



The Crux of the Matter:

Manipulating Cultural Property in Aboriginal Rights Debates

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THE BIRTH OF AUSTRALIA'S MODERN ABORIGINAL ART MOVEMENT IN THE EARLY 1970s coincided with the development of international conventions governing cultural property, as well as a concerted growth in the local indigenous rights movement that had been formulated in the 1960s.¹ The development of Australian cultural heritage law since this time has been influenced by various international instruments, and the debates over recognition, value and protection of Aboriginal cultural property can be seen as having an important influence on the development of Aboriginal rights jurisprudence, which was in a parlous state until the early 1990s. Rights debates have intersected the discursive pathways of redress and sovereignty and cut across various legal and regulatory frameworks. Neither sequential in development, nor distinct, these debates have overarching themes of reconciliation and Aboriginal self-determination, within which the manipulation of cultural property has operated as a key strategy.

Reconciliation and the Subversion Paradigm

Debates over reconciliation and sovereignty are highly charged. Usually referencing interdisciplinary anthropological and cultural theory, these debates can be

framed as a push for 'decolonisation' of the settler state, which is a process invoking 'an ongoing dialectic between hegemonic centrist systems and peripheral subversion of them; between European or British discourses and their post-colonial dismantling'.² In Australia these debates have largely centred on strategies for internal decolonisation, rather than calls for secessionist states, and include reconciliation; recognising Aboriginal sovereignty, land rights, and compensation through treaty; and guarantees of rights through a Bill of Rights.

The nature of Aboriginal protest for recognition of sovereignty has been described as 'performative politics', wherein repetition is critical to counter continued white claims of ignorance, such as 'why weren't we told?'³ The most visible statements of Aboriginal sovereignty played out through the subversion paradigm have been in the form of The Aboriginal Tent Embassy demonstrations on the front lawn of Old Parliament House, Canberra, which publicise Aboriginal peoples' alienation from law and country⁴; the symbolic reclamation of insignia to condemn the infringement

1/ Benjamin Law, *Woureddy, an Aboriginal chief of Van Diemen's Land*, 1835, cast plaster, painted, 75 x 48.3 x 27cm. Collection: National Gallery of Australia, Canberra; Purchased 1981.

2/ Benjamin Law, *Trucaninny, wife of Woureddy*, 1836, cast plaster, painted 66 x 42.5 x 25.7cm. Collection: National Gallery of Australia, Canberra; Purchased 1981.

of Aboriginal moral rights, and protests over other forms of cultural property used to propel repatriation agendas.

Reconciliation itself has been a problematic paradigm for the Aboriginal rights movement. Artist Richard Bell has suggested the government is pursuing a strategy of denial of rights, wherein reconciliation is another means to 're-con their silly nation'.⁵ Other critics have been less forthright, but the message is clear in the nuance between the discourses of reconciling *with* something, and being reconciled *to* something. As one commentator has noted, 'in a context where race-relations are structured by the rhetoric of reconciliation, indigenous sovereignty might consist precisely in not having to reconcile either with non-indigenous people or with other indigenous nations'.⁶

Cultural Insignia and Signalling Resistance

Our resistances are multifaceted; they can be visible and invisible, conscious and unconscious, partial and incomplete, intentional and unintentional ... They often contain a logic that is incomprehensible to most white folk ... who want us to perform our politics according to their ideas ...⁷

In January 2002, coinciding with the 30th anniversary of the Aboriginal Tent Embassy, Aboriginal elder and protestor Kevin Buzzacott removed the Commonwealth Coat of Arms from a pillar at Old Parliament House, Canberra, claiming he did not recognise the state's authority to use sacred Aboriginal cultural symbols (kangaroo and emu) without permission. The Coat of Arms is a pre-valorised symbol of colonial authority and power, and its removal, or reappropriation, worked as a powerful symbolic protest against the stated sovereignty of the Commonwealth Government.⁸ Buzzacott was arrested for theft, and the ensuing 2004 case added to a body of law challenging Australian courts' intrinsic right to preside over indigenous matters.⁹

Legislated protections against ethnocide/genocide were enshrined in Australian law in 2002 in order for the Commonwealth to gain admission as a stated party to the International Criminal Court.¹⁰ Legal strategy in the Buzzacott case engaged this new paradigm, with counsel for Buzzacott arguing that acts of genocide included 'deliberate, continuing psychological harm to a race of people, through both the misappropriation of cultural objects without any treaty or agreement, and the use of these objects to oppress'.¹¹ Buzzacott maintained the Government was 'not real' and 'had no right to steal our animals'. As one commentator has noted, Buzzacott's act identified 'the emu and kangaroo as elements of the process through which white sovereignty percolates invisibly through the nation'.¹²

A month after the Canberra incident, Buzzacott is reported to have threatened to lodge a copyright claim against Qantas' use of the kangaroo on the tail of its planes. The action gained press and a meeting with Qantas CEO to discuss the case. Newswires mainly focused on 'absurd acts of political-correctness' but one noted that 'it was beyond non-Aboriginal Australians' comprehension that Aboriginal people could possibly own intellectual property in representation of native fauna'.¹³ This threat was never intended to proceed to court. Rather, the performance should be seen as another strategic challenge to the establishment, highlighting the fact that 'the appropriation of indigenous iconography into state and national symbols

signifies assimilative practices whereby native art stands for native'.¹⁴ This understanding has percolated through contemporary art dialectics and practice, especially in the work of Danie Mellor, for whom the kangaroo, in particular, carries this semiotic loading.¹⁵

(Re)Appropriation of Cultural Heritage

Reappropriation of cultural heritage is a strategy in what has been termed 'the reification of identity',¹⁶ which, for indigenous peoples in particular, is a vital component in the drive for self-determination. Cultural heritage in this agenda includes cultural property in all manifest forms, while cultural appropriation can be broadly defined as illicit or unauthorised taking of cultural heritage. As one legal scholar has noted, however, this is controversial precisely because the takings were not 'illicit' under contemporaneous settler law, and therefore exist in contemporary debates as political and/or moral claims.¹⁷ As such, reappropriation claims largely hinge on the 'interaction between legal systems with different organising principles',¹⁸ and, of course, the politics of the time.

In Australia, as in other Commonwealth nations, the colonial legacy continues to assert assimilatory power, and reappropriation of cultural material is asserted in response as a means for Aboriginal people to continue their resistance. In this discourse reappropriation rather than repatriation has become the norm, as it signifies the changing relationship between indigenous peoples and symbols of colonial authority, such as museums.¹⁹ The perceived legitimacy of some reappropriation actions illustrates the complexity of these debates. For example, the reclamation of cultural symbols in use by non-indigenous corporations has been contested and dismissed by the wider population, while the repatriation of human remains has official government commitment through the Return of Indigenous Cultural Property Program²⁰ and engenders broad public support.

Claims of cultural appropriation in Australia and Canada have included: institutional appropriation and misrepresentation of Aboriginal cultures by museums; repatriation of objects collected in colonial 'salvage' enterprises; appropriation of Aboriginal 'voice'; the negative stereotyping of Aboriginal peoples in popular culture; commercial exploitation of traditional Aboriginal expertise, knowledge and biodiversity; objections to the bastardisation of Aboriginal spirituality; and unethical settler research practices.²¹

In Australia, the campaign for (re)appropriation of cultural property recently took an interesting and novel turn. Tasmanian Aboriginal activists targeted Sotheby's in the days before the company was to auction a pair of busts of Aboriginal historical figures, Truganini and her husband Woureddy, by British/Australian sculptor Benjamin Law. The busts were owned by the same family since the 1830s, and were at one time on long term loan to the Tasmanian Museum and Art Gallery for over a decade, where they had been on public display. With cries of 'Sotheby's, Sotheby's, leave them alone; Let us take our ancestors home', protestors sought to have the busts withdrawn from sale and 'returned to the Aboriginal community'. The campaign used the rhetoric of 'freeing the spirits of ancestors so they can rest in peace', and caused confusion and outcry, which was further propounded after publicity that the Tasmanian Aboriginal Centre would not rule out destroying the busts if returned.

The threat to destroy repatriated cultural property has been used in international campaigns to assert indigenous rights, and it is clear that the campaign against Sotheby's utilised many of the strategies employed by indigenous peoples worldwide in their efforts to reclaim property. Drawing judgment from public opinion, it is also clear the campaign did not promote the cause for repatriation of items of significant cultural heritage for Aboriginal peoples. Instead, it further alienated the broader community from understanding the complex issues that underpin this very sensitive and highly political issue.²²

The coopting of English sculptures of Aboriginal figures as indigenous cultural property acknowledges what has been theorised as an object's 'promiscuous intentions', the meanings of which change as they move across different domains.²³ Truganini is a highly significant figure for Aboriginal Tasmanians, and the myths, now exploded, around her being 'the last full blood Aborigine' continue to spark conflict. The reclaiming and rewriting of historical narratives by indigenous peoples are key to their articulation of identity, and it has been an active strategy of Australian Aboriginal proponents of indigenous rights.²⁴ In this instance, the Tasmanian activists exploited the highly controversial idea that indigenous peoples have a right to control all impressions or constructions of themselves by non-indigenous authors.²⁵

The merits of the debate aside,²⁶ there is precedence for this approach in the international arena, with the Apache seeking this very control in their repatriation aims. The manifesto from their 1995 Inter-Apache Summit on Repatriation asserts title to: 'all images, text, ceremonies, music, songs, stories, symbols, beliefs, customs, ideas and other physical and spiritual objects and concepts relating to Apache, including any representations of Apache culture offered by Apache or non-Apache people'.²⁷ Cogent precursor action in this arena also exists in the pattern of Native American peoples' resistance and protest against the use of Indian mascots by sports teams.²⁸ In New Zealand, it has been noted that there is a development toward a 'legal framework in which applications for trademark registration of "any word, symbol, sound, or smell" thought to have originated among the Māori will have to be screened for appropriateness by Māori consultative body'.²⁹

It has been stated that particular forms of cultural property become the target of hatred and violence due to grief being transformed into grievance.³⁰ Taking this to its extreme, the restitution of cultural property has been interpreted as a form of 'revitalisation cult', whereby indigenous injustices will be ameliorated by granting the remains of ancestors 'a good death'.³¹ Similarly, the possession of cultural heritage, tangible and intangible, has been deemed to be a redemptive requirement for the building of respect for cultural identity.³²

The success of the campaign against Sotheby's emboldened the Tasmanian activists to target museums, and they have since approached the British Museum and the Chicago Field Museum, amongst others, insisting they 'shelve their racist art'.³³ This follows the path of activists arguing for restriction of the display and access to other material in museums based on ethics, such as the records of medical experiments conducted in Nazi concentration camps.³⁴ And while this comparison may seem far-fetched, Nazi genocide rhetoric was specifically used by the activists in the Sotheby's campaign.

Cultural Property and Cultural Politics: Heritage Laws and Indigenous Rights

Indigenous rights have been doctrinally enshrined in various international legal instruments and fora, most notably the 2007 UN Declaration on the Rights of Indigenous Peoples. At the time, the settler states of Canada, the United States, Australia and New Zealand, all countries with 'Fourth World' populations, opposed the Declaration, which specifically provides that 'indigenous peoples have the collective right to maintain, protect and develop the past, present, and future manifestations of their cultures ...'³⁵ The 2007 Declaration also makes clear that indigenous peoples' input into 'effective redress' is critical'. On 3 April 2009, the new Australian Labor Government indicated its formal support for the Declaration, which includes the statement: 'We recognise the right of indigenous Australians to practise, revitalise and sustain their cultural, religious and spiritual traditions and customs', although this is in effect entirely symbolic until enacted through legislation.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (ATSIHP Act) is currently under reform review, with the chief aim being to improve protection for indigenous heritage by tightening procedural controls nationally. Unlike the heavily criticised past framework that prejudiced communities' interests via a static view of 'tradition', the new proposals specify an understanding that traditions may change over time. It also features requirements within state laws to incorporate consultation with traditional custodians in arbitration, as well as the need to respect the traditions of secrecy. The latter is particularly novel and arises from the ashes of the cases surrounding the 'Hindmarsh Island affair', in which Aboriginal interests were prejudiced due to the complexities of testing evidence regarding women's secret business.³⁶

Under the ATSIHP Act, Aboriginal people can apply to the Minister to make a protective declaration where significant Aboriginal heritage is under threat of injury or desecration. Up until 1994, the ATSIHP Act had only been used to protect archaeological sites and material. In 2004, however, the Victorian Dja Dja Warrung people employed this provision to halt the return of two early barks and an emu carving to England following the close of an exhibition at the Victorian Museum,³⁷ and after many meetings, debates, and protracted court proceedings the barks were finally returned to the UK in late 2005.³⁸

It was widely believed in the museum community that other objects of cultural significance could face seizure claims in Australia under the existing legislation, and the Minister had also suggested that the Dja Dja Warrung case had jeopardised the repatriation of other artefacts held around the world'. As a result, legislative amendments regarding exhibition material were introduced to the ATSIHP Act in November 2006, removing special provisions that had extended to Victorian 'folklore', and exempting any objects imported with a section 12 certificate under the *Protection of Moveable Cultural Heritage Act 1986 (Cth)* from the imposition of emergency declarations and seizure under the ATSIHP Act.

Following the return of the barks, the British Government announced a consultative framework to develop policy preventing the 'cultural kidnapping' of art on loan from other governments, which resulted in legislation being introduced in December 2007, followed by regulations on 1

May 2008. Interestingly, news reports in July 2009 suggested that the British Museum had agreed to reopen discussions about the return of the barks and the emu carving. Their response was probably influenced by the positive PR generated by the Seattle Art Museum's voluntary return of a stone *tjuringa* a month earlier.³⁹ The British Museum is not legally entitled to deaccession items, but it 'returned' an important mask to Canada on long term loan in 2005. As future requests of this nature are made, it will be interesting to see museums debate their fiduciary duty to donors versus the ethics of retaining works acquired through what has retrospectively come to be seen as dubious circumstances.

The Dja Dja Warrung people continue to argue their case, but it seems unlikely that they will have their way. One of the bark etchings and the emu carving are now featured on the British Museum's website amongst twelve highlights from Australia. It is likely that this promotion was strategically employed to counter arguments that significant items of cultural heritage are languishing away in museum sub-basements, which deprives dispossessed indigenous communities from accessing rare material deemed vital for strengthening connection to culture.⁴⁰ Of course, the museum's inclusion of these items on their website also falls within the 'protectors of world heritage' paradigm that is being employed by museums worldwide to counter claims for the return of cultural heritage items with problematic or disputed provenance, of which the Parthenon Marbles are the most prominent example.

Cultural property is recognised as being a strategic resource in the politics of identity. In a comment guarding against the loss of material from state control, cultural property has also been described as 'capital in the civil rights movement'.⁴¹

The actions of the Dja Dja Warrung people made the point that the etched barks were the only evidence of their existence and their attachment to land, now displaced, and their significance as a document of cultural practice has been noted in literature.⁴² Although the protagonists used the rhetoric of dispossession, the provenance of the items was not contested elsewhere by others. Neither was the agency of the Aboriginal peoples in the original exchange that brought about the transfer of the items into the possession of a colonial settler. Rather, the case is a strong example of the 'retrospective withdrawal of consent', a political manoeuvre broadly used to further the cause of indigenous rights in actions and debates.⁴³

The setting for Aboriginal performative politics in

pursuit of rights has now moved away from Canberra as centre stage. The strategic importance of the Aboriginal Tent Embassy site as a locus for the marshalling and promotion of indigenous rights was recognised in 1995 at a national level by the Australian Heritage Council through its addition to the *Register of the National Estate*. In 2005/2006, however, its future came under federal review, which included plans for a permanent and unoccupied presence. Old Parliament House is now the Museum of Democracy, in front of which the embassy's site and occasional protests will continue to draw new authority and vigour. Annual demonstrations on 26 January will no doubt continue, along with important community gatherings, such as the 2008 federal Apology to Australia's Indigenous Peoples. While demonstrations used to propel Aboriginal rights debates may now be largely removed from the stately lawns of our capital, they are very much an ongoing strategy in the commercial and public arts arenas, where they will likely remain, with the manipulation of cultural property as the crux of the matter. ❀

1. For the purposes of this essay, 'Aboriginal' will be used to refer to Australian Aboriginal peoples, including Torres Strait Islanders, while 'indigenous' will be used to reference international movements and debates.
2. Henry Tiffin, 'Post Colonial Literatures and Counter-Discourse' (1987) 9(3) *Kunapipi*, cited in Sally McCausland, *Protecting Aboriginal Cultural Heritage in Australia: Looking for Solutions in the Canadian Experience* (LLM Thesis, University of British Columbia: 1997 unpublished), available at ssrn.com/abstract=1285392, p. 20.
3. Fiona Nicoll, 'De-facing Terra Nullius and Facing the Public Secret of Indigenous Sovereignty in Australia', in *borderlands*, Vol. 1, No. 2, 2002.
4. The Tent Embassy was conceived in 1972, and was the stated home of the Aboriginal Provisional Government.
5. Richard Bell, 'Bell's Theorem, Aboriginal Art – It's a White Thing!', available at www.kooriweb.org/foley/great/art/bell.html
6. Nicoll, 2002: note 3, paragraph 10.
7. Aileen Moreton-Robinson cited in Nicoll, 2002: note 3, paragraph 19.
8. For an in-depth discussion of the inherent potency of these symbols see, Rick Mohr, 'Enduring Signs and Obscure Meanings: Contested Coats of Arms in Australian Jurisdictions', in A. Wagner, T. Summerfield and F. Benevides (eds.), *Contemporary Issues of the Semiotics of Law*, 2005, pp. 1-27.
9. '*R v Buzzacott* [2004] ACTSC 89', available at www.austlii.edu.au/cgi-bin/sinodisp/au/cases/act/ACTSC/2004/89.html?query=buzzacott He was eventually convicted but was found to have acted without malice and was released for time served. For a useful summary on the background to the calls for treaty and reconciliation see Nicoll, 2002: note 3, paragraphs 7-15.
10. *International Criminal Court Act 2002* (Cth).
11. Lara Pullin, 'Aboriginal Elder Convicted for Reclaiming Cultural Symbols', *Green Left Online*, 13 April 2005.




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12. Nicoll, 2002: note 3, paragraph 41.
13. 'Australia's Aborigines Make Kangaroo Claim', *ABC*, 8 February 2002. No copyright claim against Qantas was lodged.
14. Tressa Berman, 'As Long as the Grass grows: Representing Indigenous Claims', in Mary Riley (ed.), *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions*, AltaMira Press, Maryland, USA, 2004, 3-25, p. 10.
15. See Maurice O'Riordan's essay on the artist in *Culture Warriors: Australian Indigenous Art Triennial* (exhibition catalogue), National Gallery of Australia, 2007, revised edition 2009, pp. 124-128.
16. Jennifer Anglim Kreder, Monica Dugot, Thomas R. Kline and Lucille A. Roussin, 'Legal and Ethical Issues in Art Restitution', 2008, available at ssrn.com/abstract=1098348, p. 5.
17. McCausland, 1997: note 2, p. 11.
18. McCausland, 1997: p. 32.
19. Sandra Pannell, 'Mabo and Museums: The Indigenous (Re) Appropriation of Indigenous Things', *Oceania* No. 65, 1994, p. 20.
20. See the Federal Government's *Return of Indigenous Cultural Property* program website: www.arts.gov.au/indigenous/return
21. McCausland, 1997: note 2, p. 13.
22. The campaign to withdraw the busts was successful but they were not successful in reappropriating them for their cause. For a summary of adverse reaction see Christopher Pearson, 'Works of Art Pressed into Another Service', *The Australian*, 29 August 2009.
23. Susanne Kuchler, 'The Anthropology of Art', in Victor Buchli (ed.), *The Material Culture Reader*, Oxford: Berg, 2002, p. 58.
24. Denise Cuthbert, Cheryl Earnshaw, Susan Lowish, Stephen Pritchard and Ceridwen Spark, 'Aboriginal Identity, Culture and Art', in *The Years Work Critical Cultural Theory*, 2003, No. 11, p. 234.
25. Stephen Gray, 'In Black and White or Beyond the Pale? The 'Authenticity' Debate and Protection for Aboriginal Culture', *Australian Feminist Law Journal*, 2001, no. 15, p. 111.
26. Many commentators note that post-colonial interpretations of the Truganini narrative promote the criticism of past white appropriation of indigenous narratives, and to 'black-wash' these stories, or remove objects from display, is counter-productive to indigenous causes as it hides Aboriginal resistance. See Tim Bonyhady, 'Never Forget a Face, Early Memorials to Black Australia', *Sydney Morning Herald*, Saturday 14 October 2000; Nicholas Thomas, 'Indigenous Presences and National Narratives in Australasian Museums', in Tony Bennett and David Carter (eds.), *Culture in Australia: Policies, Publics and Programs*, Cambridge University Press, 2001, pp. 299-312.
27. Michael F. Brown, 'Can Culture Be Copyrighted?', *Current Anthropology*, 1998, No. 39(2), p. 202, and Gray, 2001: note 25, p. 118.
28. Kristen A. Carpenter, Sonia Katyal, Angela Riley, 'In Defense of Property', *Yale Law Journal*, 1-204, Fordham Law Legal Studies Research Paper No. 1220665, 2009, pp. 184-187.
29. Michael F. Brown, 'Heritage as Property', in Katherine Verdery and Caroline Humphrey (eds.), *Property in Question: Value Transformation in the Global Economy*, Berg, Oxford, 2004, p. 56.
30. Michael Rowlands, 'Cultural Rights and Wrongs: Uses of the Concept of Property', in Verdery and Humphrey, 2004: pp. 209-210.
31. Rowlands, 2004: pp. 218-221.
32. Michael Rowlands, 'The Power of Origins: Questions of Cultural Rights', in Victor Buchli (ed.), *The Material Culture Reader*, Berg, Oxford, 2002, p. 123.
33. The busts are not unique, with copies held in 30 institutions worldwide. Caroline Davies, 'Aborigines Demand that British Museum Returns Truganini Bust', *The Guardian*, 16 September 2009; and Raymond Gill, 'Museums Told to Shelve 'Racist' Art', *The Age*, 10 September 2009.
34. Brown, 1998: note 27, p. 199.
35. Carpenter et. al., 2009: note 28, p. 114.
36. Aliza Taubman, 'Protecting Aboriginal Sacred Sites: the Aftermath of the Hindmarsh Island Dispute', (2002) 19(2) *Environmental Planning Law Journal* 140-158.
37. *Etched on Bark 1854: Kulin barks from Northern Victoria*.
38. For a useful summary of the legal wrangling see Lyndel V. Prott, 'The Dja Dja Wurrung Bark Etchings Case', *International Journal of Cultural Property*, 2006, No. 13, pp 241-246.
39. Access to *tjuringa* is restricted within Aboriginal communities and no public institutions would knowingly display these items. The Seattle Art Museum's unsolicited return of the *tjuringa* has been lauded as the first of its kind in America, see Ashleigh Wilson, 'Sacred Stone Back from Seattle', *The Australian*, 30 June 2009.
40. In the case of the Dja Dja Wurrung people, Elizabeth Willis notes that the barks have actually reinvigorated a forgotten cultural practice, and that some artists of the Kulin nation, including the daughter of the case's main protagonist, Gary Murray, have begun to make etchings on smoke blackened bark. 'The Law, Politics, and "Historical Wounds": The Dja Dja Wurrung Bark etchings Case in Australia', *International Journal of Cultural Property*, 2008, No. 15, p. 60.
41. Kristen A. Carpenter et. al., op.cit, note 28, p. 115 (n. 53).
42. Jeannette Greenfield, *The Return of Cultural Treasures* (Cambridge University Press: 2007, 3rd ed.), especially chapter 11, 'The First People', at 309; and especially Willis, 2008: pp. 49-63.
43. Willis, 2008: p. 59. Willis also notes, at 60, the impact of post-colonial theory on these debates, whereby indigenous agency in the exchange of goods is sometimes retrospectively removed, or the exchange deemed improper, due to the inherent coercive circumstances of the period. This is certainly true in the case of Truganini and Woureddy, where the reference to their agency with white power in Tasmania has been broadly forsaken in deference to their tribal elder status; see www.tmag.tas.gov.au/index.aspx?base=2755. The agency with Benjamin Law, which required sittings for the contentious carved busts, is also now rarely recognised.

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