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THE PLACELESSNESS OF PROPERTY, INTELLECTUAL PROPERTY AND CULTURAL HERITAGE LAW IN THE AUSTRALIAN LEGAL LANDSCAPE: ENGAGING CULTURAL LANDSCAPES

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The Placelessness of Property, Intellectual Property and Cultural Heritage Law in the Australian Legal Landscape: Engaging Cultural Landscapes[*]

Australia has an appalling history of dispossession of Aboriginal and Torres Strait Islander (ATSI) Peoples and recognition of this motivates research that seeks to advance Indigenous rights by amending Australian laws in ways that better connect property, people and culture to place and environment. The ambition is often to open up the Australian legal space. Here international law is looked to for inspiration; categories of property, environmental, intellectual property and cultural heritage law are forensically surveyed, in the hope that these may be imaginatively repositioned to make room for the 'Other' under domestic law.[1] This chapter interrogates the distinction between space and place under Australian law as a major problem that needs addressing for reform initiatives to bear fruit. We are concerned with deconstructing the idea of legal space in abstract as if it is "an empty vessel existing prior to the matter which fills it",[2] and in questioning the priority afforded to space over and above attention to the importance of recognising the specificities of particular places in law.

Part One explores the reasons why the Australian legal space is necessarily placeless due to our colonial history and the dominant legal conception of property rights. Rights are conceived in abstract terms as 'dephysicalised', with interests realised in term of market value that fosters the economic growth priorities of Federal and State Governments. When the legal space is pre-occupied with this particular economic logic, there is little room for 'place', and in particular for ATSI knowledges and laws, which are intimately connected to place, to be recognised.

Part Two shows this problem in action, reviewing the legal machinations surrounding property development at Kumarangk which involved an unsuccessful attempt to prevent the construction of the Hindmarsh Island Bridge under State and Federal heritage laws.[3] We argue that Aboriginal interests and heritage are made especially vulnerable as a consequence of legal investment and reinvestment in a placeless property paradigm. If there is little within Australian jurisprudence that can recognise place, there cannot ever be any political settlement that is different to where we are now - no decolonisation - whatever the attempted discussion or reimagining of the political or legal space.

Having framed this problem, Part Three takes a strategic turn by exploring concepts that are currently present within our existing laws and jurisprudence that house some, albeit undeveloped, capacity to confront and disrupt the reproduction of placelessness. We explore the potential productivity of the notion of "cultural landscape" under the UNESCO World Heritage Convention (WHC), ratified by Australia on 22 August 1974. The term "cultural landscape" has developed with the implementation of the WHC. In 1992 the World Heritage Committee adopted a very broad definition. It includes cultural properties that "represent the 'combined works of nature and of man' designated in Article 1 of the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.[4] Though 'cultural landscape' is not a judicially considered concept in Australia, it is well established in numerous scholarly disciplines, including geography, ethnography, anthropology and environmental studies.[5] The notion already comes to life in Australian legal processes through the input of disciplinary expertise that informs protection obligations conferred by Federal and State environmental and heritage laws, whether or not there is a connection to the WHC.

Part Four looks at the significance of the Uluru-Kata Tjuta (Ayers Rock-Mount Olga) National Park listing as an "associative cultural landscape" under the WHC in 1994. While there are problems with the capacity for Indigenous governance at Uluru, the cultural landscape idea has provided a mechanism whereby ATSI laws have achieved some recognition and practical impact upon decision-making that can undermine the dominant property paradigm.

In conclusion, we argue that in order to better fulfill its capacity to bridge discordant legal traditions, the concept of cultural landscape needs to be hierarchically repositioned. At present cultural landscape is primarily defined by non-lawyers - the non-legal experts who, by "asking the Aborigines,"[6] then inform Australian legal institutions and governing bodies about ATSI culture: the relevant spiritualism, belief, practices, customs and protocols. This 'cultural' knowledge has a ghostly presence in the way it interacts with the Australian legal space. Stripped of the priority and authority of ATSI laws and traditional modes of recognition and repositioned as cultural knowledge, meanings are distorted and ATSI laws are misrepresented.

However reconsidering the cultural landscape construct as *a priori* a juridical construct both facilitates the possibility of living in accordance with ATSI laws by ATSI Peoples within the Australian legal system and better develops the potential to reconnect people, culture, place and law more generally. Regarded in terms of recognising law, not just people and their culture, it houses some capacity as a postcolonial form of governance that can dislodge the historical 'placelessness' of the Australian legal system. Further, in starting to redress the problem with our legal space, there is a far greater potential to seed mainstream Australian laws that are more respectful of the environment and sustainability, through forging the connections between all people and places as part of the ordinary processes of land management and resource development.

1. **The Placelessness of Australian Law**

Place is a concept that combines the particular physical characteristics of a specific part of the Earth's surface with a human relationship to it.[7] That relationship can take many forms: economic, familial, political, aesthetic, psychological etc. Place can be also a sentient experience of living in, as part of, attached to, and dependent on the material world. However in contemporary Australian life, place is often regarded in somewhat reductive terms as a set of coordinates on a map, or a description of a piece of real estate. Even so, the idea of place refers to human engagement with a specific physical location including any anthropogenic structures such as buildings, dams and bridges and any cultural narratives such as significant and sacred 'natural' features. For this reason, the concept of place is a radical concept in Anglo-American cultural discourse because it reveals the possibility of the synthesis of apparently separate realms: 'natural' and 'cultural' within a single site.

The reason it is important to understand the radical potential of the idea of place is because we are concerned here with problems arising from the removal of place from law and particularly from property law. Placelessness is not unique to modern law – it is part of the deeper paradigm of anthropocentrism on which the project of colonisation was premised.[8] Anthropocentric thought facilitated the gradual transformation of inalienable relationships between peoples and places into the intra-human transactions of rights over commodities both corporeal and incorporeal with regard to land. These transactions reflected a radically changed legal order in which people became alienable from lands and people could alienate lands.[9] The history of English diaspora through the enclosure of the commons and the transportation of convicts to foreign lands is one side of that transformation – the colonisation of the lands and peoples of those foreign lands

is the other side – both were premised on the anthropocentrism of the dominant culture and the attendant placelessness of law.

The removal of place from colonial Australian property law was part of the strategy of political invasion and the imposition of foreign sovereignty. It fed deeply rooted cultural anxieties surrounding justification for invasion and colonisation of Australia. These were reflected in Letters Patent acknowledging pre-existing Aboriginal rights in South Australia,[10] reception of Aboriginal protest in the Europe,[11] landscape themes explored in late nineteenth century Australian art,[12] and in portrayals of dispossession in major twentieth century Australian literature and films.[13] It was this cultural history that contributed to the *Mabo* decision's partial reappraisal of the doctrine of *terra nullius* and its applicability to the Australian situation: "The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was … an unjust and discriminatory doctrine of that kind can no longer be accepted".[14] However despite ongoing political and legal overtures toward recognition of ATSI Peoples, none of this has led to any fundamental reappraisal of the sovereignty of the Anglo-Australian notions of property. Letters Patent suggestive of pre-existing Aboriginal rights have been read down to mean that a "principle of benevolence" should be exercised in the governance of Aboriginal people;[15] absolute Crown ownership and prerogative to dispose of title to land remains intact;[16] native title claims are determined by common law and Parliamentary rules of recognition.[17]

Although this chapter refers to the placelessness of Australian law, it is important to recognise that the absence of place is not accidental or insignificant, but critical to the operation and logic of Australian property law as a rights-based discourse and as a technology of colonisation.[18] What this means is that restoring place to Australian law is not as simple as adding it in at potentially suitable points. Restoring place to Australian law means challenging and

overcoming the ongoing convention of a colonising, if no longer colonial, legal discourse and outdated legal categories that entrench the priority of property rights over increasing environmental regulation designed to address the consequences of the placelessness of property law.[19] The work of such restoration therefore begins with a recollection and critique of the status quo.

Contemporary property law is essentially a set of equations designed to determine and allocate the access, benefits and other entitlements to land and natural resources. It is articulated as a series of 'rights' which are regarded as existing between people, as separate individual legal 'persons.' Property rights are not absolute, but relative to each other subject to a logic that facilitates the twin overarching goals of individual liberty and economic growth. Jeremy Bentham understood that the equations and language of property law, as rights, produces a necessarily 'dephysicalised' relation between humans and the environment. From his perspective it was important to a capitalist economy that property rights were disconnected from 'any exterior reality.'[20] For Bentham, this was necessary to provide for the security of wealth derived not (only) from land and its resources (which had been locked into feudal power relations) but from any number of more liquid 'things' including especially abstract notions such as shares, options and futures. This is why Bentham claimed that 'property is entirely a creature of law'[21] and that its origins were entirely 'metaphysical.'[22] Although long gone, Bentham's crystalline articulation of the dephysicalisation of English property law (back when it was known as land law) is as true a statement of property law as it ever was. Indeed, the High Court of Australia referred to this definition, amongst others in a 1999 case[23] which above all others presented the Court with an opportunity to depart from this logic of dephysicalisation – a native title determination. However, the Court repeated the notion that property law is a series of rights and the rights of native title were merely an addition to them, rather than a fundamental challenge or a conundrum.

A similar logic is evident in the intellectual property recognition of Aboriginal 'customary law'.[24]

The dephysicalisation of property law is important to understand because in addition to explaining the economic and political rationale of property as a rights-based institution, it also serves to remind legal scholars that property law is self-referential and self-authorising. Dephysicalised property conceals the real, material consequences of its operation. Whether the 'thing' of property is a natural resource, a public utility, or a sign of an abstract commodity, it is intrinsically immaterial to an account of property law as dephysicalised. Australian property law has no regard for place, rather it makes a space for commodification where 'things' are dematerialised and denatured to facilitate the process of exchange. Australian property law refers to itself, rather than to the (experiences of the) physical places it protects, shapes and destroys. The adverse environmental effects of the absence of place from law are in part addressed by a separate subordinate body of law, environmental law. But for the most part, the effects of a placeless or atopic property law are 'eclipsed by a fetishism of its technicalities.'[25] As Valerie Kerruish has stated, however:

> 'Things' may be intangible; they are no less created as things by conceptualisation and exchangeability. It is certainly a consequence of the dynamic of wealth that forms of property less-connected to wealth creation than to use in everyday life tend to be seen as consumer goods, to be protected by consumer rather than property law, or in the case of Aboriginal ideas of property to be virtually unprotected and increasingly seen as non-proprietary.'[26]

Modern Australian property law excludes non-rights based relationships between people and place, which renders invisible to it the 'things' that make life possible. This poses a considerable challenge for Australian cultural heritage laws that seek to make sense of place, and for ATSI laws which are often structured around the 'laws of reciprocity and obligation.'[27] Proprietary

relationships here are not defined by the subordination and irrelevance of place to people, but by human responsibilities for and from place. In her critique of the growth-oriented economy facilitated by modern Australian property law, Irene Watson states that the separation between the physical and metaphysical, between people and place, is antithetical to Indigenous jurisprudence:

> The non-indigenous relationship to land is to take more than is needed, depleting *ruwi* [land] and depleting self. Their way with the land is separate and alien, unable to understand how it is that we communicate with the natural world. We are talking to relations and our family, for we are one.[28]

The viability of knowledge-based land laws is evident in the long-established and successful ATSI legal regimes. These regimes are neither inherently superior (on a romantic conflation of race and environmentally sustainable law) nor were they rapid in development. ATSI legal regimes connected knowledge of places to laws on the basis of experience of specific geographic conditions, over very long periods of time and across a vast continent of diverse and dynamic climatic conditions. The point is not to essentialise and racialise law but to identify and respect the intellectual integrity and practical success of laws that have been and remain locally viable and authoritative. By contrast, as modern Australian property law increasingly exceeds the physical conditions of its own existence – what local authority can it be said to have? Its anthropocentrism and placelessness render potent obstacles to the development of enduring laws founded on knowledge of and responsibility for places.

2. The failure of culture heritage laws at Kumarangk

The dominance of the placeless property paradigm in Australian law is well illustrated in the failed cultural heritage protection actions surrounding development at Kumerangk in South Australia (SA).[29] These legal events are

infamous due to a complexity that was, at least in part, derived from the overt politicisation of the associated approval process at both State and Federal levels.[30]

Property developers, Tom and Wendy Chapman, had obtained planning permission for a marina to be built on Hindmarsh Island dating from the 1980s and it had been partially built. The Chapmans later sought a bridge to facilitate access to the island. However the financier, the Westpac bank, declined to fund the bridge. The SA State Bank had recently collapsed. The SA State Labor Government, approaching an election, was keen to be seen to be sponsoring major developments. This led to a peculiar financing arrangement whereby the Westpac bank and the Labor Government entered into a financing arrangement whereby the State government provided a guarantee and agreed to build the bridge.[31]

SA planning law required consideration of the environmental and cultural heritage significance of the site that would be affected by the bridge and marina. However the processes of heritage law mirror the monarchical power of the Crown that determines original land grants in Australia. Under both State and Federal heritage laws heritage protection is determined ultimately by the relevant Minister who reviews applications, orders investigations, determines facts and makes relevant protection orders. Ministerial advice is dependent upon expert input to the collection and presentation of relevant evidence. There is considerable discretion with respect to whom is consulted and what processes should be implemented. As such, while Aboriginal people may give evidence to anthropologists, in court Aboriginal knowledge, law, and identity based in place are miscategorised. 'Evidence' of 'culture' is taken, removed and abstracted from its lived context and authority. It is rendered an ethereal knowledge, repositioned as mythic, spiritual, backward-facing immemorial custom, oral traditions. So constructed, this knowledge can appear to require materialisation

through expert transcription. Positioned as *a priori* 'other worldy' it now needs to be translated, officially reported, verified, allowing it to be linked back to specific map co-ordinates to be potentially made relevant to Ministerial determinations about particular geographical 'sites'. As Sneddon argues:

> It is clear from numerous judgements across several jurisdictions that the courts and tribunals of Australia have little time for evidence that lacks detail and precision when determining matters relating to Aboriginal heritage values of a spiritual kind. Broad assertions of sacredness or spirituality are not well-received by courts/tribunals, who have stated on many occasions that they cannot make a determination on the basis of generalities.[32]

It is a colonising logic that presumes ATSI knowledge comes into the world as abstract and dematerialised. This fiction allows it to be presented as Other to *homo economicus*, who, in place of an original mysticism, practises modern reason in order to accumulate private property rights and deliver us 'material' progress.[33] ATSI knowledges and laws are thus boxed in by their cultural and legal positioning; an exception to the economic rationality that might 'normally' prevail in planning law.

The Chapmans appointed an expert, Nadia McLaren, to compile an archaeological report for the Aboriginal Heritage Branch of the South Australia Department of Environment and Planning. The developers were consequently asked to consult with traditional owners, referred to as the Ngarrindjeri people, however the adoption of the term 'Ngarrindjeri' disguises a contested history that flows from the violent dispossession that characterises this land.[34]

There were some discussions with some Ngarrindjeri people, the content of which remains unclear. These did not conclude anything. Following public concerns, another survey was also sought by the State's Chief Archaeologist, Mr Neil Draper. He identified different significant Aboriginal sites to those noted previously and recommended these be protected. The Draper report was received by an incoming conservative government that sought to avoid the

financial obligation to build the bridge.[35] Unsuccessful, the State Minister for Aboriginal Affairs then authorised damage to any heritage sites as was necessary to enable construction.

In response, the Aboriginal Legal Rights Movement, based in South Australia, applied to the Federal Labor Minister for Aboriginal Affairs, Hon Robert Tickner, on behalf of some affected women, seeking an urgent order prohibiting construction of the bridge under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth). The Minister appointed Professor Cheryl Saunders, a University of Melbourne constitutional law expert, as reporter. Professor Saunders cited the cosmological significance of the area. Her report had appended to it two envelopes containing 'secret women's business'. The envelopes were only read by the Minister's female advisor. She informed the Minister there was nothing in the evidence in the envelopes that conflicted with the report. The Minister then issued an emergency declaration to stop work on the bridge. The Chapmans appealed this decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), claiming lack of procedural fairness, including bias, a failure to take relevant considerations into account in the making of decisions (including the evidence of men) and unreasonability, and were successful.[36]

Another group of 'dissident women' then came forward claiming that the secret women's business was fabricated. The South Australian Government set up a Royal Commission to inquire into the authenticity of secret women's business. Legal issues thus became enshrined in questions about the genuineness of evidence about 'sites', the veracity of belief and the reliability of Aboriginal witnesses, who must recount into evidence 'relevant details' and particulars of how they came to know it. The women who had initiated the original inquiries and were at the centre of the allegations refused to appear and be subjected to

the State inquiry. The inquiry subsequently determined that the evidence of 'secret women's business' was fabricated.[37]

A further application was made to the Federal Minister for Aboriginal Affairs to ban the bridge. Another report was initiated, this time to be investigated by Justice Jane Matthews of the Federal Court. Her report was not released due to a challenge to her appointment. Apparently it determined the undisclosed information was significant but not sufficient for a declaration under the Act.[38]

With a new conservative Federal Government coming into office, development was then facilitated by the passing of a special law, the *Hindmarsh Island Bridge Act 1997* (Cth) (the Bridge Act) which allowed for the by-passing of the Commonwealth heritage act altogether. Infamously, the Bridge Act overcame a constitutional challenge, with the Court failing to agree whether the race power of the *Constitution* restricted the Commonwealth Parliament to making laws for the *benefit* of the 'Aboriginal race'. Accordingly, it was found that the government could in fact enact laws to the detriment of any particular race.[39]

While the legal events surrounding development at Kumarangk suggest an epic failure of cultural heritage laws, the case is productive in suggesting future paths for development of a different kind. Firstly, in scholarly accounts of anthropology and law, there was considerable unease at the political machinations. Though political interference expedited the process that led to the bridge development, this was widely disparaged as a legal perversion and corruption. There remained confidence that 'fairly considered' cultural heritage laws could have succeeded in protecting important 'sites'. More importantly, the events also highlight where the deeper problems lie in Australian laws. One of the biggest limitations rests in the containment of cultural heritage laws and the way they are nestled within a dephysicalised property paradigm. It is thus toward addressing the problem of

dephysicalised property through cultural heritage laws that this chapter now turns.

3. The productivity of the cultural landscape concept

Critiques of property are not new to law. As a matter of legal classification, property law is seen as a system that regulates the private rights of persons in things. Legal theorists problematise the legal relationship between persons and things.[40] There is also property law scholarship informed by anthropology, in particular the work of Marilyn Strathern.[41] These critical analyses of property law provide important insights into socio-economic problems associated with modern, alienable property such as the philosophical separation between persons and things. However, they also reproduce the abstractness of modern property law, by naturalising dichotomies between public/private; private property/communal property; reason/nature. Here in contrast to the dephysicalised paradigm of modern property Indigenous property is also reproduced in conventionally abstract terms of 'tradition', 'identity' and race-based 'customs' rather than with physical and 'place-based' laws. This assignment is very pernicious and self-serving. It allows lawyers to suspend consideration of what happened to ATSI law under conditions of invasion and to distance us from consideration of how 'progressive' scholarship reproduces the status quo through acts of categorisation and subjection.

The turn to cultural heritage is motivated out of a concern to investigate whether it is still possible to imagine a space for 'raw law'- the Aboriginal way of knowing law through living, emanating from the ruwe, currently buried beneath layers of colonialism.[42] Yet this strategy may strike as somewhat perverse. Law that straddles public and private domains occupies a marginal legal space in Australia

and its jurisprudence remains relatively underdeveloped. Heritage law is no exception having a problematic relationship to property law, where it regulates a class of interests subordinate to property. Heritage laws create procedural rights that can lead to restrictions on the freedom of movement and exchange of objects and protection orders preventing the destruction of parts of the built and/or natural landscape. In Australia heritage law is not a distinct legal specialisation. Rather it is a sub-set spread across four other legal specialisations related to the natural environment (environmental law), built environment (planning law), culture (intellectual property laws) and human rights (international law). However since the 1980s there has been a shift away from scholarship that essentialises a nature/culture distinction. [43] This has undermined the conceptual foundation of these traditional taxonomic separations and in turn, led, at least in part, to a merging of natural heritage/cultural heritage concepts and to heritage laws that embody aspects of a 'cultural landscape' approach. The historic marginalisation of heritage law and its late development arguably provides it with advantages over other doctrinally established categories that were once thought to be more productive, such as native title and copyright law. Through links with Australian environmental studies, critical geography and anthropology, heritage scholars are comparatively well informed by ATSI knowledges and can demonstrate an awareness of the problem with the mainstream confinement and distortion of ATSI laws within the Australian legal space.

"Cultural landscape" is now a preferred legal construct developed under the WHC that is valued for its potential to bridge the nature/culture divide. It has wider resonance through its circulation within the disciplinary knowledges of archeology, geography, land use planning and ecology. [44] Further, the international endorsement of this term helps legitimate local experience and authorise a particular way for relevant contemporary Australian experts to

acknowledge the importance of an Aboriginal sense of place. It is thus a term that houses some capacity to reconnect people, things, memories, geographies and identites, and it is a concept that can grow meaning and authority through its local circulation and reinscription.

The concept of cultural landscape links mental geographies (including ways of knowing), social landscapes and the natural environment. For example, John Barrett defines cultural landscape as:

> The entire surface over which people moved and within which they congregated. That surface was given meaning as people acted upon the world within the context of the various demands and obligations which acted upon them. Such actions took place within a certain tempo and at certain locales. Thus landscape, its form constructed from natural and artificial features, became a culturally meaningful resource through its routine occupancy.[45]

Barrett's reference to the cultural landscape as a "resource" is problematic if it is taken to prioritise growth-based exploitation over other relations. However the term needs to be understood in the context of broader national policy discussion of land use:

> From the end of the nineteenth century to the mid-twentieth century, and during a period of federation, war and slowing immigration Frawley (1999) and Heathcote (1972) trace the emergence of a national vision which, although it remained developmentalist, sought to make 'wise use' of the nation's resources. By the late Twentieth century, however they claim to discern the beginnings of an ecological vision which draws on elements of the earlier scientific, Romantic and national visions and on Aboriginal concepts of place an environment, and seeks a more sustainable future for Australia.[46]

Jessica Weir also notes the relevance of the idea of cultural landscape to traditional owners:

> One of the most common characteristics of Indigenous peoples' knowledge in comparison to modern thinking, is an emphasis on knowledge coming from a specific place. This place is known as 'country'. Country is profoundly important to traditional owners, who are generally the people who have inherited the rights and responsibilities to country from their ancestors and ancestral beings.

> For them, these are innate ties between particular people, land, law and language. [47]

The term has connections with Australian Federal and State environmental protection and heritage laws which pay regard to 'place', defined expansively.[48] For example, the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act) protects places of World Heritage, National Heritage and Commonwealth Heritage. Section 3 defines the objects as including:

- a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples;
- assisting in the co-operative implementation of Australia's international environmental responsibilities; and
- recognising the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- promoting the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

The Act encourages use of governance structures that incorporate Indigenous management to help identify places requiring protection at first instance[49] and in ongoing day-to-day decision making affecting relevant places. In the latter role there is some explicit recognition of the significance of Aboriginal law to decision-making about access to and culturally appropriate use of particular places.

The cultural landscape concept is is open to further jurisprudential development. There is a broadly based academic interest in exploring its potential and if thoughtfully engaged, it could help support the survival of 'raw law', when there are very few other obvious options. In the spirit that it is a path 'worth trying', in the last substantive section we critically discuss how the cultural landscape approach has been working in practice.

4. The Uluṟu-Kata Tjuṯa National Park as a cultural landscape

> First we got that World Heritage listing for that flora and fauna and now we got that cultural landscaping… first in Australia and second in the world!
> Yami Lester, Chair, Uluṟu-Kata Tjuṯa Board of Management.[50]

The Uluru (Ayers Rock-Mount Olga) National Park was first listed as a (natural) world heritage site in 1987. The Uluṟu-Kata Tjuṯa National Park renomination as an associative cultural landscape in 1994 was on the basis of it meeting four criteria.[51] These took into account the landscape being: (v) an outstanding example of a traditional human settlement that is representative of a culture or human interaction with the environment; (vi) directly or tangibly associated with events or living traditions, ideas and beliefs, with artistic and literary works of outstanding universal significance; (vii) containing superlative natural phenomena or areas of exceptional natural beauty and; (viii) outstanding examples representing major stages of earth's history and significant geomorphic or physiographic features.[52] The supporting text refers to the landscape somewhat differently:

> the landscape ….is the outcome of millennia of management under traditional Aṉangu procedures governed by the *tjukurpa* (law)… To write that the landscape is *associated with* the narratives, songs, and art of the *tjukurpa,* while accurate from a western perspective, does not do full justice to Aṉangu ontology and is a poor translation of Aṉangu concepts. For the Aṉangu this landscape is the product of the heroic ancestors' actions and can be read as a text specifying the relationship between the land and its indigenous inhabitants laid down by the *tjukurpa.* The very rock of Uluṟu and Kata Tjuṯa is proof of the heroes' actions and being.[53]

The objection to the focus being on proof of "association" with a cultural landscape points to a problem with the wording of the WHC. The criteria suggest an initial boundary between persons/things; legal subjects/objects that, in exceptional heritage cases, can be infilled by 'culture', when there is sufficient

tangible evidence of living traditions, ideas and beliefs associated with the surrounding geography. The criteria reproduces a concept of place (as landscape) in which 'nature' and 'culture' remain separate and can at best, interact or co-exist, rather than exist synthetically or holistically. This peculiar framing is entirely contrary to Anangu ontology and diminishes the significance of Tjukurpa as a knowledge system. Tjukurpa is far more than a 'belief system'. Elder Tony Tjamiwa refers to it this way:

> Government law is on paper. Ananguku Law is held in our heads and kurunpa [spirit]. You can't put Aboriginal law on paper; it's the rules that grandfathers and grandmothers and that fathers and mothers gave us to use, that we hold in our hearts and in our heads. National park are government rule, paper laws, but in Uluru we've got both laws working together, running side by side. Government might try and give you a flat tyre, just a national park without the title. Don't take it. Only talk one way, the straight way. Don't compromise your law for a Flat tyre.[54]

From an Anangu perspective law, property law and Anangu identity are one and the same thing. The flat tyre analogy points to the uselessness of forms of 'recognition' and, in particular forms of land title, that are emptied of Aboriginal jurisprudence. While, as Yami Lester puts it, "we know we had Uluru and Kata Tjuta all the time but it helps having it in writing"[55], under Australian law land title remains linked to a colonial legacy.

The area in which the park is now situated was excised from an Aboriginal reserve in 1958 and reserved by the Crown for use as a national park. In 1977 the Uluru (Ayers Rock- Mount Olga) National Park was declared under the *National Parks and Wildlife Conservation Act* 1975 (Cth) with title vesting in the Director of National Parks and Wildlife. A land claim was lodged by the Central Land Council under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). This claim was partly successful in relation to land adjoining the National Park, however the prior vesting of title in the Director of National Parks meant that this land was not available under the Land Rights Act.[56] In 1985 title was

granted by the Governor General to the Uluru–Kata Tjuta Aboriginal Land Trust, and in 1993 the park was renamed. Since 1986 the Park has been managed by the Australian National Parks and Wildlife Service, (Parks Australia) within the Commonwealth Department of the Environment, Water, Heritage and the Arts, and the Uluru-Kata Tjuta Board of Management.

Declaration of the park continued under the introduction of the EPBC Act in 1999. In addition to the WHC listing, the National Park is also included on the Commonwealth Heritage and National Heritage Lists established under the EPBC Act. Joint management is based on Aboriginal title to the land, which is supported by a legal framework laid out in the EPBC Act discussed in Part Three. The Nguraritja and relevant Aboriginal people and the Director of National Parks are formally lessees of the park. Management plans are published by the Director of National Parks.

Strelein argues that:

> Joint management allows indigenous people to be involved in habitat preservation within the confines of the Australian political system. Donna Craig notes that the evolution of joint management models under our system of land law rather than by recognition of traditional land tenure and title is a fundamental flaw.[57]

The Uluru-Kata Tjuta Board of Management are involved in key planning and everyday decision making about the park and "respect for Tjukurpa" is a principle that guides management practice.[58] This operates within an imposed alien structure of land title. However we argue that it is not simply the form of title, but rather more importantly the particular economic relation to place that informs it, where the landscape is valued primarily as a tourist resource, that poses a major confinement of Tjukurpa.

The extent and limitations of current practice can be seen from how sensitive issues are handled by park management. The Uluru-Kata Tjuta National Park Management Plan 2010-2020 notes that:

> Tjukurpa requires that Nguraritja take responsibility for looking after visitors to their country and each time a visitor is seriously or fatally injured at Uluru, Nguraritja share in the grieving process. It is this 'duty of care' under Tjukurpa that is the basis of Nguraritja's stress and grieving for those injured. Although climbing Uluru is an attraction for some visitors, it is the view of Nguraritja that visitors should not climb as it does not respect the spiritual and safety aspects of Tjukurpa…In the past, many people have been injured and more than 30 people have died attempting to climb the very steep Uluru path.[59]

The Uluru-Kata Tjuta National Park visitor site advises:

> That's a really important sacred thing that you are climbing... You shouldn't climb. It's not the real thing about this place. And maybe that makes you a bit sad. But anyway that's what we have to say. We are obliged by Tjukurpa to say. And all the tourists will brighten up and say, 'Oh I see. This is the right way. This is the thing that's right. This is the proper way: no climbing.'
> Kunmanara, traditional owner

However climbing is still not prohibited under the EPBC regulations. For visitor safety, cultural, and environmental reasons the official policy is to work toward closure, but only "when the Board, in consultation with the tourism industry, is satisfied that adequate new visitor experiences have been successfully established, or the proportion of visitors climbing falls below 20 per cent, or the cultural and natural experiences on offer are the critical factors when visitors make their decision to visit the park."[60] Whilst figures fluctuate from year to year, the numbers climbing Uluru appears to be slowly trending downwards. Yet a 2006 study showed 38% of visitors still climbed Uluru despite the clear signage and knowledge that this was not considered by traditional owners as appropriate.[61]

The prioritising of tourist interests over Tjukurpa is seen through the management of ceremonial business. Uluru is not closed to outsiders for rituals including importantly, Sorry Business. Rather there are short, partial closures

"effected in a way that minimises disruption to visitors".[62] The visitor as consumer takes priority over the needs and interests of Uluru citizens. The Management Plan treats ceremonial obligations as more a complication affecting the work practices of its Indigenous employees, than as a matter of obligation that should be adhered to because of the protocols or laws of the landscape.[63]

This is not to suggest that there is no genuine interest in or commitment to respect for Tjukurpa. However currently when it clashes with the commercial imperatives, Tjukurpa is reduced to esoteric knowledge associated with traditional owners' spiritual beliefs, primarily of relevance to traditional owners and perhaps, of interest as exotica for tourists. The problem here rests with seeing Tjukurpa through a veil of alienated property; as a 'cultural' demand on Indigenous subjects rather than as a legal imperative that establishes and requires a lawful way of living with the landscape. This flows from the lack of development of the cultural landscape idea as jurisprudence, informing the practice of law at Uluru.

Nonetheless, there are developments elsewhere worth noting in other related domains where residential developments were involved. For example, the Blue Mountains City Council (a body that governs an area of which about 70 per cent is incorporated into the World Heritage Blue Mountains National Park, listed for its natural features), denied planning permission for a large sculpture that had already been erected out the front of a privately owned art gallery situated in a Village Tourist zone. The gallery owner had commissioned a non-Aboriginal person to make a new and 'original' Aboriginal-themed work, which led to doubts that intellectual property laws could prevent the appropriation.[64] This led to a large sandstone structure being erected on site which, without permission, depicted Wandjina imagery, spirit figures from the Kimberley region of Western Australia, causing great offence. As part of the ordinary planning process, Council received objections from many people including non-

Indigenous and Indigenous residents, custodial owners from the Kimberley represented by the Ngarinyin Aboriginal Corporation, the Arts Legal Centre of Australia, and New South Wales National Parks Service.

Section 4 of the *Environmental and Planning Assessment Act* 1977 (NSW) defines environment as including consideration of 'all aspects of the surroundings of man, whether affecting him as an individual or in his social groupings' and s79C(b) refers the consenting authority to evaluate environmental impacts on both the natural and built environments, and social and economic impacts in the locality. While the legislation does not adopt the 'cultural landscape' terminology, the concepts are clearly present in the evaluative criteria applied to developments, in particular in the concept of social impact. In the Land and Environment Court it was noted that a s79C evaluation could include consideration of the religious or cultural values of an immediately affected and identifiable group who may be affected by a development. Here evidence taken, including from council planners and an anthropologist, was sufficient to "objectively" prove the sculpture was highly offensive to Aboriginal religious and cultural beliefs and that their objection was based in more than a mere "fear or concern without rational or justified foundation". Due to the prominent street location the sculpture was thus found to produce a negative social impact which justified the denial of planning permission and an order for its removal.[65]

This is not a unique approach to decision making under s79C in the NSW Land and Environment Court. For example, members of the Numbahjing clan within the Bundjalung nation successfully challenged council approval for a path associated with a new housing development where the proposed route travelled across the site of a 1853/4 massacre. Consent had been based on a heritage report that focused too closely on archeological evidence, without duly sufficiently considering the weight of anthropological evidence of the cultural significance of the massacre site.[66] Related claims were not successful in relation

to protection of Aboriginal "objects" under the *National Parks and Wildlife Act* 1974 (NSW), with destruction authorised in light of "the reality that Aboriginal objects are found across the NSW landscape."[67] The difference in outcome only reinforces the importance of heritage protection law recognising the particularity of place.

Though still limited, there is clearly some relevant jurisprudence that establishes the need to consider mental geographies in conjunction with the physical geography of heritage sites. The failure to fairly consider the two in conjunction can, in some cases, lead to planning approvals being overruled under administrative law. The combination of the existing presence of the cultural landscape idea dispersed across Federal and State environmental, planning and heritage legislation affecting many different kinds of land holdings and uses that provides a platform for further jurisprudential development. The capacity to develop it further is supported by the deployment of relevant disciplinary expertise operating in a context where there has been a significant shift in the cultural sensibility of the law, at least in some quarters– from anxiety about placelessness to a degree of acceptance of a history of colonisation. There may now be room for a stronger and formal recognition of the necessary relationship between peoples, mental geographies and places within the daily operation of Australian laws, including especially ATSI knowledges as law.

The development of the cultural landscape idea within mainstream Australian environmental law casts doubt on the relevance or necessity of separate protection under the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, a convention to which Australia is not a signatory. To the extent that the cultural landscape concept provides a critique of dephysicalised property, it also provides a mechanism for refreshing reform agendas with respect to intellectual property laws affecting ATSI Peoples. This is sorely needed given current impasses which lead to ongoing appeals for *sui generis*

laws for protection of traditional knowledge, traditional cultural expressions, and initiatives against biopiracy.[68] These calls only further reify the unhelpful and unsustainable dichotomy between tangible/intangible property rights, ignoring the placelessness that is fundamental to both legal concepts.

There will, of course, be further push back and opposition to change from those who benefit most from investment in the dephysicalised property paradigm, in particular from representatives of the mining, coal seam gas, land clearing, property developers and animal hunting lobby groups. However there are also strategic linkages to be forged with a broader environmentalist constituency who are sympathetically engaged in related pathways of resistance. Due to ongoing environmental crises – increasingly severe and recurrent bushfires, droughts, floods, losses of biodiversity, losses of arable land, and high profile doomed predictions about many of our other signature World Heritage properties including the Great Barrier Reef[69] - there are productive anxieties to be nurtured and engaged, raising concerns about the irresponsibility inherent in the very idea of dephysicalised property when we live in a material world of contaminated and depleting resources.

5. Conclusion

Of late, in seeking to explain the difficult social challenges we face critical legal studies has turned toward addressing the spatiality of law. In this literature law is constructed as a mechanism that secures the infrastructure necessary for extended capital accumulation, and in line with a neoliberal sensibility, it operates to eliminate spatial constraints to accumulation.[70] This analysis offers a totalising view of law even whilst plotting marginal pockets of resistance, because, in adopting the pursuit of capital as the inner logic of all law, the possibility of other ideas of law are *apriori* excluded. In essence in ignoring the

survival of ATSI laws, critical legal theorists suspend taking responsibility for colonialism.

Colonialism houses political and economic imperatives within a legal framework in which there are jurisprudential choices to be made. It is clear that, as with the example of Kumerangk, law-makers can choose to reinvest in dephysicalised property. By so doing the law continues to disembody the emancipatory potential within cultural heritage law. Australian law remains a technology of governance,[71] where the State legitimates planning decisions that accord with the colonial project. This priority is also present to some extent in the governance structures and practices at Uluru-Kata Tjuta National Park. It is only when the cultural landscape concept is taken to provide an access point to an alternate way of thinking about the materiality of law, identity and place that the capacity to challenge the legal status quo arises. This requires us to stop thinking about cultural landscape in terms of exceptional cases and in terms of embodying only procedural rights that permit a consideration of cultural claims. We need to develop a jurisprudence where the particular economic logic of dephysicalised property does not pre-determine the legal space. This requires us to stop thinking and talking about cultural landscape in terms of culture, and repositioning it as being about law.

Colonialism is perpetuated through the embededness of dephysicalised property concepts because it currently confines other political and legal agendas. This creates an intractable political situation whereby ATSI demands for survival are misconstrued as disembodied cultural claims. Because of the hold of this way of thinking, calls to open up the Australian legal space to accommodate cultural difference, for constitutional recognition, for reconciliation are all compromised from the outset. Human rights law has a fractious relationship with the domestic legal space. There is no treaty discussion. Native title jurisprudence has failed to fulfill its own limited potential. Intellectual property laws replace sovereign

claims with rights to protect 'traditional knowledge', 'traditional cultural expressions' and 'benefit-sharing' from innovation, instead of engaging with ATSI law as law. These are sideshows that divert attention from the poverty of the property model in securing a way of living with the landscape. The nourishing of cultural landscape law offers greater possibility in a lawscape currently occupied by very few other viable pathways.

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[1] For example, United Nations Convention on Biodiversity: Article 8(j) (1992); UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003); United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007); WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2001-current).

[2] Chris Butler, 'Critical Legal Studies and the Politics of Space' (2009) 18 *Social and Legal Studies* 313, 319.

[3] The event is often referred to as the Hindmarsh Island Bridge controversy, the Ngarrindjeri "secret womens' business" or with reference to associated High Court litigation, *Kartinyeri v Commonwealth* [1998] HCA 22.

[4] See Expert Group on Cultural Landscapes (La Petite Pierre, France, 24 - 26 October 1992) WHC-92/CONF.202/10/Add. The text was subsequently approved for inclusion in the Operational Guidelines by the World Heritage Committee at its 16th session (Santa Fe 1992), WHC-92/CONF.002/12; WHC. 13/01, July 2013.

[5] See Graeme Aplin (2007) 13(6) 'World Heritage Cultural Landscapes' *International Journal of Heritage Studies* 427-446.

[6] "Ask the Aborigines: the process is complexly embedded in politics, history, ethics and stereotypes. The temptation is to conceptualise Aboriginal people as guides – a familiar cultural icon which we all know how to grasp. Stereotypically, the black person indicates the terrain, the white person makes notes on maps, describes, sketches, consults documents, and finally defines the meanings which transforms a piece of geographical space into a cultural and historical place. The white person imposes meaning, and the worlds of meaning are lost." Deborah Bird Rose and Darrell Lewis, 'A bridge and a pinch' (1992) (1) *Public History Review* 26-36, 29.

[7] Tim Creswell, 'Place' in (ed) Barney Warf *Encyclopedia of Human Geography* Sage Publications 2006, 357.

[8] Nicole Graham, *Lawscape: Property, Environment, Law* Routledge 2011, 5-6.

[9] Ibid, 41-47.

[10] The establishment of the colony of South Australia provided, "nothing in those our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the

said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives*".* *Letters Patent for the setting up of the new colony of South Australia*, 19 February 1836.

[11] Fiona Paisley, *The Lone Protestor. AM Fernando in Australia and Europe* Aboriginal Studies Press 2012.

[12] Tim Bonyhady, *Images in opposition : Australian landscape painting 1801-1890* Oxford University Press 1991.

[13] For example, James Vance Marshall, *Walkabout* Penguin Books 1963; *Walkabout* Film Director: Nicolas Roeg, Producer: Si Litvinoff 1971, See <http://aso.gov.au/titles/features/walkabout/notes/>; Thomas Keneally, *The Chant of Jimmy Blacksmith* Angus and Robertson 1972; *The Chant of Jimmy Blacksmith,* Film Director: Fred Schepsi, Producer: Fred Schepsi 1978, <http://aso.gov.au/titles/features/chant-jimmie-blacksmith/notes/>

[14] Brennan J. in *Mabo v Queensland (No 2)* ("Mabo case") [1992] HCA 23 at [42].

[15] *Milirrpum and Others v. Nabalco Pty. Ltd. and The Commonwealth of Australia* (1971) 17 FLR 141, 255-258.

[16] *Attorney-General v. Brown* (17) (1847) 1 Legge, 317-320); *Seas and Submerged Lands Case* (1975) 135 CLR 337; *Mabo v. Queensland* [1988] HCA 69; (1988) 166 CLR 186; *Mabo v Queensland* (No 2) [1992] HCA 23; (1992) 175 CLR 1

[17] *Native Title Act* 1993 (Cth)

[18] Graham above n.8, 91.

[19] Nicole Graham, 'This is not a thing: land, sustainability and legal education' (2014) 26(3) *Journal of Environmental Law* 395-422 .

[20] Peter Fitzpatrick, *The Mythology of Modern Law* Routledge 1992, 56.

[21] Jeremy Bentham (1838) *The Works of Jeremy Bentham,* Vol. I (ed. J. Bowring), William Tate, 308.

[22] Jeremy Bentham, [1864] 'A Theory of Legislation' in (ed) C.B.Macpherson, *Property: mainstream and critical positions,* University of Toronto Press, 1978, 51.

[23] *Yanner v Eaton* (1999) 201 CLR 351. For a detailed discussion of the role of dephysicalised definitions of property in the case see: Graham, above n.8, 166-170.

[24] *Bulun Bulun v. R & T Textiles Pty Ltd* [1998] 41 IPR 513; Kathy Bowrey, 'The Outer Limits Of Copyright Law - Where Law Meets Philosophy And Culture' (2001) 12(1) *Law and Critique* 1-24.

[25] Alain Pottage, 'Foreword' in Graham above n.8, x.

[26] Valerie Kerruish, 'Property and equity', unpublished lectures, Macquarie University 1999.

[27] Irene Watson, 'Buried Alive' (2002) 13 *Law and Critique* 256.

[28] Watson, ibid, 256.

[29] For an Aboriginal history of Kumerangk see Irene Watson, *Aboriginal Peoples, Colonialism and International Law. Raw Law* Routledge 2014.

[30] International lawyer Prof Hilary Charlesworth noted that it, "will surely enter Australian folklore as one of the most complex, and litigated, of disputes'. Hilary Charlesworth, 'Little Boxes: A Review of the Commonwealth Hindmarsh Island Report by Jane Mathews' (1997) 3(90) *Aboriginal Law Bulletin* 19.

[31] This view was based on advice received by Samuel Jacobs QC, who was appointed by Premier Brown to determine the legal responsibilities arising out of the contracts into which the parties entered.

[32] 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(3) *Environmental and Planning Law Journal* 217, 218.

[33] See generally, Meyers, Diana, 'Feminist Perspectives on the Self', *The Stanford Encyclopedia of Philosophy* (Spring 2010 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2010/entries/feminism-self/>.
[34] For the history of the term 'Ngarrindjeri' see Irene Watson, 'First Nation Stories, Grandmother's Law: Too Many Stories to Tell' in (eds) Heather Douglas, Francesca Bartlett, Trish Luker, Rosemary Hunter, *The Australian Feminist Judgments Project. Righting and Re-writing Law* Hart Publishing 2014, 46-53.
[35] Statement by the Hon. Diana Laidlaw, Legislative Council, South Australia, Debates, 15 February 1994, 25-28.
[36] *Chapman v Tickner* (1995) 55 FCR 316 .
[37] South Australia, Hindmarsh Island Bridge Royal Commission, *Report* (1995). Based on the Royal Commission report, there was further action for damages in the Federal Court against Robert Tickner, Cheryl Saunders and others associated with the Tickner report. These claims were dismissed. See *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62; *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 (21 August 2001).
[38] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; Alexander Reilly, 'Finding an Indigenous Perspective in Administrative Law' (2009) 19 *Legal Education Review* 271, 284.
[39] *Kartinyeri v Commonwealth* [1998] HCA 22.
[40] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality*, Ashgate, 2001; Margaret Radin, *Reinterpreting Property,* University of Chicago Press, 1993.
[41] Marilyn Strathern, *Property, substance and effect: anthropological essays on persons and things*, Althone Press 1999; (eds) Alain Pottage and Martha Mundy, *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* Cambridge University Press 2004.
[42] Irene Watson, above n.29, 12-13.
[43] See Sarah M. Titchen, 'Changing perceptions and recognition of the environment- from cultural and natural heritage to cultural landscape' in J Finlayson and A Jackson-Nanko, *Heritage and Native Title: Anthropological and Legal Perspectives* Native Title Research Unit AIATSIS 1996, 40.
[44] See for example, C.O. Sauer, 'The Morphology of Landscape' (1929) 2(2) *University of California Publications in Geography* 19-53. And, A.J. Rose, 'Australia as a Cultural Landscape' in Rapoport, Amos (ed) *Australia as Human Setting: Approaches to the designed environment* Angus & Robertson 1972.
[45] Quoted in Rodney Harrison, *Shared Landscapes. Archeologies of Attachment and the Pastoral Industry in New South Wales* University of New South Wales Press 2004, 10-11.
[46] Roy Jones & Christina Birdsall-Jones, 'The Contestation of Heritage: The Coloniser and the Colonised in Australia', in (ed) Brian Graham and Ian Howard, *The Ashgate Research Companion to Heritage and Identity* Ashgate 2008, 374.
[47] Jessica Weir, *Murray River Country. An ecological dialogue with traditional owners* Aboriginal Studies Press 2009, 11.
[48] Eg. s4 *Heritage Act* 1977 (NSW) defines environmental heritage as including buildings, works, relics or places of historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance for the State.
[49] For example *Aboriginal Heritage Act* 1988 (SA) provides for the protection and conservation of Aboriginal sites, Aboriginal objects and Aboriginal remains, defined in relation to significance according to Aboriginal tradition; or of significance to Aboriginal archaeology, anthropology or

history, with the Minister advised by an Aboriginal representative body, the Aboriginal Heritage Committee.

[50] Quoted in Sarah M. Titchen, above n.43, 46.

[51] World Heritage listing No.447 (1987); Renomination WH No. 447rev (1994). For the deficiencies of the original nomination see Rodney Harrison, *Heritage. Critical Approaches* Routledge, 2003, 122-5.

[52] Operational Guidelines for the Implementation of the World Heritage Convention, WHC-92/CONF.002/12; WHC. 13/01, July 2013

[53] Ibid.

[54] Tony Tjamiwa 'Tjunguringkula Waakaripai: Joint Management of Uluru National Park', translated by Jon Willis, in (ed) John Birckhead, Terry De Lacy, Laura-Jane Smith, *Aboriginal Involvement in Parks and Protected Areas* AIAITSIS 1992, 7, 10.

[55] Quoted in Sarah M. Titchen, above n.43, 46.

[56] Office of the Aboriginal Land Commissioner, *Uluru (Ayers Rock) National Park and Lake Amadeus/Luritja Land Claim: Report by the Aboriginal Land Commissioner, Mr. Justice Toohey to the Minister for Aboriginal Affairs and to the Minister for Home Affairs*, Australian Government Printing Service 1980.

[57] Lisa M. Strelein, 'Indigenous people and protected landscapes in Western Australia', (1993) 10 *Environmental Planning & Law Journal* 380, 390. (note omitted).

[58] Uluru Kata-Tjuta National Park Management Plan 2010-2014, Director of National Parks (2010).

[59] Ibid, 90.

[60] Ibid, 92.

[61] Hannah Hueneke, *To climb or not to climb? The sacred deed done at Australia's mighty heart*. Thesis. Bachelor of Arts/Science with Honours, School of Resources, Environment and Society, ANU, 2006, 36.

[62] Uluru Kata-Tjuta National Park Management Plan 2010-2014, Director of National Parks (2010), 7.

[63] "Where Anangu have been required to go away for several weeks at a time for religious ceremonies or to honour other social or family responsibilities, Parks Australia has been able to adapt work requirements so as not to disadvantage Anangu and not to affect overall park management responsibilities. The park was closed for three hours in 1987 to allow the unobserved transit through the park of Anangu who were engaged in ceremonial activity. Since this time parts of the park have sometimes been closed for ceremonial reasons." Ibid. See also Department of the Environment, 'A Mark of Respect for the Passing of Senior Uluru Elder' Media Release, 21 September 2001 <http://www.environment.gov.au/archive/media/dept-mr/dp21sep01.html>

[64] For a discussion of the intellectual property aspects of the case see Kathy Bowrey, 'An Australian Perspective' in Christoph Beat Graber, Karolina Kuprecht & Jessica Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* Edward Elgar 2012, 396, 412-414.

[65] *Tenodi v Blue Mountains City Council* [2011] NSWLEC 1183.

[66] *Anderson v Ballina Shire Council* [2006] NSWLEC 76; *Anderson (behalf of Numbahjing Clan within the Bundjalung Nation) v Minister for Infrastructure Planning & Natural resources* [2006] NSWLEC 725.

[67] *Anderson & Anor v Director-General of the Department of Environment and Climate Change & Anor* [2008] NSWLEC 182, [27], [28].

[68] See Kathy Bowrey, 'Economic rights, culture claims and a culture of piracy in the Indigenous art market: what should we expect from the western legal system?' (2009) 13(2) *Australian Indigenous Law Review* 35, 43 ; Daniel Robinson, 'Traditional Knowledge and Biological Product Derivative Patents: Benefit-Sharing and Patent Issues Relating to Camu Camu, Kakadu Plum and Açaí Plant Extracts – a discussion paper', United Nations University Traditional Knowledge Inititative (UNU-TKI) 2010, http://www.unutki.org/news.php?doc_id=174.

[69] UNESCO, 'Decision on Australia's Great Barrier Reef Deferred until 2015' <http://whc.unesco.org/en/news/1149>

[70] See generally Chris Butler, "Critical Legal Studies and the Politics of Space" (2009) 18 *Social and Legal Studies* 313, 321.

[71] Laurajane Smith, 'Archeology of the Governance of Material Culture: A Case Study from South Eastern Australia' (2001) 34 (2) N*orwegian Archaeological Review* 97-105; Libby Porter, *Unlearning the Colonial Cultures of Planning* Ashgate 2010, 108-109.