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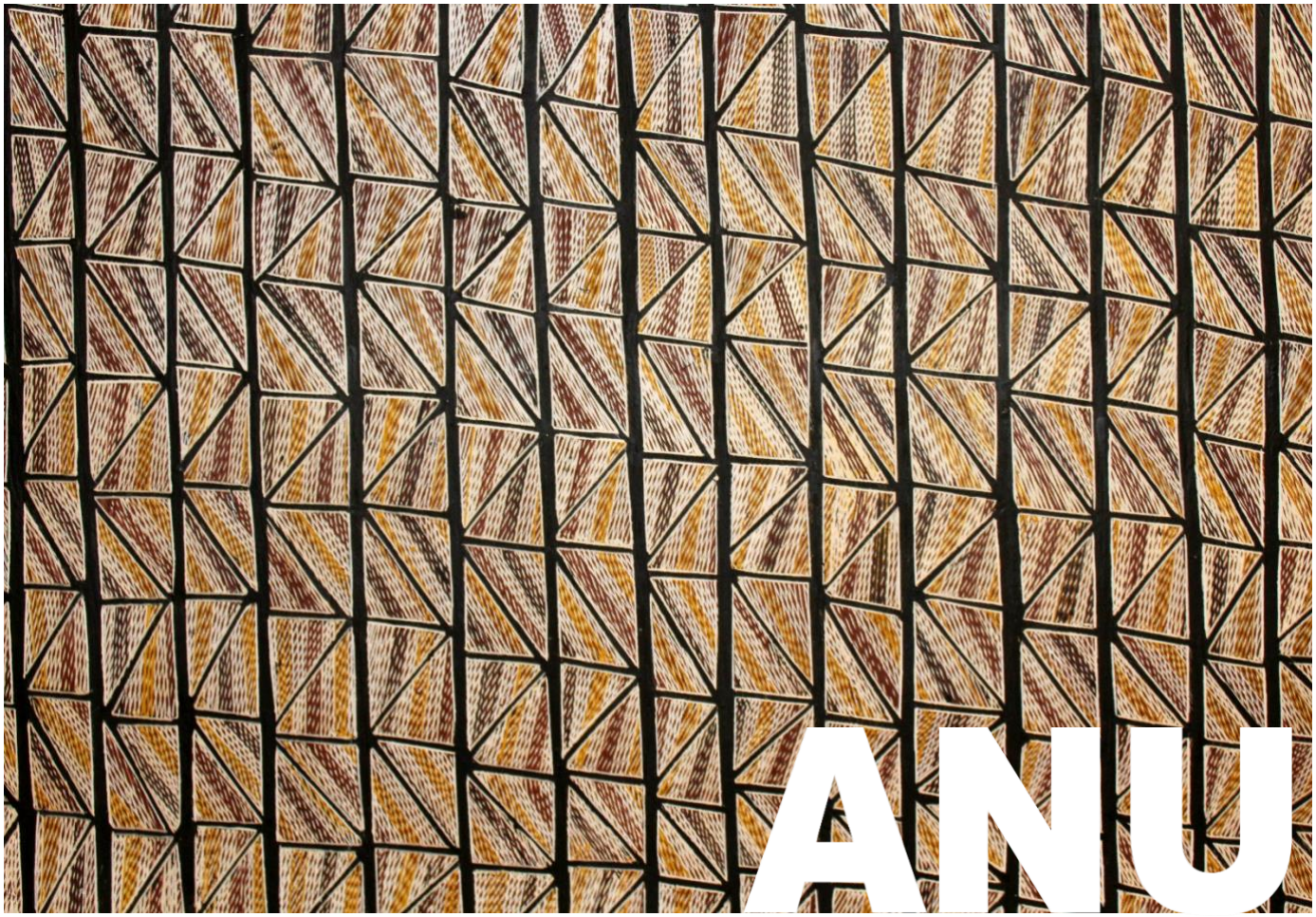

CULTURAL VANDALISM: REGULATED DESTRUCTION OF ABORIGINAL CULTURAL HERITAGE IN NEW SOUTH WALES

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CULTURAL VANDALISM: REGULATED DESTRUCTION OF ABORIGINAL CULTURAL HERITAGE IN NEW SOUTH WALES

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Abstract

The destruction of a cultural site of the Puutu Kunti Kurrama and Pinikura people, which has evidence of 46,000 years of continual human occupation, by mining giant Rio Tinto has attracted national and international condemnation. The company's actions at Juukan Gorge were lawful, though wrong, due to the weak protections offered by the outdated laws in Western Australia relating to Aboriginal cultural heritage. But Western Australia is not alone. The *National Parks and Wildlife Act 1974* (NSW) came just two years after the *Aboriginal Heritage Act 1972* (WA) and is similarly outdated. Aboriginal people in New South Wales have been trying to strengthen the law that is supposed to protect their cultural heritage since the late 1970s, but reform remains elusive. Meanwhile hundreds of important sites continue to be destroyed. Failed appeals by Aboriginal custodians to the Commonwealth only reinforce the need for urgent law reform at every level.

Keywords: Aboriginal, Cultural Heritage, New South Wales, Legislation, Law reform

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I would like to acknowledge the traditional custodians of the land on which I live and work, and their efforts over generations to protect and care for their country and their precious cultural heritage.

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I remain ever grateful for the education I received about the importance of Aboriginal cultural heritage and the rate it is being destroyed from the late Allan Carriage, a Wadi Wadi elder.

Acronyms

ACHWG	Aboriginal Cultural Heritage Working Group
ANU	Australian National University
CAEPR	Centre for Aboriginal Economic Policy Research
NPWA	*National Parks and Wildlife Act 1974* (NSW)
NSW	New South Wales
NSWALC	New South Wales Aboriginal Land Council
NTSCORP	NTSCORP Limited
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WA	Western Australia

Contents

Cultural Vandalism

The deliberate destruction of a cultural site of the Puutu Kunti Kurrama and Pinikura people, which held evidence of 46 000 years of continual human occupation, by mining giant Rio Tinto has rightly attracted national and international condemnation (Wahlquist, 2020). The response to this destruction at Juukan Gorge has also put pressure on another major mining company, BHP, which has been forced to delay the proposed destruction of more Pilbara sites of great significance (Allam & Whalquist 2020). Both companies' actions or proposals are lawful, due to the weak protections offered by the outdated *Aboriginal Heritage Act 1972* (WA) relating to Aboriginal cultural heritage.

But WA is not alone. Its law dates back to 1972, while the equivalent law in New South Wales (NSW)—the *National Parks and Wildlife Act 1974* (NPWA)—came only two years later and is just as outdated. Aboriginal people in NSW have been trying to strengthen the law that is supposed to protect their cultural heritage since the late 1970s, but reform remains elusive.

The asserted purpose of Aboriginal cultural heritage legislation is to protect the valuable and important Aboriginal cultural heritage of this ancient land. In NSW, the law is meant to protect 'places, objects and features of significance to Aboriginal people' (NPWA s. 2A) itself a rather narrow definition of Aboriginal cultural heritage that excludes cultural landscapes and intangible cultural heritage. But the legislation clearly fails to do so. Between 100 and 200 sites and objects are lawfully destroyed every year (NSWALC, 2009). Permits issued by the state government to companies or others for the disturbance or destruction of Aboriginal cultural heritage are common, with around five per week being issued in the late 2000s on public and private lands in NSW (NSWALC, 2009). Rejections are a rare occurrence. In June 2010 the NSW Parliament passed the National Parks and Wildlife Amendment Bill which made changes to the 1974 Act, designed to give greater protection to Aboriginal cultural heritage through heavier fines and penalties and a strict liability clause intended to overcome the previous situation whereby a largely ignorant public could be sanctioned only if they destroyed cultural heritage 'knowingly'—their ignorance being their defence.

Prior to 2010, penalties were low, and prosecutions remained few and far between (NSWALC, 2009; NSW Office of Environment and Heritage, 2012). When these amendments came into effect in October 2010, Aboriginal people hoped that this would slow the rate of destruction and better protect their cultural heritage. However, ongoing destruction continued, including by government-owned entities themselves (NSWALC & NTSCORP, 2011, p. 11). For example, in 2010, Forests NSW logged an area within the Biamanga Mountain Aboriginal Place—a very significant site for the NSW South Coast's Yuin people (Hunt & Ellsmore, 2016). Indeed, in the years following the 2010 reforms hundreds of permits relating to the destruction or disturbance of Aboriginal cultural heritage were approved. In fact, between 2012 and 2017, 704 permits to allow damage or destruction of Aboriginal cultural heritage were issued and only one was rejected (Grieve 2020a). The NSW Minister responsible for the environment makes or delegates these decisions (NSW Office for Environment & Heritage, 2012). Aboriginal people are consulted in the process but if their views do not prevail, must take legal action (usually in the NSW Land and Environment Court) where damage or destruction they oppose is lawfully allowed.

In a small victory in 2016, the Clarence River Council was fined $300,000 for destroying a scar tree (White & Ross, 2018). This was at least a heftier fine than the $4,690 fine energy company Ausgrid was given for destroying a known urban heritage site in Cromer just three years earlier (McKenny, 2013).

But that is but a passing victory considering the grave concerns over major sites in NSW. For instance, the potentially legal destruction of hundreds of Gomeroi sites by a proposed major coal mine, and similar impact of coal seam gas projects on cultural heritage across the state, remains contested and unresolved. In an important

legal case being taken by the Gomeroi Traditional Custodians, the Commonwealth Minister's powers under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, in her July 2019 decision to allow the destruction of Gomeroi heritage and enable mining and energy company Shenua to build the Watermark coal mine near Gunnedah, will be tested (Business Acumen Magazine, 2020; Murphy, 2019).

According to the Environmental Defenders Office '[t]he Minister made this decision despite acknowledging the 'immeasurable' cultural value of the sacred places and objects under direct threat of destruction or desecration' (Global Travel Media, 2020,). Clearly she put coal-led economic development ahead of such immeasurable value. This has provoked Parliamentarians across the major parties in NSW to formally call upon the Premier to ensure no destruction of cultural artefacts as a result of this mine development (Grieve, 2020b). It remains to be seen what will happen.

The ongoing threats to, and experience of, cultural heritage destruction in NSW point to an Australia-wide trend in Aboriginal heritage protection management identified by Schnierer et al. (2011) which is that the increasing identification of Aboriginal cultural heritage has not led to an increase in protection, but rather to better informed, regulated harm to that heritage, sanctioned by government agencies. Five years on, the 2016 State of the Environment Report, commissioned by the Australian Government, referred to Australia's fragmented state of Indigenous cultural heritage protection, going on to say that:

> *Australia's Indigenous heritage remains at risk from incremental destruction. This arises in part from a lack of formally protected sites, but also from reactive statutory assessment and development-consent systems, and a pattern of conscious lawful destruction arising from informed development consent. Indigenous communities continue to express concern about this issue generally, and through opposition to specific development projects. (Mackay, 2017, p. 149).*

And while cultural heritage law is a state responsibility, Commonwealth law has no better record of protecting Indigenous heritage than laws in the states and territories. Aboriginal people in NSW, as elsewhere in the country, can, when all else fails in their state, appeal to Commonwealth law, under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. This enables Aboriginal people to make an application to the Minister for the Environment, orally or in writing, for an emergency declaration to preserve or protect an area that is under serious and immediate threat of injury or desecration. Such appeals almost never succeed—and although the Australian Government was alerted to the impending destruction, it appears no emergency declaration was made in time to save the Juukan Gorge.

Law reform

So why can't state laws be strengthened?

Efforts to strengthen Aboriginal heritage legislation in NSW go back to before 1980, when in response to Aboriginal activism and demands for land rights, the 1980 NSW Legislative Assembly Select Committee upon Aborigines, better known as the Keane Committee, was established. This Committee considered cultural heritage legislation as part of a far broader brief about the causes of Aboriginal socio-economic disadvantage and land rights. The first of its two reports covered land rights and Aboriginal heritage, and it recommended the establishment of both a land rights system and an Aboriginal Heritage Commission. While the former was established in 1983, the latter recommendation languished (NSWALC, n.d.; NSW Office of Environment and Heritage, 2011).

Since then, there have been two major efforts to achieve Aboriginal heritage reform before the current process, which began seven years ago and moves at glacial speed. The first attempt was in 1988–1989, with a Ministerial Task Force which consulted widely with Aboriginal people across the state. While the Task Force

developed some principles for new legislation and some options for future heritage protection, this failed to lead to change. The second attempt was from 1993–1996 through the Aboriginal Cultural Heritage Working Group (ACHWG) which developed a Green Paper on Aboriginal Cultural Heritage. The Green Paper never received Cabinet approval, and once again reform stalled (NSW Office of Environment and Heritage, 2011).

All the reviews commissioned by governments to date have recommended development of stand-alone Aboriginal cultural heritage legislation and an Aboriginal-controlled cultural heritage commission for NSW. The reviews have also agreed that Aboriginal ownership of Aboriginal culture and heritage should be recognised and that Aboriginal people should make decisions about the significance of cultural heritage. And the reviews have all recognized the importance of Aboriginal definitions of cultural heritage, which are holistic, incorporating cultural landscapes and dynamic contemporary aspects of a living culture, with many manifestations, notably language, art, and music, and heritage which is intangible as well as tangible (NSW Office of Environment and Heritage, 2011).

The 1980 Keane Committee, the 1989 Ministerial Task Force and the 1995 ACHWG Green Paper all saw the Aboriginal community as the place where responsibility for protection and management of Aboriginal cultural heritage should reside (NSW Office of Environment and Heritage, 2011).

But 40 years on, nothing is being proposed in the latest NSW attempt at cultural heritage law reform to give genuine control of Aboriginal cultural heritage to Aboriginal people. The current reform process commenced a decade ago and has been through four consultation phases. In 2013 a new model for a cultural heritage system was proposed and has been improved over subsequent years in response to Aboriginal feedback. In 2018, a draft law was publicly released which proposes an Aboriginal Cultural Heritage Authority, comprising Aboriginal people appointed by the Minister, a broader definition of cultural heritage, and a number of other positive features.[1] But it seems that in NSW, as elsewhere, governments backed by powerful development interests are unwilling to make reforms consistent with Aboriginal rights to self-determination. While in 2020 what's been on the table looks much better than the 1974 NPWA, it remains inadequate in terms of what all previous reviews have recommended. There is no plan to give an Aboriginal Heritage Authority full control over cultural heritage. The Minister retains excessive discretion and control, and importantly not all developments will be subject to its processes. Projects deemed to be 'State Significant' will be exempt. This is not a small loophole but a gaping chasm for government to so designate any major development and render it unhindered by cultural heritage protection requirements. The Bill proposes to entrench the existing imbalance of proponent rights over Aboriginal peoples' rights, particularly relating to appeals. There remain many concerns about how a new system would work in NSW, and how adequately any eventual Aboriginal Heritage Authority would be resourced to ensure compliance, should this Bill be passed (NSWALC, 2018).

Clearly cultural vandalism isn't confined to Western Australia—it is legally sanctioned in NSW and laws being debated even now will still allow it to continue. The Commonwealth's laws do little to change that situation – in fact they reinforce it. Talk of reducing red tape and fast-tracking infrastructure development may even accelerate it (Coorey, 2020).

As Aboriginal archaeologist Dave Johnston said five years ago (Johnston, 2015), there is an Indigenous cultural heritage site management crisis. It's time for a national discussion on Indigenous heritage reform. Commonwealth leadership to set some cultural heritage protection standards is needed, but seems unlikely to emerge from a Parliamentary Inquiry just announced, as it is led by the Committee charged with fostering the development of Northern Australia (Parliament of Australia, 2020). To date the Northern Development agenda

[1] Full details of the reform process which began in 2010 are available at: https://www.environment.nsw.gov.au/topics/aboriginal-cultural-heritage/legislation/reform-process

has had a heavy emphasis on extractive industries and large-scale development (Australian Government, 2015), neither of which are well known for protecting Aboriginal heritage.

NSW law reform needs to move into the twenty-first century, reflecting international standards such as those embodied in the UN Declaration of the Rights of Indigenous People (UN, 2007) and the UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage (UNESCO, 2018), as well as the nationally agreed Burra Charter (Australia ICOMOS, 2013). Each of these frameworks expect Indigenous rights to be respected and cultural heritage to be protected.

There is now strong national Aboriginal activism to this end. On 17 June 2020, in response to the Juukan Gorge destruction in WA, major Aboriginal organisations came together to form a national network to stop the destruction of Aboriginal heritage. As their media statement said:

> *We find ourselves in this situation because governments, of both political persuasions and at all levels, have rarely been prepared to put the protection of Aboriginal heritage ahead of development and (sic) in the past 20 years, other than in the rarest of cases. They have let their legislation, supposedly to protect our heritage, to fall into disuse or to focus on regulating destruction, rather than protecting, enhancing and educating about our living cultures unique to this country (NSWALC, 2020).*

Their leaders want 'to meet with responsible Ministers from the Commonwealth, States and Territories as soon as possible to discuss a process for reviewing heritage protection legislation across Australia, to engage with our communities and Traditional Owners about what they want to see in these laws, and to jointly design with Ministers a new system that will make sure that an incident like what happened at Juukan Gorge never happens again'. In the meantime they have asked all governments 'not to make any decisions that will damage our heritage sites' (NSWALC, 2020).

It now remains to be seen whether this unprecedented national initiative will achieve its goals where earlier efforts at the state level have failed.

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