ANNEXURE 4

Pamela Statham

Trashing Heritage

Dilemmas of rights and power in the operation of Western Australia's Aboriginal Heritage Legislation[1]

David Ritter

Western Australia's *Aboriginal Heritage Act 1972*[2] is said to operate to protect places and objects of significance to Aboriginal people on behalf of the community.[3] This paper takes a critical view of the *Aboriginal Heritage Act*, interrogating the legislation in the context of the power relationships that exist between Aboriginal and non-Aboriginal people. The intent is to 'trash' the *Aboriginal Heritage Act*, that is, to subject it to the kind of interrogation of legal institutions and doctrines that is best associated with critical legal theory. 'Trashing' is an exercise in deconstructing legal orthodoxies, aimed at exposing the ambiguities and ironies that are latent within liberal legal discourse.[4] This will be done through an examination of a number of features of the 'Aboriginal heritage system' in operation to reveal the ways in which, as a system, it both disempowers and colonises Aboriginal people, reducing their social power and stultifying political aspirations.

Outline of the Aboriginal Heritage Act 1972 (WA)[5]

The *Aboriginal Heritage Act* establishes a central source of authority to record and regulate all dealings with Aboriginal places and objects of significance. This central authority has three elements: the relevant state government minister,[6] the Aboriginal

1 Many thanks to Michael Robinson and Frances Flanagan for their specific comments on this paper and to Nicholas Green and Philip Haydock for their general contributions to my understanding of the relevant issues. Thanks to Kathy Wright for assisting me with obtaining sources. Any mistakes are of my own making.

2 Aboriginal Heretige Act 1972 (WA).

3 See *Aboriginal Heritage Act* 1972 (WA) long title.

4 K. Upston-Hooper, 'Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi', *Victoria University of Wellington Law Review*, No. 28, (1998), pp.683ff, at p.700.

5 See Warwick Dix, 'The Aboriginal Heritage Act of 1972' in Michael C. Howard (ed.), *'Whitefella Business': Aborigines in Australian politics*, Philadelphia, USA: Institute for the Study of Human Issues, c1978; McDonald, G., 'Western Australia', in Nicolas Petersen (ed.), *Aboriginal Land Rights: A Handbook*, Canberra: Australian Institute of Aboriginal Studies, 1981; Kerry Clarke, *Environmental Management in Western Australia: Aboriginal Heritage*, Nedlands: University of Western Australia, Department of Civil Engineering, Department of Politics, Law School, 1983; Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 1996, ch.6 and Appendix VIII: 'Overview and Summary of State and Territory Laws'; D. Saylor, 'Aboriginal Cultural Heritage Protection in Australia: The Urgent need for Protection', *Aboriginal Law Bulletin*, Vol. 3, No. 76, October, 1995, p.9.

6 The Department in its current incarnation is known as the 'Department of Indigenous Affairs'.

Cultural Material Committee (ACMC) and the Registrar of Aboriginal Sites.[7] The ACMC is comprised of at least one anthropologist and the Director of the Western Australian Museum is an ex officio member.[8] Otherwise it is made up of 'persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility'.[9] The functions of the ACMC include evaluating 'on behalf of the community' the importance of places and objects 'alleged to be associated with Aboriginal persons' and where appropriate, 'to record and preserve the traditional Aboriginal lore' [sic.] related to such places and objects. The ACMC also has the role of recommending to the Minister places that, in the opinion of the ACMC, are of special significance to persons of Aboriginal descent and should be preserved, acquired and managed by the Minister. In evaluating the importance of places, the ACMC must have regard to certain criteria, including any existing use or significance attributed under relevant Aboriginal custom; any former or reputed use or significance which may be attributed upon the basis of tradition, historical association, or Aboriginal sentiment; any potential anthropological, archaeological or ethnographic interest; and aesthetic values. Significantly, the *Aboriginal Heritage Act* specifies that associated sacred beliefs, and ritual or ceremonial usage shall be regarded as the primary considerations to be taken into account in the evaluation of any place or object.[10] In addition to its more specific functions, the ACMC must advise the Minister generally on the operation of the *Aboriginal Heritage Act*.[11]

The Registrar of Aboriginal Sites must be an officer of the relevant government department and he or she has the function of administering the day-to-day operations of the ACMC. In the fulfillment of his or her duties, the Minister is required to 'have regard to the recommendations of the Committee and the Registrar', but is not bound by them.[12] Some of the Minister's decisions are subject to review by the Supreme Court.[13]

The *Aboriginal Heritage Act* refers to various kinds of places of significance that are ascribed different levels of importance.[14] These include 'places of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial object, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present';[15] 'sacred, ritual or ceremonial sites, which are of importance and special significance to

7 The administrative arrangements made by the *Aboriginal Heritage Act* have changed by amendment since its inception. The nature of the amendments is beyond the scope of this paper. See *Aboriginal Heritage Amendment Act (2) 1980*, (WA).

8 Sections 28–29, *Aboriginal Heritage Act*.

9 Section 28, *Aboriginal Heritage Act*.

10 Section 39(3), *Aboriginal Heritage Act*.

11 Section 39, *Aboriginal Heritage Act*.

12 See section 11A, *Aboriginal Heritage Act*.

13 See section 18, *Aboriginal Heritage Act*.

14 In this paper, I do not tackle the problem of how 'Aboriginal heritage' might be defined and whether such a definition should even be attempted. Suggesting any definition of heritage requires a compartmentalisation of Indigenous culture that may be neither appropriate nor possible on its own terms: pers. com. Micheal Robinson and Frances Flanagan.

15 See section 5(a), *Aboriginal Heritage Act*.

persons of Aboriginal descent';[16] and any place which, in the opinion of the ACMC, is associated with Aboriginal people and which is of 'historical, anthropological, archaeological or ethnographic interest and should be preserved because of its importance and significance to the cultural heritage of the State'.[17] Aboriginal sites of 'outstanding importance' may be made 'protected areas' and thereby accorded the highest form of protection available under the *Aboriginal Heritage Act*.[18]

The *Aboriginal Heritage Act* makes it illegal to damage any places or objects of significance and a transgression renders the perpetrator liable to prosecution, creating an apparent 'blanket protection'.[19] There are, however, exceptions. In general terms, the *Aboriginal Heritage Act* is not to be construed so as to take away or restrict Aboriginal peoples' rights or interests held or enjoyed in respect to any place or object to which it applies.[20] However, this construction is subject to the overriding proviso that nobody is authorised to dispose of or exercise any right or interest in a manner that is, in the opinion of the Minister, detrimental to the purposes of this *Aboriginal Heritage Act*.[21] Otherwise, the right to excavate or to remove anything from an Aboriginal site is reserved to the Registrar[22] unless an owner of the land[23] in question has obtained consent to use the land in a way that would be prohibited without such consent.[24] Thus, while it is generally illegal for non-Aboriginal people to in any way alter or deal with any Aboriginal site or object, such activity can be legalised by the Minister.[25]

The Minister may legalise the destruction of an Aboriginal site when a land owner makes an application to that effect.[26] This is first considered by the ACMC, which makes a recommendation to the Minister who then may give or decline consent, or give consent conditionally. In proceedings for unauthorised alteration or dealings with any Aboriginal site or object, it is a defence for the person charged to prove that they did not know and could not reasonably be expected to have known, that the place or object to which the charge related was a place or object to which the *Aboriginal Heritage Act* applies.[27] In any event, even where a prosecution is successful, the penalties available under the *Aboriginal Heritage Act* are pitifully limited—particularly if the convicted party is a corporation.[28]

16 See section 5(b), *Aboriginal Heritage Act*.

17 See section 5(c), *Aboriginal Heritage Act*.

18 See section 19, *Aboriginal Heritage Act*. See also sections 20–26, *Aboriginal Heritage Act*.

19 See M. Jago and N. Hancock, 'The Case of the Missing Blanket: Indigenous Heritage and States' Regimes', *Indigenous Law Bulletin*, Vol. 4, No. 16, November 1998, p.18.

20 But only in so far as that right or interest is exercised in a manner that has been approved by the Aboriginal possessor or custodian of that place or object and is not contrary to the usage sanctioned by the Aboriginal tradition relevant to that place or object: section 7(1)(a), *Aboriginal Heritage Act*.

21 Section 7(2), *Aboriginal Heritage Act*.

22 Section 16(1), *Aboriginal Heritage Act*.

23 'Owner' includes a lessee from the Crown and the holder of any mining or petroleum tenement: s 18(1) *Aboriginal Heritage Act*.

24 See section 17, *Aboriginal Heritage Act*.

25 The interaction of sections 17 and 18 of the *Aboriginal Heritage Act*, particularly section18(8).

26 See sections 16 and 18 of the *Aboriginal Heritage Act*.

27 See section 62, *Aboriginal Heritage Act*.

28 The maximum financial penalty is a penalty of two thousand dollars: see section 58, *Aboriginal Heritage Act*.

Trashing Heritage

The *Aboriginal Heritage Act* makes it the duty of the Minister to ensure that so far as is reasonably practicable all places in Western Australia that are of traditional or current sacred, ritual or ceremonial significance to persons of Aboriginal descent should be recorded on behalf of the community, and their relative importance evaluated so that the resources available from time to time for the preservation and protection of such places may be co ordinated and made effective.[29] Any person who has knowledge of the existence of any thing in the nature of Aboriginal burial grounds, symbols or objects of sacred, ritual or ceremonial significance, cave or rock paintings or engravings, stone structures or arranged stones, carved trees, or of any other place or thing to which the *Aboriginal Heritage Act* applies or to which the *Aboriginal Heritage Act* might reasonably be suspected to apply, shall report its existence to the Registrar, or to a police officer.[30] This enterprise extends to Aboriginal cultural material of traditional or current sacred, ritual or ceremonial significance regardless of where it is located.[31] The Registrar is then required to maintain a register of places and objects that records all protected areas, all Aboriginal cultural material; and all other places and objects to which the *Aboriginal Heritage Act* applies.[32] A partial exception to these rules is that the *Aboriginal Heritage Act* does not require Aboriginal people themselves to disclose information or otherwise to act contrary to any cultural prohibition.[33] The *Aboriginal Heritage Act* also establishes a scheme for the regulation of commercial dealing in Aboriginal cultural material.[34]

The Chimera of Protection

It is sometimes suggested that submitting information about sites to the Registrar in order to have them registered under the *Aboriginal Heritage Act* is the way that Aboriginal people can 'enforce their rights under the *Aboriginal Heritage Act*'. Aboriginal people are sometimes urged to register their sites in order to protect them.[35] Yet, as a swift analysis of the *Aboriginal Heritage Act* shows, the registration of sites offers no greater protection, it merely eliminates the availability of the defence of ignorance to a prosecution for damaging a site. Further, it places power over them in the hands of bureaucrats who define what they are and whether they are expendable according to some unstated set of 'scientific' principles that the sites' owners cannot interrogate or challenge. The *Aboriginal Heritage Act* does not establish any specific right on behalf of Aboriginal people to sue for damage to a site or to seek injunctive or declaratory restraint of a party intending to damage a site. It does not create any special property in Aboriginal heritage held by Aboriginal

29 See section 10(1), *Aboriginal Heritage Act*.

30 Section 15, *Aboriginal Heritage Act*. It has crossed my mind that it might interesting to ring one's local police station in order to report having seen an Aboriginal site to see what response it elicited.

31 See sections 10(2) and 38, *Aboriginal Heritage Act*.

32 See s 38, *Aboriginal Heritage Act*.

33 See section 7(1)(b), *Aboriginal Heritage Act*.

34 See Part VI, *Aboriginal Heritage Act*, particularly sections 40 and 43.

35 See for example Dix, p.86.

people.[36] The *Aboriginal Heritage Act* was, at its most emancipative intent, predicated on the recognition that the 'preservation of sites and objects of Aboriginal origin is now recognised throughout Australia as an important aspect of providing Aboriginal citizens with the social environment that they need when they still retain partly or wholly their traditional religious beliefs'.[37] As one opposition member pointed out in response to the original Bill's second reading speech, Aboriginal people themselves do not have a prominent role within the legislation:

> This measure is in fact a Bill relating to the Museum, purely and simply. It will extend the power and authority of the Museum and the reference to Aborigines is, in the main, purely ancillary to the original purpose of the Bill.[38]

The 'balance' contained within the Aboriginal Heritage Act has been accurately described as 'recognizing and acknowledging as legitimate Aboriginal concerns even if real power[39] was not transferred'.[40]

While the *Aboriginal Heritage Act* establishes a regime of sorts for the protection of heritage, it is a regime that is largely not enforceable by Aboriginal people themselves. The *Aboriginal Heritage Act* guarantees the participation of some Aboriginal people in its processes, but the role is essentially limited to information provision. If Aboriginal people try to attempt to enforce the provisions of the *Aboriginal Heritage Act* themselves, they will invariably have to rely on administrative law actions rather than any mechanism established under the *Aboriginal Heritage Act*. The legislation then, does not create a 'right on behalf of Aboriginal people to have Aboriginal heritage protected' that is enforceable by Aboriginal people as having a special interest under the'*Aboriginal Heritage Act*. The *Act* creates nothing more than an illusion of rights—it is a deception, a chimera.

The critical legal theory concept of 'loaning'[41] is clearly evident in the context of the *Aboriginal Heritage Act*. The registering of a site, 'loans' protection to it that is readily recoverable under the section 18 process. 'The government of the day can decide in the interests of the broader community what Aboriginal sites should be destroyed or damaged, no matter how sacred or important or special their significance to Aboriginal people may be'.[42] In order to enjoy such protection of their cultural materials as the *Aboriginal Heritage Act* offers, Aboriginal people must 'respect the forms and norms laid down by those in power' and 'avoid excesses in

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36 See M. Tehan, 'Anglo-Australia Law and the Search for Protection of Indigenous Cultural Heritage', *University of Tasmania Law Review*, Vol.15, No.2, 1996, pp.267ff at p.268.

37 Hon. W.F. Willesee, second reading speech, *Hansard*, Tuesday, 11 Apr, 1972, p.471.

38 Hon. G.C. MacKinnon, *Hansard*, Tuesday, 20 Apr 1972, p.831.

39 It is clear, of course, that 'real power' in Western Australia lies with developers: see P. Moore, 'Aboriginal Heritage and Anthropological Practice: Working as a Consultant in Western Australia' in Sandy Toussaint and Jim Taylor (eds), *Applied Anthropology in Australasia*, Nedlands: University of Western Australia Press, 1999, p.107; see also Steven Churches, 'Aboriginal Heritage in the Wild West: Robert Bropho and the Swan Brewery Site', *Aboriginal Law Bulletin*, Vol.2, No.56, June, 1992.

40 Moore p. 107.

41 Freeman, quoted in Upston Hooper, p.712.

42 The Aboriginal Land Inquiry [Western Australia], *The Aboriginal Land Inquiry* by Paul Seaman, Perth: The Inquiry, September, 1984, at 8.16.

behaviour or demands'.[43] This is because protection of Aboriginal heritage is not 'owned' by Aboriginal people, but rather 'merely loaned, and all too easily manipulated away'.[44] Once the Indigenous political desire to protect sites was reflected in the *Aboriginal Heritage Act*, it became appropriated and used against those it was designed to protect. Having apparently legislated to preserve Aboriginal heritage, the legislation has the effect (in political substance) of legitimising its destruction. Protection of Aboriginal cultural materials 'bestowed upon the powerless by the powerful' remains at the mercy of the colonising power, and is left 'ultimately within the control of those with authority to interpret or rewrite the sacred text from which they derive'.[45]

Scientific Inquiry

The spirit of scientific inquiry pervades the *Aboriginal Heritage Act*. The legislation seeks both to 'preserve' Aboriginal cultural sites and materials like so many specimens or samples. Accordingly, anthropological, archaeological and ethnographic interests are repeatedly given emphasis in the *Aboriginal Heritage Act* and the legislation embarks on the fundamentally scientific enterprise of 'recording on behalf of the community' and 'evaluating the relative importance of' Aboriginal heritage. The main criteria observed by the ACMC in its deliberations are scientific in nature.[46] Two social scientists, at least, sit on the ACMC and the Registrar has invariably been a social scientist.[47] A conclusion that the *Aboriginal Heritage Act* is more about science than rights is indicative that early Aboriginal heritage legislation 'was concerned to preserve heritage as a relic of pre-1788 Australian history, rather than as the living cultural heritage of indigenous people'.[48] A clue to this lies in the legislation's very title: it is not 'Aboriginal people's heritage', but 'Aboriginal heritage'; ownership is forsaken in the name of an objectifying pronoun.

Not only is the *Aboriginal Heritage Act* in part cast in terms of a scientific enterprise, but scientific interpretation plays a significant role in determining what legal processes and outcomes apply under the *Act*. That is, how a particular place is to be treated under the *Aboriginal Heritage Act* depends on specialists engaging in extensive description and categorization of Indigenous heritage according to a studied taxonomy that relies on 'narrow, eurocentric' definitions of 'cultural heritage'.[49] Different levels of protection apply to places of 'importance and

43 Freeman, quoted in Upston Hooper, p.712.
44 Freeman, quoted in Upston Hooper, p.712.
45 Freeman, quoted in Upston Hooper, p.712.
46 I include the social sciences as science, but in doing so I do not mean to set up a straw horse here. I am grateful for the cautioning (in another context) of my colleague Dr Nicholas Smith to that effect.
47 The Registrars of sites have been Warwick Dix, Michael Robinson, Nicholas Green, Stuart Reid, Irene Stainton and Madge Schwede.
48 Tehan, p.281.
49 Tehan, p.267. The operation of the *Aboriginal Heritage Act* requires that the experts engaged in the process rate the relative importance of sites. While there is some Indigenous input into this process, overwhelmingly the final arbiter will be non-Indigenous: the Registrar or the Minister. Further, it should be noted that the information that finds its way to the Aboriginal Cultural Material Committee and the Registrar is information that has been collated by anthropologists. It is anthropologists who complete Aboriginal heritage surveys and record sites.

significance' from places which are 'important and of special significance' and again from those of 'outstanding importance'. The *Aboriginal Heritage Act* 'protects' all sites, but there is a hierarchy and sites that are established to be 'sacred' by scientific inquiry are given paramountcy.

Science, of course, purports to be value neutral. Accordingly, legislation like the *Aboriginal Heritage Act* that determines heritage protection on the basis of scientific appraisal appears objectively fair, an achievement of enlightened and rational lawmaking. The problem though is that 'science' is not free of values or ideology. It is no more than a discourse of knowledge and power that reflects hegemonic values. Thus the effect is to create the appearance of value neutrality, for what is in truth an ideological process. Masking the function of the hierarchy of Aboriginal sites within the *Aboriginal Heritage Act* as rational, acts to legitimate the destruction of some heritage places in exchange for the weak protection of others. The 'scientific' and 'fair' nature of the process serves to legitimate the suppression of Aboriginal interests within the *Aboriginal Heritage Act*. The *Aboriginal Heritage Act* relies on discourses of science to mask and legitimate its political agenda to control and appropriate Indigenous heritage.[50]

The political contingency of the 'scientific method' of the *Aboriginal Heritage Act* is revealed in part by the semantic absurdities contained within the *Aboriginal Heritage Act*. Expressions like 'places of importance and significance' and places of 'outstanding importance', are not defined in the *Aboriginal Heritage Act* and are hardly capable of neutral definition.[51] These expressions have been interpreted and reinterpreted by experts, who may form their own views about the importance of places, but they defy objective exposition. The tension between 'scientific' form and power-political reality has also been exposed by some of the *causes celebre* of Aboriginal Heritage in Western Australia. In the Noonkanbah dispute, for instance, the insistence of 'outstanding importance' and the imperative for protection by the Aboriginal community in question was undercut by a scientific and political debate about the 'real' importance of the site in question.[52] Ideologically then, the operation of discourses of science and 'genuineness' prohibit the *Aboriginal Heritage Act* from ever being an instrument of Aboriginal political will. Fundamentally, Aboriginal heritage is not seen as being a political activity or any kind political determination on the part of Aboriginal people. It is regarded as being an exercise in science: archaeology, anthropology and topography. Accordingly, while the *Aboriginal Heritage Act* calls for the study of Aboriginal 'lore' it makes no mention of respect for any Aboriginal 'law'.[53]

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50 See work by Dr Laurajane Smith in this regard.

51 See Kenneth Maddock, 'Metamorphosing the Sacred in Australia', *The Australian Journal of Anthropology*, Vol.2, No.2, 1991, p.213 for a description of the emergence of the term 'sacred sites'.

52 See for example Steve Hawke and Michael Gallagher, *Noonkanbah: whose land, whose law*, Fremantle: Fremantle Arts Centre Press, 1989, and *Noonkanbah: The Facts*, Government Printer, Perth, September, 1980; Erich Kolig, *The Noonkanbah Story*, Dunedin, N.Z: University of Otago Press, 1987; Phillip Vincent, 'Noonkanbah' in Nicolas Peterson and Marcia Langton (eds), *Aborigines, Land and Land Rights*, Canberra: Australian Institute of Aboriginal Studies, 1983, p.335.

53 'Lore' not 'law' in section 39, *Aboriginal Heritage Act*. This contrasts with the use of 'law' in native title case law and legislation.

In this context the notion of the 'independence' of heritage researchers (anthropologists) is thrown into stark relief.[54] When industry requires independent verification of sites, it invariably means that it wants a researcher who is not in the employment or service of the Aboriginal people in question. Yet, why a researcher who is in the employment of the government or a resource company is seen as being independent is mystifying. Surely, the same principle should apply both ways. If anthropologists are to be independent, then they must be free of the state and the development industry.[55] The reason why this does not occur is because the position of the colonising power is seen as being normal, objective, independent, fair. Only the position of Aboriginal people is seen as being political and therefore partial. Thus, the *Aboriginal Heritage Act* calls for independent scientific enquiry and that means enquiry within the terms accepted by non-Indigenous authority. The moment a researcher becomes directed or employed by Aboriginal people, that person is seen as becoming political and therefore non-scientific.

Aboriginal participation in the *Aboriginal Heritage Act* system is largely confined to that of 'subject'. Even where Aboriginal people are given decision making input in the *Aboriginal Heritage Act* system, they are required to make choices and participate within a process that is alien to Indigenous culture. Whatever views Aboriginal people have about the value of places and objects are conditioned by being transmitted in the language of non-Aboriginal expertise and usually by non-Aboriginal experts and are ultimately subject to appraisal by non-Aboriginal experts and in non-Aboriginal language. Ways of describing places in heritage terms are circumscribed by the categories available in the *Act*. Thus, to the extent that Indigenous people do achieve a form of expression under the *Aboriginal Heritage Act*, these interests will invariably be as presented through a conduit of expert interpolation.[56] When Aboriginal people are themselves cast in positions of authority within the *Aboriginal Heritage Act* process, it is clear that they are expected to exercise expertise or authority in a manner acceptable to non-Indigenous society rather than the precepts of their own Indigenous law and culture.[57] Thus, in 'Western Australia Aboriginal voices are muted throughout the process of determining the significance of their own cultural heritage'.[58]

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54 See generally Moore, p.107.

55 Of course no anthropologist is 'independent' or 'truly objective' because all knowledge is relative and knowledge, itself, is a form of power. This merely serves to further illustrate the absurdity of anthropologists who are retained by Aboriginal people being seen as less independent.

56 See M. Harris, 'The Narrative of Law in the Hindmarsh Island Royal Commission' in Martin Chanock and Cheryl Simpson, *Law and Cultural Heritage*, (A special edition of Law in Context, Vol.14, No.2, 1996) Bundoora, Vic.: La Trobe University Press, 1996, p.119; Lee Godden, 'Indigenous Heritage and the Environment: "Legal categories are only one way of imagining real", Paper delivered at *The Past and Future of Land Rights and Native Title*, conference, Townsville, 28–31 August 2001.

57 Where Aboriginal people sit on the ACMC, it is because of their 'special knowledge, experience or responsibility', not their Aboriginal decent: *Aboriginal Heritage Act*, section 28(4). Obviously, those Aboriginal people who do sit on the ACMC are required to breach basic Aboriginal protocols by making decisions about other Aboriginal people's country.

58 Moore, p.113.

Science (including anthropology) and law are, of course, systems of knowledge and power that have served the project of colonisation well.[59] Aboriginal people have been scientifically measured and assessed and subject to legal definition unremittingly. The *Aboriginal Heritage Act* is a classic case of these dynamics. Indigenous feelings for land (alien and unknowable to non-Indigenous society on their own terms) are reduced by a legally sanctioned and scientifically legitimated process, into a form where the colonising power can deal with them according to hegemonic views of the good of the community.

The disjunction of Aboriginal heritage and native title

The protection of sites of significance is a fundamental native title right.[60] Notwithstanding this clear acknowledgement, the *Aboriginal Heritage Act* and the institutions and processes established pursuant to it, remain strangely blind to native title. Formalistically, the incoherent relationship between the *Native Title Act* and the *Aboriginal Heritage Act* can be easily explained. When the *Aboriginal Heritage Act* was enacted in 1972, *Mabo* was still more than 20 years away and native title was not acknowledged to exist under the common law of Australia. Native title is a common law doctrine now regulated by Commonwealth legislation, the *Aboriginal Heritage Act* is a state statute without a common law foundation. The one strength of the *Aboriginal Heritage Act* over native title, is that such protection as the *Aboriginal Heritage Act* offers to heritage is regardless of the tenure of the land on which it is located. Native title on the other hand is extinguished by inconsistent tenure.[61] Native title and statutory Aboriginal heritage, then, are different in both nature and origin.[62]

Nevertheless, while it may be institutionally explicable, the division between native title and Aboriginal heritage is logically and culturally absurd. The ludicrous practical situation is that whereas both registered native title claimant groups and their native title representative bodies must be notified if the state government intends to grant even the smallest prospecting licence, the ACMC does not regard itself as being required to notify either if it is about to recommend that a particular Aboriginal site or place can be destroyed under sections 16 or 18 of the *Aboriginal*

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59 On law as a discourse of conquest see Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York: Oxford University Press, 1990. On the use of anthropology in the colonisation of Australia see C. Cheater, *The Human Laboratory: Anthropology in Australia (1800–1950)*, unpublished PhD thesis.

60 'Any form of native title which did not recognise the need to protect sacred and significant sites would debase the whole concept of recognition of traditional rights in relation to land': *Hayes v Northern Territory* [1999] FCA 1248, para 51. See also section 237(b) of the *(Commonwealth) Native Title Act 1993*.

61 This is not the place for a lengthy exposition of the law of extinguishment. For the basic principles see *Mabo (2)* (1992) 175 CLR 1 at 68–69.

62 The strange intersection of the two is illustrated by the interaction of the application of the expedited procedure process under the *Native Title Act* and the *Aboriginal Heritage Act*. See Sumner, C.J., *Guide to Future Act Decisions made under the Commonwealth Right to Negotiate Scheme*, National Native Title Tribunal, Perth, 2001. The leading case on the matter probably remains *Dann v WA* (1997) 74 FLR 391; 144 ALR 1, but note the 1998 amendments to the relevant sections of the *Native Title Act*. In the latter respect see *Smith v WA* [2001] FCA 19, French J, 19 January 2001.

Heritage Act. The ACMC does not even see the legal imperative to afford natural justice to native title holders in respect of the sanctioned destruction of sites on their traditional country. This strange disjunction means that heritage, shielded by a common law right to protect heritage as an incident of native title, can be obliterated under state heritage legislation without even the courtesy of notice.[63]

In the result, the politics of the relationship between native title and the *Aboriginal Heritage Act*, further demonstrate the extent to which the latter fails in its proclaimed mandate to protect heritage and manifestly contributes to the further disempowerment of Aboriginal people. Indigenous outrage over country being damaged can be discounted in a 'heritage' context (the heritage process being scientific, rather than political), while outrage over a site being damaged is irrelevant in native title terms where it has been extinguished by prior inconsistent tenure. Thus, Indigenous political convictions are divided by whitefellah legislation and, as a consequence of the division, are more easily negated and conquered. A classic expression of this division and conquest, was articulated by one Member of the *Native Title Act* who remarked (in respect of the Northern Territory's Aboriginal heritage legislation) that, where it applied it seemed unnecessary for the tenement applicant to have to negotiate with the native title holders. Thus, because of the 'legal' application of practically ineffective heritage legislation, native title 'rights' are neutralised. This is yet another incident of the 'chilling effect' of rights discourse on Aboriginal social struggle.[64] A struggle for power over land and resources, an argument over equity and justice, is rendered mute because of 'objective' and 'neutral' processes: the institutional separateness of heritage and native title.[65]

The Recording Fetish

A critical component of the scientific undertaking of the *Aboriginal Heritage Act* is the 'recording' of sites and objects. If the *Aboriginal Heritage Act* is interpreted literally, it is intended that an inventory be maintained of all objects, sites and places of significance to Aboriginal people in Western Australia. Even on the face of it, such a legislative intention appears absurd. Presumably, the rationale is that when places and objects are recorded, it is possible to avoid them and therefore avoid damaging them or destroying them. Such a simplistic position seems to operate on the premise that Aboriginal places and objects of significance can easily be isolated (both geographically and conceptually) and therefore avoided. Eventually, one

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63 Maybe, as a matter of constitutional law, it can't be. The matter has not been tested. An intriguing question is whether the *Aboriginal Heritage Act* and the state legislation that governs independent tendering would, in this context, survive an attack under section 109 of the Constitution for inconsistency with either the *Racial Discrimination Act* or the *Native Title Act 1993* (Cwlth). Watch this space. See generally *WA v Commonwealth* (1995) 183 CLR 373.

64 D. Miller, 'Knowing Your Rights: Implications of the Critical Legal Studies Critique of Rights for Indigenous Australians', *Australian Journal of Human Rights*, Vol. 5 No. 1, 1998, pp.48ff at p.59.

65 The practical application of this distinction is that developers will seek to have separate arrangements about heritage and native title.

presumes, it will be possible to have a heritage map of the whole of Western Australia for which one could navigate (even with a bulldozer) avoiding all sites and objects of significance along the way. However, this project is predicated on an extremely static view of Aboriginal culture and is ignorant of the fact that 'the significance of land for Aboriginal groups cannot be confined solely to particular bounded areas containing focal nodes of totemic meaning'.[66] Indigenous cultural beliefs are dynamic and Aboriginal interaction with the land involves what has been called a 'deductive process'[67] or an 'epistemic openness'.[68]

A 'site of significance' is a redolent phrase, a discursive *double entendre*. It contains a judgment of one culture about the worthiness and authenticity of a 'site' of another. That 'site' will itself be of significance within Indigenous cultural discourse, a site (as these things are) of power and of contest. Each 'site', though, is also a site of contest—an intersection—of power between Indigenous and non-Indigenous culture and authority. The phrase 'site of significance' then is unwittingly a *goak*, a doubly ironic and ambiguous phrase.[69] It is not for a white legal mechanism to determine or record the significance of Aboriginal sites, rendering the phrase problematic. Yet each site of significance is, by its labeling, a site of significance in the sense of being a flashpoint in the inter-cultural power-contest.

Beneath the practical and conceptual problems with developing an ecumenical record of Aboriginal sites are deeper undercurrents. The act of writing information down changes its nature.[70] Once Indigenous cultural beliefs are recorded they become an 'authentic' record, any divergence from which is in danger of being labeled inauthentic: Aboriginal cultural fraud.[71] The *Aboriginal Heritage Act*, by rendering Aboriginal places as 'heritage' or not, enshrines an 'authentic'/'inauthentic' dichotomy that is highly problematic. This false binary does not allow for the reality that Aboriginal society (like all societies) is dynamic: a thing of flux

66 David Trigger and Michael Robinson, 'Mining, land claims and the negotiation of Indigenous Interests' in David G. Anderson and Kayunobu Ikeya, *Parks, Property and Power: Managing Hunting Practice and Identity within State Policy Regimes*, Senri Ethnological Studies No.59, National Museum of Ethnology, Osaka, Japan, 2001, pp.101–116; at p.101.

67 Robert Tonkinson quoted in Trigger and Robinson, p.102.

68 Francesa Merlan quoted in Trigger and Robinson, p.102.

69 A concept popularised by A. J. P. Taylor.

70 See Harris, p.121.

71 See for instance both Noonkanbah and Hindmarsh. In respect of the former, see Hawke and Gallagher, 1980 and 1989 Kolig, and Vincent. In respect of the latter, see C. Woo, 'The Hindmarsh Island Bridge Controversy', *Identity, Land and Culture in the Era of Native Title*, National Native Title Tribunal, November, 1998; Diane Bell, *Ngarrindjeri wurruwarrin : a world that is, was, and will be*, North Melbourne, Vic.: Spinifex, 1998.

and change.[72] The result is that when Indigenous cultural expression diverges from the written record, it is likely to be accorded adverse treatment by authority.[73]

When Aboriginal places are 'defined' as heritage they are rendered useable and ahistoric, making the act of recording and registration a further colonisation. This expression describes processes by which the colonising power appropriates Indigenous knowledge in exchange for limited beneficial treatment that exhibits the appearance of Indigenous autonomy. The bargain enshrined in the *Aboriginal Heritage Act* then, is that in exchange for surrender of the power/knowledge of Aboriginal culture, the colonial authority provides a contingent degree of protection. The dominant system only provides protection of heritage through 'intrusions into that heritage and the valuation of it through and by the dominant system'.[74]

Where Aboriginal heritage has not been mapped, recorded or registered, it can render greater political advantage to the traditional owners. Such indeterminacy means that any developer who wants to perform a heritage clearance will need to engage with the traditional owners. However, once the mapping and recording has been accomplished, the traditional owners have, under the *Aboriginal Heritage Act*, no further political leverage. They have been neutralised. Thus the very act of recording negates Aboriginal political capacity, while an absence of recording enlivens it. Notwithstanding this political reality, many Aboriginal people still comment on their desire to have sites recorded.[75] Others will insist, even when heritage mapping has occurred that 'we keep some places secret and don't tell white

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72 See John Ah Kit, 'Aboriginal Aspirations for Heritage Conservation', *Historic Environment*, Vol.11, Nos. 2 & 3, 1995, pp.34–36.

73 See Hindmarsh and Noonkanbah. See also *Yorta Yorta Aboriginal Community v Victoria* unreported, BC9806799. In respect of this seminal case see Wayne Atkinson, "Not One Iota" of Land Justice: Reflections on the Yorta Yorta Native Title Claim 1994–2001', *Indigenous Law Bulletin*, Vol 5, issue 6, February-March 2001, p.19; Richard Bartlett, *Native Title in Australia*, Sydney: Butterworths, 2000, pp.115ff, para [8.78]; Robert Foster, 'Turning Back the Tide: The Use of History in the Native Title Process', *Indigenous Law Bulletin*, Vol 4, Issue 22 July 1999, at p.17; T. Murray, 'Conjectural Histories: some archaeological and historical consequences of dispossession in Australia' in Ian Lilley, (ed.), *Native Title and the Transformation of Archaeology in the Postcolonial World*, Oceania Monograph 50, Sydney: University of Sydney, 2000; Rod Hagen, 'Ethnographic information and anthropological interpretations in a Native Title Claim—The Yorta Yorta experience', paper presented to Conference, South-East Humanities Research Centre, Australian National University, Canberra, 18 June, 1997; Ron Howie, 'Where are we at with native title following the appeals in Croker Island, Miriuwung Gajerrong and Yorta Yorta' in Bryan Keon-Cohen, *Native Title in the New Millennium*, Canberra: Aboriginal Studies Press, 2001; Kerruish and Perrin, 'Awash in Colonialism', p.3; A. Reilly, 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title', *Federal Law Review*, 2000 (28), pp.453ff at p.460; A. Reilly, 'History Always Repeats: Members of the Yorta Yorta Aboriginal Community v State of Victoria', *Indigenous Law Bulletin*, Vol. 5, Issue 6, February-March 2001, p.25; David Ritter, 'No Title Without History', (publication in an AIATSIS anthology forthcoming), an article based on a paper entitled 'The Importance of History in presenting Native Title Applications' presented at *The Use of History in Native Title Processes, a Native Title Practitioners' Workshop* convened by AIATSIS at ANU on 10-11 May 1999; David Ritter and Frances N.A. Flanagan, 'The Difference Between Lawyers and Rats', conference paper delivered at *Crossing Boundaries: Anthropology, Linguistics, History and Law in Native Title*, 19–20 September 2000, University of Western Australia.

74 Tehan, p.303.

75 In my experience.

people'.[76] The debate among Aboriginal people over whether to register or not register sites may, in a sense, be an expression of the tension between those who do not have rights being uncomfortable with spurning rights (or even the appearance of rights).[77]

Implicit in the *Aboriginal Heritage Act* is a latent fear of Indigenous knowledge and culture. If the government does not know the location of Aboriginal sites and places of significance, they are dangerous because they are beyond control.[78] Aboriginal concerns about country are a 'problem' to be avoided and contained.[79] Perhaps then, it is possible to detect in the *Aboriginal Heritage Act* that deeper fear of non-Indigenous society about its own illegitimacy in Australia and the recency of its arrival. Statutory evidence of this idea that Aboriginal places are unconsciously regarded as deviant is the incredible provision in the *Aboriginal Heritage Act* that requires that if a person comes upon an Aboriginal site they are required to report it to the police. Under the legislation, Aboriginal heritage is subject to institutionalisation and is quite literally, policed. Aboriginal sites and places are subject to the same routine institutionalisation to which Aboriginal people have been subject. The definition and control of Indigenous cultural material as inherently aberrant, mirrors the socio-legal treatment of Indigenous people themselves, completing the impression that to be 'Indigenous' is to be institutionalised by your very identity. There is perhaps no better symbol of this than the famous engraved stones from the Burrup Peninsula removed from their location in the early 1980s and now 'preserved' in a compound surround by wire.

Beyond 'mere' Inadequacy: the Creature of a Debunked Understanding

It has been remarked that there 'is general community support for the protection of sites and objects of significance to Aboriginals and Torres Strait Islanders'.[80] In conventional terms, it can be argued that the *Aboriginal Heritage Act* fails to achieve this aim. It is unquestionably an ineffective and dysfunctional item of legislation.[81] Its definitions are vague and impossibly broad; its categories are spurious and its penalties are hopelessly inadequate. There is some statistical evidence that the ACMC fails in its aim to protect places and objects of significance to Aboriginal people. In the thirty years of operation of the *Aboriginal Heritage Act*, there have been few successful prosecutions, while the overwhelming number of applications made to the ACMC under section 18 of the *Aboriginal Heritage Act* have resulted

76 *Birrell & Ors v State of Western Australia & Anor*, National Native Title Tribunal, W099/574, Franklyn DP, Perth, 25 September 2000.

77 See, for example, Delgado, quoted in K. Upston-Hooper, 'Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi', *Victoria University of Wellington Law Review*, (1998) 28, 683, at 700 at 705.

78 See Harris, p.132.

79 Trigger and Robinson. See also Clarke, 58–59, which talks of the 'problem' of Aboriginal non-cooperation with heritage protection.

80 Graeme Neate, 'Power, Policy, Politics and Persuasion – Protecting Aboriginal Heritage under Federal Laws', *Environmental and Planning Law Journal*, Sept 1989, 214 at 214.

81 This is widely recognised within government: see *The Aboriginal Land Inquiry*, Chapter 8.

in the Minister granting permission for the area in question to be disturbed.[82] In general terms it is critiques of this nature that have dominated discussions of the *Aboriginal Heritage Act*: 'it fails in its job of protecting Aboriginal heritage'.[83]

However, merely attacking the inadequacy of the *Aboriginal Heritage Act* does not explore the power relationships that exist within and are perpetrated by the *Aboriginal Heritage Act*. It is a myth, expressed by the objects of the *Aboriginal Heritage Act*, that the main purpose of the legislation is to protect Aboriginal heritage. It may be more accurate to describe the *Aboriginal Heritage Act* as an act to regularise the obliteration of Aboriginal heritage. In substance, the *Aboriginal Heritage Act* prohibits no more than the deliberate and unauthorised destruction of sites and in so doing, both establishes and perpetuates a system of power and knowledge that colonises Aboriginal people, disempowers them and mutes their political struggle.[84] To adopt a critical position that merely attacks the current provisions of the *Aboriginal Heritage Act* is to ignore the discursive role of the *Aboriginal Heritage Act* in subjugating Aboriginal people.

The *Aboriginal Heritage Act* establishes nothing more than a 'paternalistic and patronizing process' of 'outside bodies controlling Aboriginal heritage'.[85] This is unsurprising when it is recalled that when the *Aboriginal Heritage Act* was enacted, discrimination was not prohibited under Australian law; native title was not recognised; Henry Reynolds had not yet been published; and neither the Kimberly Land Council nor the Aboriginal Legal Service of Western Australia yet existed. The Yamatji Land and Sea Council, perhaps currently the single most active enforcer of Indigenous heritage rights in Western Australia, would not exist for another generation.[86] The *Aboriginal Heritage Act*, then, 'is legislation of its time'.[87]

What a critical legal analysis of the *Aboriginal Heritage Act* demonstrates is that the *Aboriginal Heritage Act* does not protect Indigenous interests. Rather, to a very moderate extent, it acts to prevent non-Indigenous people from disturbing Aboriginal places and materials that the non-Indigenous community regards as being worthy of such preservation. It is legislation by the non-Indigenous community for the non-Indigenous community that creates a superficial veneer of protection for Indigenous interests. The result is that the colonising power can continue to do with Aboriginal places and materials exactly as it wants. Far from being an instrument of Indigenous power, the *Aboriginal Heritage Act* is an instrument for the ongoing colonisation and subjugation of Indigenous peoples that denies the legitimacy and validity of Aboriginal people making political decisions about their own land.

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82 See for instance Hilary Rumley, 'South Australian Aboriginal Heritage Legislation: Summary,Comparisons and Interaction with Native Title' in G. Meyers and A. Field, *Identity, Land and Culture in the Era of Native Title*, National Native Title Tribunal, November, 1998 at 23–24. Also personal communication from two ex-Registrars of Sites, Michael Robinson and Nicholas Green.

83 See for instance Clarke, at pp.57–58.

84 See Harris, pp.120–121.

85 Saylor, p.11.

86 In terms of annual numbers of objections lodged and agreements reached under the *Native Title Act*.

87 Moore, p.109.