The Role of State Governments in Native Title Negotiations: A Tale of Two Agreements’ (2014–15) 18(2) *Australian Indigenous Law Review* 29; Butterly, ‘Changing Tack’, above n 40, 5.



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.<sup>43</sup> Respected Indigenous leader Noel Pearson described the legislation as having been ‘concocted by green groups in Brisbane in return for green [election] preferences’.<sup>44</sup> It has since been repealed.

Although conflicts between Indigenous worldviews and environmental conservation are not new,<sup>45</sup> it has been observed that conflict between Indigenous groups and environmental groups (what has been labelled by some commentators as ‘green-black conflict’) is a growing feature of Australian politics.<sup>46</sup> These conflicts often relate to self-determination, which in turn relates to the *United Nations Declaration on the Rights of Indigenous Peoples* – to which Australia is a signatory.<sup>47</sup>

The issues relating to ‘who speaks for country’ create potential uncertainties for courts, and could even lead to court disputes themselves where competing parties have different views on developments or conservation on country. Of course, these issues are not just in relation to Indigenous heritage if we think more broadly about ‘who speaks’. ‘Green-black conflict’ should cause us to reflect more broadly on the relationship between environmental law, Indigenous heritage and self-determination. As noted by Graeme Neate, use of legislation for the protection of Indigenous heritage arises where the government has to ‘weigh or rank legitimate competing interests’.<sup>48</sup> Although we often think of such interests involving what might loosely be called environmental destruction, environmental conservation is also a competing interest, for example, where an area is closed off ‘for conservation’ so that no one can access it (even to visit important heritage sites). This is an extreme illustration, but it demonstrates the

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43 For a brief outline of the Wild Rivers debate, see Timothy Neale, ‘Whatever Happened to Queensland’s Wild Rivers Controversy?’, *The Conversation* (online), 1 June 2012 <<http://theconversation.com/whatever-happened-to-queenslands-wild-rivers-controversy-7360>>.

44 Sarah Elks and Rosanne Barrett, ‘Wild Rivers Act Crushes Aborigines: Pearson’, *The Australian* (Sydney), 5 November 2011.

45 Benjamin J Richardson, ‘The Ties that Bind: Indigenous Peoples and Environmental Governance’, in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 337; Marcia Langton, ‘What Do We Mean by Wilderness? Wilderness and Terra Nullius in Australian Art’ [1996] (Summer) *Sydney Papers* 10, 20; David Ritter, ‘Black and Green Revisited: Understanding the Relationship between Indigenous and Environmental Political Formations’ (2014) 6(2) *Land, Rights, Laws: Issues of Native Title* 1.

46 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>>.

47 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, UN Doc A/RES/61/295 (13 September 2007) art 3 (‘UNDRIP’). 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 *Melbourne Journal of International Law* 439, 461.

48 Neate, above n 12, 214.

importance of hearing and understanding the Indigenous voice – first and foremost – in decisions about Aboriginal heritage.

### C 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. This is particularly the case when compared to other offences, for example, environmental offences relating to the destruction of wildlife or native vegetation.<sup>49</sup>

In 2010, the maximum penalties under the *National Parks and Wildlife Act 1974* (NSW) ('*NPW Act*') were increased.<sup>50</sup> For instance, the maximum penalty under the *NPW Act* for the offence of 'harming an Aboriginal object' increased from \$11 000 for an individual and \$22 000 for a corporation, to \$55 000 for an individual and \$220 000 for a corporation.<sup>51</sup> However, in *Ausgrid*, the NSW Land and Environment Court 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.<sup>52</sup> In that case, which involved a plea of guilty to the offence of harming an Aboriginal object, Pepper J stated that:

The maximum penalty for this offence is \$220,000 in the case of a corporation (s 86(2)(b) of the NPWA). The maximum magnitude of the penalty reflects the seriousness with which Parliament views the offence of harming Aboriginal objects (*Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 698 ...).<sup>53</sup>

By contrast, at the time *Ausgrid* was decided, offences by corporations against the *Environmental Planning and Assessment Act 1979* (NSW) attracted a maximum penalty of \$1 100 000.<sup>54</sup> Tier 1 offences by corporations against the *Protection of the Environment Operations Act 1979* (NSW) ('*POEO Act*') attracted a maximum penalty of \$2 000 000 for negligent actions<sup>55</sup> and a maximum penalty of \$5 000 000 for wilful actions.<sup>56</sup>

Putting aside the low penalties, enforcement by Indigenous peoples of provisions that protect cultural heritage is expensive. There is also the potential of adverse costs orders. For example, in *Anderson v Director-General, Department of Environment and Climate Change*,<sup>57</sup> one of the reasons given for the NSW Land and Environment Court not departing from the normal costs rule

49 *Chief Executive of the Office of Environment and Heritage v Ausgrid* (2013) 199 LGERA 1, 15 [46] (Pepper J) ('*Ausgrid*').

50 *National Parks and Wildlife Act 1974* (NSW) s 86; *National Parks and Wildlife Amendment Act 2010* (NSW) sch 1.

51 *National Parks and Wildlife Act 1974* (NSW) s 86(2).

52 (2013) 199 LGERA 1, 15 [46] (Pepper J).

53 *Ibid* 15 [44].

54 *Environmental Planning and Assessment Act 1979* (NSW) s 126. This has now increased to \$5 million: see s 125A(2) of that Act. See also *Environmental Planning and Assessment Amendment Act 2014* (NSW) sch 1.

55 *POEO Act* s 119(a).

56 *POEO Act* s 119(a).

57 *Anderson v Director-General, Department of Environment and Climate Change* [2008] NSWLEC 299.

was because ‘the Aboriginal community was divided’ as to whether the relevant permit and consent should have been granted.<sup>58</sup> Additionally, funding constraints imposed on environmental and local legal centres also limit the ability of Aboriginal groups to enforce the existing law. In short, it would appear that there exists both a lack of political will and a lack of funding to effectively protect Aboriginal cultural heritage.

#### **D 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’.<sup>59</sup> This includes objects, as well as the more intangible features and elements of cultural identity, for example, landscapes in which there is a spiritual and cultural connection, and songlines.<sup>60</sup> Illustrating this point, Commissioner Pearson and Acting Commissioner Sullivan stated in *Ashton Coal Operations Pty Ltd v Director-General, Department of Environment, Climate Change and Water [No 3]* that:

It was common ground that the area in which the objects exist is of traditional as well as archaeological significance for Aboriginal people. ... However ... a number of registered Aboriginal parties described traditional associations, and personal recollections of the area generally, and described the existence or possible existence of specific cultural associations such as traditional routes, songlines associated with initiation ceremonies, birthing sites, and special traditional associations such as with the kingfisher and with bush medicine plants, all of which extend over the creek system and which would make the whole area significant.<sup>61</sup>

Emma Lee describes the dangers of seeing Indigenous heritage as in the past: ‘framed within a distant and unreachable past, leaving contemporary people as ticket-holders to the spectacle of their own history’.<sup>62</sup> Yet some older promulgated heritage legislation (particularly that of WA, Tasmania and NSW) is based on outmoded historical, social and philosophical conceptions that locate Indigenous peoples and cultures in an earlier time, and give the legislation a ‘museum mentality’ – that is, that the place for tangible items is in a museum, and not as part of a living culture.<sup>63</sup> Neate notes that legislation may emphasise certain values over others and that, for example, it might assist in the preservation of some items like rock art (that has values relating to their ‘outstanding aesthetic and scientific appeal’), while not protecting others (such as

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58 Ibid [14].

59 Terri Janke and Robynne Quiggin, ‘Indigenous Cultural and Intellectual Property and Customary Law’ (Background Paper No 12, Law Reform Commission of Western Australia, March 2005) 7.

60 See, eg, the cases below of: *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* [2013] NTMC 19; *Darkinjung* [2015] NSWLEC 1465.

61 [2011] NSWLEC 1249, [81].

62 Emma Lee, ‘Aboriginal Cultural Heritage Protection in Tasmania: The Failure of Rights; The Restorative Potential of Historical Resilience’ in Pamela Faye McGrath (ed), *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title* (AIATSIS Research Publications, 2016) 315, 325.

63 Kwaymullina, Kwaymullina and Morgan, above n 1, 8.

intangible heritage that is harder to see).<sup>64</sup> Essentially, Neate is suggesting that legislation may emphasise elements that accord more with non-Indigenous values of aesthetics in protecting heritage, rather than Indigenous values and worldviews. As Part III of this article demonstrates, a much more nuanced understanding of Indigenous cultural heritage is necessary and, arguably, the courts have the capacity to act as a vehicle to cut through any legislative lacuna.

### III WORKING TOWARDS OVERCOMING COLOURBLINDNESS

There have been, and continue to be, substantial attempts at overcoming some of the problems identified above. At the root of all attempts is an effort to broaden the understanding of what Indigenous heritage encompasses. This knowledge is central to formulating meaningful statutory protections and, in turn, central to the courts interpreting and applying these laws in an effective manner. While our focus is principally on the courts and the three case studies identified, it is, however, important to briefly touch upon some broader legislative initiatives.

#### A Legislative Initiatives

Notwithstanding the disparate state of statutory Indigenous cultural heritage protection, there exists meaningful promulgation and reform of laws protecting cultural heritage. As noted above, relatively recent reforms have been undertaken to overhaul stand-alone Indigenous cultural heritage legislation in both Queensland (initially in 2003) and Victoria (initially in 2006, and there have been more recent substantial amendments in 2016).<sup>65</sup> Tan notes that these statutes move beyond the archaeological model, where it is an offence to damage a site and permits to damage or alter sites can be obtained from a government official or appointed body.<sup>66</sup> Both the Queensland and Victorian legislation require more information and additional procedures before a person can obtain permission to damage a place of significance.<sup>67</sup> They also contain broader definitions of what is ‘regarded’ (by the state) as cultural heritage. For example, the definition of ‘cultural heritage significance’ in the *Aboriginal Heritage Act 2006* (Vic) includes: ‘archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance’ and ‘significance in accordance with Aboriginal tradition’.<sup>68</sup>

Prior to the reforms of the Queensland legislation, the South Australian legislation ‘gave more legal recognition and control to Aboriginal people[s] ...

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64 Neate, above n 12, 244.

65 *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 2006* (Vic). See the commentary in Atkinson and Storey, above n 2, and, relatedly, the *Aboriginal Heritage Amendment Act 2016* (Vic).

66 Tan, above n 34, 30.

67 Ibid 31.

68 *Aboriginal Heritage Act 2006* (Vic) s 4 (definition of ‘cultural heritage significance’).

than in any other Australian jurisdiction'.<sup>69</sup> The Northern Territory ('NT') was the first jurisdiction to legislate in relation to Indigenous cultural heritage in 1955, and as early as 1978 moved 'away from the historical non-Aboriginal focus on archaeological interests' and focussed instead on how the site was of significance to Aboriginal peoples.<sup>70</sup> As we will see below, the NT legislation provides for substantial penalties with respect to destruction of cultural heritage.<sup>71</sup> The Australian Capital Territory has a combined statute for both Indigenous and non-Indigenous heritage.<sup>72</sup> Aboriginal place and Aboriginal tradition are defined broadly in the *Heritage Act 2004* (ACT) to include places that are associated with 'customs, rituals, institutions, beliefs or general way of life of Aboriginal people'.<sup>73</sup>

The three other State jurisdictions are involved in, albeit very slow, reform processes. Tasmania has made only relatively small amendments to their legislation so far, such as changing the name of the legislation from the *Aboriginal Relics Act 1975* (Tas) to the *Aboriginal Heritage Act 1975* (Tas), but they acknowledge that further, more major reform will be needed.<sup>74</sup> The NSW Government is committed to implementing separate, stand-alone Indigenous heritage legislation and, as noted above, has recently released a discussion paper on the proposed reforms and commenced community consultations.<sup>75</sup> The WA Government has been discussing reform for a number of years, but an amendment Bill put forward by the previous Government has effectively been shelved after much criticism.<sup>76</sup> Nevertheless, it appears that the new Minister for Aboriginal Affairs in WA is committed to reforming the legislation.<sup>77</sup>

However, even though some of the reforms offer significant improvement on what has previously existed, there still needs to be ongoing effort to ensure that the enactments are operating effectively.<sup>78</sup> The very recently promulgated *Aboriginal Heritage Amendment Act 2016* (Vic) demonstrates this. The amendments included adding 'omissions' (not just 'acts') to the offence of harming Aboriginal cultural heritage, and enacting '24 hour stop orders' that can be issued where an authorised officer or an Aboriginal heritage officer is satisfied that an act is harming, or is likely to harm, Aboriginal cultural heritage, and that Aboriginal cultural heritage could not be properly protected unless a 24 hour stop

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69 Boer and Wiffen, above n 9, 293.

70 Ibid 287.

71 *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) pt IV.

72 *Heritage Act 2004* (ACT).

73 *Heritage Act 2004* (ACT) s 9.

74 Matthew Groom, Minister for Environment, Parks and Heritage (Tasmania), 'Amending the Aboriginal Relics Act' (Media Release, 15 March 2017) <[http://www.premier.tas.gov.au/releases/amending\\_the\\_aboriginal\\_relics\\_act2](http://www.premier.tas.gov.au/releases/amending_the_aboriginal_relics_act2)>; *Aboriginal Relics Amendment Act 2017* (Tas) s 4.

75 NSW Office of Environment and Heritage, above n 24.

76 See Kwaymullina, Kwaymullina and Butterly, above n 2; Lauren Butterly, Ambelin Kwaymullina and Blaze Kwaymullina, 'Opportunity is There for the Taking: Legal and Cultural Principles to Re-Start Discussion on Aboriginal Heritage Reform in WA' (2017) 91 *Australian Law Journal* 365.

77 See, eg, Craig Quartermaine, 'WA's First Indigenous Treasurer Flags Sweeping Changes to Aboriginal Affairs', *NITV News* (online), 17 March 2017 <<http://www.sbs.com.au/nitv/nitv-news/article/2017/03/16/was-first-indigenous-treasurer-flags-sweeping-changes-aboriginal-affairs>>.

78 See, eg, the commentary in Atkinson and Storey, above n 2.

order is issued.<sup>79</sup> The amendments to the Victorian legislation also include new provisions relating to intangible cultural heritage.<sup>80</sup> ‘Intangible cultural heritage’ in the *Aboriginal Heritage Act 2006* (Vic) is defined as:

any knowledge of or expression of Aboriginal tradition, ... and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.<sup>81</sup>

Under the Victorian legislation, intangible cultural heritage can be included on the Victorian Aboriginal Heritage Register and may also be subject to an Aboriginal intangible heritage agreement.<sup>82</sup> Such an agreement may provide for a wide range of issues in relation to Aboriginal intangible heritage such as management; protection or conservation; research or publication; development or commercial use; rights of traditional owners; and compensation to be paid to traditional owners for research, development and commercial use.<sup>83</sup>

The NSW and WA legislatures in particular have the opportunity not only to meet the standard of the reformed legislation of the other jurisdictions, but to reach further in working with Indigenous communities. Meanwhile, in respect of those jurisdictions that have reformed their legislation in recent years, more can be done with ongoing proper consultation and engagement.

Although it is only one small part of the legislative response, the courts are the place where the offence provisions relating to cultural heritage are given effect to. Various enactments specifically protect Aboriginal cultural heritage and make its destruction an offence in a range of ways.<sup>84</sup> Accordingly, in the decision of *Ausgrid*, a case concerning the wholly accidental partial destruction of an Aboriginal rock carving, a conviction and fine of \$4 690 nevertheless resulted, despite a submission that no conviction should be recorded.<sup>85</sup> The low fine was in part a reflection of the low maximum penalty under the *National Parks and Wildlife Act 1974* (NSW) (only \$220 000 for a corporation which, as discussed above, compared to other environmental and planning offences, is very low).<sup>86</sup>

In *Aboriginal Areas Protection Authority v OM (Manganese) Ltd*,<sup>87</sup> the defendant was charged with an offence of desecration of a sacred site and an offence of breaching a condition of its approval (or ‘authority’) causing damage to a sacred site under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).<sup>88</sup> The registered sacred site, known in the English language as ‘Two Women Sitting Down’, was of two female dreaming figures, whose skin names were ‘Namakili’ and ‘Napanangka’, and who were represented by rocky

79 See *Aboriginal Heritage Act 2006* (Vic) ss 27, 95A. See also *Aboriginal Heritage Amendment Act 2016* (Vic) ss 24, 70.

80 See *Aboriginal Heritage Act 2006* (Vic) pt 5A; *Aboriginal Heritage Amendment Act 2016* (Vic) s 59.

81 *Aboriginal Heritage Act 2006* (Vic) s 79B.

82 *Aboriginal Heritage Act 2006* (Vic) ss 79C, 79D.

83 *Aboriginal Heritage Act 2006* (Vic) s 79D(2).

84 See generally the summary in Pepper and Duxson, above n 23, 27.

85 *Ausgrid* (2013) 199 LGERA 1, 24 [101], 26 [112] (Pepper J).

86 *National Parks and Wildlife Act 1974* (NSW) s 86(2)(a).

87 [2013] NTMC 19.

88 At ss 35 and 37 respectively.

outcrops.<sup>89</sup> The sacred site was one of a number of sacred sites along a particular song line. A significant identifying feature of the site was a horizontal rock arm extending off a pillar.<sup>90</sup> The arm fell off and broke into many pieces as a result of mining activity, including drilling, carried out by the defendant. The defendant knew of the significance of the site and of the rock arm. The authority granted to the company was conditional upon the sacred site not being entered or damaged. The Court found that the defendant had conducted the mining activities in a manner that maximised its financial gain at the expense of complying with the conditions attached to the approval.<sup>91</sup> Pursuant to guilty pleas, the defendant was fined \$120 000 for the 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.<sup>92</sup>

As noted above, there have been recent attempts to increase penalties for Indigenous cultural heritage destruction. However, the penalties in some jurisdictions remain, and at least in NSW, on any view, too low. Given that the maximum penalty proscribed for an offence reflects the seriousness with which a Parliament views the commission of the offence,<sup>93</sup> it begs the question of how important – or otherwise – the NSW legislature views the destruction of Indigenous cultural heritage in that State.

## B Broader Policy Issues that Impact the Courts

Before turning to consider the decisions of the courts in more detail, it is useful to draw attention to some broader policy issues that impact on the operation of the courts in this area. The 2016 Consultation Report, ‘The Path to Justice: Aboriginal and Torres Strait Islander Women’s Experience of the Courts’, prepared for the Judicial Council on Cultural Diversity noted the importance of Indigenous interpreters.<sup>94</sup> The recommendations of the Consultation Report included that all courts should have interpreter policies and that judicial officers and lawyers should receive training and guidance about how to work with interpreters.<sup>95</sup>

More broadly, the Consultation Report recommended that all judicial officers should receive cultural competency training. Different ways of communicating can affect the way that Aboriginal and Torres Strait Islander peoples are heard and understood when giving evidence. These considerations need to be understood by judges and taken into account during hearings about cultural heritage. This is particularly important when very complex details about

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89 *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* [2013] NTMC 19, [3]–[4] (Stipendiary Magistrate Oliver).

90 *Ibid* [9] (Stipendiary Magistrate Oliver).

91 *Ibid* [74] (Stipendiary Magistrate Oliver).

92 Amos 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>>.

93 *Camilleri’s Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683, 698 (Kirby P).

94 See generally, Frances Byers, ‘The Path to Justice: Aboriginal and Torres Strait Islander Women’s Experience of the Courts’ (Report, Judicial Council on Cultural Diversity, 2016).

95 *Ibid* 9.

Indigenous worldviews are being explained in court. As the *Equality Before the Law Bench Book* ('*Bench Book*') (produced by the Judicial Commission of NSW) notes:

**Some differences in relation to Aboriginal appearance, behaviour and body language of which appropriate account may need to be taken, are:**

- **Lack of direct eye contact/looking down or away** – for many Aboriginal people it is impolite and disrespectful to look someone direct in the eye – particularly if that person is in authority. It does not mean that they are dishonest or lacking in credibility. Phrases like 'Please look at me when I'm speaking to you' are not appropriate in these situations.
- **Dress that appears eccentric or disrespectful** – many Aboriginal people have low income levels, do so not have the ability to 'dress up' for court appearances in the same way as people who have a higher level of income.
- **Silence** – silence is a common and positively value communication style in Aboriginal society. It often means the person wants to think, or to adjust to or become comfortable with a particular situation. ...
- **Different gestures or sign language** – these are significant ways of communicating in traditional Aboriginal culture. For example, sign language is particularly important in hunting and mourning practices. ... If there is any doubt about what a particular sign or gesture means, ask for its meaning rather than potentially ascribing the wrong meaning to it.<sup>96</sup>

To mitigate these cultural and linguistic differences in the courtroom, in addition to judicial education (further discussed below),<sup>97</sup> legislative responses at both the Commonwealth and state level include various provisions in the relevant Evidence Acts that allow the courts greater flexibility when receiving evidence from Indigenous persons. For example, in NSW there exists powers of the court to make orders in relation to the way witnesses give oral evidence, and in particular, the manner in which they are questioned.<sup>98</sup> These provisions allow for witnesses to give their oral evidence in narrative form, that is to say, as a continuous story in their own words, rather than in the more orthodox and confined manner of eliciting evidence only by question and answer. There is an exception to the hearsay rule of a representation about the existence or non-existence, or the content of the traditional laws and customs of Aboriginal or Torres Strait Islander peoples.<sup>99</sup> There also exists an exception to the opinion evidence rule permitting evidence of an opinion expressed by a member of a particular Aboriginal and Torres Strait Islander group about the existence or non-existence, or the content of the traditional laws and customs of the group.<sup>100</sup> In addition, in conducting native title proceedings under the *Native Title Act*, the

96 Judicial Commission of New South Wales, 'Equality Before the Law Bench Book' (Bench Book, Release 10, July 2016) 2307–8.

97 See generally Diana Eades, 'Judicial Understandings of Aboriginality and Language Use in Criminal Cases' in P G Toner (ed), *Strings of Connectedness: Essays in Honour of Ian Keen* (ANU Press, 2015) 27.

98 *Evidence Act 1995* (NSW) ss 11, 26, 29, 41, 192 ('*Evidence Act*').

99 *Evidence Act* s 72.

100 *Evidence Act* s 78A.



Federal Court ‘may take account of the cultural and customary concerns’ of Indigenous peoples.<sup>101</sup>

### C Education

Education is central to understanding not merely of the need for the protection of Aboriginal cultural heritage, but also what ‘heritage’ comprises, and therefore, how best to protect it. In a representative democracy such as Australia, the education of the public is essential 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. In the Parliamentary debates about the Aboriginal Relics Amendment Bill 2017 (Tas), one of the opposition members noted that it was a failing that there was no Aboriginal Member of the Tasmanian Parliament to speak on these issues.<sup>102</sup>

Judicial education is also critically 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 New South Wales’ Ngarra Yura Committee, whose aims include the education of judicial officers in NSW in respect of Indigenous issues, both civil and criminal, are to be commended, if not replicated in other jurisdictions.<sup>103</sup> Specifically, the Committee raises awareness of cultural heritage issues through visits to sacred sites and presentations by traditional owners, archaeologists and anthropologists. Its innovations include, as referred to above, its publication of the *Bench Book*.<sup>104</sup> The *Bench Book* is a loose-leaf resource, the aim of which is to assist judicial officers in conducting hearings. It contains both general cultural information and directs judicial officers to practical considerations that ought to inform the conduct of hearings involving Indigenous persons. The Committee also provides a forum for the dissemination of information, experience and knowledge, by and to, judicial officers, by means other than the more conventional of the publication of judgments and attendance at conferences. It is this type of sharing of experience and knowledge in the judicial space that we promote in our final section where we turn to our three case studies.

### D Courts

The courts are increasingly recognising and acknowledging that cultural heritage comprises of much more than artefacts, and includes landscapes and values. A recent trilogy of cases, from three different jurisdictions, illustrates the curial evolution in this respect. These cases emphasise both the recurring

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101 *Native Title Act 1993* (Cth) s 82(2); *Federal Court Rules 2011* (Cth) r 34.121. See also Richard H Bartlett, *Native Title in Australia* (LexisNexis, 3rd ed, 2015) 949; Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) 647–78.

102 Tasmania, *Parliamentary Debates*, House of Assembly, 5 April 2017, 42 (Madeleine Ogilvie).

103 Judicial Commission of New South Wales, *Ngarra Yura Program* <<https://www.judcom.nsw.gov.au/education/ngarra-yura-program/>>.

104 Judicial Commission of New South Wales, above n 96.

challenges faced by judges in this area, but also the novel and insightful approaches that judicial officers are striving to take. Although all these cases were decided within a short timeframe (2015–16), curiously none of them referred to each other.<sup>105</sup> Nor did they refer to historical, well-known Indigenous heritage cases (for example, the *Hindmarsh Island Bridge Case*<sup>106</sup>). This may not be unusual given the different jurisdictions and areas of law which they dealt with, however, it is somewhat trite to observe that judges can learn from how other cases have dealt with the unique challenges of interpreting evidence of Indigenous worldviews about heritage.

The idea that ‘state’ (Australian) law is not the only legal order, and that Indigenous laws exist in Australia, is not radical. Section 223(1)(a) of the *Native Title Act* provides that the expression native title means the rights and interests of Indigenous peoples in relation to land and waters where ‘the rights and interests are possessed under the traditional laws acknowledged’. It has been referred to in judicial determinations as an ‘intersection’ of ‘traditional law and custom’ with the common law.<sup>107</sup> Gleeson CJ, and Gummow and Hayne JJ suggested in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 that the relevant intersection is that of two normative systems, and that: ‘it is only if the rich complexity of indigenous societies is denied that reference to traditional laws and customs as a normative system jars the ear of the listener’.<sup>108</sup> Yet, as was clearly stated by their Honours, the intersection is located by reference to the state law – in that case, the *Native Title Act*.<sup>109</sup> That sentiment is relevant here because although Indigenous laws and worldviews inform the content of Indigenous cultural heritage, the courts are necessarily examining heritage through the prism of the relevant legislation – the state law. As is suggested below, the courts are looking at the *interaction* of Indigenous cultural heritage and the relevant legislation.

In examining the three heritage cases below, this article looks at how courts have engaged with Indigenous laws and worldviews ‘within’ the legal frameworks of cultural heritage (though, not restricted to stand-alone cultural heritage legislation). We acknowledge that broader work has already been done in this area, particularly from a social science perspective.<sup>110</sup> We also acknowledge that there are other cases that deal with similar issues. However, our particular focus is deliberately on three recent cases decided over 2015–16, in

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105 We acknowledge that this does not necessarily mean that the relevant judicial officers had not read the other cases or the historical cases.

106 (1998) 195 CLR 337.

107 See, eg, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 439 [31] (Gleeson CJ, Gummow and Hayne JJ), quoting *Fejo v Northern Territory* (1998) 195 CLR 96, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

108 441–2 [39]–[40].

109 Ibid 439 [31].

110 See, eg, Andrew Sneddon, ‘Aboriginal Objections to Development and Mining Activities on the Grounds of Adverse Impacts to Sites of Spiritual Significance: Australian Judicial and Quasi-Judicial Responses’ (2012) 29 *Environment and Planning Law Journal* 217, which covered a wide range of courts and tribunals both historical and contemporary. This included consideration of specialist bodies such as the National Native Title Tribunal.

different jurisdictions and relating to different statutory contexts. This approach is useful as a way of emphasising the recurring challenges faced by courts in this area, noting the similarities and differences in approaches of various judicial officers and seeking to suggest that judicial officers are finding ways to overcome colourblindness even within the ‘confines’ of the court.

### ***1 Darkinjung Local Aboriginal Land Council***

In *Darkinjung*<sup>111</sup> the Land and Environment Court of NSW upheld objector appeals under the *Environmental Planning and Assessment Act 1979* (NSW) 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.<sup>112</sup> 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.<sup>113</sup> This in turn had the capacity to further exacerbate the process of fragmentation of Aboriginal heritage that had occurred in the area.<sup>114</sup> 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’.<sup>115</sup>

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 the precautionary principle and the *Burra Charter* principles.<sup>116</sup> 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.<sup>117</sup>

The case reinforces the need for Aboriginal cultural heritage to be thoroughly assessed at the commencement of any development proposal. This assessment must encompass all aspects of the *Burra Charter* – not merely that of archaeological significance – including the need to examine the broader landscape within which the proposed development is sought to be placed. In addition, the decision emphasised the need for an assessment of not merely historic, but also contemporary, values of the land in question. Finally, it is clear that a great depth of knowledge is required when decisions are made that may

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111 [2015] NSWLEC 1465.

112 Ibid [36] (Commissioner Dixon and Acting Commissioner Sullivan).

113 Ibid.

114 Ibid [199] (Commissioner Dixon and Acting Commissioner Sullivan).

115 Ibid [36] (Commissioner Dixon and Acting Commissioner Sullivan).

116 Ibid [301], [481] (Commissioner Dixon and Acting Commissioner Sullivan).

117 Australia International Council on Monuments and Sites, *Burra Charter and Practice Notes* (2017) <<http://australia.icomos.org/publications/burra-charter-practice-notes/>>.

irreparably impact upon areas of high cultural value. And in the absence of this information, application of the precautionary principle may be appropriate.<sup>118</sup>

## 2 *Tasmanian Aboriginal Centre [No 2]*

In the decision of the Federal Court in *Tasmanian Aboriginal Centre [No 2]*,<sup>119</sup> 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*.<sup>120</sup>

This case highlights that protection under the *EPBC Act* includes protection of Indigenous heritage values.<sup>121</sup> Her Honour stated that the protection of the *EPBC Act* 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.<sup>122</sup> The opening of the tracks would damage the whole of the landscape, and therefore, significantly impact upon the Western Tasmanian Aboriginal Cultural Landscape. Mortimer J noted that:<sup>123</sup>

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 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 decision was the subject of a successful appeal by the Tasmanian government.<sup>124</sup> The government, and the Commonwealth appearing on appeal as an intervenor, argued that Mortimer J had erred by overly narrowly construing the terms ‘governmental action’ and ‘action’, and in characterising the Indigenous heritage values of the landscape by reference to evidence of its significance to the Aboriginal community, rather than, as a matter of construction, by reference exclusively to those values expressly described in the listing statement.

The Full Court of the Federal Court agreed, in part, holding that the trial judge had erred in determining that a declaration that the tracks were open was

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118 See observations to this effect in commentary by Ballanda Sack, Andrew Beatty and Karina O’Callaghan, ‘Determining the Adequacy of Aboriginal Cultural Heritage Assessments: Amber Lights and Red Lights’ (2016) 33 *Environmental and Planning Law Journal* 264, 265.

119 (2016) 337 ALR 96.

120 Ibid 170 [298].

121 The case considered s 15B of the *EPBC Act*.

122 *Tasmanian Aboriginal Centre [No 2]* (2016) 337 ALR 96, 124–5 [108], 148 [214].

123 Ibid 150 [225].

124 *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* (2016) 244 FCR 21.

sufficient to constitute an ‘action’ under the *EPBC Act*.<sup>125</sup> Furthermore, the Court accepted the argument that the National Heritage values were the values in the National Heritage list.<sup>126</sup> However, the Court went on to hold that the approach advocated by the Tasmanian Government – that the expression of the value was incapable of either explanation or contextualisation by other material – was too narrow.<sup>127</sup> Rather, the Court found that to appreciate the nature of the National Heritage value (and therefore, Indigenous heritage values) of a place may require some context and background which could be given by other material found, or referred to, in the National Heritage List; namely, the history of the area and the full cultural and historical significance of ‘what can still be found there’.<sup>128</sup>

Accordingly, although confining the scope of the material to which recourse could legitimately be made in identifying National Heritage values (including Indigenous cultural heritage values), the Full Court did not traverse Mortimer J’s eloquent expression of ‘values’ as encompassing notions of place and landscape within an Indigenous cultural context.

Not dissimilar to *Darkinjung*, the *Tasmanian Aboriginal Centre* litigation (and the first instance decision in particular) is important insofar as it has, albeit in small part, sought to dissolve the silos that exist in Australia’s patchwork protection of Indigenous cultural heritage by considering heritage and a wider cultural and spiritual environment, or landscape, together, rather than separating ‘pieces’ of heritage (typically the more tangible or physical aspects of Indigenous cultural heritage) from country. It is no coincidence that Mortimer J also presides over native title cases.

### 3 *Robinson v Fielding*

In the recent WA case of *Robinson*,<sup>129</sup> Chaney J upheld an application for judicial review under the *Aboriginal Heritage Act 1972* (WA) (*AH Act*). Relevantly, Marapikurrinya Yintha (Port Hedland harbour and adjoining creeks) had been placed on the WA Register of Aboriginal Sites in 2008 under the *AH Act*.<sup>130</sup> However, in 2013, Marapikurrinya Yintha was identified as ‘not a site’ at a meeting of the Aboriginal Cultural Materials Committee (‘the Committee’) (a statutory body under the *AH Act*).<sup>131</sup> The Department of Aboriginal Affairs published guidelines relating to section 5 of the *AH Act* (‘the Guidelines’) about six months prior to the relevant decision in *Robinson*.<sup>132</sup> The Guidelines set out additional criteria that were to be taken into account when determining whether a place is a ‘sacred, ritual or ceremonial site’. These included: ‘[t]he meaning of “site” is narrower than “place”’ and ‘for a place to be a sacred site means that it

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125 Ibid 50 [76].

126 Ibid 52 [86].

127 Ibid 53–4 [87]–[90].

128 Ibid 53 [88].

129 [2015] WASC 108.

130 Ibid [15].

131 Ibid [35]–[45].

132 Buttery, ‘Update on Aboriginal Heritage in the West’, above n 26, 104.

is devoted to a religious use rather than a place subject to mythological story, song or belief'.<sup>133</sup>

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'.<sup>134</sup> His Honour emphasised that to suggest that particular rituals or ceremonies are required denies the expression 'sacred site' a separate meaning.<sup>135</sup> Put another way, he reasoned that 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 by and given effect to by the courts.<sup>136</sup> Further, Chaney J held that although there is nothing in section 18 of the *AH Act* (the relevant decision-making section) that requires consultation with Aboriginal people on sites, and notwithstanding the focus on the 'community generally', the 'effective operation of the *AH Act* requires input of some kind from Aboriginal people'.<sup>137</sup>

This decision has had impacts beyond the case itself because, just after the case was handed down, the WA Minister for Aboriginal Affairs issued a statement that, since November 2012, 22 sites had changed their status to 'not a site' as a result of evaluation by the Committee. This has led to much uncertainty as to the Register of Aboriginal Sites and the process more generally. It has also impacted upon the controversial reform process which has been ongoing in WA over a number of years.<sup>138</sup>

#### 4 *Significance of the three cases*

The three cases demonstrate how judicial understandings of Indigenous heritage can impact statutory interpretation. In turn, the judges' reasoning and understanding of Indigenous heritage influences government decision-making (given that all of these cases had a 'government party'). Each of the three cases involved a more sophisticated understanding of how the Indigenous heritage site related to the legislative framework; each required the judicial officer to consider how the two interacted.

This interaction suggests that, when determining cases involving Indigenous heritage there is utility in judicial officers considering a wide range of authority. This may involve looking at cases from different substantive areas of law. For example, it is interesting to note that *Robinson* was the only case of the trilogy that directly related to stand-alone Aboriginal heritage legislation; the other cases concerned environmental legislation. Yet, the need to consider the interaction

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133 *Robinson* [2015] WASC 108, [75].

134 *Ibid* [98].

135 *Ibid*. See Butterly, 'Update on Aboriginal Heritage in the West', above n 26, 105–6.

136 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J); *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2014) 88 NSWLR 125, 133 [27] (Basten JA) ('*Nelson Bay Claim*').

137 *Robinson* [2015] WASC 108, [129].

138 See Kwaymullina, Kwaymullina and Butterly, above n 2.

between the Indigenous heritage site and the related legislative framework was common to all three cases.

Further, as is evident from all three examples, it is useful to look across legal and statutory jurisdictions, to better understand and analyse how Indigenous heritage has been interpreted, understood, and applied.

#### IV CONCLUSION: NEAR SIGHT AND FAR SIGHT

The decisions of *Darkinjung*, *Tasmanian Aboriginal Centre [No 2]* and *Robinson*, together with other initiatives, demonstrate the impact that courts can have in protecting Indigenous cultural heritage. However, courts can only work with the legislation before them, and moreover, within the constitutional and institutional 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 in ‘bringing together’ the current patchwork of legal protection in this area.

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 no doubt across political boundaries.

Moreover, it is 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, especially Indigenous communities.<sup>139</sup> 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’, in the sense of support and participation, 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. 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.

Having said this, attempts to reform the legal protection of Indigenous cultural heritage are making progress, albeit slowly. In the meantime, the courts are continuing to evolve their understandings of Indigenous worldviews and conceptions of heritage.

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139 Megan Davis and Lauren Butterly, ‘Who Is the “Community”? Consultation with, and Obtaining the Consent of, Aboriginal Communities in Relation to Laws and Government Decisions’ (Paper presented at the Australian Institute of Administrative Law National Conference, 21 July 2017, Hotel Realm, Canberra).