To Be or Not To Be (Property) Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage

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Although a recent phenomenon, all Australian jurisdictions, including the Commonwealth, now have legislative regimes for the protection of land-based indigenous cultural heritage.[1] The regimes have been controversial, not the least for their perceived inadequacy in protecting indigenous cultural heritage. At one level, this inadequacy is due to the nature of the regimes, with protection decisions resting ultimately in the exercise of ministerial discretion. At a more fundamental level, the failure of these regimes to protect heritage stems from their narrow, eurocentric definition of cultural heritage, a definition

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1 Many, if not all, aspects of indigenous cultural heritage arise from relationships to land. Those relationships may be expressed via paintings, oral or written stories, the conduct of rituals, or identification with features of the land. This article is confined to consideration of 'land-based indigenous cultural heritage'. This term refers to indigenous cultural heritage that is identifiably and physically part of land. Recognition and protection of indigenous knowledge does not necessarily extend to the source of that knowledge. Thus, protection of that knowledge through intellectual property laws does not necessarily provide protection for the land-based source of that knowledge. For discussion of broader issues of heritage protection see: R Bell, 'Protection of Folklore: The Australian Experience' (1985) 19(2) *Copyright Bulletin* 4; S Gray, 'Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?' (1992) 9 *Copyright Reporter* 8; C Bell, 'Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate' (1992) 17 *Am Ind LR* 457; D Ellison, 'Unauthorised Reproduction of Aboriginal Art' (1994) 17 *UNSWLJ* 327; T Simpson, 'Claims of Indigenous Peoples to Cultural Property in Canada, Australia and New Zealand' (1994) 18 *Hastings Int'l and Comp L Rev* 195; S Wright, 'Aboriginal Cultural Heritage in Australia' [1995] *U Brit Col L Rev* 45; S Gray, 'Enlightenment and Dreaming' [1995] *Arts & Ent LR* 18; M Martin, 'What's in a Painting? The Cultural Harm of Unauthorised Reproduction: *Milpurrurru v Indofurn*' (1995) 17 *Sydney L Rev* 591; M Blakeney, 'Protecting Expressions of Australian Aboriginal Folklore Under Copyright Law' (1995) 9 *EIPR* 442; C Callison, 'Appropriation of Aboriginal Oral Traditions' [1995] *U Brit Col L Rev* 165; M Harris, 'Scientific and Cultural Vandalism' (1996) 21 *Alt LJ* 28.

which fails to accord value to indigenous peoples' perceptions of their heritage and how it should be protected.

At the heart of many of the controversies and disputes about indigenous land-based heritage protection is a conflict between the property interests of proponents of development which threatens heritage, and the interests of indigenous groups. The interests of indigenous groups are often perceived as spiritual or religious in nature and are often considered only because of the existence of a legislative regime requiring their consideration. No inherent rights, and in particular no property rights, attach to indigenous claims to protection. Heritage is not valued because it is not accorded the status of property, the Anglo-Australian legal system being incapable of dealing with different conceptions of interests in land. Thus, claims for indigenous heritage protection are tenuous and dependant. The events surrounding the proposal for a bridge connecting Kumarangk (Hindmarsh Island)[2] to the mainland in South Australia provide the most recent illustration of this irreconcilable conflict.

The possibility of a reconsideration of the narrow common law approach to indigenous land-based interests was raised in *Mabo v Queensland (No 2)*,[3] where the High Court recognised that some form of native title survived the acquisition of sovereignty. However, the form of this interest as a property interest remains contested, especially as it is subject to extinguishment by the assertion of other rights and interests recognised by the dominant system. Arguably, the *Mabo* decision has had a negative impact on the limited heritage protection that does exist, since it demonstrated that the common law is unable to recognise interests in land which are different to, or not derived from, its own concepts of property and which do not meet the stringent test for the survival of native title.*

2 The Ngarrindjeri occupied the area around Hindmarsh Island prior to the establishment of the colony of South Australia. 'Kumarangk', the Ngarrindjeri name for the island, is used throughout this article, except where directly quoted work refers to 'Hindmarsh Island'.

3 (1992) 175 CLR 1.

* Editor's note: This article was received before the High Court's decision in *The Wik Peoples v Queensland* (Unreported Matter No B9/1996), where the High Court recognised that native title and pastoral leases may coexist.

Property and Indigenous Relationships with Land

The Concept of Property

The search for a coherent conceptual understanding of property at common law, and a determination of its boundaries, has been a long and not particularly successful process.[4] However, within the dominant Anglo-Australian legal system, derived from the English common law, it is possible to identify some central tenets which underpin property and property rights.

In considering the concept of property, Tay and Kamenka[5] identify ownership as 'the prima facie ultimate power'[6] associated with poperty, carrying with it the 'right to use, control, enjoy and exclude others'.[7] It divides those who have power and privilege over the property from those who do not and in this sense is always private.[8] This power does not exist in a vacuum but in relation to its environment. Thus it is a 'relationship both to the item owned and to other people'.[9]

This social and spatial relationship finds expression as a series or bundle of rights that the owner and others exercise in relation to the property and to each other.[10] The power of ownership is central to what is or is not said to be property and, further, allows dominant groups to influence the determination of what is or is not property; Native Americans, women,[11] and colonised peoples in Africa,[12] for example, have historically been denied property rights within this framework of power.

4 See for example K Gray, 'Property in Thin Air' (1991) 50 *Cambr LJ* 252; B Edgeworth, 'Post-Property?: A Post-Modern Conception of Private Property' (1988) 11 *UNSWLJ* 87.

5 A Tay & E Kamenka, 'Introduction: Some Theses on Property' (1988) 11 *UNSWLJ* 1.

6 Id at 1.

7 Ibid.

8 Id at 2.

9 Id at 1.

10 Id at 4.

11 J Singer, 'Re-Reading Property' (1992) 26 *New England Law Review* 711 at 718-720; CB Macpherson (ed), *Property: Mainstream and Critical Positions* (Uni of Toronto Press, 1983) p 1.

12 P McAuslan, 'Land Policy: A Framework for Analysis and Action' (1987) 31 *Journal of African Law* 185; W Neale 'Property in Land as Cultural Imperialism or Why Ethnocentric Ideas Won't Work in India and Africa' (1985) XIX(4) *Journal of Economic Issues* 951. The exercise of this power in relation to Australia's indigenous people is discussed below.

But as Tay and Kamenka and others recognise, rights of property are not absolute[13] and there are limitations on ownership,[14] as well as changes in the bundle of rights that constitute property.[15] This view of property stems from a variety of sources, and within the liberal tradition of the English and Australian common law systems the basic concept of the right to use, control, enjoy and exclude others appears to have been the dominant view.[16]

Two well-known cases in which this view of property was profoundly significant were *Victoria Park Racing v Taylor*[17] and *Milirrpum v Nabalco*.[18]

Victoria Park Racing v Taylor

Victoria Park involved an action in nuisance brought by a company which conducted race meetings. The defendants built a tower on adjoining land and broadcast the races on radio, reducing attendance at the meetings and harming the plaintiff's business. As Gray points out, 'the central issue—so central that it lay largely unspoken—was whether the defendants had taken anything that might be regarded as the plaintiff's "property".'[19]

The plaintiff was unsuccessful. The majority of the High Court found that the defendant had not deprived the plaintiff of anything in the nature of property. Latham CJ found that it was not possible to have property in a spectacle.[20] McTiernan J based his decision on the fact that there was no 'element of exclusiveness ... in the knowledge which the defendants participate in broadcasting'.[21] Dixon J's view was based on a similar notion. His Honour said that it is 'the intangible or incorporeal right [a plaintiff] claims falls within a *recognised category* to

13 Gray, note 4 above, at 296; Macpherson, note 11 above.

14 Tay & Kamenka, note 5 above, at 1.

15 Id at 5ff.

16 See for example: Tay & Kamenka, note 5 above; M Cohen, 'Property and Sovereignty' (1927) 13 *Cornell LQ* 8; S Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Clarendon, 1991); D Jackson, *Principles of Property Law* (LBC, 1967); F Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers LR* 357.

17 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

18 *Milirrpum and Ors v Nabalco Pty Ltd and The Commonwealth of Australia* (1970) 17 FLR 141.

19 Gray, note 4 above, at 266.

20 (1938) 58 CLR 479 at 483.

21 Id at 525.

which legal or equitable protection attaches'[22] which gives rise to a remedy that will protect the exclusiveness of property.[23]

The case provides an insight into the way in which the courts determine whether a resource or an interest is property. Rather than rely on all the indices identified by Tay and Kamenka, Gray argues that the key factor, exemplified by the majority in *Victoria Park*, is whether the resource is 'excludable', that is, whether 'it is feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource.'[24] The excludability of a resource, which may be assessed on physical, legal or moral grounds,[25] will determine its 'propertiness'.

In *Victoria Park*, it was not physically possible to exclude the defendants from viewing the racecourse.[26] Nor was it legally possible to exclude the resource, the right of exclusiveness claimed by the plaintiff not known to the law.[27] In relation to his notion of moral excludability, Gray points to the court's refusal in *Victoria Park* to limit the free communication of observable events as the basis for arguing that there are some matters in the realm of human or civic rights that fall outside 'the field of property'.[28] He argues that courts are required to 'engage constantly in a range of latent policy decisions which shape the contours of the concept of property'[29] and thus what is revealed 'is a power relation being legally sanctioned control over access to the benefits of excludable resources.'[30]

22 Id at 509 (emphasis added).

23 Dixon J relied on the dissent of Brandeis J in *International News v Associated Press* 248 US 215 (1918) who said (at 250): 'An essential element of individual property is the legal right to exclude others from enjoying it.'

24 Gray, note 4 above, at 268.

25 Id at 269.

26 (1938) 58 CLR 479 at 494 per Latham CJ; that is, it would never be possible to build a fence or screen sufficient to prevent the neighbour from looking into the racecourse.

27 Id at 521 per McTiernan J.

28 Gray, note 4 above, at 283. Gray also relies on the High Court decisions in *Davis v Commonwealth* (1988) 166 CLR 79, which he characterises as linguistic exclusion, and *Gerhardy v Brown* (1985) 159 CLR 70, which he characterises as territorial exclusion—ie that in some cases the exercise of property rights might be limited by some superior claim.

29 Gray, note 4 above, at 281.

30 Id at 295.

Milirrpum v Nabalco

Milirrpum v Nabalco provides perhaps the most well-known example of the strict application of the basic property concept of the right to use, control, enjoy and exclude others from a particular resource. The circumstances of the case are well known: members of a number of clans in Arnhem Land brought an action challenging the validity of certain mineral leases granted by the Commonwealth to Nabalco. The grant was challenged on the basis that it contravened rights retained by the clans in the land, such rights and interests having survived the acquisition of sovereignty by the Crown.[31] The plaintiffs argued that the relationship to land enjoyed by the clans was a recognisable and proprietary interest.[32]

Taking account of earlier Privy Council decisions that suggested both the difficulty of the task[33] and the dangers of engaging in it,[34] Blackburn J found that:

> there is so little resemblance between property, as our law, or what I know of any other law, understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests.[35]

31 The crucial part of the decision involved a finding that, as a matter of law, NSW was a settled colony and, as a result, no rights or interests in land survived the acquisition of sovereignty by the Crown (at 203 and 245). See: J Hookey 'Settlement and Sovereignty' in P Hanks & B Keon-Cohen (eds), *Aborigines and the Law* (Allen & Unwin, 1984) p 1; B Hocking, 'Does Aboriginal Law Run in Australia?' (1979) 10 *Federal Law Review* 161.

32 The argument required a finding that the nature of the clans' relationship to land amounted to a proprietary interest in order to bring the interest within the purview of the *Lands Acquisition Act* 1955-1966 (Cth) and thus render the grant of mineral leases to Nabalco invalid.

33 In *St Catherine's Milling and Lumber Co v The Queen* (1888) 14 AC 46, the Privy Council characterised the interest of the Ojibbeway Indians as, at best, a personal or usufructuary right. In *In re Southern Rhodesia* [1919] AC 211 at 233, the Privy Council suggested that the gulf between some tribes and the 'the legal ideas of civilized society ... cannot be bridged. It would be idle to impute to such people some shadow of rights of property as we know them.'

34 In *Amodu Tijani v Secetary, Southern Nigeria* [1921] 2 AC 399 at 402, the Privy Council indicated that 'it is necessary to consider the real character of the native title to land' and that caution must be exercised not to confine the 'title conceptually in terms which are appropriate only to systems which have grown up under English law'.

35 (1970) 17 FLR 141 at 273.

Blackburn J indicated that the way to approach the issue was to consider 'the substance of proprietary interests rather than their outward indicia.'[36] The substance, his Honour said, was

> the right to use or enjoy, the right to exclude others, and the right to alienate ... [B]y this standard I do not think that I can characterize the relationship of the clan to the land as proprietary.[37]

The nature of the clans' relationship was found by his Honour to be varied. There were significant spiritual and mythological links which manifested themselves in association with particular sites and the performance of rituals, including 'fructification and renewal of the fertility of the land'.[38] These were, however, indicative of an obligation to the land, rather than of ownership. Nor were they indicative of 'any significant economic relationship.'[39] Even though the use of resources of the land provided the essential needs for life,[40] permission for such activities was not necessarily required.[41]

Thus, these factors did not equate with any known property principle within English law. Rather, the focus of Blackburn J's inquiry was on the right to exclude, which he said could not be found because 'it was never suggested that ritual rules ever excluded members of other clans *completely* from clan territory; the exclusion was only from sites'.[42] Nonetheless, the search for indicia that go to the *substance of property* is not immediately evident in Blackburn J's reasoning. On its face, his inquiry ultimately appears to result in a mechanical application of the standard principle of property interests.[43]

Gray's proposition concerning power, property and non-excludable resources resounds in both *Victoria Park* and *Milirrpum*. Both cases exhibit a rigid adherence to the dominant common law notion of 'property' as the only expression of relationships to land recognisable at law. Consequently, both cases illustrate the common law's inability to go beyond the known and the familiar. In *Milirrpum*, in spite of an emphasis on 'the substance of proprietary interests',[44] it is submitted that the process of decision-making focussed on the outward indicia:

36 Id at 272.
37 Ibid.
38 Id at 270.
39 Ibid.
40 Id at 169-170.
41 Id at 182.
42 Id at 272 (emphasis added).
43 Blackburn J's reasoning is discussed further below.
44 (1970) 17 FLR 141 at 272.

do these aspects of the clans' land-use relationships fit the standard rules? The lack of an overriding right to physically exclude others from the whole of the clans' claimed territory appeared to be vital. Yet, there was a finding that the clans had some capacity to exclude, even if this 'exclusion was only from sites'.[45]

What then were the factors that prevented this judicial exercise from recognising the clans' relationships with land, even if limited to this specific right of physical exclusion, as property? What in reality was the relationship between the substance of property rights and the inquiry into the nature of the clans' relationship with the land, and why could some congruence not be found?

Indigenous Relationships with Land and the Common Law

Milirrpum is important because it represents the first attempt to consider whether indigenous relationships with land could be accommodated by Australian common law. The interconnectedness of common law property notions and indigenous relationships with land are central to the argument of this article.

Indigenous peoples' relationships with land are complex and various, revolving around spatial, spiritual and social organisation deriving from, and given meaning through, connections to particular land. They represent a complex of meanings which explain the universe, and are the source of laws, customs, identity and meaning. They provide a 'kind of narrative of things that once happened; a kind of charter of things that still happen; and a kind of logos or principle of order transcending everything significant for Aboriginal man.'[46]

Land and the landscape provide the central connecting element in this set of meanings, although the detail of the relationships, meanings and obligations deriving from them may differ between groups.[47] These relationships have been identified as primarily spiritual,[48] but

45 Ibid.

46 W Stanner, *White Man Got No Dreaming: Essays 1938-1973* (ANU Press, 1979) at p 24.

47 See for example: N Tindale, *Aboriginal Tribes of Australia* (ANU Press, 1974); N Sharp, *Stars of Togai: The Torres Strait Islanders* (1993); and F Myers, *Pintupi Country Pintupi Self* (Australian Institute of Aboriginal Studies, 1986) which provide detailed discussion of very different indigenous groups and cultures.

48 See for example: A Elkin, *The Australian Aborigines* (4th ed, 1964); W Stanner, 'Aboriginal Territorial Organization: Estate, Range, Domain and Regime' (1965) 36 *Oceania* 1; W Stanner, note 46 above; K Maddock, *Anthropology, Law and the Definition of Australian Aboriginal Rights to Land* (1980); M Meggitt, *Desert People* (1986).

the relationships to land cannot, and should not, be limited to spiritual or religious representations, since the use of the land's resources has always been central to indigenous concepts of relationships, rights and responsibilities in relation to land.[49]

The emphasis on the spiritual has arguably been at the heart of the common law's failure to recognise indigenous land interests—a problem exacerbated rather than alleviated by the High Court decision in *Mabo*. Although Blackburn J in *Milirrpum*[50] recognised some connection between spiritual association and economic uses of land, he failed to recognise the dominant spiritual relationships as encompassing any property rights. This view has been overtaken to some extent by the High Court's decision in *Mabo*, where in determining that the common law of Australia recognises a form of native title, the Court considered the nature of the interest.[51] Varying views were expressed by the majority as to the proprietary nature of native title. Was it proprietary or personal,[52] for example, or merely usufructuary?[53] Was it capable of alienation?[54] Must possession be exclusive?[55] While Brennan J suggested that there needed to be some element of exclusivity to establish the proprietary nature of the interest,[56] and Deane and Gaudron JJ considered that 'the personal rights conferred by common law native title do not constitute an estate or interest in

49 See for example Myers, note 47 above; Elkin, note 48 above; Stanner, note 48 above. See also N Sharp, 'No Ordinary Case: Reflections Upon *Mabo (No 2)*' (1993) 15 *Sydney Law Review* 143 at 151-156; R Bartlett, 'The Source, Content and Proof of Native Title at Common Law' in R Bartlett (ed), *Conference on Resource Development and Aboriginal Land Rights* (1993) p 48, who discusses the different approach to the economic/spiritual divide in North American jurisprudence.

50 (1970) 17 FLR 141 at 270.

51 The threshold issues of the basis and effect of the acquisition of sovereignty are not directly relevant to this paper. G Simpson, '*Mabo*, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *MULR* 195 and D Ritter, 'The 'Rejection of Terra Nullius in *Mabo*' (1996) 18 *Sydney Law Review* 5 both discuss the ambiguous way in which the High Court dealt with the settlement/sovereignty issue. Simpson argues that, in rejecting *terra nullius*, the Court created a new and previously unknown category of colony for acquistion of sovereignty, namely an occupied settled colony. On the other hand, Ritter argues that it was not necessary for the Court to reject *terra nullius* in order to reach its decision and that in fact it did not.

52 (1992) 175 CLR 1 at 51-2 per Brennan J; at 110 per Deane and Gaudron JJ; at 185 per Toohey J.

53 Id at 61 per Brennan J; at 87, 110 and 112 per Deane and Gaudron JJ.

54 Id at 60 per Brennan J; at 88 per Deane and Gaudron JJ.

55 Ibid.

56 Id at 51.

land itself',[57] ultimately the majority agreed that, at least, the interest was capable of protection by the common law.[58]

This was the case even if the particular form of native title was not recognisable as proprietary according to 'European' concepts of proprietary interests.[59] Rather, the title 'has a common law existence because the common law recognises the survival of traditional interest'.[60] The substance of the interest is ascertained according to the particular laws and customs of each indigenous group. That such interests are different from, or even incomprehensible to, the common law is not relevant to the threshold question of the existence of traditional title.

> [I]nquiries into the nature of traditional title are essentially irrelevant. A determination that a traditional right or duty amounts to a proprietary interest ... will not reveal the existence or non-existence of traditional title, except in so far as it indicates that reasonably coherent rights and duties were, and are, exercised in an area of land.[61]

In both *Milirrpum* and *Mabo*, courts were required to find a method of dealing with the religious or spiritual aspect of the indigenous relationship to land. In *Milirrpum*,[62] Blackburn J could find no significant economic relationship with the land[63] and focused on the spiritual association. Discerning a significant difference between the two, his Honour emphasised the spiritual relationship at the expense of an economic relationship. In *Mabo*, Moynihan J, in his findings of fact, found a significant economic relationship with the land that was akin to European land uses such as cultivation and gardening on small plots of individually owned land—a direct economic exploitation of the land.[64] This emphasis on the dichotomy of spiritual/economic use of, and relationships with, land has been emphasised by Williams[65] and Sharp[66] in their analyses of *Milirrpum* and *Mabo* respectively.

57 Id at 110 per Deane and Gaudron JJ.

58 Id at 61 per Brennan J; at 113 per Deane and Gaudron, JJ; at 187 per Toohey J.

59 Id at 59 per Brennan J; at 85-6 per Deane and Gaudron JJ; at 187 per Toohey J.

60 Id at 187, relying upon the Canadian cases *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) DLR (3d) 513 and *Calder v Attorney-General (British Columbia)* (1973) 34 DLR (3d) 145.

61 Id at 187.

62 (1970) 17 FLR 141.

63 Id at 270.

64 (1992) 175 CLR 1 at 16-19, 34.

65 N Williams, *The Yolngu and Their Land* (1986).

66 Sharp, note 49 above.

Williams suggests that Blackburn J overplayed the spiritual aspect and ignored the link between the economic use of land and its spiritual importance.[67] Sharp is highly critical of both Blackburn J in *Milirrpum* and Moynihan J in *Mabo* for emphasising the link between economic exploitation of land and the capacity of the Anglo-Australian legal system to recognise indigenous land interests.[68]

The problem posed by spiritual issues in the recognition of property rights, as exhibited in *Milirrpum*, has been overcome to some extent by the *Mabo* approach. However, while it allows for a diversity of relationships to land and relieves potential title holders of the requirement to 'fit' their relationships into discernible common law interests, it may also have the effect of diminishing their interest.[69] In particular, it suggests that native title, as an interest in land in the form found by the Court and subject to the strict rules of extinguishment,[70] is the only form of interest in land that might be recognised.

Arguably then, the effect of *Mabo* has been, paradoxically, twofold. On the one hand, it has created a 'space' within which the 'spiritual' can be recognised as a tenet of a specific group's native title, rather than as a necessary element of the title itself, and without necessarily diminishing it.[71] On the other hand, it has removed from considera-

67 Williams, note 65 above, at p 202.

68 The emphasis on the economic aspects led Brennan J to conclude in *Mabo* that the Murray Islanders may have been able to establish that they cultivated the land and were not therefore *terra nullius* in the pre-*Mabo* sense: (1992) 175 CLR 1 at 34.

69 R Bartlett, 'Native Title' (1995) 20 *MULR* 282 at 283; N Pearson, '204 Years of Invisible Title' in M Stephenson & S Ratnapala (eds), *Mabo: A Judicial Revolution* (University of Queensland Press, 1993) p 75; M Mansell 'The High Court Gives an Inch But Takes Another Mile' (1992) 57 *Aborignal Law Bulletin* 4.

70 In *Mabo* (1992) 175 CLR 1 all the majority judgments recognised that native title was subject to extinguishment by valid executive act and that once extinguished, the title could not be revived: at 63-64 per Brennan J; at 110 per Deane and Gaudron JJ; at 194-196 per Toohey J. See also: R O'Hair, '*Mabo* and Land Rights: Searching for a Golden Thread' in Stephenson & Ratnapala, note 69 above, at p 63; P van Hattem, 'The Extinguishment of Native Title' in R Bartlett (ed), *Conference on Resource Development and Aboriginal Land Rights* (1992) p 61; G McIntyre, 'Aboriginal Title: Equal Rights and Racial Discrimination' (1993) 16 *UNSWLJ* 57; *WA v The Commonwealth* (1995) 183 CLR 373; K McNeil, 'Racial Discrimination and the Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181.

71 However, the process of proving the tenets of title (including the spiritual) may itself involve a diminution of the beliefs because of the need for disclosure: see B Keon-Cohen, 'Some Problems of Proof' in Stephenson & Ratnapala (eds), note 69 above, at p 185; G McIntyre 'Proving Native Title' in Bartlett & Meyers (eds), *Native Title Legislation Conference* (1994) p 121; N Hancock 'Is This The Spanish Inquisition?: Legal Procedure, Traditional Secrets and the Public Interest' in J

tion by the common law any interests in land that indigenous people may claim that do not amount to native title.

The range of duties, responsibilities and activities undertaken in relation to land encompasses both the spiritual and the economic. They may involve hunting, fishing, and such diverse duties as cleaning waterholes, the correct performance of ceremonies related to the land and the continuation of animal and plant species, and the making and maintaining of ceremonial artefacts. On the *Mabo* view, these activities have no impact on whether any rights might be claimed other than to detail the content of the title claimed. Meyers has argued that native title need not be so narrowly confined and that the nature of rights claimed, arising out of traditions and customs and a spiritual relationship to the land, may give rise to a right nonetheless acknowledged and 'identifiable as common law or a common law-like right', particularly the right to hunt and fish.[72] It has also been argued that such rights might arise as a result of custom.[73] Yet the restrictive approach in *Mabo* suggests that such an approach is not relevant in determining the nature and status of the interest.

In *Milirrpum*, the relationship to land was not recognised as property because it *did not* 'fit', whereas in *Mabo* the relationship to land was not recognised as property because it *need not* fit. In its search to recognise the significance of the particular relationships of indigenous people to land, the courts have privileged the spiritual or religious over the economic use of land, limiting the possible sources of common law property rights that might protect these relationships to a general *sui generis* interest,[74] requiring proof of a continuing connection to land[75] and subject to extinguishment.[76]

What is most significant here is unravelling the process by which the Court recognised the native title interest but divorced it from com-

Finlayson & A Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (1996) p 91.

72 G Meyers 'Aboriginal Rights to the 'Profits of the Land': The Inclusion of Traditional Fishing and Hunting Rights in the Content of Native Title' in G Meyers & R Bartlett (eds), *Native Title Legislation in Australia* (Perth, 1994) p 213 at p 223; C Bell, note 1 above, at 464.

73 D Sweeney, 'Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia' (1993) 16 *UNSWLJ* 97; G Meyers, 'Implementing Native Title in Australia: The Implications for Living Resources Management' (1995) 14 *University of Tasmania Law Review* 1.

74 (1992) 175 CLR 1 at 89 per Deane and Gaudron JJ.

75 Id at 67 per Brennan J.

76 Ibid.

mon law interests. If Blackburn J rigidly applied the common law indices of property, with the effect that 'the power of (the common law) to determine the truth'[77] was affirmed, then arguably the Court in *Mabo* was engaged in the same process. While providing a means of overcoming the lack of commensurability of indigenous land relationships and the common law, the decision had the effect of producing a new 'truth'—that indigenous relationships to land could only be recognised as 'native title'. Howe[78] relies on Foucault[79] to support this analysis of *Mabo*. Central to this argument is the notion of the power relations inherent in the recognition of native title and the assertion of legal 'truth'.[80] In particular, Howe argues that by its reinterpretation of historical 'truths', the Court has in fact established a new set of rules about indigenous people's relationships to land and property: 'the translating of conditional historical truths into legal truths has a performative function—it is to induce effects of truth.'[81] One 'truth' revealed in *Mabo* is that indigenous relationships to land may now only be recognised in the form of native title.

Ritter,[82] while arguing primarily about the role of *terra nullius* in *Mabo*, makes a similar point: power relations operate to produce the effects of truth about indigenous people, land and law. The effect of the decision, Ritter suggests, has been to 'relegitimate the existing social hierarchy' and while recognising indigenous land interests, to subjugate them to the dominant system and the rule of law.[83] In the context of property, Howe suggests this process operated to 'conceal power relations at work in the conceptualisation of "property"'[84] which, while classifying 'native title' as a property interest, considered it a lesser interest than those recognised by the common law, especially the fee simple interest.[85]

77 R Hunter, 'Before Cook and After Cook: Land Rights and Legal Histories in Australia' (1993) 2 *Social and Legal Studies* 487 at 492.

78 A Howe, 'A Post-Structuralist Consideration of Property as Thin Air—*Mabo*: A Case Study', paper presented to the Culture, Sex, Economies Conference (Melbourne, 1994).

79 M Foucault, 'The History of Sexuality' in C Gordon (ed), *Power/Knowledge* (Harvester, 1980); M Foucault, 'The Order of Discourse' in M Shapiro (ed), *Language and Politics* (Blackwell, 1984).

80 Note 78 above, at p 5.

81 Ibid.

82 D Ritter, note 51 above, at 9-10.

83 Id at 32.

84 Note 78 above, at p 5.

85 Id at pp 11-12. The Court did find that extinguishment must not breach the *Racial Discrimination Act* 1975 (Cth): *Mabo v Queensland* (1988) 166 CLR 186; *Mabo v*

These analyses of *Mabo* resonate with Grey's argument about the value judgments[86] and power relations[87] inherent in courts' decisions about what resources constitute property. Historically, these power relations and value judgments have resulted in the dominant or powerful asserting their view of property.[88] The assertion of the dominant power relationship through the dominant legal system resulted in the non-recognition of indigenous relationships with land before *Mabo*, and in *Mabo* itself the recognition was diminished and confined. The notion of moral non-excludability might be seen in the limited space for property rights—there are, as Gray says,[89] some things that should not be propertised and this vague, spiritual, even unprovable relationship with land is one of these.

If property is a set of social and legal relationships in space and time then the dominant relationship 'is a power relation, being legally sanctioned control over access to the benefits of excludable resources.'[90] *Mabo* sought to expand the purview of the common law by finding a place for indigenous relationships to land, including spiritual relationships. However, in its particular formulation of that 'place', the decision has had a limiting effect. In unravelling the place of indigenous interests in land, courts have narrowly applied common law concepts with the effect of excluding the core element of the relationship—the obligations and uses of land derived from the relationship—which are different from, and have no place within, the conventional common law view of property. As a result, the possibility of claiming any property interest outside a narrow native title interest has been almost obliterated. What then are the consequences of this process for the protection of specific land-based cultural heritage?

Heritage Protection Regimes

Legislative regimes for the protection of land-based cultural heritage are of recent origin. Acts relating to preservation of relics or archaeological finds were passed generally in the 1960s[91] and early

Queensland (No 2) (1992) 175 CLR 1; *WA v The Commonwealth* (1995) 183 CLR 373.

86 Gray, note 4 above, at 281.

87 Id at 295.

88 Notes 11 and 12 above.

89 Gray, note 4 above.

90 Id at 295.

91 *Aboriginal and Historic Relics Preservation Act* 1965 (SA); *Aboriginal Relics Preservation Act* 1967 (Qld).

1970s[92] and the *Aboriginal Heritage Act* 1972 (WA) became the first legislation protecting land-based cultural heritage.[93] The Commonwealth passed its own legislation twelve years later: the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth). Prior to this series of legislation, there had been legislation establishing reserves for the benefit of indigenous people with limitations on access and use.[94] While this legislation might be described as 'beneficial',[95] none was focused on heritage or involved regimes for its protection. The tenor of the legislation was paternal and protective and the legislation did not provide for participation in the management of the reserves by indigenous people.

State Heritage Legislation

The attitudes underlying State heritage protection legislation may be gauged from the provisions of each Act and the mechanisms by which they provide protection. The early legislation was concerned to preserve heritage as a relic of pre-1788 Australian history, rather than as the living cultural heritage of indigenous people. The name of the Victorian legislation, for example—the *Archaeological and Aboriginal Relics Preservation Act*—gives an indication of this focus. The Victorian Act provided for protection of relics which were defined as 'pertaining to the past occupation of the Aboriginal people of Victoria [including] any Aboriginal deposit, carving, drawing, skeletal remains ...'.[96] The Act confirmed Crown ownership of relics, with the Director of the Museum having responsibility for their protection. The Act established an Archaeological Advisory Committee of ten members of whom only one was to be an indigenous person.[97] While the Act requires strict compliance with its provisions,[98] its focus on prehistory and objects, with ownership vested in the Crown and power

92 *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic).

93 Other States and Territories passed similar legislation at various stages, eg *Native and Historical Objects and Areas Preservation Ordinance* 1976 (NT).

94 For example such reserves could be proclaimed under s 29 of the *Land Act* 1933 (WA). Such proclamations usually involved reservations of land for 'the use and benefit of Aborigines' but the reserves were not controlled by them. See also *Aboriginal Land Trusts Act* 1966 (SA).

95 *Mabo (No 2)* (1992) 175 CLR 1 at 68 per Brennan J; *Pareroultja and Ors v Tickner* (1993) 42 FLR 32.

96 *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic), s 3.

97 This provision was amended by the *Archaeological and Aboriginal Relics Preservation (Amendment) Act* 1980 (Vic) to increase the number of indigenous members to three.

98 *Berg v Council of the Museum of Victoria and Others* [1984] VR 613.

and control in museums, is indicative of the general approach to indigenous heritage since colonisation—a preoccupation with heritage as an object of curiosity or study.[99] This Act remains current in Victoria.[100]

Attempts to amend the Victorian legislation in 1986 failed to pass the Legislative Council. Consequently, at the request of the Victorian Government, the Commonwealth inserted Part IIA, 'Victorian Aboriginal Cultural Heritage', into the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth), establishing a special regime for heritage protection within Victoria.[101] Two major changes were introduced with this legislation. The first was the recognition of the central role of indigenous people in protecting their heritage. Indigenous communities[102] were empowered to consider applications for protection of heritage and advise the Minister in relation to them,[103] to make application to the court for emergency declarations,[104] and to erect notices and enter upon land to erect notices.[105] Substantial penalties for interference with or destruction of aspects of heritage, similar to those contained in the balance of the Commonwealth Act, were included.[106]

The second change of major importance was in the manner of dealing with land-based areas of significance. The purview of the Act was expanded to include land-based cultural heritage, by providing in s

99 Id; M Harris, 'Scientific & Cultural Vandalism' (1996) 21 *Alternative Law Bulletin* 28.

100 The Act is being reviewed but is yet to be substantially amended. The *Heritage Act* 1995 (Vic) made certain amendments to the Act but specifically excluded 'a place or object of cultural heritage significance only on the ground of its association with (a) Aboriginal tradition; or (b) Aboriginal traditional use': s 5.

101 *Aboriginal and Torres Strait Islander Heritage Protection (Amendment) Act* 1987 (Cth); G Nettheim, 'Victoria Requests the Commonwealth' (1987) 25 *Aboriginal Law Bulletin* 8; C Warren, 'Aboriginal Power Over Cultural Heritage' (1991) 16 *Legal Service Bulletin* 6.

102 A number of communities were named in the Schedule to the Act.

103 *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth), s 21D(1).

104 Id, s 21C(1)(b).

105 Id, s 21G(1) and (2).

106 Contravention of Declarations in relation to 'places' carries a penalty of $10,000 or 5 years imprisonment for an individual or $50,000 for a body corporate: s 21H(1); wilfully defacing or damaging or interfering with a 'place' carries a penalty of $10,000 or 5 years imprisonment for an individual or $50,000 for a body corporate: s 21U(1). However no prosecutions have ever been instituted.

21A protection for Aboriginal places 'that are of particular significance to Aboriginals in accordance with Aboriginal tradition'.[107]

This protection of *land* is significant. However, in spite of involvement by Aboriginal people as discussed above, the means of protection is ultimately dependant upon the exercise of discretion by the Minister.[108] There is no 'as-of-right' protection.[109] Even where a place of significance has been identified, a local Aboriginal community may consent to interference with a place[110] and, in the absence of its consent, the Minister may either consent to such interference[111] or revoke a declaration.[112] While this Victorian regime provides a means of protecting land-based cultural heritage, ultimately it is dependant upon Ministerial goodwill with no obligation to protect cultural heritage.

Legislation introduced during the 1970s began to recognise land-based cultural heritage. The thrust of the *Aboriginal Heritage Act* 1972 (WA) provides a useful example of this legislation. In many respects it differed little from the Victorian regime in its definitions,[113] method of protection (via declarations and control of objects by the Museum),[114] offences for interference,[115] the role of the Museum[116] and the absence of an indigenous voice in heritage protection. However, the Act extended the protection accorded land-based heritage by providing protection for 'Aboriginal sites', which were not confined to archaeological sites as in the Victorian Act, but extended to include 'any place, including any sacred, ritual or ceremonial site, which is of importance or special significance to persons of Aboriginal descent.'[117] The Act was not only expressed in the present tense, indicating the contemporary significance of land to indigenous people,

107 Id, s 21A. 'Aboriginal tradition' means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships: s 3.

108 Id, s21E(3).

109 The issue and consequences of the Minister's exercise of discretion are discussed more fully below.

110 *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) s 21U(1).

111 Id, s 21U(5).

112 Id, s 21E(4).

113 *Aboriginal Heritage Act* 1972 (WA) s 4.

114 Id, s 40.

115 Id, ss 17 and 43.

116 Id, ss 28-39.

117 Id, s 5(b).

but its language also acknowledged that attachment to land or place represented some special relationship between indigenous people and land which might form the basis of special protection for that place.[118]

The Act provided protection through declarations[119] made in relation to specific places by a system of notices and fences.[120] The Act provided for the protection of such sites on private land,[121] subject to consideration of objections to such declarations[122] and compensation for compulsory acquisition of land.[123] Compulsory acquisition occurred by operation of the statute, vesting in the Museum on behalf of the Crown 'the exclusive right of occupation and use of ... every protected area'.[124] Interestingly, the Act allowed the Museum to enter into covenants with people with an interest in land on which a site was located. Such covenant could be either permanent or for a specified time and could impose conditions on the use of the land.[125] The covenant could be dealt with in the same manner as other covenants under the *Transfer of Land Act* 1893 (WA).[126]

These latter provisions suggest an emergence of the 'property' aspects of the regime, vesting property in the Crown and accomodating interaction between this heritage property interest and interests under the land registration system. However, just as these 'property' provisions did not involve indigenous people, the Act did not provide for indigenous involvement in deciding whether or not a site was significant—it gave that power to the Trustees of the Museum.[127]

Recognising the existence of competing interests in a site, the Act established a process for allowing work to be undertaken which would be deleterious to a site.[128] The decision to permit injury to a site was largely in the hands of the Trustees of the Museum. One of few amendments to the Act altered this process by significantly increasing

118 'Site' is the language of the Act: s 4.
119 Id, s 21.
120 Id, s 23.
121 Id, s 18.
122 Id, s 18.
123 Id, s 22(2).
124 Id, s 22(1).
125 Id, s 27(1).
126 Id, s 27(3).
127 Id, s 18.
128 Id, s 18.

the power of the Minister in the decision-making process and providing for appeal to the Supreme Court by the owner of the land.[129]

The South Australian *Aboriginal Heritage Act* 1988 represented a significant change in the approach to protecting heritage. This Act substantially transferred control and management of heritage to local indigenous people, both in terms of deciding what constitutes heritage[130] and who should make decisions in relation to it.[131] It did not change the ultimate power of the Minister to authorise the damage or destruction of a site, however.[132] It was this power that became the subject of scrutiny in the *Kumarangk* case, discussed below.[133]

The Commonwealth Act

In 1984, the Commonwealth passed the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984.[134] With the exception of Part IIA of the Act which applied only to Victoria, the Act did not seek to establish a regime for identifying and protecting sites, but sought only to prevent damage to sites when State legislation was ineffective in providing protection. The Act was intended to operate concurrently

129 Id, s 6. The Minister is empowered to direct the Trustees in the exercise of their discretion and to make the final decision in relation to interference with a site: M Dillon, '"A Terrible Hiding ..." Western Australia's Aboriginal Heritage Policy' (1983) XLII *Australian Journal of Public Administration* 486; D Saylor, 'Aboriginal Cultural Heritage Protection in Western Australia: The Urgent Need for Protection' (1995) 3(76) *Aboriginal Law Bulletin* 9; S Hawke & M Gallagher in *Noonkanbah* (Fremantle, 1989) at p 314 refer to the events that led to these amendments and their use in the Noonkanbah dispute. The need for further amendments has been acknowledged by successive Western Australian governments. The most recent review was conducted by Dr Clive Senior in 1995. Amendments in the *Aboriginal Heritage Amendment Act* 1995 made only minor amendments to the Act. The fragility of the right granted is evidenced by the *Aboriginal Heritage (Marandoo) Act* 1992 under which the Marandoo nickel project was removed from the impact of the provisions of the *Aboriginal Heritage Act* 1972.

130 *Aboriginal Heritage Act* 1988 (SA) s 3 defines Aboriginal tradition as 'traditions, observances, customs or beliefs of the people who inhabited Australia before European colonization and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonization.'

131 Sections 7 and 8 of the *Aboriginal Heritage Act* 1988 (SA) established an Aboriginal Heritage Committee comprising Aboriginal people. The Committee has power to identify and protect heritage in accordance with the Act.

132 Id, s 23.

133 The exercise of this power during the *Kumarangk* case is discussed in detail below.

134 The history and operation of this and other Commonwealth legislation directed at protecting a range of indigenous cultural heritage is discussed in G Neate, 'Power, Policy, Politics and Persuasion: Protecting Aboriginal Heritage Under Federal Laws' (1989) 6 *Environmental and Planning Law Journal* 214.

with State legislation and to be used as a last resort,[135] applying only to sites in 'serious and immediate threat of injury or desecration'.[136] However, as with the legislation already considered, the main technique for protection was the exercise of Ministerial discretion.

The Act included references to land and land relationships in the range of things protected. A declaration, either emergency or otherwise, may be made when a 'significant Aboriginal area' is threatened.[137] A 'significant Aboriginal area' is inter alia defined as 'an area of land ... of particular significance to Aboriginals in accordance with Aboriginal tradition.'[138] 'Aboriginal tradition' is defined as:

> a body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.[139]

The combination of these definitions establishes a link between land and traditions. The nature of the interest protected is not just based upon historical or archaeological significance, but upon some other set of tangible or intangible relationships with particular land. The form of those relationships is limited to their indigenous source and the requirement that they be of 'particular significance'. Otherwise, there is a degree of freedom in how the relationships might be characterised and explained. That is, on the face of the legislation, there are no other criteria to be met by indigenous people seeking the protection provided by the Act.

Additional requirements and obligations which are imposed on the Minister include consideration of a report by a person appointed by the Minister[140] dealing with certain matters set out in section 10(4) of the Act. These include 'the significance of the area to Aboriginal people',[141] 'the nature and extent of the threat of the injury',[142] and 'the effects the making of the declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginals'.[143]

135 *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth), s 7.
136 Id, s 9(1)(b)(ii).
137 Id, ss 9 and 10.
138 Id, s 3.
139 Id, s 3.
140 Id, s 10(1), (3) and (4).
141 Id, s 10(4)(a).
142 Id, s 10(4)(b).
143 Id, s 10(4)(e).

These are in the nature of procedural requirements which go to the issue of *how* the decision is made under the Act and the proprietary interests of others, rather than the substance of the interest protected by the decision. These provisions require compliance[144] and any decisions may be reviewed under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).[145]

What is absent from these provisions is any right other than the right to make an application to the Minister for an emergency[146] or other declaration,[147] and to have the application dealt with in accordance with the Act. The existence of a relationship to land of the sort set out in the Act is akin to a threshold test, providing the Minister with guidance in the exercise of her or his discretion.[148] However, it carries with it no other rights and certainly no property rights, either at common law or arising from the legislation. The existence of the relationship does not provide the basis for establishing any interest in the land itself for indigenous people.

It was under the provisions of the Commonwealth Act that indigenous people with links to Kumarangk sought to protect their land-based cultural interests against the construction of a bridge that would link Kumarangk to the mainland at Goolwa in South Australia. Some of the significant legal events in the case provide the basis for exploring the contested relationship between indigenous people and their land-based cultural heritage which emerged from this legislative regime and the manner in which the dominant system gives its meaning to those relationships.[149]

144 *Tickner v Bropho* (1993) 114 ALR 409 at 419 per Black J.

145 The detail of these requirements is discussed further below.

146 *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth), s 9.

147 Id, s 10.

148 *Tickner v Bropho* (1993) 114 ALR 409 at 419 per Black J.

149 All the material relied upon in this article is available in the public domain. Historical and cultural material is derived from the work of missionaries, anthropologists and historians and law reports or commissions of inquiry in which these sources are quoted. Reliance on such material to the exclusion of indigenous voices has been severely criticised: R Coombe, 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 6 *Canadian Journal of Law and Jurisprudence* 249; T Birch, '"Real Aborigines": Colonial Attempts to Re-Imagine and Re-create the Identities of Aboriginal People' (1993) 4 *Ulitarra* 13; C Callison, note 1 above. In this article, the material is not used with any particular authority or as evidence of the 'truth' of such accounts. Rather it is intended to provide the background for an exploration of the ways in which such material is used within the legal process and the consequences of the use of such material.

The *Kumarangk (Hindmarsh Island)* Case

Kumarangk, or Hindmarsh Island, lies in Lake Alexandrina at the mouth of the Murray River in South Australia. The island became the focus of controversy as a result of a proposal for a tourist development on Kumarangk by Binalong Pty Ltd, a company controlled by Thomas and Wendy Chapman. Part of the proposal involved the construction of a bridge linking Kumarangk with the mainland at Goolwa. Over a period of six years, the proposal, and particularly the bridge, attracted political and legal attention. The bridge became the subject of exercises of Ministerial discretion under the *Aboriginal Heritage Act* 1988 (SA) and the *Aboriginal and Torres Strait Islander Heritage Act* 1984 (Cth). These exercises of discretion became the subject of judicial review and the substance of the Ngarrindjeri beliefs became the subject of a search for 'truth' in a Royal Commission.

Ngarrindjeri Occupation of Kumarangk

Groups of indigenous people, including the Ngarrindjeri, occupied Kumarangk and the Lower Murray area prior to the arrival of European sealers in the region in the early 1800s.[150]

The area now known as South Australia was physically colonised in 1836, although legally it was claimed by the British upon the settlement of New South Wales in 1788. The legal fiction, based on the notion of *terra nullius*, that the Crown acquired radical and beneficial title to all lands in the colony of NSW provided the basis for the systematic physical dispossession of the original inhabitants of that

150 The nature of the Ngarrindjeri associations with the area is at the centre of the dispute about the island. Reliance has been placed upon the work of early missionaries such as Taplin (see *Report of the Hindmarsh Island Bridge Royal Commission*, 1995, p 44) and anthropologists such as the Berndts (R & C Berndt, *A World That Was: The Yaraldi of the Murray River and the Lakes of South Australia*, Carlton, 1993). The Berndts' work provided the basis for the Royal Commission's elaboration of pre-colonisation Ngarrindjeri society: Royal Commission Report at pp 37-41. The fact that the island has become the centre of controversy provides a central challenge to the reliability of this work.

land.[151] A very brief summary of this physical dispossession appears in the Royal Commission Report.[152]

Prior to 1836, sealers 'forcibly abducted Aboriginal women from the coastal regions to become wives and labourers.'[153] During this time there were two waves of small pox which 'had an enormous impact ... upon the population',[154] and venereal disease introduced by the European population also had a severe impact on the indigenous population. By 1840, Kumarangk had been leased to Europeans. Some Ngarrindjeri remained on the island until early this century, when they were removed to the Port McLeay Mission which had been established in 1859 by George Taplin. 'Taplin's main intention was ... to (c)hristianise the Aboriginal people and he therefore saw little place for indigenous behaviour and beliefs in the future development of the people.'[155] Indigenous people were forcibly moved to the mission and, although some remained on the island, 'by 1910 the remaining few were moved to Point McLeay.'[156] The operation of the *Aborigines Act* 1911 (SA)[157] gave the chief protector of Aborigines extensive powers to restrict or force the movement of indigenous people at the Mission.[158]

As a result of changes in the *Aborigines Act* in the 1940s, some indigenous people were able to leave the Mission. This resulted in the further dispersal of the Ngarrindjeri people, a trend accelerated with the abolition of the restrictive laws in the 1960s.[159] While many Ngarrindjeri people still live at Point McLeay Mission, now known as 'Raukkan', many also live elsewhere. 'Settlement gradually effected

151 In *Mabo* (1992) 175 CLR 1 at 29, Brennan J described this process as follows: 'the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live.'

152 *Report of the Hindmarsh Island Bridge Royal Commission* (1995) referred to below as the 'Royal Commission Report', at pp 41-45.

153 Id at 42.

154 Id at 43.

155 Ibid.

156 Id at 45.

157 See C Mattingley & K Hampton (eds), *Survival in Our Own Land* (Adelaide, 1988) for a detailed discussion of this legislation.

158 The consequences of the power of movement have included an absence from their traditional lands, a break up of families and transformations in traditional practices and traditional knowledge.

159 *Aboriginal Affairs Act* 1962 (SA).

the total disposition and removal of most Aborigines from Hindmarsh Island'.[160]

The Bridge Proposal

The development on Kumarangk consisted of residential, business and service facilities and a 320-berth marina complex. An essential element of the development, and a condition of some approvals for the marina, was the building of a bridge from the mainland to the island, replacing the single cable-drawn vehicular ferry[161] which had provided access.[162] The bridge was to be constructed by the South Australian Government on the basis of a contribution from Binalong Pty Ltd, subject to a satisfactory Environmental Impact Statement. Until the bridge was completed, the development was to be limited to 160 allotments. This first phase was completed by 1993. Upon final completion, it was anticipated that the complex might have as many as 800 allotments.[163]

Work in Progress

Between 1989 and 1993, two studies into indigenous associations with the general area were undertaken in an attempt to ensure protection of indigenous interests.[164] Binalong Pty Ltd engaged Mr Rod Lucas to undertake an anthropological assessment of the area.[165] The Department of Environment and Planning commissioned an archaeological report from Dr Vanessa Edmonds for the purpose of locating, recording and assessing Aboriginal sites on the island.[166] Edmonds identified five sites on Kumarangk and one on the mainland.[167] Lucas indicated difficulty in compiling genealogies[168] and re-

160 Royal Commission Report at p 45.

161 *Chapman and Ors v Minister for Aboriginal and Torres Strait Islander Affairs and Ors* (1995) 133 ALR 74 at 79.

162 The ferry approaches and a series of barrages, both of which altered the flow of the river and involved substantial construction and interference with the land on both the mainland and the island, had been constructed many years earlier (Royal Commission Report at p 247).

163 (1995) 133 ALR 74 at 79-80.

164 Reports such as these were necessary to ensure that no damage was done to sites in contravention of s 23 of the *Aboriginal Heritage Act* 1988 (SA).

165 Royal Commission Report at p 62; G Partington, 'Determining Sacred Sites: The Case of the Hindmarsh Island Bridge' (1995) 71(5) *Current Affairs Bulletin* 4.

166 V Edmonds, *An Archeological Survey of the Marina Goolwa, Hindmarsh Island, South Australia* (Adelaide, 1990).

167 Royal Commission Report at p 64.

168 Partington, note 165 above.

ported that as a result of dispossession and dispersal, 'details of the island's mythic geography are ... probably lost'.[169] Nothing in these reports prevented the first stage of the project proceeding.

Further work was done in 1992. Discussions with the Aboriginal Heritage Branch indicated that:

> no surface archaeological features were evident at the time of [the] inspection and that it was likely that any sites that occurred ... had been destroyed or become obscured by the urban and industrial development that had taken place in the area over the previous 150 years.[170]

The developers were cleared to continue but were to contact the Aboriginal Heritage Branch if any archaeological finds were made during earth works.[171] Preliminary work on the approaches to the bridge was undertaken during 1993. Discussions between indigenous people, the Government and the developers resulted in a temporary access road being rerouted to avoid a site registered under the *Aboriginal Heritage Act* 1988 (SA).[172]

However, resumption of further work on the bridge was delayed by demonstrations and industrial action,[173] the election of a new South Australian government in December 1993 and a review of the contractual arrangements between the Government and Binnalong Pty Ltd by Samuel Jacobs QC.[174] In February 1994, Jacobs advised that the Government was contractually bound to proceed with the bridge or face significant compensation claims.[175]

Dr Neale Draper[176] prepared a further report on the area, including the sites of the bridge connections on Kumarangk and the mainland. This report confirmed the existence of Aboriginal sites on both sides close to the proposed bridge, but these provided insufficient grounds for the Government not to proceed with the bridge.[177] Although at-

169 Royal Commission Report at p 71.

170 Ibid.

171 Ibid.

172 E Rush, 'Bridge opponents hail road re-route', *Advertiser* (30 October 1993) p 8.

173 *Advertiser* (23 November 1993) p 21; Partington, note 165 above, at 5; (1995) 133 ALR 74 at 80.

174 Royal Commission Report at p 98.

175 Id at p 102; Diane Laidlaw, Minister for Transport, *Advertiser* (17 February 1994) p 10; (1995) 133 ALR 74 at 81.

176 N Draper, *Aboriginal Heritage Sites Directly Impacted by Kumarangk (Hindmarsh Island) Bridge* (Adelaide, 1994).

177 (1995) 133 ALR 74 at 81.

tempts were made to find an alternative site for the bridge,[178] these were unsuccessful. On 3 May 1994, the South Australian Minister for Aboriginal Affairs, Dr Armitage, used his power under section 23 of the *Aboriginal Heritage Act* 1988 (SA) to authorise damage, interference or disturbance of two sites to the minimal extent necessary to allow construction of the bridge.[179] Work commenced on the site on 11 May, amid protests and arrests.[180]

Using the Heritage Legislation

Although Lucas reported some concern that there be no disturbance of archaeological sites,[181] there appears to have been little other concern expressed among indigenous people about the development, up until 1993.[182] However, in November and December 1993, the Lower Murray Aboriginal Heritage Committee and the Aboriginal Legal Rights Movement (ALRM), in correspondence to the Federal Minister for Aboriginal Affairs, expressed concern over the impact of the proposed bridge on Aboriginal sites in the area.[183]

Further correspondence with the Federal Minister did not occur until 7 April 1994, after the South Australian Government finally indicated their view that the bridge construction should proceed[184] and sought an emergency declaration under s 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth). Once work resumed on the bridge on 11 May 1994, the Minister made the emergency declaration (for 30 days) on 12 May, and on 9 June extended the declaration for a further 30 days. During the period of the emergency declaration, Professor Cheryl Saunders prepared a report for the Minister pursuant to s 10(4) of the Commonwealth Act.

The emergency declaration and the appointment of Professor Saunders were based upon a series of letters received by the Federal Minister. On 23 December 1993, the ALRM wrote to the Federal Minister on behalf of its clients, seeking a declaration under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth). The Minister is empowered to make a declaration for the protection

178 Diane Laidlaw, Minister for Transport, *Advertiser* (23 February 1994) p 10.

179 C James, 'Sacred sites outrage: Row looms as bridge goes ahead', *Advertiser* (4 May 1994) p 2; (1995) 133 ALR 74 at 82.

180 C James, 'Arrests in bridge clashes', *Advertiser* (12 May 1994) p 2.

181 Royal Commission Report at p 65.

182 Id at pp 67 and 86; (1995) 133 ALR 74 at 80.

183 (1995) 133 ALR 74 at 80.

184 Ibid.

of areas provided she or he is satisfied that the area is a significant Aboriginal area and is threatened with injury or desecration. Such a declaration can only be made after receiving and considering a report and any representations attached to it and any other relevant matters.[185]

The appointment of Professor Saunders on 23 May 1994 to provide the report required by s 10(1)(c) of the Act related to the ALRM's application to the Minister of 23 December 1993, but followed the making of an emergency declaration based on two subsequent letters from the ALRM to the Minister. The first, dated 7 April 1994, stated that the threat of injury or desecration was now 'imminent'[186] and thus sought an emergency declaration. The second, dated 20 April 1994,[187] revealed the existence of

> some secret/sacred information abut the Hindmarsh Island, the Lakes and Coorong area ... to more clearly show the effect of the bridge upon their cultural integrity and tradition ... Ngarrindjeri life and culture came from the Murray Mouth, the Lakes, islands, and the Coorong. The configuration of these features has a very detailed and specific set of cultural meanings, concerning the creation and renewal of life. The Goolwa Channel is a 'Meeting of the Waters', and is of crucial importance in these terms.
>
> Consequently, the bridge proposal is culturally destructive. It would cripple the body and natural functioning of the spirit ancestors, and cause great cultural trauma to the Ngarrindjeri.[188]

While this letter indicated the secret nature of this information, it did not indicate that it was restricted to women, although as O'Loughlin J indicated, it was this information, its expansion and its limitation to women, that later became identified as 'women's business'.[189]

Professor Saunders placed notices of her inquiry in the Government Gazette on 26 May and the *Advertiser* newspaper on 28 May 1994.[190] Neither notice contained information about the existence of 'women's business' as a basis for any declaration. It appears that the

185 *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) s 10(1); *Tickner v Bropho* (1993) 114 ALR 409.

186 (1995) 133 ALR 74 at 81.

187 There was dispute about which letter constituted an application to the Minister and therefore what relevant information should have been given to the public about the basis of the application: id at 116. The point was dealt with in the course of deciding the issue of procedural fairness.

188 Id at 81.

189 Ibid.

190 Id at 119.

details of the 'women's business' were at that stage unknown to Professor Saunders. The report, with its submissions attached, including details of the 'women's business' in sealed envelopes with the rider that the material contained in the envelopes be read by women only, was sent to the Minister. On 9 July 1994, on the basis of the report, the Commonwealth Minister, Robert Tickner, made a declaration prohibiting, for 25 years, a range of acts in the area including 'any act done for the purpose of constructing a bridge in any part of the area.'[191]

The difficulty confronting Aboriginal people making claims under this (or other) heritage legislation might be gauged by the reaction of South Australian Premier, Dean Brown, to the Declaration. The Premier:

> accused ... Mr Tickner of throwing national development into 'chaos' by banning construction of the ... bridge on what he said was the basis of 'Aboriginal mythology' ... rather than archaeology or physical burial sites.[192]

Such a view suggests that cultural heritage is based in a past and specific physical reality rather than a contemporary set of beliefs and practices deriving from land, landscape and relationships between them and the people for whom they have meaning. Such a view might also be contrasted with the advice given by ATSIC that more than archaeological sites were required to enable the Minister to act. The Royal Commission report indicates that on 12 April 1994, an ATSIC representative had advised Dr Neale Draper that the information currently before the Minister (ie the archaeological information) was insufficient to support a declaration and more information about the disruption of heritage values was required.[193]

Judicial Review of the Minister's Decision

The Chapmans successfully reviewed the Minister's decision and Professor Saunder's report in the Federal Court.[194] Justice O'Loughlin ultimately found for the Chapmans on two main grounds: first, the Gazette notice and the press notice by Professor Saunders seeking submissions on the issue were inadequate, and sec-

191 *Commonwealth Gazette* (10 July 1994).

192 J Kerin, 'Bridge banned over women's family beliefs', *Australian* (12 July 1994) p 3.

193 Royal Commission Report at p 115.

194 *Chapman and Ors v Minister for Aboriginal and Torres Strait Islander Affairs and Ors* (1995) 133 ALR 74.

ondly, the Minister did not in fact *consider* the 'women's business' upon which he relied so heavily in making his decision.[195] As a consequence, the Chapmans and other members of the public were denied natural justice and thus the Minister lacked jurisdiction to make the section 10 declaration.[196]

Professor Saunders' notices were said to lack specificity. They did not identify in detail the area of the inquiry, even though this was known to the Minister.[197] In any event the notices were also found deficient because they did not detail 'the perceived desecration ... that the bridge would have upon the spiritual and cultural beliefs of Aboriginal women'.[198] The justification for this view was that '[a]n ordinary member of the public should have been able to read the notice in the local press and thereby determine from the information that it contained whether the matter was one of interest to him or her'.[199] 'The public were entitled to know that significance and to know the nature and extent of the perceived threat.'[200]

The second major problem was that the Minister did not consider the representations attached to Professor Saunders' report but relied on the advice of a female staff member to inform him of the contents of these representations and in particular to advise him that the material in the sealed envelopes supported the findings of Professor Saunders.[201] The court did not find that the Minister must read every word of every document, but that there must be 'substantial personal involvement'[202] by the Minister. This was especially the case in relation to the material in the envelopes because of the emphasis Mr Tickner placed on the 'women's business' in making his decision.

To some extent the finding of O'Loughlin J on this point might be confined to its facts, since he found on the basis of both written and oral material before him[203] that the staff member's advice was inadequate to allow the Minister to *consider* the attachments. The Minis-

195 Id at 128.

196 Id at 129.

197 Id at 119.

198 Ibid.

199 Id at 129.

200 Id at 119.

201 Id at 124.

202 Id at 123.

203 This material included the affidavit and oral evidence of the staff member as well as the fact that the Minister produced two statements of reasons for the decision, the first of which excluded reference to his having *considered* the representations.

ter's failure to consider the representations could have been remedied by the Minister's reconsidering the representations.[204] The inadequacy of the notice meant that the applicants were denied natural justice and that the Minister lacked jurisdiction to make the declaration.[205] The Minister and others unsuccessfully appealed this decision to the Full Federal Court.[206]

In relation to both these issues (ie the adequacy of the notice and the Minister's consideration of the representations), there is a clear emphasis on revealing information or knowledge in order that it might be scrutinised, evaluated, weighed against competing interests and decided upon. The framework within which this occurs is the dominant legal system, with reliance on the principles of procedural fairness. The dominant system can find no alternative means of assessing such claims. A fundamental assumption underlying this approach is that indigenous heritage claims based upon relationships to land are capable of, and must be subject to, transparent evaluation and assessment according to criteria imposed by the dominant legal system. Such an assumption might be based on one of two notions: either the difference in these relationships is not so great as to preclude adequate consideration by the dominant legal system or, to the extent that they are different, they should be subjugated to the analysis and practices of the dominant system.

This conclusion can be drawn from the finding that details of the 'women's business' should have been advertised. While O'Loughlin J suggested that there could be difficulty in providing detail where the information was secret,[207] his Honour was in no doubt that sufficient detail was necessary to inform the general public of the nature of the significance of an area and the nature of the threat to it.[208] Similarly, his Honour was in no doubt that in this case the Minister should have been made aware of the detail of the 'women's business' in the envelopes. O'Loughlin J indicated that, while Aboriginal claims to confidentiality can be maintained, a time will necessarily come when there must be some disclosure in order that a claim can be tested.[209] Black CJ in the Full Court suggested that Aboriginal groups making claims

204 (1995) 133 ALR 74 at 127.

205 Ibid.

206 *Norvill and Anor v Chapman and Ors, Norvill and Anor v Barton and Ors, Tickner v Chapman and Ors, Tickner v Barton and Ors* (1995) 133 ALR 226.

207 (1995) 133 ALR 74 at 124.

208 Id at 129.

209 Id at 124.

need to understand that there is an 'obligation to consider all representations (as) part of the process.'[210]

This approach indicates that if indigenous people wish to protect their cultural heritage under heritage legislation, they impliedly accept the 'rules' of such protection demanded by the dominant system. If this is not accepted, then the protection provided by the system cannot be claimed. Where places of significance are based upon beliefs of which secrecy is an integral part, the requirement of disclosure may itself have the effect of diminishing or destroying aspects of the heritage for which protection is sought. The strict application of the rules and procedures of the dominant system therefore may operate to prevent protection of heritage even where legislation is specifically expressed to exist for the purpose of such protection.[211]

Aboriginal Heritage Act 1988 (SA)

The South Australian legislation is similarly expressed to exist for the protection of Aboriginal heritage. However, as with the Commonwealth legislation, such protection is entirely at the discretion of the Minister. In the case of the Kumarangk bridge, the South Australian Minister played a significant role, giving authorisations under the Act which permitted the destruction of sites so as to facilitate the bridge's construction. In addition, once the Royal Commission was established,[212] the Minister approved the release of confidential information under the Act to the Commission. The Act imposes a requirement that the Minster consult with Aboriginal people before authorising the disclosure of information pursuant to s 35 of the Act. The Minister's actions were challenged in the South Australian Supreme Court which confirmed that while the Minister must consult, there is no requirement that the views of those consulted be complied with.[213]

These incidents again point to the subjugation of indigenous cultural interests to the dominant system—a system ostensibly for the protection of heritage appears to have the opposite effect. Ultimately, each

210 (1995) 133 ALR 226 at 241.

211 As is s 4 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth).

212 The circumstances of the establishment and the findings of the Royal Commission are discussed below.

213 *Aboriginal Legal Rights Movement v The State of South Australia & Stevens* (1995) 64 SASR 558.

exercise of power under those 'protection' regimes confirms that dominance.

The Royal Commission

On 16 June 1995 the South Australian Government established a Royal Commission to inquire:

> (w)hether the 'women's business', or any aspect of the 'women's business' was a fabrication and if so:
>
> (a) the circumstances relating to such a fabrication;
>
> (b) the extent of such fabrication; and
>
> (c) the purpose of such fabrication.[214]

The South Australian Government justified the Royal Commission on the grounds that there were 'allegations that the secret "women's business" [was] a fabrication'[215] and that '(t)here was significant disagreement within the South Australian (A)boriginal communities regarding the "women's business" and the allegations'.[216]

The immediate event leading to the establishment of the Royal Commission was the appearance on television on 5 June 1995 of Doug Milera who said 'I think the whole issue of the women's belief was fabricated'[217] and claimed to have played a part in the fabrication. The television appearance was the culmination of political and media discussion which had first emerged in late 1994 over the possibility of 'fabrication' and was based on the views of a number of Ngarrindjeri women who said they did not know anything about the 'women's business'.[218]

On the day the Royal Commission was announced, the Commonwealth Minister for Aboriginal Affairs announced that a new inquiry under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) would be conducted by Jane Matthews J once the Full Court of the Federal Court handed down its decision.[219]

214 Royal Commission Report, Appendices p 312.

215 Id at p 311.

216 Ibid.

217 Id at p 194.

218 Id at p 166; C James, 'Women's Claims on Bridge Made Up', *Advertiser* (10 November 1994) p 1.

219 *Advertiser* (22 June 1995) p 8. Justice Matthews' appointment under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 was challenged by the 'dissident' women on the basis that the appointment of a federal judge infringed the separation of powers doctrine in Chapter III of the Constitution. On

The Royal Commission was required to consider and report on issues relating to the 'fabrication' of the 'women's business' which formed part of the basis for the Federal Minister's declaration preventing construction of the bridge. The Commission interpreted 'fabrication' as involving 'the deliberate manufacture of secret "women's business" where it did not previously exist'.[220]

The Commission conducted its hearing in the latter part of 1995. The Commission conducted its inquiry 'along the lines of a trial',[221] with witnesses giving evidence and legal representatives permitted to question them. The standard of proof applied by the Commission 'was proof on the preponderance of probability with due regard to the importance of the particular issue being determined.'[222] The issue was important because of the 'important economic consequences follow[ing] the decision to halt the construction of the ... bridge and [the fact that] the findings of this inquiry may affect the reputations of some persons involved.'[223] The proponents of the 'women's business' did not appear, nor were they represented before the Commission. Ngarrindjeri people supporting the application to the Commonwealth Minister chose not to give evidence.

In spite of this, the Commission proceeded to make a number of key findings on the questions before it, the most important of which was that the 'women's business' was fabricated. The Commission reported on 19 December 1995 that 'the whole of the "women's business" was a fabrication [in order] to prevent the construction of a bridge between Goolwa and Hindmarsh Island'.

The Royal Commission's findings might briefly be summarised as follows: the proposal to build a bridge was widely publicised and 'could scarcely have escaped the attention of persons with an interest in Hindmarsh Island';[224] in 1990, archaeological and anthropological surveys disclosed no Aboriginal sites 'and no extant mythology';[225]

6 September 1996, the challenge was upheld in the High Court: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220. On 9 September, the Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, announced that a further inquiry under the Act would not be held and special legislation would be passed to allow the bridge to proceed: B Mitchell, 'New laws will let Hindmarsh bridge proceed', *Age* (10 September 1996) at p 4.

220 *Hindmarsh Island Bridge Royal Commission Rulings on Preliminary Issues* 2.

221 Royal Commission Report at p 5.

222 Id at p 7.

223 Ibid.

224 Id at p 288.

225 Ibid.

there was no indication of Aboriginal objections to the bridge until October 1993;[226] after that time, Aboriginal objections were based on archaeological sites;[227]during the early part of 1994, stories about the spiritual significance of the land and 'women's business' began to emerge;[228] there were some meetings at which men suggested the existence of 'women's business';[229] the 'women's business' was unknown and unrecognised in the literature, was unknown to other Ngarrindjeri women and unknown to the twelve Ngarrindjeri women who gave evidence to the Commission;[230] if the 'women's business' existed, some people would have known about it; and the public statement of Doug Milera about fabrication should be accepted, even though he had since retracted the statement.

Not only did the Commission not hear from the proponents of the 'women's business', but it placed little emphasis on the absence of that evidence. Significant emphasis was placed upon the lack of any recorded information about the 'women's business' by ethnographers, without any analysis of the limitations of such ethnographic work[231] and the inconsistency in other ethnographic information (about genealogies) which had been identified. Inferences were drawn from the absence of earlier opposition to the bridge or widespread knowledge of the 'women's business' without alternative explanations being explored. Emphasis was also placed on the absence of Aboriginal opposition to the building of the barrages and ferry installations in the 1930s and 50s, again with no exploration of possible explanations. Finally, and most importantly, the history of dispossession and dispersal of Ngarrindjeri people, although briefly referred to by the Commission, appeared to play no part in its conclusions. There was no consideration of the impact of that history on the transmission and transformation of cultural heritage as a basis for the beliefs entailed in the 'women's business' nor of this history as an explanation for the lack of earlier opposition.

As a forensic exercise firmly based within the dominant legal culture, the Royal Commission may be the subject of critical comment. As a

226 Id at p 290.

227 Id at p 291.

228 Id at pp 292-3.

229 Id at p 294.

230 Id at p 297.

231 For example, the influence of Taplin's christianising zeal on his work, or the fact that both Tindale and Berndt worked at a time when there had already been massive cultural disruption.

process for discovering and evaluating indigenous cultural heritage, it is an example of the inadequacies of that legal culture in giving a voice to indigenous defined 'truths', values and meanings. This has consequences for the forms of recognition and protection of indigenous cultural heritage.[232]

Implications of *Kumarangk* for Cultural Heritage Protection

The events of the *Kumarangk* case suggest that what constitutes indigenous knowledge of an area sufficient to satisfy the requirements of the *Aboriginal and Torres Strait Islander Heritage Act* 1984 (Cth) and how it is 'known' are central to the relationship that a group may claim with land. This raises the issue of what, if any, aspects of the knowledge and the relationship such knowledge discloses are capable of amounting to a property interest, and what is the effect of this potential interest in a regime based on Ministerial discretion.

The manner in which indigenous knowledge was ultimately treated in the *Kumarangk* case, an exploration by the dominant legal processes of what constitutes 'truth' as a condition precedent to protection of land interests, and the requirement for revelation of cultural confidences, revealed the extent to which indigenous land interests can be subjugated to the dominant system.

This outcome was not surprising. In a number of earlier cases dealing with the issue of confidential knowledge, courts had indicated that revelation was necessary to achieve protection. Such a position was adopted by the Federal Court in *Aboriginal Sacred Sites Authority v Maurice: Re Warumungu Land Claim*,[233] a case relied upon by O'Loughlin J in the *Kumarangk* case.[234] A similar view was taken by Carr J in *Western Australia v Minister of Aboriginal and Torres Strait Islander Affairs*,[235] leading Hancock to conclude that while 'the protection of Aboriginal culture may be predicated on the existence of Aboriginal law, the significance of this law is being reduced to mere evidentiary status'.[236] The emphasis on procedural fairness, and in

232 Andrews suggests that the experience of the Royal Commission should lead to some new system of dealing with Aboriginal spiritual beliefs, including perhaps protection by legislation: N Andrews, 'Illegal and Pernicious Practices: Inquiries Into Indigenous Religious Beliefs' in Finlayson & Jackson-Nakano, note 71 above, at p 62.

233 (1985-1986) 10 FCR 104.

234 (1995) 133 ALR 74 at 126.

235 (1995) 54 FCR 144 and confirmed on appeal.

236 N Hancock, 'Disclosure in the Public Interest' (1996) 21 *Alternative Law Journal* 19. For a more detailed discussion of this idea, see N Hancock, 'Is This the

particular the right of the parties to know the basis of the applicant's claim, has been at the root of this approach in the cases under the Commonwealth Act.[237] However, this focus on procedural fairness has not always been similarly applied to indigenous people.

In *Onus and Anor v Alcoa of Australia Ltd*,[238] the High Court reversed a decision of the Victorian Supreme Court denying that certain members of the Gournditch-jmara people had standing to bring an action against Alcoa Ltd for contravention of the *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic). It was necessary for the Court to determine whether the interest was sufficient to give standing. Gibbs CJ considered that the plaintiffs' interest was greater than other members of the public as the relics in question were of cultural and spiritual importance to them[239] and they were custodians of them according to the laws and customs of their people.[240] He held that a special interest could be sufficient if 'accompanied by an emotional or intellectual concern'.[241]

This approach was not adopted in *Western Australia v Bropho*[242] however, where a mere spiritual interest was held not to be sufficient to provide a 'right to be heard' under the *Aboriginal Heritage Act* 1972 (WA). In this case Robert Bropho sought the right to be heard before the Minister made a decision allowing work to proceed on the Swan Brewery site in Perth. The Full Court of the Western Australian Supreme Court held that Bropho did not have a right to procedural fairness. This right depended on something more than 'an emotional and intellectual interest'.[243] The Court considered that the demand for procedural fairness should not extend to 'a person with a deep "religious" commitment'[244] and that something in the nature of use of the area was required.[245] Murphy J in *Onus v Alcoa* took the view that the interest was a special interest even though it derived from a non-

Spanish Inquisition?: Legal Procedure, Traditional Secrets and the Public Interest' in Finlayson & Jackson-Nakano, note 71 above, at p 91.

237 R Goldflam, 'Between a Rock and a Hard Place: The Failure of Commonwealth Sacred Sites Protection Legislation' (1995) 3(74) *Aboriginal Law Bulletin* 13.

238 (1981) 149 CLR 27.

239 Id at 36.

240 Id at 37.

241 Ibid.

242 (1991) 5 WAR 75.

243 Id at 87.

244 S Churches, 'Aboriginal Heritage in the Wild West' (1992) 2(56) *Aboriginal Law Bulletin* 9 at 10.

245 Id at 11.

Judeo-Christian source: 'There is no justification for using "standing" to introduce religious, racial or cultural discrimination to the courts'.[246] On the other hand, in *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs*,[247] Carr J, discussing whether women barristers should have access to men's confidential cultural information, suggested that Aboriginal law had no special status in the area of public interest immunity. More significantly, his Honour said of the dominant system:

> I do not think it is appropriate to describe that body of law as 'white fella law.' The *truth* of the matter is that it is Australian law for all Australians regardless of their colour.[248]

By contrast, O'Loughlin J in *Chapman and Ors v Minister for Aboriginal and Torres Strait Islander Affairs and Ors*[249] made it clear that the *Aboriginal and Torres Strait Islander Heritage Act* 1984 (Cth) requires only that the Minister be satisfied that the area is 'a significant Aboriginal area'[250] and that the Act carries with it no requirement for establishing a link that 'relies on use, occupation or ownership'.[251]

What inferences can be drawn from these cases? While O'Loughlin J's view removes the substantial barrier faced in *Bropho*,[252] it almost certainly removes any possibility of finding a property right, and confines the right to the limited statutory right granted. Mere spiritual association may carry with it no special status other than giving rise to the right to make an application to the Minister. It may in fact operate to impose additional barriers for protection once that application is made, with the effect of denying access to the statutory regimes for protection. This is in effect the conclusion to be drawn from the conduct of the *Kumarangk* case and in particular the Royal Commission process, emphasising as it did the notion of proving the 'truth' of a belief system on which a claim for protection was based.

Gray's search for a coherent conceptualisation of property brought him to the conclusion that physical, legal or moral non-excludability goes to the core of property.[253] There are, as Gray says, some things

246 (1981) 149 CLR 27 at 46.
247 (1995) 54 FCR 144.
248 (1995) 54 FCR 144 at 150 (emphasis added).
249 (1995) 133 ALR 74.
250 s 3.
251 (1995) 133 ALR 74 at 112.
252 (1993) 114 ALR 409.
253 Gray, note 4 above, at 295.

that should not be propertised. While this might provide the parameters of what may or may not be 'propertised', he also concluded that:

> The precise allocation of 'property' in excludable resources is left to be determined—is indeed constantly formulated and reformulated—by various kinds of social and moral consensus over legitimate modes of acquisition and the relative priority of competing claims.[254]

What the courts appear to be engaged in is a process of narrowing the scope and impact of indigenous relations to land whether they claim them to be property or merely to affect the property interests of others. The vague, spiritual, even unprovable relationship with land, central to indigenous land relationships, is one of those things that should not be propertised.

Conclusion

The seemingly incoherent ways in which the common law has dealt with indigenous relationships to land 'conceal power relations at work in the conceptualisation of "property"'[255] so that in fact a consistent and coherent approach is revealed. There is a recognition of difference that suggests concern about the issue by the dominant system. However this concern melts away into thin air[256] when attempts are made to protect indigenous relationships through the common law. As the common law fails to recognise, value and protect this difference, both the power relations within the decision-making process and the continual assertion of the dominant legal system are revealed.

I have argued that the failure to recognise any land-based property rights for indigenous people until the *Mabo* decision resulted in the High Court devising a specific, narrow and partial view of what constitute indigenous interests. As a result of that decision, it now appears that native title is the *only* form of common law property interest that can be recognised.

This is not to suggest that the Ngarrindjeri or any other group claiming protection of land-based heritage could not prove native title and seek protection of heritage from that source. Nor is it to suggest that protection of heritage under statutory schemes may not be a significant adjunct to native title once established. Rather it is to suggest

254 Ibid.

255 Howe, note 78 above, at p 5.

256 Note 4 above.

that indigenous people are left with a precarious source of heritage protection: the availability of native title is subject to the vagaries of both extinguishment and proof of continued connection, both of which may provide insuperable barriers to the Ngarrindjeri, given their history of dispossession and dislocation from Kumarangk.

However, a consequence of this argument is that protection of land-based cultural heritage can only be afforded by statutory schemes. While there is no reason why these schemes could not characterise the rights granted under the statutory schemes as property rights, and make them amenable to the advantages that accrue,[257] they currently do not. Any protection is limited to statutory protection in the form of a right to make an application to the Minister. That right is subject to judicial review and the partial imposition of the right to procedural fairness. In these circumstances, there is a continual re-evaluation of the precise nature of indigenous relationships through the imposition of the norms of the dominant legal system.

Conflicts between land-based indigenous cultural heritage and development projects will inevitably arise for resolution as they have in the case of *Kumarangk*. The different narratives surrounding the *Kumarangk* case, the manner in which they have been played out in the legal system and the privileging of the dominant narrative suggests that current regimes and processes for the protection of indigenous cultural heritage are inadequate. It is difficult to foresee how the dominant system can provide protection when its mechanisms for protection ultimately require intrusions into that heritage and the valuation of it through and by the dominant system. The conclusion to be drawn is that there is no adequate protection for land-based cultural heritage either from the common law or from the current statutory heritage protection schemes.

257 Such as protection under the *Racial Discrimination Act* 1975 (Cth). A whole new regime for dealing with heritage protection issues including removal of decision making from the political realm and the establishment of a tribunal to determine matters has been suggested: D Fergie, 'Federal Heritage Protection: Where To Now? Cautionary Tales from South Australia' in Finlayson & Jackson-Nakano, note 71 above, at p 142.