ANGLO-AUSTRALIAN LAW AND THE ABORIGINAL CULTURAL HERITAGE

Peter C. James

At present many people and organisations who or which are in any way interested in the continued future of Aboriginal issues in Australia are preoccupied with Mabo and its political fallout.

This paper is not about the Mabo case; but clearly it is difficult to ignore it. There is need to make mention of certain aspects - if only to make the record clear and to ensure that the issues which this paper tries to address will not be clouded by the expanded Mabo debate.

This paper needs to address two basic issues: the theoretical one about coping with the Aboriginal Cultural Heritage under our legal system (and here it will be necessary to look briefly at aspects of Mabo), and the practical one of how those philosophical issues can be adopted in Australia today - not only with their inherent difficulties but also with the additional issues which Mabo has brought with it.

It may be easier to deal with the Mabo decision first, to deal with it briefly and only insofar as it is relevant to the protection of the Aboriginal Cultural Heritage.

It is perhaps then best to address the major (or what was, until Mabo, the major) problem of protecting the Aboriginal Cultural Heritage within our political and legal system. The problem of protecting a heritage which was in existence thousands of years before the Common Law evolved and which still continues is the major issue of the paper.

Thirdly, the paper will address the issue of how we may be able to resolve these problems - an issue made no easier by Mabo.

Strangely enough the general issue of the protection of the Aboriginal Cultural Heritage and the difficulties of so doing seem to have been infrequently addressed over the years. Even the question of where legislation should be placed has been ignored in many jurisdictions.

There have been a small number of articles which have addressed the subject. Most are critical of the present provisions rather than addressing the basic and crucial issue of how the law could be adapted to accommodate the peculiar (so far as the law is concerned) issues of the Aboriginal Cultural Heritage.

In Australia most legislation which was intended to protect places of natural or cultural significance has appeared since the Second World War, and much of that since 1970. All of the first generation legislation was included as part of National Parks legislation or as Aboriginal Relics legislation. Much is still to be found, as inappropriately as ever, with the kangaroos, koalas and gum trees in the various pieces of National Parks legislation in a number of jurisdictions in Australia.

The problems with the present system are several and a number of these are relatively easy to deal with. For example, the Commonwealth Government could legislate to resolve the practical issues tomorrow - and probably should do so as it is fairly clear that a number of the States will not - now or in the foreseeable future.

The first of these issues is where the controls are provided. As mentioned above the placement of such controls within National Parks legislation is not the appropriate place. This is easy to rectify.

Secondly, in most jurisdictions the control of the Aboriginal Cultural Heritage still rests solely or, at best, with the non-Aboriginal sector of the community. Again this continuing source of annoyance and rightful complaint is easy to rectify. All that is required is a simple change in the system to provide for Aboriginal control of such matters.

The third issue is not so easy to resolve: that is the issue of the protection of places which, of their nature by Aboriginal tradition and belief and custom, do not attract, or are not capable of attracting, protection by the existing provisions of our Statutory or Common Law.

This is where the real problems arise and where Mabo has added a new dimension to the issue by, quite correctly, disposing of the concept of terra nullius which had pertained in Australia since 1788.

The effect, morally if not legally, of Mabo is that it must follow from the destruction of the terra nullius concept and the acceptance that Aboriginal people had a system of land rights, that they also had a system which would have, if called upon, protected their sites of significance.

The other issue which is bound to arise, albeit incorrectly, from Mabo is that of the legal system in place in Australia and the issue of 'sovereignty'.

Both these issues are easy to deal with unless one has some idea of breaking Australia into two countries - establishing a system as bad as that presently being disbanded in South Africa.

Regardless of what misdeeds were committed by white settlers in the late 18th, 19th and earlier 20th centuries the High Court dealt specifically (and correctly) with the issue of sovereignty. The dispelling of the terra nullius myth did
not introduce, nor give any encouragement for, any new issue of sovereignty. There is only one Australian nation, thus only one legal system and only one sovereign (this is not an argument against republicanism in Australia - there has to be a 'sovereign' power even in a republic).

However this does not mean that there is not substantial room for renegotiation and rethinking of the ways in which the present Australian legal system looks to the protection and conservation of the Cultural Heritage of the Aboriginal Australians. The issue of looking at a different way of protecting different assets is not a creation of a separate sovereign state nor is it necessary to create a separate legal system. It just means taking another look at the way in which certain issues are dealt with; another way of looking at protecting another culture's way of considering things.

It is important to remember that our (European) concept of heritage protection is based on our legal concept of land law and, in many cases, rights to property. All our cultural artefacts tend to be protected because and by virtue of their connection - in one form or another - with a 'place'. Our land law - the basis of the whole of Western economic society - requires precision, for example, in the description of boundaries. Thus the system has difficulty in coping - in fact it cannot cope without some major legislative assistance - with places which are a moral or spiritual concept rather than a legal entity.

Our society is so tied to the concept of place that even our deities - The Father, The Son and The Holy Ghost comply with the requirements of society and usually only dwell in precisely definable places such as churches and temples. They do not wander all over the countryside confusing town planners as to where they may have been.

In many societies, not just Aboriginal society, the spiritual aspect of a place takes precedence over the physical value - the bricks and mortar. Cases closer to our concepts, yet still quite at odds with the Burra Charter for example, are those of societies such as the Japanese in which temples thousands of years old may have no individual element of fabric more than 100 years old. As parts wear out or decay, or are damaged or destroyed, they are replaced, admittedly with care and in accordance with their tradition. We (Europeans) would, in accordance with our society's beliefs, try to retain the original fabric.

This is perhaps part way to the recognition of the Aboriginal Cultural Heritage's problems. In Japan it is the site which has the significance as much as the actual fabric of the place - but there the site is usually clearly defined.

When one comes to look at many places of Aboriginal Cultural Heritage significance the difficulty is twofold. It is important to distinguish between places that attained their significance after Europeans arrived. Since then our system, although it may have ignored the issues intentionally or unintentionally, can in fact deal with them because our system was in place.

Our legal system requires 'a place for everything and everything in its place'. The difficulty is for the European mind to comprehend the significance of a place where there is no visual evidence of that significance. We overcome that problem, for example, by making a place of significance to the presence of, say, The Holy Ghost. We build a church or other religious structure and The Holy Ghost obligingly not only stays within the confines of the walls of that building but also confines itself to the Blessed Sacrament which is kept in the tabernacle - very neat and tidy and no stray spirits wandering around making difficulties for people to use various areas of the country side.

Ironically the English legal system which we inherited was more flexible almost one thousand years ago when the Court of Equity, the Court of Conscience, was operating as a moderator of strict Common Law rules. But as society became more complex and as more things acquired monetary value it became essential to provide increasingly stricter controls to protect people and their property.

But the quantum leap required to resolve the issue described above is small beside the next problem which arises: how to find a way of protecting places which not only show no visible sign of Aboriginal Cultural Heritage but which have no definable boundaries. In some cases they cannot, by tradition or long held belief, even have those qualities disclosed to, say, a heritage authority without the very significance for which the place should be protected being destroyed forever.

Every race which invades another country finds problems in coming to terms with the indigenous culture. In some cases the problem was resolved by annihilation or genocide. In some cases a genuine attempt was made to try and accommodate both cultures. It is not just a problem for Australia or of Western Culture dominating other cultures. It has been a problem since the first two groups of people in the world with different cultures met, and it is still a problem today.

Fortunately we have only to deal with one problem of this kind - that of how the Aboriginal Cultural Heritage can be protected. Whilst there are now many different cultures in Australia there remains, for reasons that need not be dealt with in this paper, only one genuine legal problem as all other cultures have a similar legalistic approach to ours. This does not mean that ours is 'right' it just means that the other cultural differences are easier to accommodate.

Bearing in mind our (European Australian) society and legal system, there is little point in looking at other countries trying to grapple with this problem. The only countries where we can seek any guidance (and this is not really very useful except as examples of how not to do things) are the USA, Canada and New Zealand.
Whilst all three countries are dealing in their own way with indigenous peoples’ land rights, none recently have had to resolve the *terra nullius* concept as it has not been an issue in any of those countries for many years. As land rights issues are different so are the issues related to the respective cultural heritages. It is unwise in most cases, and dangerous in some, to try and apply the provisions or concepts of the protection of indigenous cultural heritage in one country to another.

Before we look to possible solutions I emphasise three things.

First there is in my mind, as a lawyer and as a conservationist, no question within one country of having other than one sovereign government. In a democracy, if we do not like the government (or even the system) we do not wreck either but vote for a change.

Secondly, this paper is not about land rights in the Mabo sense. It is about protecting certain sticks in the whole bundle of rights which make up Australia’s land laws. These rights are only a part of the whole.

Thirdly, it is also not about control of land because of one party’s claim over another.

What it is about is trying to find a way, within our governmental and legal system, of enabling the proper protection of those parts of the Aboriginal Cultural Heritage which the Aboriginal people hold as important. It is about those places where, at present, protection is not available or is defective in its operation.

So what can properly and reasonably be done in the foreseeable future?

There is firstly an urgent need for all Governments in Australia to agree that almost all legislation in Australia is defective in its protection of the Aboriginal Cultural Heritage and that it must be replaced.

My own view is that this requires an immediate Commonwealth initiative to prepare model legislation -and a requirement that the States adopt it within a short and specified period - or face the alternative that the Commonwealth will legislate for them.

There is the power in the Constitution for the Commonwealth to act in s.51(xxxvi), following the change to that section in the overwhelmingly successful referendum of 1967. That the cultural heritage is included in that power is indisputable following the statements of the High Court of Australia in The Tasmanian Dams Case.

This legislation must do two things to begin with. It must remove the Aboriginal Cultural Heritage protection from National Parks legislation. This is not to be critical of the various Parks Services - it is just no longer appropriate - if it ever was.

The other step it must take is to provide for the control of such legislation to be in the hands of the relevant Aboriginal people - or people whom they appoint. This does not mean that they are not ultimately responsible to the sovereign government. As is everyone else, they must be responsible to the Government of the country, whether this is a direct responsibility to Canberra or to a State or Territory government.

Now comes the hard part. How is the system, which is the system for the country, to protect places it does not know about - places which cannot be described in the terms we use to conceptualise land or use to define the rights and obligations that go to making up Society’s need for certainty in land law matters?

Several attempts have been made - mainly unsuccessfully, although every attempt at an improvement in the system should be commended and lessons learned from what has and has not been achieved.

In 1983 the Commonwealth Government investigated these very issues and, in a complex and ultimately unsuccessful procedure, came up with various recommendations which, *inter alia*, involved the proposed better protection of the Aboriginal Cultural Heritage. In fairness the reports commissioned and the work done did culminate in the [now] *Aboriginal and Torres Strait Islander Heritage Protection Act*. But this Act could hardly be said to be a resounding success.

The reasons for the high failure rate of protective applications under this Act are many, but it is probably fair to say that, because of the lack of appropriate mechanisms in most States and Territories, applications under the Act are frequently made too late for appropriate and practical resolution.

Yet another policy was prepared by the Commonwealth in 1985, primarily on Aboriginal Land Rights and it in turn contained quite worthwhile recommendations in relation to the protection of the Aboriginal Cultural Heritage. But this, like many other proposals, has confused the quite separate issues of Land Rights and the Aboriginal Cultural Heritage. Perhaps in many cases they may cover the same places.

To achieve the degree of protection that Aboriginal people may wish to see for places of importance to them, it is incumbent upon bodies such as ICOMOS to ensure that the two issues are not confused in the preparation of policy and the introduction of legislation. The Aboriginal Cultural Heritage is a matter in relation to which ICOMOS has certain qualifications to enable it to comment professionally.

To combine them both will detrimentally affect the Aboriginal Cultural Heritage both legally and politically. This is evidenced, if by nothing else, by the total lack of...
interest shown by Governments in the Aboriginal Cultural Heritage since the Mabo decision.

This paper does not presume to resolve major issues which have been exercising the minds of many over the years. It does however hope to highlight certain fundamental problems; to point people in the right direction when it comes to reviews of the present systems, and to encourage the Commonwealth to act as soon as possible to have appropriate legislation introduced throughout the country.

After all, the Aboriginal people of Australia did not have a system of eight States and Territories and part of the present problem is the different provisions within jurisdictions which frequently cross Aboriginal Cultural Heritage boundaries.

One other issue, which may be hard for some to accept, is that as we have a system of Government in Australia any proposal for change must be within that system. This does not mean that new concepts cannot be considered and incorporated within that system.

Many of the systems which are presently used in Australia can be adapted quite easily, and with no legal problem, to the proper protection of the Aboriginal Cultural Heritage. The areas where problems arise are those mentioned above where it is not possible to describe them in accordance with our traditional system, or in some cases, to describe them at all.

The Australian Heritage Commission and the South Australian legislation, as examples, overcome this problem by not giving precise descriptions but identifying areas within which sites of Aboriginal Cultural Heritage significance may be found. This avoids the problems of vandalism and, where appropriate, that of secrecy outside the Aboriginal group concerned.

This does not, with the computerisation of land titles and records, cause the enormous problem it would have a few years ago. It is relatively easy to have an endorsement on a title that a particular place is within an area declared because of its Aboriginal Cultural Heritage significance.

In brief, model legislation for Australia should provide for the following:

1. An Aboriginal Heritage Council made up of Aboriginal people and/or their nominees appointed at their request and in the manner they desire by the Minister responsible.

2. Wide powers of advice to Ministers and input to community education.

3. The power to put places of Aboriginal Cultural Heritage significance on a register. (This, in many cases, will be a problem without legislative amendment, as, for example, with dreaming trails).

4. A reasonable power for property owners to object on the grounds that the place is not of Aboriginal Cultural Heritage significance. (This is a difficult one because in some cases all the places in an area will not be of Aboriginal Cultural Heritage significance but will be within the general ‘zone’ or ‘area’ registered to protect secret places within that ‘zone’ or ‘area’.)

5. The power for people to request permission to carry out work in an area or on a place on the Register and a proper right of appeal to a recognised tribunal (though the appeal body may have to hold certain hearings in camera or accept a statement that does not contain the factual information which would normally be required).

6. The usual range of measures to assist in the protection of places of Aboriginal Cultural Heritage significance as there is with places of non-Aboriginal significance.

7. Power to issue stop work orders at the request of the appropriate Aboriginal authority.

8. Power of courts etc. to impose penalties and sanctions as needed.

9. Power for the Aboriginal Heritage Council to enter into agreements to assist in the conservation of such places. (These already exist in some States).

10. Any necessary ancillary powers and provisions.

As can be seen from the above the only area of difficulty, over and above those experienced in any other conservation process, is that of the identification and protection of unspecified areas. Whether unspecified by area or by content, this does raise difficulties which will have to be overcome.

Some are relatively easy, such as that of non-disclosure of specific sites. Clearly if an application to carry out development does not harm the site, or is adjacent to it rather than on it, the application will be carried out in the normal way - except for the fact that the hearing in relation to such sites may be held in camera, or the recognition of acceptance of a statement that the area is of importance without disclosing why it is important (this aspect has already been recognised by the NSW Land and Environment Court). Severe penalties should be imposed for breaches of any secrecy provisions.

The next problem is that of sites, the existence and significance of which cannot be disclosed to anyone outside the Aboriginal group concerned. So far as identification is concerned there needs to be a system set up by the Aboriginal Heritage Council whereby the same ‘area’ system is applied by those groups who notify the Aboriginal Heritage Council and who then have the area reference endorsed in the register.

Clearly there cannot be an appeal on ‘heritage’ grounds because of the inability of the relevant group to disclose information.
But it is only fair and reasonable that an owner who is adversely affected must be able to have a process available whereby any application for development can be considered. This may mean acquisition in very few cases but it is a matter which will need much further deliberation and consideration.

This, in theory, leaves only one problem for consideration and that is the problem of unknown boundaries - such as those of dreaming tracks. This is a real and complex issue. Again it is not possible to come up with a definitive answer in this paper but the problem can, in all probability and with a great deal of goodwill on the part of the community, be resolved by the use of a legal fiction. This would allow the protection of such areas and at the same time not prohibit totally all forms of development on all large areas.

Our system does not give complete protection to the historic cultural heritage but now provides a system whereby the heritage values are weighed up, once established, against the other needs of society. It would be foolish to anticipate that government would give more extensive control to places of Aboriginal Cultural Heritage significance than to the historic cultural heritage, even though the values protected in the former may be wider.

The important thing is that the protection given is at least equal; the problem in the past has been that the coverage was not comprehensive because of perceived difficulties in identification and due to insufficient protective measures being in place.

In fact the same dual problem reveals itself here as with the rest of the heritage, be it cultural or natural. There are two processes: the first the identification of the places, the second the decision on the future use of such places.

These two processes must be identified as separate issues. If the problems of the first can be overcome by some process along the lines suggested above, there is a chance that the problems of the second will reveal themselves as not being of such monumental proportions as presently thought - so many claims of Aboriginal Cultural Heritage significance are presently perceived as really being de facto Land Rights claims.

In conclusion it is perhaps important to realise the fact that certain concepts, such as important sites with no physical evidence visible, are unknown to the law and thus incomprehensible to lawyers and government advisers. This does not mean that the legal system with which the country is controlled and administered cannot show the flexibility to deal with the issue in hand and resolve previously unrecognised rights in relation to the Aboriginal Cultural Heritage.

Note:
The term "Aboriginal Cultural Heritage" is used throughout but is intended to include the Torres Strait cultural heritage in those parts of Australia where this is appropriate.

Peter James is a Barrister and Solicitor, and Heritage Consultant in Hobart. He has been actively involved in heritage conservation for three decades.