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Abstract

The chapter canvasses the deterioration and destruction of Australian Aboriginal and Torres Strait Islander heritage since British colonisation. While much of the history of Indigenous heritage in Australia is associated with decline and destruction, and although much has been lost, the chapter records that over the past four decades, since the 1967 federal referendum, there has been a resurgence and revival that heritage, due to the efforts of individuals and groups in demanding change, both through political fora and in the courts. That rejuvenation has been promoted by international laws and declarations and through Australian federal, state and territory legislative initiatives and policy. However, legislative mechanisms for dealing with the protection of Aboriginal and Torres Strait Islander heritage remain inconsistent in their robustness across the Australian legal landscape.

Key Words

Indigenous – Aboriginal – Torres Strait Islanders - Heritage destruction - intentional – negligent – physical heritage - intangible heritage - Indigenous languages - resurgence – revival –

Introduction

The destruction of heritage is often associated with deliberate acts of aggressors in contexts of armed conflict. This chapter focuses on a different aspect of heritage destruction, namely that associated with the colonization and domination of territories occupied by Indigenous and local communities, in the light of international and national heritage protection mechanisms. It addresses the destruction of items of both the tangible and the intangible heritage. It seeks to show that heritage destruction can be as a result of conscious intention to damage, as well as through recklessness and wilful neglect.

The chapter focuses on the Australian Indigenous experience, where the deterioration and destruction of heritage of Aboriginal and Torres Strait Islander peoples¹ occurred from the

¹ In Australia, Indigenous peoples are generally divided into two main categories. People from the mainland and Tasmania are normally referred to as Aboriginal people; there are over 500 Aboriginal clans many with different cultures, belief systems and language. Aboriginal and Torres Strait Islander people make up approximately 2.4% of the Australian population. People from the approximately 240 islands in the Torres Strait, between Papua New Guinea and Australia, are normally referred to Torres Strait Islanders; see <https://www.australia.gov.au/about-australia/our-country/our-people> accessed 16 December 2019. Collectively, they are usually referred to as Aboriginal and Torres Strait Islander people. Sometimes the term First Australians is used and now also First Nations, similar to the practice in Canada. In this chapter, I use either the term 'Indigenous people' or 'Aboriginal and Torres Strait Islander people', depending on context. In

earliest period of European colonisation. This has involved slow deterioration over long periods of time as well as the destructive impacts of recent development activity. These processes concern both the tangible and intangible heritage, and in many cases inevitably involves both. Indeed, the disappearance of Indigenous languages through the long-term effects of colonial domination, or the disturbance of spiritual and ritual activities, can be seen at the same level of significance as the intentional or negligent destruction of rock art. The wholesale dispossession of the land of Indigenous land by British colonisers across the Australian continent and its islands and seas,² has meant that both tangible and intangible forms of heritage destruction have, until recent times, proceeded apace.

The destruction of Australian Indigenous heritage might be divided into gradual deterioration and rapid deterioration, recognizing that often there can be no exact time measure in this context. The processes of gradual deterioration include, from the time of colonisation, the effects of Western agricultural and grazing practices, increasing use of land for the building of cities, towns and associated infrastructure, mining and forestry activities.

The chapter canvasses the deterioration and destruction of the Indigenous heritage since British colonisation. While much of the history of Indigenous heritage in Australia is associated with decline and destruction, and although much has been lost, the chapter records that over the past four decades since the 1967 referendum that enabled the federal parliament to pass legislation concerning Aboriginal and Torres Strait Islander people,³ there has been a resurgence and revival that heritage, due to the efforts of individuals and groups in demanding change, both through political fora and in the courts. That rejuvenation has been promoted by international laws and declarations and through Australian federal, state and territory legislative initiatives and policy.

Thus despite continuing discrimination and high rates of incarceration⁴ of Aboriginal and Torres Strait Islander people, a significant part of the Australian Indigenous heritage lives on, recognized and encouraged by a patchwork of federal, state and territory legislation protecting heritage and traditions, and significant legal actions in the courts.⁵ One of the most important legal developments was the recognition of native title by the High Court of Australia in *Mabo v Queensland*,⁶ and the rejection of the doctrine of terra nullius, as mentioned above, resulting in the embedding of that recognition in federal Native Title Act 1993. These developments led

publishing this chapter, I pay my respect to the Elders past and present, and I honour Australian Aboriginal and Torres Strait Islander peoples' unique cultural and spiritual relationships to the air, land, waters and seas and their rich contribution to society.

² Documented, for example, by Henry Reynolds, *Dispossession: Black Australians and White Invaders*, (Allen and Unwin 1989), passim.

³ Section 51 (xxvi), Constitution of Australia originally stated that the Australian Parliament could enact laws for 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws. The Constitution Alteration (Aboriginals) Act 1967 removed the words 'other than the aboriginal race in any State'.

⁴ 'Although Aboriginal and Torres Strait Islander adults make up around 2% of the national population, they constitute 27% of the national prison population': *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Australian Law Reform Commission Report 133 'Disproportionate incarceration rate' <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/executive-summary-15/disproportionate-incarceration-rate/> accessed 19 December 2019.

⁵ The Australian federal government and each Australian state and territory has passed some form of legislation concerning Australian Indigenous heritage; see Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (Melbourne, Oxford University Press 2006) chapter 9.

⁶ *Mabo v Queensland (No 2)* [1992] HCA 23; (1992).

to the establishment of the National Native Title Tribunal,⁷ and the successful conclusion of many native title land claims across Australia, whereby native title claim groups have been able to demonstrate that they hold rights and interests in lands and/or waters according to their traditional laws and customs. However, major issues relating to protection and conservation continue to demand attention, as evidenced, *inter alia*, by the two case studies.

As in many other countries, political and economic considerations continue to play a part in decisions as to whether the cultural and heritage should be protected. Always in the background is the fact that many violations of heritage, particularly that relating to Indigenous peoples and local communities, are related to questions of human rights.⁸

International legal framework

The international legal framework relevant to a consideration of Australian Indigenous heritage includes the 1970 UNESCO Convention on Cultural Property,⁹ the 1972 World Heritage Convention,¹⁰ the 2001 Underwater Heritage Convention,¹¹ the 2003 Intangible Heritage Convention,¹² and the 2005 Convention on Cultural Expressions.¹³ The Indigenous and Tribal Peoples Convention¹⁴, the non-legally binding 2003 Declaration on Intentional Destruction of Cultural Property¹⁵ and the 2007 United Nations Declaration on the Rights of Indigenous Peoples¹⁶ are of fundamental importance.

ILO Convention 169 and the UN Declaration of the Rights of Indigenous Peoples

The Indigenous and Tribal Peoples Convention, sponsored by the International Labour Organisation (often referred to as ILO 169), and the United Nations Declaration of the Rights of Indigenous Peoples, are of particular important documents as a measure or standard for how countries have dealt with the protection of the cultural heritage of their indigenous peoples.

⁷ National Native Title Tribunal, 'Types of native title claims' <http://www.nntt.gov.au/nativetitleclaims/Pages/default.aspx>

⁸ As noted by the UN Special Rapporteur on Culture, 'The intentional destruction of cultural heritage as a violation of human rights' <https://www.ohchr.org/EN/Issues/CulturalRights/Pages/IntentionalDestruction.aspx>; see also United Nations 'Report of the Special Rapporteur in the field of cultural rights' A/71/317, 9 August 2016.

⁹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (1971) 823 UNTS 23131 (adopted 14 November 1970, entered into force 4 April 1972)

¹⁰ Convention for the Protection of the World Cultural and Natural Heritage 1037 UNTS 151.

¹¹ Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001) 41 ILM 40 (2002)

¹² Convention on the Safeguarding of the Intangible Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (not ratified by Australia).

¹³ Convention on Protection of the Diversity of Cultural Content and Cultural Expressions (adopted 2005, entered into force 218 March 2007) 440 UNTS 311

¹⁴ Convention concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Organisation (adopted 27 June 1989, entered into force 5 September 1991) 28 ILM 1382; not ratified by Australia.

¹⁵ 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, (adopted by the General Conference of UNESCO 17 October 2003) http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html accessed 12 December 2019.

¹⁶ United Nations Declaration of the Rights of Indigenous Peoples UNGA A/RES/61/295 (2007).

ILO 169 called attention to ‘the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding’.¹⁷ Article 1 recognizes two categories: ‘tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations’, and ‘peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions’. Subsequent articles place responsibility on governments to protect their rights and to guarantee respect for their integrity, and to promote the full realization of their social, economic, and cultural rights concerning their social and cultural identity, their customs and traditions, and their institutions.

The United Nations Declaration of the Rights of Indigenous Peoples, agreed in 2007, and for which the Australian Government announced its support in 2009, contains a range of provisions concerning the cultural heritage of indigenous peoples. Article 3 recognises that ‘Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ Article 5 provides that ‘Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.’

More specifically with regard to cultural heritage, Article 8(2) provides: ‘Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. Article 11(1) recognises that: ‘Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual a performing arts and literature.’ Article 11(2) provides for redress through effective mechanisms, and Article 31(1) recognises ‘the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions’. Article 32 covers ‘the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources’ with obligations on the part of states to consult and cooperate in good faith and to provide effective redress mechanisms ,and in particular to take appropriate measures for the mitigation of environmental, economic, social, cultural or spiritual impacts.

The Australian Human Rights Commission notes that the Declaration is particularly significant for the reason that Indigenous peoples, including Aboriginal and Torres Strait Islander peoples, had a hand in drafting it.¹⁸ It can readily be seen that the provisions summarized above are directly relevant to the approach that should be taken to Australian Indigenous heritage.

The UN Declaration on the Rights of Indigenous People is now being taken more seriously on the part of many governments and their institutions around the world. In Australia, while

¹⁷ Ibid, Recital 6, Preamble.

¹⁸ Australian Human Rights Commission, <http://declaration.humanrights.gov.au/>; see also Walter Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples*, (2013 Fulcrum Publishing, Golden, Colorado).

legislation has now been enacted in federal, state and territory jurisdictions concerning aspects of the Indigenous heritage, the fact remains that many more steps need to be taken before Australia as a whole can be said to conform to both the letter and the spirit of that document with respect to the protection of the Indigenous cultural heritage.

Legislation on Indigenous Heritage in Australia

The introduction of legislation focused on the Indigenous heritage began in the 1960s at state and territory level across Australia, with some the early law focused narrowly on relics and places rather than broader heritage concepts.¹⁹ Now, the federal government²⁰ and each state²¹ and territory²² has introduced some form of legislation.²³ However, that there are wide inconsistencies from jurisdiction to another. The legislation as a whole can be characterised as attempting to redress the historical degradation and destruction of Australia's Indigenous cultural heritage, and, in more recent instances, to actively encourage its revival. However, despite the fact that Indigenous heritage issues all relevant to federal, state and territory governments alike, there is no common approach, and thus there have been many missteps along the way.

It should also be noted that at federal level, the Environment Protection and Biodiversity Conservation Act 1999, Article 12)(4), specifies that cultural heritage and natural heritage have the meanings given by the World Heritage Convention. With respect to national heritage places, the Act differentiates between (a) natural heritage values of places; (b) indigenous heritage values of places; (c) historic heritage values of places. Items listed as national heritage places can include more than one criterion, although each has a main criterion under which it is classified. Thus although 'Indigenous' is the main criterion for a site of Aboriginal settlement or activity, the listing itself makes clear that the natural values are also significant,²⁴

Thus, for the most part, the Australian legislative regimes are now more modern, but with significant inconsistencies from one jurisdiction to another. The legal and policy mechanisms to protect heritage and to combat heritage destruction are wielded with varying commitment, as exemplified by two brief case studies. The first of these explores the legal and policy issues surrounding the conservation of globally significant ancient rock art on Burrup Peninsula in Western Australia.²⁵ The second is the issue of tourist use and abuse of one of the iconic places of Aboriginal significance, namely the magnificent monolith in the centre of Australia, called Uluru.

We can note that in a similar time span to the introduction of the international conventions and declarations, namely for the 1970s, on various aspects of the non-Indigenous (British and other European), heritage. But at the same time, we saw the commencement of the modern

¹⁹ See Ben Boer and Graeme Wiffen (n 5) Chapter 7.

²⁰ Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth.), Aboriginal and Torres Strait Islander Act 2005 (Cth.) . Aboriginal Land Rights (Northern Territory) Act 1976 (Cth.);

²¹ Heritage Act 1977 (New South Wales); Aboriginal Languages Act 2017 (New South Wales); Aboriginal Cultural Heritage Act 2003 (Queensland); Aboriginal Heritage Act 1988 (South Australia); Aboriginal Heritage Act 1975 (Tasmania); Aboriginal Heritage Act 2006 (Victoria); Aboriginal Heritage Act 1972 (Western Australia)

²² Heritage Act 2004 (Australian Capital Territory); Heritage Act 2011 (Northern Territory)

²³ For analysis of heritage laws in Australia at federal, state and territory levels, see Boer and Wiffen (n 5).

²⁴ Brewarrina Aboriginal Fish Traps (New South Wales), Australia http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;place_id=105778

²⁵ Burrup Peninsula, dealt with below.

Indigenous land rights movement,²⁶ and the enactment of the first lands rights legislation at federal level in 1976.²⁷ The judicial recognition of ‘native title’ by the High Court of Australia occurred in the case of *Mabo v Queensland*²⁸ in 1992. The case overturned the doctrine of *terra nullius* (land belongs to no-one) hitherto assumed to apply in Australia. Brennan J stated in that case ‘If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law" ... can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be, nor be seen, to be frozen in an age of racial discrimination’. The subsequent legislative embedding of native title took place in 1993.²⁹ These developments are associated with the subsequent resurgence of Indigenous demands for participation through the Makarrata ‘treaty’ or agreement process,³⁰ the issue of an official ‘Apology to Australia's Indigenous Peoples’ through the Australian Parliament³¹ in 2008 and the negotiation and publication of the ‘Uluru Statement from the Heart’ in 2017.³²

Indigenous representation in government

Until a federal referendum in 1967, Indigenous people in Australia were not counted in any census and were not able to vote until that referendum. The referendum enabled the federal government to legislate for the benefit of Australia’s indigenous people.³³ Prior to that time, only the states were able to pass legislation concerning Australia’s Aboriginal people. Accordingly, indigenous the cultural heritage was not able to be protected at federal level; however, up until that time, with one exception,³⁴ no state had enacted such legislation either.

A continuing debate has occurred in Australia concerning Indigenous political representation. Only one jurisdiction, the Australian Capital Territory) has introduced legislation that recognizes, inter alia, self-determination of Aboriginal and Torres Strait Islander concerning political status and to ‘freely pursue their economic, social and cultural development in line with the right to self-determination’, to recognize the Indigenous to reach decision-makers.³⁵

With respect to the Federal government, in May 2017 over 250 Indigenous delegates met near Uluru, part of a traditionally owned World-Heritage listed national park in the centre of Australia to talk about changes to Australia’s constitution concerning Indigenous people. that This meeting resulted in the Uluru Statement from the Heart.³⁶ The Statement sparked a good

²⁶ The earliest Indigenous land rights movements in Australia can be traced back to the 1830s; see Henry Reynolds, *The Law of the Land*, (Penguin, Ringwood 1992) Ch 4.

²⁷ Aboriginal Land Rights (Northern Territory) Act 1976 (Comm).

²⁸ *Mabo v Queensland* (n 5) at para 41.

²⁹ Native Title Act 1993 (Cth.)

³⁰ ‘Makarrata’ is a word in the language of the Yolngu people in the Northern Territory; it means a ‘coming together after a struggle, facing the facts of wrongs and living again in peace’. A makarrata or similar agreement has been under discussion since 1980s; Northern Territory Government, ‘Makarrata Agreement’, <https://dtsc.nt.gov.au/arts-and-museums/northern-territory-archives-service/cabinet-records/1981-records/makarrata-agreement>; see also Judith Wright McKinney, *We Call for a Treaty* (Collins/Fontana 1985).

³¹ <https://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>

³² See Appendix.

³³ Constitution Alteration (Aboriginals) Act 1967 (n 7).

³⁴ Aboriginal and Historic Relics Act 1967 South Australia (repealed).

³⁵ Aboriginal and Torres Strait Islander Elected Body Act 2008 (Australian Capital Territory).

³⁶ A <https://www.clc.org.au/files/pdf/Uluru-Statement-3.pdf>

deal of debate and policy discussion revolving around the implementation the statement, which represents a robust demand for a First Nations voice to be enshrined in the Australian Constitution.³⁷ Despite vigorous advocacy³⁸ The demand, while still current, was placed to one side by the Liberal-National Coalition government.³⁹

Dispossession of Indigenous lands and loss of cultural heritage

In 1770 Captain James Cook sailed along the eastern Australian waters on the Bark H.M 'Endeavour', as part of his first circumnavigation of the globe, dubbed a voyage of the 'Enlightenment.'⁴⁰ His secret official orders from the English Admiralty were that he was to take possession of 'convenient situations in the country, but 'only with the consent of the natives'.⁴¹ The 'possession' by Cook is alleged to have taken place on what became known as Possession Island (known in the local language as 'Bedanug') in the Torres Strait off what is now the State of Queensland. Cook stated in his journal: 'I now once more hoisted English Colours and in the Name of His Majesty King George the Third took possession of the whole Eastern Coast...by the name New South Wales, together with all the Bays, Harbours Rivers and Islands situate upon the said coast'.⁴² The commentary by the Australian Museum of Democracy states:

Cook's Secret Instructions represent Britain's first official expressions of interest in Australia. They record the quest for scientific discovery, combined with the desire to find exploitable natural resources and to expand Britain's control of strategic trading posts around the globe. The Instructions confidently assume that these varied interests could be made compatible with a respect for the native populations in those countries so identified.⁴³

The lands and coasts that Cook surveyed were subsequently seen by his British Government masters as a landing site for the refugia of Britain's prison system. There appears to be no evidence that Cook took possession 'with the consent of the natives', and given what was known then, and much more abundantly now, the obtaining of a valid consent would clearly have been impossible, given the many clans up and down the coast and the absurdity of communicating a request for such an agreement, given the language barriers as well as the fact that such a notion would have been totally alien to the Indigenous people with whom Cook came into contact with. Indeed, there never has been a treaty of such a type in Australia.⁴⁴

³⁷ The Statement is extracted in the Appendix to this chapter.

³⁸ Murray Gleeson (Former Chief Justice, High Court of Australia) Recognition in keeping with the Constitution: A worthwhile Project', monograph, *Uphold and Recognise* <http://www.upholdandrecognise.com/>

³⁹ Greg Brown, 'PM needs to rethink opposition to "voice to parliament"', peak law body says' *The Australian*, July 19, 2019.

⁴⁰ *James Cook and the Exploration of the Pacific* (Thames and Hudson 2009) 18.

⁴¹ 'Secret Instructions to Captain Cook, 30 June 1768' National Library of Australia, <https://www.nla.gov.au/content/secret> Accessed 16 December 2019.

⁴² James Cook First Voyage round the World: Captain Cook's Journal during his First Voyage in HM Barque Endeavour 1768-71 (Verne, Nikosia) 2016, 423.

⁴³ Secret Instructions to Lieutenant Cook 30 July 1768 (UK) <https://www.foundingdocs.gov.au/item-did-34.html> accessed 16 December 2019.

⁴⁴ The attempt in 1836 by John Batman to buy a very large tract of land from an Aboriginal group on his arrival in the Port Phillip region of Victoria was firmly repudiated by the Governor of New South Wales, who declared that 'the British Crown owned the entire land of Australia, and that only it could sell or distribute land; 'Batman's treaty' State Library of Victoria, <http://ergo.slv.vic.gov.au/explore-history/colonial-melbourne/pioneers/batmans-treaty> accessed 16 December 2019.

The landing at Botany Bay,⁴⁵ can be said to be the beginning of the gradual but certain degradation of Australia's Indigenous heritage at the hands of the British colonizers.⁴⁶ Not too many years hence, in 1788, the First Fleet, consisting of eleven ships filled with convicts and their keepers, landed near what is now called Sydney. That second arrival sealed the fate of the traditional life of Australia's Indigenous people, and the beginning also of the conflicts between the colonists and the owners of the land.⁴⁷ With the spread European-borne diseases, countless massacres and forcible dispossession of the land of Australia's original people,⁴⁸ the rapid loss of various components of their tangible and intangible heritage became inevitable.

A widely-shared assumption with respect to Australian indigenous people was that the task of government was to 'smooth the dying pillow'.⁴⁹ Apart from the astute observations of some of the early explorers, as recorded in their journals, there was also a lack depth in the perceptions of the British invaders of the complexity of the First Nations peoples whose lands they took over. Greer records: 'Prior to first European settlement in 1788, Indigenous communities in Australia were highly diverse in language, specific customs and the nature of kin relations, economic practices and so forth...However, broad similarities in way of life and perhaps ritual practices were such that 'settlers' could think of these many societies as a single cultural group – the 'Australian Aborigines'. Alternatively, this way of life may have been so distant from that of the settlers that these differences, so obvious in the ethnography today, were just not visible to them. Whatever its origin, the idea of Australia's Indigenous peoples as a single cultural unit has remained in spite of significant challenges to this from anthropological work.'⁵⁰ Fortunately, with the work of archaeologists, anthropologists and historians, and increasingly vocal Indigenous voices over the last few decades. these perceptions have changed markedly.

Evidence of indigenous land use and practices gradually disappeared, with knowledge of such uses practices being passed on largely through oral communication from one generation of indigenous people and groups to the next. With the deterioration of indigenous languages, the bicultural knowledge contained in those languages also went into decline.

Destruction of Australian Aboriginal Heritage

⁴⁵ Captain Cook's Landing Place, <https://www.nationalparks.nsw.gov.au/things-to-do/historic-buildings-places/captain-cooks-landing-place> accessed 16 December 2019.

⁴⁶ One indicator of this the recognition by the Australian Institute of Aboriginal and Torres Strait Islander Studies, in anticipation of the 250th anniversary in 2020: of Cook's first journey 'The arrival of Cook in 1770 marks the start of a process of Aboriginal and Torres Strait Islander cultural heritage being removed overseas' <https://www.arts.gov.au/what-we-do/cultural-heritage/250th-anniversary-captain-cooks-voyage-australia> accessed 9 December 2019

⁴⁷ Eric Wilmot, *Pemulwuy, The Rainbow Warrior*, 1987; Pemulwuy is said to have led the resistance by the Eora people around the Sydney region against the British, of whom he was apart, from 1790 until his death in 1802.

⁴⁸ See for example, Henry Reynolds, *Dispossession: Black Australians and White Invaders*, (Allen and Unwin 1989), passim.

⁴⁹ Australian Human Rights Commission, *Bringing them home, Report of the National Inquiry to the Separation of Aboriginal and Torres Strait Islander Children from their Families* (April 1997) 23; the author Daisy Bates, was also convinced of the idea that the Indigenous people were a dying race, as depicted in her book, *The Passing of the Aborigines: A Lifetimes Spent among the Natives of Australia*, (The University of Adelaide 1938).

⁵⁰ Shelley Greer 'Heritage and empowerment: community-based Indigenous cultural heritage in northern Australia' *International Journal of Heritage Studies*, Vol 16, 2010 Issue 1-2 45-58, 46. <https://www-tandfonline-com.virtual.anu.edu.au/toc/rjhs20/current>

Since rock carvings and drawings can be found across the Australian continent, both in remote rural areas and within and around cities and towns, Australia might be described as a vast open air Indigenous art gallery.⁵¹ While many sites have been carefully recorded, and made the subject of heritage protection under federal⁵² or state legislation, and in some cases under both, some jurisdictions have been slow to legislative and implement protective measures.

Much Australian Indigenous art takes the form of engravings⁵³ and the use of red and white ochre for drawings and paintings, often in caves and rock overhangs. Body painting, primarily for ritual and ceremonial purposes continues to be practiced. Contemporary Indigenous art, often reflecting traditional art practice but using modern materials of paint and canvas, has become very popular. Prints made from liquid ochres sprayed on a hand to produce a stencil on a rock face can also be found in many places. In or close to urban environments, such works are liable to desecration⁵⁴ or destruction.⁵⁵ A wide range of objects can also be identified; these include 'tjuringas', namely sacred objects of wood or stone often carved with some kind of inscription; some analysts have referred to certain types of such tjuringas as 'title deeds' to particular lands to which indigenous groups relate;⁵⁶ however, they have broader spiritual meanings as well. As the seas around Australia were at a much lower level than at present for much of the 70,000 or so years that Indigenous people have been in occupation, archaeological research indicates that there is a physical evidence remains of the underwater Indigenous heritage.⁵⁷ However, archaeologists argue urge that '[W]hen considering Australia's marine cultural heritage, it is vital to incorporate the ongoing connection Aboriginal and Torres Strait Islander peoples have to a living heritage'.⁵⁸ The reason for this is development of offshore seabed natural resources, as well as infrastructure for such things as wind farms that are built in shallow waters. Unless the environmental impact assessment process specifies archaeological investigations within its scope, underwater cultural heritage maybe missed. As Ward et al point out, 'Overlooking cultural resources potentially results in a loss in cultural identity associated with certain habitats or features, decline in local ecological knowledge and loss of opportunity for social and cultural capital'.⁵⁹ Since the 1990s, through the native title

⁵¹ Some examples: Australia's top 7 Aboriginal rock art sites

<https://www.australiangeographic.com.au/topics/history-culture/2016/03/top-7-aboriginal-rock-art-sites/>

⁵² Australia's National Heritage List, <https://www.environment.gov.au/heritage/places/national-heritage-list>

Commonwealth Heritage List, <https://www.environment.gov.au/heritage/places/commonwealth-heritage-list>

⁵³ It is estimated that there are over 100,000 surviving Indigenous rock sites, which represents the 'oldest firmly-dated rock art in the world', but also the distinction of being a living tradition with an extensive ethnography: Josephine Flood, *Rock Art of the Dreamtime: Images of Ancient Australia* (Angus and Robertson 1997) ix.

⁵⁴ For a recent example see Carrie Fellner, "'Chinese Gatsby" billionaire built bar in Hunters Hill Aboriginal rock cave' November 16, 2019, *Sydney Morning Herald* <https://www.smh.com.au/national/nsw/chinese-gatsby-billionaire-built-bar-in-hunters-hill-aboriginal-rock-cave-20191115-p53b3t.html>

⁵⁵ Ted O'Connor, 'Vandals deface 8,000-year-old Indigenous art in Tasmania' 26 May 2016, ABC News <https://www.abc.net.au/news/2016-05-26/8.000-year-old-indigenous-art-defaced-in-tasmania/7446460> accessed 19 December 2019.

⁵⁶ Peter McCloy, *The Survival Dreaming*, (Management Interface Pty. Ltd, Lindfield Australia 1995) 49; Bruce Chatwin, *Songlines*, Patagonia (Penguin Classics 2003) passim.

⁵⁷ Ingrid Ward, Dermot Smyth, Peter Veth, Jo McDonald, Sean McNeair, 'Recognition and value of submerged prehistoric landscape resources in Australia' in James Fitzsimons, and Geoff Wescott (eds) *Big, Bold and Blue: Lessons from Australia's Marine Protected Areas* (CSIRO Publishing 2016) 307-326.

⁵⁸ Dermot Smyth and Miya Isherwood, 'Protecting Sea Country: indigenous peoples and marine protected areas in Australia' in: Fitzsimons and Wescott, G. (n 37).

⁵⁹ Ward et al (n 37).

claim process,⁶⁰ a range of sea areas (referred to as ‘sea country’) have been claimed, and maritime Indigenous Protected Areas have also been established.⁶¹

Heritage and cultural genocide

The history of Australian ‘settlement’ provides ample evidence from the earliest times of the many thousands of Aboriginal people across Australia were murdered, often *en masse*. The year 1928 was the year that the last ‘officially’ sanctioned massacre was recorded (and for which an apology was finally issued to the victims’ descendants some 90 years later).⁶² In recent years, maps have been produced indicating precisely the location of massacres.⁶³ There is no doubt genocide occurred with regard Australia’s Indigenous people at the hands of the British.

Although the concept of cultural genocide was excluded⁶⁴ from the Genocide Convention,⁶⁵ the fact remains that Aboriginal and Torres Strait Islander people in Australia, as well as in many other places around the world, have been subjected to this phenomenon. Patty Gerstenblith argues that destruction of cultural heritage becomes an act of genocide, as well as evidence of genocidal intent.⁶⁶ Thus cultural genocide might be said to be one aspect of the broader genocide that took place over the past 200 years on the Australian continent, as a result of the impact of colonization from the very earliest times of the British incursions into Australia.

The Report of the Human Rights Commission, *Bringing Them Home*, canvasses the phenomenon of the massacres as referred to above, as well as the forced removal of many thousands of children from their families and their communities by state welfare authorities for their ‘protection’⁶⁷ and the assimilation policies of successive federal and state governments. The Report argues that forced removal of children can in itself be a form of genocide: ‘Genocide can be committed by means other than actual physical extermination. It is committed by the forcible transfer of children, provided the other elements of the crime are established. As the United Nations Secretary-General explained, the separation of children

⁶⁰ Native Title Act 1993.

⁶¹ ‘Indigenous Protected Areas’ Australian Government Department of the Environment and Energy, <https://www.environment.gov.au/land/indigenous-protected-areas> accessed 19 December 2019.

⁶² Coniston Massacre: ‘NT police apologise for state-sanctioned massacre of Aboriginal people’ <https://www.abc.net.au/news/2018-08-24/nt-police-apologise-for-state-sanctioned-coniston-massacre/10162850> accessed 16 December 2019.

⁶³ See an investigation of the years 1776 to 1929 by *The Guardian* newspaper as one example: ‘The killing times: the massacres of Aboriginal people Australia must confront’ <https://www.theguardian.com/australia-news/2019/mar/04/the-killing-times-the-massacres-of-aboriginal-people-australia-must-confront#img-1> Map documenting massacres at; <https://www.theguardian.com/australia-news/ng-interactive/2019/mar/04/massacre-map-australia-the-killing-times-frontier-wars>; see also ‘Colonial Frontier Massacres in Australia, 1788-1930’ University of Newcastle, <https://c21ch.newcastle.edu.au/colonialmassacres/>, accessed 10 December 2019.

⁶⁴ See Elisa Novic, *The Concept of Cultural Genocide; an International Perspective*, (Oxford, Oxford University Press, 2012) pp. 3-4 see also Report of the Special Rapporteur in the field of cultural rights. UNGA A/71/317 (2016).

⁶⁵ Convention on the Prevention and Punishment of the Crime of Genocide 1948

⁶⁶ Patty Gerstenblith, “The destruction of cultural heritage: a crime against property or a crime against people?”, *John Marshall Review of Intellectual Property Law*, vol. 15, No. 336 (31 May 2016), p. 344, see also Gerstenblith, ‘Toward a Human Rights-Based Approach as an Element in Post-Conflict Cultural Heritage Reconstruction’, this volume.

⁶⁷ Australian Human Rights Commission, *Bringing them home, Report of the National Inquiry to the Separation of Aboriginal and Torres Strait Islander Children from their Families* (April 1997). (UN Document E/447 1947)’; *ibid* 235; see also p. 239.

from their parents results in ‘forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time’.⁶⁸ The Report also observes that the speaking of Indigenous languages was frequently prohibited, and recognised that: [T]he loss of language is intimately connected with the loss of identity for those forcibly removed and their descendants.’⁶⁹

Seigfried Weissner,⁷⁰ in analysing the content of the UN Indigenous Peoples Declaration, argues that ‘the effective protection of indigenous culture is key to its understanding’. He goes on to say that this fundamental policy goal undergirds, in particular, ‘the novel prohibition of ethnocide against indigenous peoples’ which he argues is the effect of Article 8(1). That article states: ‘Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.’ Weissner says in a footnote that even though Article 8(1) does not use the word ethnocide ‘it captures its essence’. Given the experience of indigenous people in Australia for the first two centuries since the arrival of the First Fleet, the points that Weissner makes are highly pertinent.

Despite the many developments that have occurred in Australia relating to the protection of the indigenous heritage through legislative enactments, Australia’s historical record of discrimination against its Indigenous people, the officially sanctioned massacres, the removal of children from their families are clear evidence of acts of genocide, but also include cultural genocide.

Resource exploitation and heritage destruction

One of the major causes of indigenous heritage destruction in many countries is exploitation of natural resources by the dominant culture. This is recognised in the UN Declaration on the Rights of Indigenous Peoples. Tobin, for example, argues: ‘Indigenous peoples’ rights to self-determination and cultural survival are both dependent upon and threatened by natural resource use. On the one hand, Indigenous peoples’ daily subsistence, development, spiritual and cultural wellbeing is intertwined with the natural environment and biodiversity. On the other hand, natural resource exploitation is the single biggest threat to their territorial and cultural integrity and in some cases to their very existence.’⁷¹ This is certainly the story of Aboriginal and Torres Strait Islander people with respect to the unauthorised use of their lands by British settlers for large-scale grazing and agriculture.

Destruction of Indigenous agricultural and aquaculture systems

While many analysts of Indigenous culture in Australia have assumed that Aboriginal people were largely nomadic, a growing body of archaeological and anthropological evidence indicates that Aboriginal groups and communities across Australia were often sedentary, living in permanent and semi-permanent settlements and engaging in agriculture and aquaculture.

⁶⁸ Ibid. 236.

⁶⁹ Ibid.

⁷⁰ Siegfried Wiessner, ‘*The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*’ *EJIL* (2011), Vol. 22 No. 1, 121–140 at 131.

⁷¹ Tobin (n 9 XX) 120.

As noted by Pascoe,⁷² evidence of agriculture is found in the notebooks and journal of early explorers, who recorded such as fire stick burning in mosaics to encourage green growth for grazing animals targeted by Aboriginal people,⁷³ the harvesting of native rice grasses⁷⁴ the storing of the grain and preparation for cooking and eating.⁷⁵ Further, physical evidence still exists of the extensive use of intricate and comprehensive fish traps in rivers and other water bodies.⁷⁶ Pascoe records of that '[D]estruction of these systems was witnessed by the very earliest Europeans. Aboriginal Protector William Thomas saw many agricultural systems, but reported that most were destroyed by Europeans in the first days after their arrival.' Pascoe refers to these acts as 'heritage destruction'.⁷⁷

With regard to the practice of aquaculture, the nomination and acceptance of the Aboriginal Budj Bim Fish traps as a cultural in the State of Victoria to the World Heritage List⁷⁸ is one prominent example among hundreds of such devices that were in existence around Australia, although many of them have been destroyed.

The intangible Indigenous heritage in Australia

In spite of the ravages of colonization wrought upon its land and its people, Australia harbours a range of extraordinarily rich and continuous cultures of the Aboriginal and Torres Strait Islander people. This intangible heritage includes languages, skills, mythology stories, songs dances, spiritual and religious practices; many of these are associated with specific places.⁷⁹ These cultures can be seen as both separate and combined with the ethnic cultural diversity represented by immigration from all over the world in over the past two centuries, with hundreds of languages spoken.⁸⁰ Despite the reasoned recommendation from the Australian Human Rights Commission that Australia ratify the Convention on the Safeguarding of the Intangible Heritage Convention, the Australian Government has not yet signed or ratified it,⁸¹ in common with other states with substantial Indigenous populations, namely Canada, New Zealand and the United States. While the reasons for non-membership have never been clearly articulated, they are likely to include the political and cultural complexities of nominating representative examples of the Indigenous cultures to the List of Intangible Cultural Heritage in Need of Urgent Safeguarding under the Convention. Notwithstanding lack of ratification

⁷² Bruce Pascoe, *Dark Emu* (Magabala Books 2018) Chapter 1 'Agriculture'.

⁷³ Gammage, B. 'The biggest estate on earth: how Aborigines made Australia' *The Conversation*, December 7, 2011

<https://theconversation.com/the-biggest-estate-on-earth-how-aborigines-made-australia-3787>

⁷⁴ See also Gammage, B. 'The biggest estate on earth: how Aborigines made Australia' *The Conversation*, December 7, 2011 <https://theconversation.com/the-biggest-estate-on-earth-how-aborigines-made-australia-3787> accessed 16 December 2019.

⁷⁵ Pascoe (n 72) 38-45.

⁷⁶ *Ibid.* Chapter 2 'Aquaculture'.

⁷⁷ *Ibid.* 80.

⁷⁸ UNESCO World Heritage List, Budj Bim Cultural Landscape, <https://whc.unesco.org/en/list/1577> accessed 16 December 2019.

⁷⁹ One well-known example is the 'Land of the Lightning Brothers'; see Flood (n 53) xx.

⁸⁰ In 2016, there were over 300 separately identified languages spoken in Australian homes: Australian Bureau of Statistics, <https://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3> accessed 16 December 2019.

⁸¹ 'Ratification of 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage' Australian Human Rights Commission Submission to the Department of Environment, Water, Heritage and the Arts, 24 September 2008 <https://www.humanrights.gov.au/our-work/legal/submission-ratification-2003-unesco-convention-safeguarding-intangible-cultural>; Australia ICOMOS.

at Australian federal level, the State of Victoria has amended its Aboriginal heritage legislation to include intangible elements.⁸²

Destruction and revival of Indigenous languages

The colonisation of Indigenous lands around the world over the past three centuries has resulted in the loss of settlements, livelihoods, cultures and lives. An issue that has come to be more clearly recognised in recent years is the loss of Indigenous and local community languages. The disappearance of the use of languages involves not only the capacity of a community or linguistic group to communicate in their language on an everyday basis. It has also involved the loss of embedded knowledge of their culture as well as knowledge of the use and conservation of the environment and natural resources that indigenous and local communities have traditionally depended upon. That embedded knowledge is sometimes referred to as part of biocultural diversity.⁸³

In marking international year of Indigenous languages in 2019,⁸⁴ the *UNESCO Courier* stated: ‘For indigenous peoples, languages not only identify their origin or membership in a community, they also carry the ethical values of their ancestors – the indigenous knowledge systems that make them one with the land and are crucial to their survival and to the hopes and aspirations of their youth.’^{85 86}

As Blake has pointed out, ‘when the languages and traditional cultural practices of local populations are lost, a vast repository of traditional knowledge of biodiversity associated with it is also lost’.⁸⁷ In the Australian context, ‘of the estimated original 250 Aboriginal and Torres Strait Islander languages, only around 120 are still spoken. Of these approximately 90 per cent are endangered.’⁸⁸

One positive legislative development in recent years was the enactment of legislation relating to Indigenous languages is found in the State of New South Wales, with the enactment of the Aboriginal Languages Act 2017, a law that attempts to redress the losses of Aboriginal language. The introductory provisions connect languages to the land, or, in other words, the

⁸² The Aboriginal Heritage Act Victoria 2006, as amended, defines intangible Aboriginal heritage as ‘Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, 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 (section 79B(1)).

⁸³ Luisa Maffi defines biocultural diversity as ‘diversity of life on earth is comprised not only of biodiversity (the variety of plant and animal species, habitats, and ecosystems) but also of cultural and linguistic diversity (the variety of human cultures and languages), and that all these manifestations of the diversity of life are “interrelated (and possibly coevolved) within a complex socio-ecological adaptive system”; see Luisa Maffi, ‘Sustaining Biocultural Diversity’ Chapter 30, in Kenneth L. Rehg and Lyle Campbell (eds.) *The Oxford Handbook of Endangered Languages*, (Oxford University Press 2018).

⁸⁴ proposed by the United Nations Permanent Forum on Indigenous Issues

⁸⁵ Minnie Degawan ‘Indigenous languages: Knowledge and Hope’, *UNESCO Courier* 2019, 7.

⁸⁶ The international year of Indigenous languages was proposed by the United Nations Permanent Forum on Indigenous Issues: <https://www.un.org/development/desa/indigenouspeoples/> accessed 19 December 2019.

⁸⁷ Blake *International Cultural Heritage Law* (n 17), 142. See also UNESCO, *Sharing a World of Difference—The Earth’s Linguistic, Cultural and Biological Diversity* (UNESCO, 2003). At the national level, we can note the manifestations of these international efforts; see, for example, *Aboriginal Languages Act 2017* in New South Wales, Australia and the Indigenous Languages Bill C-91 (Canada) February 2019.

⁸⁸ Department of Communications and the Arts, 2019 International Year of Indigenous Languages <https://www.arts.gov.au/what-we-do/indigenous-arts-and-languages/2019-international-year-indigenous-languages>, accessed 9 December 2019.

Indigenous culture to the natural environment on which the indigenous peoples have traditionally relied.

Its introductory provisions observe that '[T]he languages of the first peoples of the land comprising New South Wales are an integral part of the world's oldest living culture and connect Aboriginal people to each other and to their land'. It also recognises that '[A]s a result of past Government decisions Aboriginal languages were almost lost, but they were spoken in secret and passed on through Aboriginal families and communities. Further, there is an acknowledgement that Aboriginal people 'will be reconnected with their culture and heritage by the reawakening, growing and nurturing of Aboriginal languages'. It also clearly states that 'Aboriginal languages are part of the cultural heritage of New South Wales' and also acknowledges that 'Aboriginal people are the custodians of Aboriginal languages and have the right to control their growth and nurturing.' Significantly 'Aboriginal language' is defined as meaning 'a language, or dialect of a language, of the traditional custodians of the land comprising New South Wales'. This legislation can be categorised as recognising a vital part of the intangible heritage of the Aboriginal people of New South Wales.

The New South Wales legislation is generally consistent with Article 13(1) of the United Nations Declaration of the Rights of Indigenous Peoples,⁸⁹ which provides that 'Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, *languages, oral traditions*, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons' (emphasis added).

Destruction of Indigenous legal regimes

Unwritten traditional legal regimes, orally transmitted from one generation to another, can themselves be regarded as part of the cultural heritage. As Brendan Tobin has pointed 'Indigenous peoples' legal regimes, which are largely but not solely of a customary law nature, have survived centuries of marginalization, repression, disdain and attempts at their destruction by colonial and settler state governments'. He goes on to say and that the Canadian and Australian regimes have experienced a resurgence with the recognition of native title in both countries. He recalls that the recognition of rights to their own legal regimes and institutions is recognised by ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples.⁹⁰

It might be argued here that in many countries that have been the subject of colonisation, the deterioration or disappearance of customary law systems themselves constitute a threat to that community's cultural heritage. This point becomes more obvious when reading explanations Australian Aboriginal law. For example, the Anangu, who are the traditional owners of the Uluru-Kata Tjuta National Park *Tjukurpa* has many deep, complex meanings: '*Tjukurpa* refers to the creation period when ancestral beings created the world. From this came Anangu religious heritage, explaining their existence and guiding daily life. For Anangu, *Tjukurpa* provides answers to important questions, the rules for behaviour and for living together. It is the law of caring for each other and the land that supports

⁸⁹ United Nations Declaration of the Rights of Indigenous Peoples. (n xxx).

⁹⁰ Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (Routledge 2014) 1-2.

them. *Tjukurpa* tells of the relationships between people, plants, animals and the physical features of the land. It is the past, present and future – all at the same time.’⁹¹

If the people and communities who hold to these customary laws are forcibly moved or ‘assimilated’, or if their laws are not respected, for example through lack of recognition of their validity by the Western legal system, then the legal regimes that hold them together often become weaker or disappear altogether.

The significance of customary law was captured by Justice Blackburn in the Australian Federal Court case (concerning bauxite mining on Indigenous land) in the Gove Land Rights Case in the Northern Territory: ‘The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws, and not of men”, it is that shown in the evidence before me.’⁹² Ultimately, the plaintiffs were not successful, but the judgment nevertheless opened the way to a broader consideration of Indigenous land rights in the Northern Territory, and ultimately led to the enactment of the Aboriginal Land Rights Act 1976 (Cth.).

Two case studies

These two case studies illustrate separate instances of the effects of development on heritage items. The first concerns the apparent deterioration of the extraordinary Aboriginal rock art of Murujuga or Burrup Peninsula in the northwest of Western Australia. The second focuses on the disturbance of the spiritual lives of the traditional owners of Uluru, also known as Ayers Rock, by the practice of tourists climbing the rock. These examples are just two of many dozens that could have been explored to illustrate the main themes of this chapter.

Protection of Aboriginal rock art of the Burrup Peninsula,

The Burrup Peninsula contains more than one million petroglyphs, across 36,857ha of the peninsula and surrounding Dampier archipelago in the north-west of the state of Western Australia. Petroglyphs are a form of rock art made by incising, picking, carving, or abrading. While this type of art is found in many places around the world, none compare in number, complexity or age with the Burrup petroglyphs. The rock art is believed to contain the oldest known representation of the human face in the world.⁹³ They include elaborate geometric designs, portrayal of extinct mammals such as megafauna, the fat-tailed kangaroo and Thylacines⁹⁴ (otherwise known as Tasmanian tigers). Black et al state: ‘The petroglyphs on

⁹¹ ‘Tjukurpa’ Department of the Environment and Energy, Australian Government, <https://www.environment.gov.au/topics/national-parks/uluru-kata-tjuta-national-park/culture-and-history/tjukurpa> accessed 19 December 2019.

⁹² *Milirrpum v. Nabalco Pty Ltd* (58) (1971) 17 FLR 141, at p 267; for a critique of this case see John Hookey, ‘The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?’ [1972] FedLawRw 5;

⁹³ John L. Black, Ilona Box and Simon Diffey, ‘Inadequacies of research used to monitor change to rock art and regulated industry on Murujuga (‘Burrup Peninsula’) Australia, quoting Ken Mulvaney, *Murujuga Marni: rock art of the macropod hunters and mollusc harvesters*. UWA Press, Perth. 2015) .

⁹⁴ Caroline Bird and Sylvia J. Hallam *Archaeology and rock art in the Dampier Archipelago*, Report of National Trust of Australia (WA), August 2006

Murujuga are a priceless, irreplaceable, historical and archaeological treasure of global significance.’⁹⁵

The introduction of various chemical industries, including a liquid ammonia plant for production of fertiliser and an ammonium nitrate plant for the manufacture of explosives, on the Burrup Peninsula have been a cause for significant concern by archaeologists and heritage experts for many years because of their potential effects on the nearby petroglyphs due to acid emissions from the industries. In a submission to an Australian Senate Inquiry in 2017, a scientific expert stated: ‘There is irrefutable empirical and theoretical evidence that any increasing acid accumulation on the surface of rocks on Burrup Peninsula is now destroying and will completely dissolve the desert varnish patina. These processes will result in the destruction of the petroglyphs within the next 20-30 years at the current rate of acid emissions’.⁹⁶ There has been a good deal of controversy over the accuracy and quality of studies with respect to these effects.⁹⁷

The slow deterioration of the engravings on the Burrup Peninsula in Western Australia exemplifies the failure to follow international norms to respect Indigenous cultural heritage, the duty to obtain free, prior and informed consent, and tortuous process involved in nominating the site under the World Heritage Convention. The suggestion to place the site on the World Heritage List was first made in 1980, particularly referencing the Burrup rock art.⁹⁸ Due to pressure and publicity, the Dampier Archipelago (including the Burrup Peninsula) was declared a National Heritage Place under the Environment Protection and Biodiversity Conservation Act 1999 in July 2007.⁹⁹ However, the Australian Government refused for some years to place the Peninsula on the World Heritage tentative list, despite the submission of various organizations and individuals. According to Australian jurisprudence on the interpretation of Article 5 of the Convention,¹⁰⁰ once an item is placed on a country’s inventory under Article 11, there is an obligation for the item to be protected as if it is already on the World Heritage List. The rationale behind this is obvious enough: most states, in putting forward a tentative list, can expect to have a property listed in due course. It would make no sense for a potential item on the World Heritage list to be subjected to any activity which would affect its outstanding universal values.

The Australian Heritage Council (a federal body) initiated an inquiry chaired by a former premier of the State of Western Australia in 2011.¹⁰¹ A report commissioned by the Inquiry

⁹⁵ Black et al (n 88) 1.

⁹⁶ *An inquiry into the Commonwealth's responsibility under the Environment Protection and Biodiversity Conservation Act 1999 to protect the globally significant and National Heritage listed Aboriginal rock art of the Burrup Peninsula*, John Black, Submission 13, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/BurrupPeninsula/Submissions, accessed 16 December 2019.

⁹⁷ Black et al (n 88) 131.

⁹⁸ Dr Ken Mulvaney to 2017-2018 Protection of Aboriginal rock art of the Burrup Peninsula Submission 10 to Senate Inquiry (n 89).

⁹⁹ National Heritage Places - Dampier Archipelago (including Burrup Peninsula) [file:///Users/bernhardboer/Dropbox%20\(Sydney%20Uni\)/Leiden%20paper/National%20Heritage%20Places%20-%20Dampier%20Archipelago%20\(including%20Burrup%20Peninsula\)%20-%20Department%20of%20the%20Environment%20and%20Energy.html](file:///Users/bernhardboer/Dropbox%20(Sydney%20Uni)/Leiden%20paper/National%20Heritage%20Places%20-%20Dampier%20Archipelago%20(including%20Burrup%20Peninsula)%20-%20Department%20of%20the%20Environment%20and%20Energy.html)

¹⁰⁰ *Richardson v Forestry Commission* [1988] HCA 10; (1988) 164 CLR 261 (10 March 1988); see also Boer and Wiffen (n 5) 74-75.

¹⁰¹ ‘The Potential Outstanding Universal Value of the Dampier Archipelago Site and Threats to that Site: A report by the Australian Heritage Council to the Minister for Sustainability, Environment, Water, Population and Communities’

was asked to examine the World Heritage criteria of ‘outstanding universal values’ of the Burrup.¹⁰² That report found that there was adequate evidence for the Dampier Archipelago to justify listing under the natural criteria I (a masterpiece of human creative genius) iii (bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared) and iv (an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history) to meet the threshold for Outstanding Universal Value. It also found that there ‘also a good case for arguing that criteria ii (with respect to the exchange of ideas and values through time) and criteria vi (in terms of living cultural traditions) could meet the threshold for the Dampier Archipelago’. The report noted however, that further research was required on these criteria and that the ‘consent and input from Traditional Owners is required before these cases could be considered as robust and persuasive as argued for criteria (i), (iii) and (iv).’¹⁰³ The Inquiry Report found: ‘[T]here is adequate existing research and data to justify that the heritage values of the Dampier Archipelago meet the threshold of Outstanding Universal Value against World Heritage criterion (i) i.e. The Dampier Archipelago represents a masterpiece of human creative genius.’¹⁰⁴

In 2016, the Senate referred an inquiry into the protection of Aboriginal rock art of the Burrup Peninsula to the Senate Environment and Communications References Committee for inquiry and report.¹⁰⁵ The subsequent report was issued in early 2018, in which a range of views was expressed as to whether the Peninsula should be nominated.¹⁰⁶ One concern was that not all the local Aboriginal clans had not yet given consent.

Forty years after the initial suggestion was made, with numerous investigations, inquiries and reports, the preparation of the nomination was begun in 2019, with each of the five groups of traditional owners of the site finally having given consent.¹⁰⁷ While a number of Australian World Heritage sites include indigenous cultural values within a broader nomination, the fact that the Budj Bim site and this site are the only ones in Australia that have been nominated specifically for their Indigenous cultural values is indicative of the unwillingness on the part of the federal and state governments until recently to place an Indigenous cultural heritage at the forefront of heritage considerations. Perhaps this is not surprising, given the history of dispossession and discrimination concerning Indigenous people in Australia, whose rich and culture has taken two centuries to being fully recognised by non-Indigenous Australia.

¹⁰² Josephine McDonald and Peter Veth, ‘Study of the Outstanding Universal Values of The Dampier Archipelago Site’, Western Australia Technical Report · September 2011 https://www.researchgate.net/publication/271079233_Study_of_the_Outstanding_Universal_Values_of_The_Dampier_Archipelago_Site_Western_Australia, accessed 16 December 2019.

¹⁰³ Calla Wahlquist ‘Burrup peninsula rock art: Western Australia to seek world heritage listing’ *The Guardian*, 27 August 2018 <https://www.theguardian.com/australia-news/2018/aug/27/burrup-peninsula-rock-art-western-australia-to-seek-world-heritage-listing> accessed 16 December 2019

¹⁰⁴ ‘The Potential Outstanding Universal Value of the Dampier Archipelago Site and Threats to that Site,’ A report by the Australian Heritage Council to the Minister for Sustainability, Environment, Water, Population and Communities, 2011.

¹⁰⁵ Australian Senate Inquiry, ‘Protection of Aboriginal rock art of the Burrup Peninsula’ 2018 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/BurrupPeninsula

¹⁰⁶ Environment and Communications References Committee Protection of Aboriginal rock art of the Burrup Peninsula;

¹⁰⁷ Susan Standen and Sonia Feng ‘World Heritage listing of Burrup Peninsula rock art edges closer with nomination process starting’ ABC News 28 August 2018.

Uluru, also known as Ayers Rock, is a very large monolith in the centre of Australia, encompassed by a traditionally owned National Park. From the earliest times of tourism in the area in the 1930s, Uluru became an iconic climb, from the base to the top, by tourists. The Aboriginal traditional owners, the Anangu, had made it clear over many years that their traditional law (encompassed by, but not wholly expressed by the concept of Tjukurpa) obliged them to ask visitors not to climb. The traditional owners had made it clear that they felt responsible for those who climbed the rock, with at least 36 people having die over the years during the climb.¹⁰⁸ There was already a power under the relevant regulations to stop this practice, but the process of carrying out the objectives of the plan of management was very slow.

Eventually, the Uluru-Kata Tjuta National Park Board of Management, made up of a majority of traditional owners, together with professional staff from Parks Australia announced that it had decided to close the climb to the top of Uluru in 26 October 2019.¹⁰⁹ At the Board meeting, the chair, Jimmy Wilson, a traditional owner, stated:

‘This is a sacred place restricted by law. It’s not just at board meetings that we discussed this but it’s been talked about over many a camp fire, out hunting, waiting for the kangaroo to cook, they’ve always talked about it. The climb is a men’s sacred area. The men have closed it. It has cultural significance that includes certain restrictions and so this is as much as we can say. If you ask, you know they can’t tell you, except to say it has been closed for cultural reasons. What does this mean? You know it can be hard to understand – what is cultural law? Which one are you talking about? It exists; both historically and today. Tjukurpa includes everything: the trees; grasses; landforms; hills; rocks and all.... Over the years Anangu have felt a sense of intimidation, as if someone is holding a gun to our heads to keep it open. Please don’t hold us to ransom.... This decision is for both Anangu and non-Anangu together to feel proud about; to realise, of course it’s the right thing to close the “playground”’¹¹⁰

Given the history of the Uluru climb, and sentiments expressed above, which are a selection from a broader range of comments from the Anangu, can it be argued that a refusal stop the practice by the parks service since the declaration of the area as under the traditional ownership of the Anangu in 1984, can be characterized as a form of destruction of the cultural heritage of the Anangu, or even an intentional destruction of the cultural heritage? Of course, there may be general awareness of damage being done by the activities of developers, entrepreneurs or tourists, which does not necessarily amount to a legally understood issue of intention. Whether the perpetrators state of mind is one of conscious intention, recklessness, neglect, ignorance or lack of care, the resulting destruction or deterioration of the heritage remains the same.

In the case of Uluru, there was little by way of physical destruction of the site caused by the years of climbing. But the language of the 2003 UNESCO Declaration concerning the

¹⁰⁸ Graham Readfearn and Lorena Allam, ‘Respect is given: Australia closes claim on sacred Uluru’, *The Guardian* <https://www.theguardian.com/australia-news/2019/oct/25/respect-is-given-australia-closes-climb-on-sacred-uluru>

¹⁰⁹ <https://parksaustralia.gov.au/uluru/news/uluru-climb-to-close/> accessed 12 December 2019.

¹¹⁰ Words from the Chair, Sammy Wilson, English translation from Anangu language <https://parksaustralia.gov.au/uluru/pub/uktnp-climb-closure-words-from-chair-nov-2017.pdf> accessed 12 December 2019.

Intentional Destruction of Cultural Heritage¹¹¹ (were it to apply) does not restrict its application to the physical heritage. Indeed, Article II spells out the scope of the Declaration as addressing ‘intentional destruction of cultural heritage including cultural heritage *linked to a natural site*’ (emphasis added), Certainly, in addition to being a site of major cultural significance, the Uluru monolith is physically a natural site, and the cultural heritage issues concerning the climb are directly linked to that natural site.

Conclusion

Despite the many instances around the world of intentional or negligent destruction of the tangible and intangible heritage, international law offers few robust mechanisms with respect to stopping or at least minimizing such destruction.¹¹² The UNESCO Declaration on Intentional Destruction which requires that UNESCO member states take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, is honoured in Australia by a myriad of heritage legislation, and so can be said, in general, to conform to the Declaration, as it does to the various heritage related conventions to which it is signatory. However, despite longstanding urging from various quarters,¹¹³ the legislative mechanisms for dealing with the protection of Aboriginal and Torres Strait Islander heritage remain inconsistent in their robustness across the Australian legal landscape. Perhaps the ‘cri de coeur’ that is the Uluru Statement from the Heart will eventually be sufficiently widely heard and heeded so as to adequately recognise, protect and promote the revival of the ancient and contemporary heritage of Australia’s Indigenous people.

Appendix: Uluru Statement from the Heart¹¹⁴

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart: Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from ‘time immemorial’, and according to science more than 60,000 years ago. This sovereignty is a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the

¹¹¹ 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, (adopted by the General Conference of UNESCO 17 October 2003)

http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹¹² The use of the Rome Statute and the International Criminal Court in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*. ICC-01/12-01/15-236 17-08-2017 1/61 was effective *ex post facto* dealing with the main perpetrator of the Timbuktu desecration, but that case can only act as a deterrent.

¹¹³ For example, Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Canberra : Minister for Aboriginal and Torres Strait Islander Affairs) Chapter 6, called for minimum standards for federal, state and territory heritage laws to be introduced; see also Boer and Wiffen (n 5), calling for a consistent approach to the legal regimes on heritage, including the Indigenous heritage.

¹¹⁴ Uluru Statement from the Heart <https://www.clc.org.au/files/pdf/Uluru-Statement-3.pdf>

sovereignty of the Crown. How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years? With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood. Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future. These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness. 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. Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination. We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history. In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.