Legislative and Policy Approaches to Heritage Law, Human Rights and World Heritage in Queensland: K'gari and Indigenous rights

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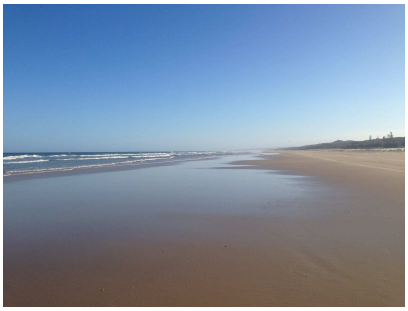

1. Introduction

The State of Queensland is one of Australia's six states under a federal system of government.[1] Of the 19 World Heritage properties in Australia, Queensland has five: K'gari (or Fraser Island),[2] Gondwana Rainforests of Australia, Australian Fossil Mammal Sites – Riversleigh section, Wet Tropics of Queensland and the Great Barrier Reef as well as two sites on the Tentative List for proposed extensions: Great Sandy World Heritage Area and The Gondwana Rainforests of Australia. All five sites inscribed on the World Heritage List have Traditional Owners actively involved in World Heritage management. Despite many of these sites having deep cultural significance for Traditional Owners, all are currently listed only for their outstanding universal natural values under the *World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972) (World Heritage Convention).

Both the Great Barrier Reef and Wet Tropics of Queensland cover vast parts of Queensland and have special statutory authorities managing their World Heritage values.[3] Both sites also involve significant numbers and diverse groups of Traditional Owners who are engaged through their respective statutory management authorities.[4] The remaining sites engage Traditional Owners through either Community Advisory Committees or through a combined Scientific and Community Advisory Committee (Department of Environment and Heritage Protection 2016a, 2016b, 2016c). Unlike the Great Barrier Reef and Wet Tropics of Queensland, the remaining World Heritage sites in Queensland do not have specific federal or state legislation enacted to manage their World Heritage values.

These World Heritage properties in Queensland illustrate a consistent approach by the Queensland Government to recognise the critical role Indigenous peoples play in managing World Heritage sites by establishing mechanisms at each site to facilitate Indigenous peoples' engagement. What is interesting, however, is that there is no consistent policy defining either the extent of Indigenous peoples' engagement or the level of Indigenous peoples' control over decision-making about World Heritage

[1] The Australian Government's legislative powers are set out in the Australian Constitution (1901). In addition to the federal government, Australia is comprised of six state governments (Queensland, New South Wales, Victoria, Tasmania, South Australia, Western Australia) and two mainland territory governments (Northern Territory and Australian Capital Territory).

[2] K'gari is the traditional Butchulla name for the island currently called 'Fraser Island'. The Traditional Owners request that the name K'gari be used whenever referring to the island and this paper therefore adopts the name 'K'gari' throughout.

[3] The Wet Tropics Management Authority (WTMA) is the statutory authority responsible for the Wet Tropics of Australia World Heritage area that is 8,935km^2 (WTMA 2012). The Great Barrier Reef Marine Park Authority (GBRMPA) is the statutory authority responsible for the Great Barrier Reef World Heritage area that is 344,400km^2 (GBRMPA 2016).

[4] Within the Wet Tropics World Heritage Area there are 18 tribal groups speaking 6 languages with around 20,000 Aboriginal people (WTMA 2012). Within the Great Barrier Reef World Heritage Area there are over 70 Aboriginal and Torres Strait Islander groups (GBRMPA 2016).

management. While responsive and flexible governance structures may be better able to represent the diverse needs and aspirations of the many Traditional Owners at World Heritage sites throughout Queensland, it is important to consider whether existing approaches are adequate and whether they fully support Indigenous peoples in realising social, political and economic rights.

In assessing whether Indigenous peoples' rights are advanced through existing approaches to World Heritage management in Queensland, this report traces the intersection of heritage law, human rights law and Indigenous rights. While all five World Heritage properties in Queensland have Indigenous peoples engaged in its management, this report focuses on the experiences of those Traditional Owners at K'gari, the Butchulla people, through a research based case study. As part of this research, interviews were undertaken with Butchulla, Queensland Government department staff including World Heritage managers and Indigenous and non-Indigenous Queensland Parks and Wildlife Services (QPWS) staff. K'gari provides a useful case study as with the recent determination of native title over the World Heritage area, Traditional Owners and non-Indigenous managers and QPWS staff have only begun to redefine their post-native title relationship and to better understand how Butchulla's native title rights co-exist with World Heritage values. This offers a unique opportunity to critically examine the policies surrounding the management of K'gari and their intersection with Butchulla's rights.

2. Natural Heritage: Environmental Law and World Heritage in Queensland

World Heritage sites are managed under what has been described as 'a cascading regulatory regime' (Mackay 2012: 42). In 1974 Australia became one of the first countries to ratify the World Heritage Convention. The Convention is the source of the Australian government's international World Heritage obligations ensuring 'the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage' listed for outstanding universal values (World Heritage Convention 1972, Art 4). The Australian Constitution grants the federal government powers to enact laws with respect to various matters including matters of 'external affairs' (s51(xxix)). Following the ratification of the World Heritage Convention the federal government went on to enact various key legislation that was vital to the protection of Australia's natural and cultural heritage. While some of this legislation is no longer in force, much remains critically relevant in environmental and heritage laws protecting and conserving World Heritage properties in Queensland.

The Australian Constitution does not specifically authorise the federal government to enact laws relating to the environment or heritage. Further, until a referendum was held in 1967 amending the Constitution, the federal government did not have authority to legislate on matters specifically relating to Indigenous peoples, such as Indigenous rights. The 1967 referendum amended section 51(xxvi) of the Constitution or what was referred to as the 'race power' which had previously authorised the federal government to legislate with respect to 'any race, *other than* the aboriginal race in any State' (emphasis added, Australian Constitution 1901). In accordance with this clause, Indigenous people were left under the exclusive control of state governments and during the early colonial project, many states enacted legislation

that strictly regulated Indigenous peoples' lives and that denied their basic rights.[5] The referendum removed this exclusion of Aboriginal people and granted the federal government authority to legislate on matters relating to Indigenous peoples.[6]

With these constitutional limitations on the federal government, during the 1960s and 1970s the federal government tested the scope of its constitutional powers. Having recently signed the *Convention on the Territorial Sea and the Contiguous Zone*, it used the external affairs power to enact legislation that claimed jurisdictional rights over the seas which had, until then, been assumed to be under state jurisdiction (White 2011). The state governments unsuccessfully challenged this claim of jurisdiction (*New South Wales v The Commonwealth ('Seas and submerged lands case'))*, and with its newly asserted expanded jurisdictional authority over seas, the federal government introduced the *Great Barrier Reef Marine Park Act 1975* (Cth) (GBRMP Act) (White 2011). The GBRMP Act is still in force, though it has been amended at various times, for example, to recognise the World Heritage obligations following the area's inscription in 1981.

The year prior to the enactment of the GBRMP Act, the federal government enacted its first piece of environmental legislation, the *Environmental Protection (Impact of Proposals) Act 1974* (EP Act) (Cth). The EP Act permitted the review of any proposals or projects which involved the Commonwealth (see s5) and led to key inquiries into development activities that were significantly harmful to the environment (Environmental Protection Agency 2004). Together with the newly enacted *National Parks and Wildlife Conservation Act 1975* (Cth), which provided for the establishment and management of national parks (including marine parks), recommendations from inquiries held under the EP Act led to the end of mining operations or resource development at some ecologically sensitive sites and the declaration of National Parks (Environmental Protection Agency 2004).

It was under the *Environmental Protection (Impact of Proposals) Act 1974* (Cth) that the Queensland Government initiated an inquiry into the exportation of sand minerals from the largest sand island in the world, K'gari. The island is abundant with natural resources, there is diverse vegetation and it is rich with mineral sand deposits. The mining operations on K'gari were highly controversial as conservationists were already opposed to the extraction of minerals on K'gari for domestic sale and its destructive impact upon K'gari's fragile ecology (Environmental Protection Agency 2004). The inquiry concluded that heavy minerals should not be mined or exported from the island and that the area should be declared a National Park. K'gari and the surrounding area was eventually declared part of Great Sandy National Park (Environmental Protection Agency 2004: 18). The company seeking to export these sand minerals challenged the constitutional validity of the inquiry. The High Court of Australia again upheld the EP Act and the recommendations of the inquiry prohibiting

[5] Through state government legislation, such as the Queensland Government's *The Aboriginals Protection and Restriction of the Sale of Opium Act, 1897*, Indigenous people were forcibly removed from their traditional lands throughout Queensland. Under the Act, Indigenous peoples were forced to live on reserves and prohibited from holding property or having bank accounts. They had to apply to the Protector of Aborigines for permission to carry out day-to-day activites, including to work, travel off reserve or marry.

[6] As part of current debates about amending the Constitution to formally recognise Indigenous peoples as the nation's First Peoples, there are ongoing discussions about the removal of the 'race power' from the Constitution altogether (see Davis 2016).

the export of heavy minerals from K'gari (*Murphyores Inc Pty Ltd v Cth* ('Fraser Island Case')(1976)). All mining leases were eventually relinquished by 1984 (Stringer 2012: 84).

In 1990, the Queensland Government established a Commission of Inquiry into the Conservation, Management and Use of Fraser Island and the Great Sandy Region (Commission of Inquiry 1990). The final report included the recommendation that the region, both K'gari and the surrounding Cooloola area, be nominated as a World Heritage site. K'gari, but not Cooloola, was inscribed in 1992 as a World Heritage site in recognition of its outstanding universal value under three natural criteria, for its significant ongoing geological processes as well as biological evolution and as an example of superlative natural phenomena (UNESCO 2016a).[7] The extensive cultural heritage of the Traditional Owners of K'gari, the Butchulla people, was recognised by the government at the time of nomination, but not considered significant enough to be recognised under the cultural criteria for listing under the World Heritage Convention (Ross 2014: 81). The decision by state and federal governments to nominate the site was motivated by a desire to protect the natural heritage of K'gari. There was, at this time, limited reference to cultural heritage and limited involvement of Indigenous people.

With overlapping interests between federal and state governments around development, environmental and heritage conservation and no clear legislative regime giving force to Australia's obligations under the World Heritage Convention, there were often periods of intense conflict between the federal and state governments. These tensions reached their peak during the controversy over the Tasmanian Government authorising the construction of a large hydro-electric dam in the Tasmanian Wilderness World Heritage Area. The Federal Government sought to stop the construction of the dam by enacting the *World Heritage Properties Conservation Act 1983* (Cth). The Tasmanian Government challenged the legislation in the High Court of Australia, but the provisions needed to protect the site were held to be constitutionally valid (*Commonwealth of Australia v State of Tasmania* (1983)('Tas Dam case').

By the 1990s a more conciliatory approach was taken to World Heritage nomination and management. Listed as a World Heritage site in 1988, the Wet Tropics of Queensland was the subject of an Intergovernmental Agreement in 1990 between the Queensland Government and Commonwealth Government (Marrie & Marrie 2014: 351). Both governments enacted legislation to give effect to the Intergovernmental Agreement being the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) (Wet Tropics Qld Act) and *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* (Cth) (Wet Tropics Commonwealth Act). Significantly, the Rainforest Aboriginal peoples, the Traditional Owners of the Wet Tropics World Heritage area, are recognised in both acts and in the Wet Tropics Qld Act there is explicit recognition that Indigenous peoples be engaged through joint management arrangements.

In 1992, this conciliatory approach was formalised between the Commonwealth

[7] K'gari is inscribed on the World Heritage List under criterion (vii), (viii) and (ix), but was originally listed under earlier versions of this criteria.

Government and all the state governments with the signing of the *Intergovernmental Agreement on the Environment* (IGAE) (Department of Environment and Energy 1992). The IGAE covered a wide range of matters to facilitate better coordination between all levels of government on environmental matters, but importantly, to coordinate the nomination and management of World Heritage areas in Australia. For example, Schedule 8 of the IGAE committed the federal government to consult with states about potential sites for nomination to the World Heritage List (Schedule 8.3 IGAE) and states recognised the Commonwealth's international obligations in relation to World Heritage (Schedule 8.1 IGAE).

Following this agreement, the Commonwealth Government enacted the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). This is the current overarching legislative framework in Australia giving effect to the World Heritage Convention. Together with other environmentally important sites around Australia, World Heritage properties are recognised as a matter of 'national environmental significance' and afforded special measures to uphold the Australian Government's responsibilities under the international convention. Under the EPBC Act, World Heritage sites are protected from any action that has, or is likely to have, a significant impact on the World Heritage values of a site (s12 EPBC Act). The *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) set out more detailed management principles for World Heritage properties in Australia.

The objectives of the EPBC Act support Indigenous peoples' engagement and the establishment of co-management regimes. The stated aim of the EPBC Act are:

> (*d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land holders and Indigenous peoples; and*
> *(e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and*
> *(f) to recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and*
> *(g) to promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge* (*EPBC Act* s3(1)).

Further, the Australian Intergovernmental Agreement on World Heritage sets out two national advisory groups, the Australian World Heritage Indigenous Network (AWHIN) and the Australian World Heritage Advisory Committee (AWHAC) (Department of Environment and Energy 2015). The AWHIN includes Indigenous representatives from each World Heritage site where there are Indigenous custodians and AWHAC includes representatives from all of Australia's World Heritage sites including the two Indigenous co-chairs from AWHIN. These advisory groups are important mechanisms facilitating Indigenous peoples' collaborative engagement on World Heritage management.

The EPBC Act sets the broad legislative framework for managing World Heritage in Australia setting out clearly that Indigenous people are to be consulted and engaged in the management of World Heritage sites. Both the AWHAC and AWHIN have been established as national forums through which Indigenous and non-Indigenous peoples

from around Australia can share and learn from knowledges and diverse experiences across the country. Funding remains an issue, especially for AWHIN, to meet as frequently as would be desired (Halliday *et al.* 2013: 161), but the framework and intent underpinning these organisations demonstrate recognition of the important role Traditional Owners play in the management of World Heritage properties.

3. Cultural Heritage Law

i) Federal Cultural Heritage Law

The EPBC Act is the key federal legislation for regulating cultural heritage sites of national and international significance. This includes both indigenous and non-indigenous places of significance that are nominated, or are listed on the National Heritage List, Commonwealth Heritage List or World Heritage List. Further, the *Australian Heritage Council Act 2003* (Cth) established the Australian Heritage Council as an advisory body to the federal government regarding those places registered under the EPBC Act.

The *Aboriginal and Torres Strait Islander Heritage Protection Act* (Cth) 1984 (ATSIHP Act) was enacted to preserve and protect from harm 'areas and objects in Australia and in Australian waters, … of particular significance to Aboriginals in accordance with Aboriginal tradition' (s4 ATSIHP Act). Under the Act, an individual may make an application for a declaration where there is threat to a 'significant Aboriginal areas' or 'significant Aboriginal objects'. This legislation was intended as a 'last resort' if state or territory legislation was inadequate in protecting Indigenous heritage from harm (Department of Environment 2014).

ii) Queensland Cultural Heritage Law

In Queensland, non-Indigenous cultural heritage and post-contact Indigenous heritage is regulated under the *Queensland Heritage Act 1992* (Qld). Under the Act, places and items can be added to the Queensland Heritage Register. Once listed, penalties apply for damage to a place or item on the Register. The Queensland Heritage Council has adopted the revised Australian ICOMOS *Burra Charter* (Australian ICOMOS 2013) as best practice in managing conservation under the *Queensland Heritage Act 1992* (Qld) (Queensland Heritage Council 2016).

There are specific legal obligations in Queensland that arise in relation to Indigenous cultural heritage under the *Aboriginal Cultural Heritage Act 2003* (Qld) (ACHA) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (TSICHA).[8] The ACHA sets out a duty of care requiring those conducting activities in areas of significance to take all reasonable and practicable measure to avoid harming cultural heritage (s23 ACHA). The definition of a 'site' can be either an area of significance or an object. It can include both places or objects that are of traditional and/or contemporary historical significance to Aboriginal people. One of the ways that a land user can demonstrate that they have met their duty of care is by negotiating a Cultural Heritage Management Plan (CHMP) with the relevant Aboriginal cultural heritage body (Part 7 ACHA). A CHMP creates certainty for the land user as it sets out the agreed protocol for either avoiding harm to Aboriginal cultural heritage or where harm cannot be reasonably avoided, how to minimise harm. CHMPs are necessary when any activity

[8] The ACHA and TSICHA are almost identical except that one deals with Aboriginal cultural heritage and the other Torres Strait Islander, but given the focus of this paper on Aboriginal people on K'gari, the ACHA will be referred to here.

requires an Environmental Impact Statement (EIS) under the EPBC Act. An EIS may be required as part of the EPBC Act approval process if a proposed activity is likely to have a significant impact on, for example, a World Heritage property. Though necessary in these situations, CHMPs are otherwise voluntary arrangements.

A land users' duty of care may also be met under the ACHA by demonstrating that the person acting in relation to cultural heritage followed the Guidelines gazetted by the Minister (s 23(3)(2)(iv)). These Guidelines were gazetted in 2004 and identify steps that may be reasonably and practicably taken in order to avoid harming Aboriginal cultural heritage (Department of Aboriginal and Torres Strait Islander Partnerships 2004). Given the important role these Guidelines play in assisting parties to determine how best to meet their statutory duty of care, the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) is currently undertaking a review of these Guidelines (DATSIP 2016b).

The ACHA establishes a Queensland cultural heritage register and database. The register is available for public access and provides information relevant for land use planning including, for example, about relevant cultural heritage bodies for an area or whether a CHMP applies over an area (DATSIP 2016a). In contrast, the database is not publicly available. It can, however, be searched by Aboriginal and Torres Strait Islander parties and land users in satisfying their duty of care under the Acts (DATSIP 2016a). Aboriginal people, who have applied and been granted special access, can submit new sites for inclusion on the database (DATSIP 2016a).

iii) Cultural Heritage Management on K'gari

Training on cultural heritage is available to NPWS staff working on K'gari so that they meet their duty of care and avoid harming Butchulla cultural heritage. Some Butchulla interviewed, however, expressed concern that the significance of their sites are being threatened by the vast number of tourists visiting K'gari.[9] Though K'gari has benefited from resources being dedicated to new interpretation around the island identifying and explaining, where appropriate, the significance of Butchulla cultural sites, there are still many sites needing interpretation and protection. For Butchulla, there are both tangible and intangible features central to their culture and identity embedded throughout the landscape. Features such as middens, stone tools, scarred trees, fish traps can be found throughout the island as well as the landscape holding intangible cultural significance including sites for birthing, initiation, meeting, storytelling and death (Brown *et al.* 2015: 163). There is concern among Butchulla interviewed that these cultural sites are not being adequately protected from potential harm.

The Greater Sandy Region Management Plan (GSRMP) is the policy framework providing guidance for the management of Fraser Island and the surrounding areas. The policy recognises the right of Butchulla to 'control information and interpretation relating to their heritage' (Department of National Parks, Recreation, Sport and Racing 2005:40). Butchulla have to date, through the IAC, been involved in developing signage around K'gari, particularly at high use sites, but there remains need to further develop interpretation to promote awareness of the depth and scope of Butchulla cultural heritage on K'gari.

[9] K'gari receives about 500,000 tourists each year (Stringer 2012: 86).

There is a genuine willingness among staff and management on K'gari to learn about Aboriginal culture and better understand those rights recognised and this openness has provided the basis for transformative two-way learning. Even with this goodwill, there is a divide between what is regarded as the 'real work' of K'gari management and cultural work that Butchulla Rangers might undertake. Indigenous Rangers were in the past given the opportunity to have one cultural day each month where they were able to attend to cultural business on the island. Unfortunately, this is no longer available and the Butchulla Rangers must carry out this work either in their own time or incidentally to their day-to-day work.

There is work currently being undertaken by Indigenous Rangers on K'gari to develop a Butchulla cultural heritage database. This project would be consistent with the objectives of the GSRMP. The GSRMP sets out the Queensland Government's commitment to develop 'a detailed inventory of known Indigenous heritage sites, both traditional and contemporary … prepared in consultation with Traditional Owners in the Region' (Department of National Parks, Recreation, Sport and Racing 2005: 40). The GSRMP is currently under review with public consultation to begin in February 2017. There is scope, therefore, in reviewing this policy to set out more fully how these broad commitments are to be implemented. If Indigenous Rangers are to be supported in pursuing the important work of identifying and recording cultural heritage on K'gari, they need the resources and time to carry out this work.

Perhaps more fundamentally, much of this cultural heritage work is not characterised in terms of broader cultural rights. The GSRMP sets out recognition of Butchulla's 'custodial obligations' to promote and practice cultural heritage, but these responsibilities are not expressed in terms of specific Indigenous rights. 'Rights' discussions in Australia has tended to be dominated in the past by discussions around land rights and native title rights. This may change, however, with recent legislation in some Australian states adopting human rights legislation and, in Queensland, the possibility of the introduction of human rights legislation.

4. Human Rights in Queensland: A Bill of Rights?

Australia has no national bill or charter of rights and the Constitution has very few express rights. Since the 1970s, there have been attempts to enact a national bill of rights or to incorporate express rights into the Australian Constitution, but these have been, to date, unsuccessful (Williams and Reynolds 2016: 81).

Despite these few express rights, the Australian Government is signatory to key international human rights treaties including the *Universal Declaration on Human Rights* (1948), *International Convention on the Elimination of all Forms of Racial Discrimination* (1966) and the *Declaration on the Rights of Indigenous Peoples* (2007). These are not legally binding agreements unless incorporated into domestic legislation. Some of these treaties have been given full legal effect through legislation, such as the *International Convention on the Elimination of all Forms of Racial Discrimination* (1966) being legislated through the *Racial Discrimination Act 1975* (Cth). In Queensland, principles of human rights have also been incorporated into law through the *Anti-Discrimination Act 1991* (Qld). The legislative nature of these protections reflect the vulnerability of rights in Australian law, particularly as it relates to Indigenous peoples (Marrie & Marrie 2014: 344).

Given this lack of federal progress on the explicit recognition of human rights, the states and territories have largely driven reform. Since 2003, community consultations have been held in several jurisdictions in Australia looking at the possibility for human rights legislation. The Australian Capital Territory, Victoria, Tasmania and Western Australia have all considered the best path for the protection and promotion of human rights (Williams & Reynolds 2016). From these consultations, two States have enacted legislation to protect human rights, the ACT with the *Human Rights Act 2004* (ACT) (HR Act) and in Victoria with the *Charter of Human Rights and Responsibilities Act 2006* (Vic)(Charter).

Importantly, the Victorian Charter and ACT HR Act both adopt those rights set out in the *International Covenant on Civil and Political Rights* and to different degrees adopt rights set out in *International Covenant on Economic, Social and Cultural Rights* (Queensland Parliamentary Committee 2016). Section 19(2) of the Victorian Charter protects Aboriginal peoples' cultural rights stating that 'Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community' in expressing their identity and culture, in maintaining language, kinship ties and to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

On 14 September 2015, the Queensland Government commenced its own consultation process to consider the appropriateness of introducing human rights legislation similar to those enacted in the ACT and Victoria. After holding widespread public consultations, the Queensland Parliament's Legal Affairs and Community Safety Committee report was submitted to parliament in June 2016. The Committee was unable to agree on whether a Human Rights Act would be beneficial to the state (Queensland Parliamentary Committee 2016). The division was split along government Committee members who supported the introduction of legislation, and non-government members who did not (Queensland Parliamentary Committee 2016). Despite this, on 29 October 2016, the Premier of Queensland announced that the Government would introduce a Human Rights Act for Queensland and that it would be based on the Victorian Charter (Elks 2016). For Indigenous peoples, the introduction of this legislation will be significant and will challenge the narrow discourse around rights. Importantly, the introduction of human rights legislation will bind the Queensland Government to ensure any proposed legislation upholds those human rights recognised.

5. Indigenous Rights

a. Land rights, native title and resource rights

The 1992 High Court of Australia's decision *Mabo v Queensland (No. 2)* recognised native title for the first time at common law.[10] Prior to this significant High Court decision, Indigenous peoples across Australia had fought for recognition of their land rights which from the 1960s were recognised through legislation.[11] The Mabo

[10] *Mabo v Queensland [No 2]* (1992) 175 CLR 1. The decision overturned the earlier decision by Justice Blackburn of the Supreme Court of the Northern Territory rejecting any possibility for native title to exist at common law. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (SC(NT)).

[11] See: *Aboriginal Lands Trust Act 1966* (SA), *Aboriginal Land Rights (Northern Territory) Act* 1981 (Cth), *Pitjantjatjara Land Rights Act 1981* (SA), *Maralinga Land Rights Act 1984* (SA), *Aboriginal*

decision determined that native title, as distinct from these earlier statutory land rights, continued to exist at common law and that the source of native title was Indigenous peoples' traditional connection to, or occupation of land and that the nature and content of native title was derived from Indigenous peoples' traditional laws or customs (*Mabo v Queensland [No 2]* (1992) at 58).[12] Importantly, the High Court of Australia determined that native title could be extinguished by legislation, but only where there had been a clear and plain intention to extinguish it (*Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64).[13] Following this landmark decision, the Federal Government enacted the *Native Title Act 1993* (Cth) (NTA) which clarifies how native title operates in relation to other interests in land and the process for claiming native title. The NTA clarifies that a grant made under legislation that was for the benefit of Indigenous people (such as grants under land rights legislation) or a grant 'for the purpose of preserving the natural environment of the area' (such as the establishment of a national park or World Heritage area), would not necessarily extinguish native title (ss23B(9) and 23B(9A) NTA).

Following the *Mabo* decision, and with the introduction of the NTA, many Indigenous peoples initiated claims seeking determinations of native title over their traditional lands. For the Traditional Owners of K'gari, the Butchulla people, the Mabo decision represented an opportunity to finally have their traditional ownership of K'gari formally recognised. In 2009, their native title claim was lodged by nine claimants, on behalf of the Butchulla people, over most of K'gari as well as some marine and adjacent land (ref QUD 287/2009).

In 2014, Butchulla were recognised as the native title holders over K'gari through a consent determination. Consent determinations are often made by the Federal Court of Australia as an alternative to litigated determinations about native title. Butchulla's native title rights were determined to include the right to access and move about K'gari, to camp and reside temporarily on country and build temporary shelters, to hunt, fish and gather on the land and waters for non-commercial purposes, to conduct and participate in rituals and ceremonies on country, be buried on country, hold meetings on country and light fires for personal and domestic use, such as for cooking (*Butchulla People #2 v State of Queensland* [2014] QUD287/2009).

The Queensland Government has developed the practice of linking recognition of native title with entry into Indigenous Land Use Agreements (ILUAs) (Bartlett 2015: 748). The negotiation of an ILUA provides flexibility, allowing parties to address the needs and interests of the parties about how native title is to be managed as well as providing certainty about the activities agreed to (Bartlett 2014: 737). In the case of K'gari, the ILUA sets out Butchulla's native title rights within the context of the management of the National Park and World Heritage area. The ILUA was registered and commenced on 21 November 2014 and is due to expire on 21 November 2019. After its expiration, the terms can be renegotiated.

Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)(Victoria); *Aboriginal Land Rights Act 1983* (NSW), *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld); and *Aboriginal Lands Act 1995* (Tas). Western Australia was the only state not to enact land rights legislation, despite being the largest geographical state with a substantial Indigenous population.

[12] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58 per Brennan J.

[13] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64 per Brennan J; CLR at 111 per Deane and Gaudron JJ; CLR at 195-6 per Toohey J.

In negotiating the ILUA, the then conservative Liberal Queensland Government excluded the possibility for joint management. During the interviews conducted as part of this research, commentators noted that the ILUA that was ultimately negotiated and registered was the weakest version of Butchulla rights that could have been negotiated. Fundamentally, many Butchulla were frustrated by the Queensland Government's refusal to negotiate joint management even though the government is committed to realising joint management as a broad policy objective. In the Queensland Government's *Master Plan for Queensland's Parks and Forests to 2025* it is noted that strong partnerships be developed and 'reflected in joint management agreements, collaborative management agreements, cultural awareness training and a significant number of Traditional Owner initiatives' (Department of National Parks, Recreation, Sport and Racing 2014).

The ILUA recognised Butchulla's rights to use modern weaponry when hunting and fishing. The agreement reflects the fact that Indigenous peoples' rights are not frozen in time, but are dynamic and fluid. This approach has been consistently upheld in native title decisions including in *Yarmirr v Northern Territory* (1998) where the use of modern technology was held to be consistent with their traditional right to fish and hunt in the sea area claimed.[14]

In accordance with the *Native Title Act 1993* (Cth), as native title holders, Butchulla formed a Prescribed Body Corporate (PBC), the Butchulla Aboriginal Corporation responsible for holding and managing their native title. This approach was problematised by some Traditional Owners who were interviewed through this case study, who refuse to recognise that the PBC holds their native title. These Traditional Owners see their rights as sitting outside the native title system having been continuously frustrated by the current legal system. There are also internal sensitives within the PBC as to who has authority to claim knowledge or authority to speak about certain parts of K'gari as certain families have traditional connections to specific parts of the island. Further, amongst respondents interviewed, there were concerns that those dealing with the PBC may not recognise that the PBC would still be required to consult broadly within the Butchulla community before making decisions that may affect certain families' traditional lands.

These issues are reflected in the broader context in which Australia is entering a post-native title era where a significant number of native title determinations have been made, and the focus is shifting from questions about the existence of native title, to determining what native title rights mean in practice.[15] On K'gari, through interviews with both Indigenous and non-Indigenous Queensland Parks and Wildlife Services (QPWS) staff, many were unsure how the native title rights recognised in the consent determination would operate 'on the ground'. Further, there was uncertainty as to how these rights co-exist with legislative responsibilities to manage the natural values for which K'gari was inscribed on the World Heritage List.

[14] *Yarmirr v Northern Territory* (1998) 82 FCR 533; 156 ALR 370 at 162 ('*Croker Island case*').
[15] To date, there have been 308 determinations made finding that native title exists in all or in part of the area claimed (National Native Title Tribunal 2016b). The total area currently subject to exclusive and non-exclusive native title in Australia is 2,396,065km^2 (National Native Title Tribunal 2016a)

An example of this uncertainty is the suggestion made by both Indigenous and non-Indigenous respondents that Butchulla need a permit to exercise their native title rights to light fires for personal use or to camp on K'gari. The ILUA may contain terms that limit the scope of Butchulla's rights and that may require them to apply for permits to exercise their rights. These agreements are usually subject to confidentiality clauses and only a brief extract of an ILUA is publicly available through the National Native Title Tribunal. Broadly, however, section 211(2) of the NTA operates to 'remove the requirement of a "licence, permit or other instrument" referred to in s211(1)(b) as a legal condition upon the exercise of native title rights' (*Western Australia v Commonwealth* (1995)).[16] On nature reserves where there is a total prohibition on certain activities, such as World Heritage areas, the situation is less clear (Bartlett 2015:922-923). At other World Heritage sites, however, the approach taken is to recognise the rights of Traditional Owners to exercise their rights to hunt, fish and gather, but to negotiate agreements that set out clearly how these rights will co-exist with broader conservation objectives. At the Great Barrier Reef Marine Park these agreements are called 'Traditional Use of Marine Resources Agreements' (TUMRA). These agreements create mechanisms for recognising Indigenous peoples' traditional rights, while simultaneously working towards shared goals of conservation management of World Heritage sites (see, for example, Nursey-Bray & Rist 2009). These same guidelines may be included in the ILUA for K'gari, but for many Traditional Owners interviewed, there remains confusion and uncertainty about how they can exactly go about exercising their rights.

The management plan for K'gari, the Great Sandy Region Management Plan, is currently under review as part of the Queensland Government's proposal to extend the K'gari World Heritage area to include Cooloola, Great Sandy Strait, Wide Bay Military Reserve and Breaksea Spit (Department of Environment and Heritage Protection 2016d). There is scope, therefore, as part of this review to draw upon experiences at other World Heritage sites, such as the Great Barrier Reef, to identify mechanisms that could be incorporated at K'gari that would give greater clarity to the relationship between native title rights and conservation obligations, by ensuring the sustainable use of resources within the World Heritage area.

b. Consultation and Participation

Australia is often regarded as a world leader in the engagement of Indigenous peoples through the adoption of joint management arrangements at World Heritage sites (Adams 2014: 297). World Heritage properties such as Kakadu National Park and Uluṟu-Kata Tjuṯa National Park, both with joint management models in place, are regarded as best practice in the engagement of Indigenous peoples. These arrangements have not been, however, universally adopted at all World Heritage sites in Australia. Kakadu National Park and Uluṟu-Kata Tjuṯa National Park emerged from the early Indigenous land rights movement in Australia from the 1960s and Traditional Owners have lobbied, both domestically and internationally, to pressure governments to realise their political, social and economic aspirations and continue to pressure government over recognition and respect for their rights (see O'Brien 2014; Adams 2014).[17] These sites should not, therefore, be assumed to reflect a general

[16] *Western Australia v Commonwealth* (1995) 183 CLR 373 at 474.

[17] For example, very recently the Aṉangu community living near Uluṟu, frustrated by the Commonwealth Government's failure to provide local Indigenous communities with basic services

legislative approach to Indigenous engagement in World Heritage management in Australia, but rather, are the product of historical and political experiences.

K'gari is an example of a World Heritage site in Australia where there is no joint management policy currently in place. Butchulla are instead consulted through the Community Advisory Committee (CAC), one of two advisory committees, where they represent one of many other stakeholder interests. Until very recently, K'gari had three advisory groups, the Indigenous Advisory Committee (IAC), the Community Advisory Committee (CAC) and Scientific Advisory Committee (SAC). The IAC was the first formal mechanism established at K'gari creating a forum for Butchulla to advise and shape management policy and practice. The establishment of the IAC was critical in fostering a constructive relationship between Traditional Owners and the Queensland Government, serving as a vital channel of communication.

The CAC now includes an independent chair and 11 members representing Traditional Owners, tourism, commercial, education, recreation, residential, conservation, natural resource management and local government (Department of Environment and Heritage Protection 2016a). Up to 4 members may be Butchulla Traditional Owners endorsed by the PBC. Two Butchulla Traditional Owner members (one male and one female) may represent K'gari on the Australian World Heritage Indigenous Network (AWHIN). The AWHIN meetings have been very successful in bringing together Traditional Owners from various World Heritage sites to provide their unique knowledge and experience in the management of their lands, to share and discuss their experiences, advance Indigenous rights and culturally appropriate engagement in the management of World Heritage (Halliday *et al.* 2014: 160).

At K'gari, the CAC is responsible for advising the Queensland and Commonwealth Government:

> … on matters relating to the identification, protection, conservation and transmission to future generations of the cultural and natural heritage of the Fraser Island World Heritage property from the viewpoint of the Traditional Owners and community. This includes advice on the review and implementation of Fraser Island World Heritage plans, strategies or management issues which impact on communities (Department of Environment and Heritage Protection 2016a).

Through the CAC, the Queensland Government has condensed Indigenous representation and transferred their decision-making power so that they are a group among other interests. Such an approach may not fully respect Butchulla's unique status as rights-holders. That is, Butchulla are not stakeholders with an interest in K'gari, but are the Traditional Owners with a range of rights and responsibilities recognised at law in relation K'gari.

Despite this consultative committee arrangement on K'gari, and strong statements by government advocating for Indigenous engagement at both the federal and state levels, constraints limit Butchulla's involvement in substantive decision-making.

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including housing, plumbing, food and healthcare, have threatened to close Uluṟu to tourists (SBS 2016).

Through interviews with Traditional Owners, some Butchulla expressed frustration that engagement was focused on pre-determined agenda and that government representatives were still seen to be very much 'holding the reins'. Traditional Owners said that these were not deliberative processes, but instead satisfied a perceived requirement of the Queensland Government to merely consult with Traditional Owners. Butchulla respondents stated that this was particularly apparent in relation to management practices which were of ongoing concern, such as fire and dingo management. Some Butchulla felt that fire management was approached with concern primarily to protect property on K'gari rather than in accordance with Butchulla's traditional knowledge and with a more holistic understanding of K'gari ecology. They felt that their traditional practices in fire management were marginalised.

Similar frustrations were experienced in relation to Dingo management on K'gari. A threatened species on the island, dingoes have had an ancient association with Butchulla. For Butchulla, dingoes have special meaning in their cosmology (Ross 2014: 82). Dingo management strategy has focused on concerns of habituation resulting in sometimes aggressive behaviour towards tourists (Allen *et al.* 2015: 198-199). Significant revenue has been directed to keeping dingoes separate from humans with the construction of fences and signage around the island (Department of Environment and Heritage Protection 2013). These physical barriers are at odds with Butchulla's traditional associations with dingoes. During interviews many Butchulla expressed their frustration that dingoes are being harmed by QPWS staff through cull programs or that their special status among Butchulla is not being respected.

c. Livelihood and Development

Indigenous peoples in Australia face significant barriers to achieving economic and social parity with the wider non-Indigenous community. The 'Closing the Gap: National Indigenous Health Equality Targets' initiative was a commitment by all levels of government to work to overcome the disadvantages faced by Indigenous peoples in Australia reflected, for example, in the 17-years life expectancy difference between Indigenous and non-Indigenous Australians (Department of Prime Minister and Cabinet 2016). In the Prime Minister's recent annual report on progress in key areas including early childhood health, education, employment, economic development, the report noted that 'no progress has been made' against the target of halving Indigenous unemployment from 2008 (Department of Prime Minister and Cabinet 2016). It is also noted that all levels of government in Australia are committed to prioritising Indigenous economic participation, recognising that land is a significant asset base for Indigenous people (Department of Prime Minister and Cabinet 2016). Despite these broad commitments, some of the existing legal frameworks, such as native title and cultural heritage, simultaneously facilitate and constrain Indigenous peoples' economic opportunities.

Though cultural heritage legislation in Queensland does not explicitly consider the issue of economic development, many land users carrying out activities where a duty of care could exist, engage Indigenous peoples in consultation processes (including to conduct site surveys that identify potential sites or objects of cultural significance). In practice, this commercialisation of Indigenous cultural heritage raises important challenges both for Indigenous communities as well as the conservation objectives of cultural heritage legislation (Martin *et al.* 2016). It is argued that for Indigenous

communities there is sometimes a lack of transparency about which individuals or families derive economic benefits from the income derived from cultural heritage work, while the wider community may lose confidence in the cultural heritage to being identified and protected (Martin *et al.* 2016).

World Heritage is often assumed to bring economic opportunities for Indigenous peoples (for example, through increased tourism, employment and business opportunities), Butchulla's experiences at K'gari present a different reality. There have been limited economic opportunities for Butchulla on K'gari. From time to time community members have been employed at the major resort located on the island or as cultural guides on tours, but there have not been consistent employment opportunities. Indicating the significant economic opportunities potentially generated from tourism at K'gari, it has been estimated that income from recreational activities of the Australian residents visiting K'gari, that is, not including revenue generated from international visitors or from individuals on organised tours, amounts to around $200 million annually (Fleming & Cook 2008: 1203). There is currently no arrangement where any of the revenue raised from the permit system is directed to Traditional Owners. Many Traditional Owners expressed frustration at this and are actively seeking to change this arrangement.

Those Butchulla currently working on K'gari are mostly employed as Park Rangers by QPWS. There are currently two types of positions available for Indigenous Rangers who are not employed in general duty positions. First, an 'Indigenous identified' role where an individual must be a Traditional Owner and second, 'Indigenous specified' position where an individual does not need to be a Traditional Owner, but must be able to demonstrate an ability to connect and liaise with Butchulla (QPWS 2012). The Indigenous Rangers currently employed have stated in interviews that they are proud of the work they do and the role they play within their community. Both the Indigenous and non-Indigenous Ranger staff confirmed that they see enormous value in the role Butchulla Rangers play in sharing their traditional knowledge not only within their workforce, but also with the wider public.

Butchulla Rangers have responsibilities that often go unrecognised. They are asked at times to make decisions on behalf of their community, while aware that they need to consult with their community. They are required to negotiate their cultural identity with the responsibilities of managing K'gari in accordance with existing management plans. When they are 'off-duty', they are still 'on-duty' in their community, feeding back information and explaining management practice and listening to community concerns. Much of this work goes unrecognised and uncompensated, yet is invaluable in facilitating open communication between management and Traditional Owners.

There are frustrations, both among the Park Rangers and Traditional Owners that these Indigenous Rangers are not being mentored or given clear career pathways to advance in their roles. From interviews with Traditional Owners, there is a strong desire to see greater numbers of Indigenous Rangers employed and to continue to grow the program so that young Butchulla men and women can return to country and be actively involved in managing their lands.

There has been a recent movement within UNESCO to advance the goals of sustainable development through heritage protection (2016b). It has been noted that

‘in addition to its intrinsic value for present and future generations, World Heritage – and heritage in general – can make also an important instrumental contribution to sustainable development across its various dimensions’ (UNESCO 2016b). As part of this, World Heritage could play a critical role in developing sustainable economic development for local communities and Traditional Owners.

A concept of sustainable development invites re-imagining what economic opportunities could exist for Butchulla on K’gari. Working as Park Rangers is one vital role that could be expanded. There are also Indigenous businesses that could expand upon the eco-tourism industry. Even more innovative is perhaps the concept of a sustainable economy that relies on opportunities beyond tourism (UNESCO 2016b). That is, an economy in which Indigenous people are able to practice culture on country while engaged in employment or grow businesses that are aligned with the implicit cultural and explicit natural values of K’gari as a World Heritage site. The benefit of this approach is that it would move away from dependency on a single industry and find opportunities within other market areas, for example, with sciences and medical research through the growing possibilities associated with Traditional Bio-Knowledges.

6. Conclusion

Within the overarching federal and state legislative frameworks and the management plans currently operating in relation to K’gari, there are strong policy statements that support Indigenous rights in relation to World Heritage. The Traditional Owners of K’gari have been engaged through governance mechanisms such as the IAC and now, through the CAC giving voice to their traditional knowledge and experiences shaping the direction of management policy and practices. There are frustrations, however, about the nature and scope of this engagement. Butchulla have expressed their disappointment that these governance arrangements still adopt a ‘top down’ approach and that their views have been, at times, marginalised. In restructuring these governance relationships, it would be important to reassess the scope and nature of Butchulla’s existing role in governance to ensure that the mechanisms advanced reflect Butchulla’s position not as a stakeholder, but a group with unique interests and rights in relation to K’gari.

The current approach to cultural heritage also invites critical reflection, particularly in the context of the Queensland Government’s commitment to enact Human Rights legislation that may recognise Indigenous peoples’ cultural rights. Currently there is important work being undertaking to survey the extent of cultural heritage on the island so that it is not only recognised, but protected from potential harm. Such work is critical to upholding legislative obligations under the ACHA and needs to be properly resourced. There is additional work needed to develop a richer understanding of the relationship between Indigenous cultural heritage and Indigenous rights. Currently, discussions around Indigenous rights are limited to native title rights and their implications for the management policy and practice on K’gari.

World Heritage on K’gari is entering a new era in which the relationship between Butchulla native title rights and the management of the site as a World Heritage property are beginning to be more comprehensively understood. There is scope to be innovative in re-imagining how this relationship might be structured particularly as it relates to benefit sharing. Currently, Butchulla’s role in the management of K’gari as

a World Heritage property is narrowly defined and the economic opportunities have been largely unrealised. There is renewed opportunity, however, to develop greater economic opportunities for Butchulla such as by expanding the Indigenous Ranger program and better defining career pathways for Indigenous Rangers. It could also include looking at economic opportunities beyond tourism.

Among both Traditional Owners and Indigenous and non-Indigenous staff working on K'gari, following the recent native title determination, there is a broad feeling of optimism about the engagement of Butchulla on K'gari. The management of World Heritage on K'gari remains fluid and there are real attempts to be responsive to community needs and aspirations. With the current management plan under review, this presents a significant opportunity to better align management structures and practices with Indigenous rights and to broaden discussions of rights from those relating to native title, to thinking about cultural rights, Indigenous governance and economic opportunities in the context of World Heritage.

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