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The interaction of cultural heritage and native title

This page was authored by:

Austin Sweeney

Consultant native title lawyer

Austin Sweeney is a lawyer, facilitator and mediator who has practised in the area of land rights and native title for over 25 years.

Cultural heritage is recognised and protected to varying degrees across Australia by the different cultural heritage laws made by State and Territory Governments, and also by laws made by the Commonwealth Government that apply in particular contexts.

State and Territory cultural heritage laws

For many years the States and Territories have had primary responsibility for protecting cultural heritage in most parts of Australia. This has resulted in significant differences in cultural heritage laws across the country as cultural heritage has been defined and recognised in different ways, often with a primary focus on identifying what heritage should be preserved in the broader public interest.

In recent years some (but not all) State and Territory cultural heritage laws have been revised to more appropriately recognise the cultural heritage of Aboriginal and Torres Strait Islander people as acknowledged by the High Court in *Mabo* and subsequently in the Native Title Act and in Federal Court decisions.

In the native title context it has been recognised that the continuing native title rights and interests of Aboriginal and Torres Strait Islander people can include a right to protect places and areas of importance and to safeguard the cultural knowledge associated with an area.

Commonwealth cultural heritage laws

There are also Commonwealth laws that deal with cultural heritage in a number of different contexts. These laws may be relevant in circumstances where cultural heritage is considered to be of national significance, or in situations of last resort where a State or Territory law does not provide adequate protection.

Commonwealth laws also provide cultural heritage protection in the context of recognising the rights and interests of Aboriginal and Torres Strait Islander people more broadly, as can be seen in the Native Title Act and the Aboriginal Land Rights (Northern Territory) Act.

How does the Native Title Act protect cultural heritage?

The Native Title Act provides a framework for recognising and protecting the traditional rights and interests of Aboriginal and Torres Strait Islander people on areas of land and waters where native title has not been extinguished. This can include vacant Crown land and reserves, forests and parks, as well as seas and inland waters.

Most significantly, the Native Title Act provides for determinations of native title by the Federal Court that recognise the continuing native title rights and interests of Aboriginal and Torres Strait Islander people. As noted above, this may include a right to protect places and areas that are important under traditional law and custom.

It may be possible to protect these places and areas in some circumstances by applying to a Court for a legal remedy such as an injunction to prevent an activity that would damage them. Protection of this nature may be available in the absence of, or in addition to, protection available under other State, Territory or Commonwealth cultural heritage laws.

Future act processes and agreements

The Native Title Act also establishes a 'future act regime' whereby activities that may affect native title rights and interests can only validly proceed if certain processes are followed by governments and proponents of the activities. Some of these processes require consideration of whether there is a cultural heritage law in place that provides for the preservation or protection of areas or sites of particular significance, or whether there is likely to be an impact on these areas.

The Native Title Act contains important notification, consultation and negotiation provisions that apply in different situations to ensure that a PBC is made aware of proposed activities that may have an impact on cultural heritage.

Most significantly, the Native Title Act makes provision for native title holders to reach a number of different types of agreements with governments and proponents who want to carry out future act activities. Indigenous land use agreements, section 31 agreements, and ancillary agreements provide native title holders with an opportunity to negotiate appropriate terms and conditions to put in place cultural heritage protection and monitoring safeguards before future act works are undertaken.

Limitations on Native Title Act protection

The cultural heritage protection available under the Native Title Act is confined to areas of land and waters where native title may exist or has been determined to exist. This is in contrast to other cultural heritage laws that can apply more broadly, including over areas where native title has been extinguished.

Even where native title has been determined to exist, native title rights and interests do not provide absolute protection or a right of veto over development activities. Governments and statutory tribunals have the power to approve development activities even where this may override native title rights to protect places of importance, or in certain circumstances, even where these activities will extinguish native title.

Importance of understanding native title and cultural heritage laws

An understanding of the protection provided by the Native Title Act and its relationship to state and territory cultural heritage laws is of particular importance for PBCs and native title holders so they are fully aware of

the options available to protect their cultural heritage.

In areas where native title may exist or has been determined to exist, the rights recognised under the Native Title Act and its future act processes can assist in protecting cultural heritage. As noted earlier, future act agreement negotiations provide native title holders with an important opportunity to ensure that appropriate cultural heritage protection measures are implemented. State, Territory and Commonwealth cultural heritage laws can also be used to protect cultural heritage in these same areas where native title rights and interests may continue exist.

In areas where native title no longer exists, recognising and protecting cultural heritage will largely depend on the protection available under the relevant State or Territory laws. In addition, it may be possible to use specific Commonwealth cultural heritage laws in a limited number of circumstances, including where cultural heritage is considered to be of national significance, or in situations of last resort where a State or Territory law does not provide adequate protection.

The Balanggarra Aboriginal Corporation experience

The Balanggarra Aboriginal Corporation RNTBC administers land on behalf of the Balanggarra People. Balanggarra people's Country is over approximately 26,025 square kilometres of land and sea in the northern Kimberley region of Western Australia.

The Far West Coast Aboriginal Corporation experience

The Far West Coast Aboriginal Corporation (FWCAC) manages the Far West Coast land as belonging to the Far West Coast Peoples. FWCAC represents 6 distinct cultural groups of Aboriginal people: Mirning Peoples, The descendants of Edward Roberts, Wirangu Peoples, Yalata Peoples, Kokatha Peoples and Maralinga Tjaratja (Oak Valley) Peoples.

Relevant legislation

State and Territory Cultural Heritage Laws

Cultural heritage is protected to varying degrees in different states and territories by a number of laws. These include:

Australian Capital Territory - [Heritage Act 2004](#)

New South Wales - [National Parks and Wildlife Act 1974](#)

Northern Territory - [Northern Territory Aboriginal Sacred Sites Act](#)

Queensland - [Aboriginal Cultural Heritage Act 2003](#)

[Torres Strait Islander Cultural Heritage Act 2003](#)

South Australia - [Aboriginal Heritage Act 1988](#)

Tasmania - [Aboriginal Heritage Act 1975](#)

Victoria - [Aboriginal Heritage Act 2006](#)

Western Australia - [Aboriginal Heritage Act 1972](#)

Commonwealth Cultural Heritage Laws

Cultural heritage is protected in particular contexts under a number of Commonwealth laws, including:

[Native Title Act 1993](#)

[Aboriginal and Torres Strait Islander Heritage Protection Act 1984](#)

[Environment Protection and Biodiversity Conservation Act 1999](#)

[Protection of Movable Cultural Heritage Act 1986](#)

[Aboriginal Land Rights \(Northern Territory\) Act 1976](#)

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