CRITIQUE AND COMMENT

PRESERVING NATURAL HERITAGE: NATURE AS OTHER

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[This article explores evolving concepts of nature which encompass an inherently dichotomous understanding of the people–nature interaction and how these views find expression in Australian law. The article also considers the ramifications of this view for natural heritage protection within Australia. Property law concepts, particularly the bundle of rights notion, effectively preclude the consideration of nature as natural heritage. Both private property and public regimes of land management in 19th century Australia contributed to lack of recognition of the natural heritage aspects of the environment. However, recent changes in environmental and heritage legislation and policy have emphasised a holistic approach to people–nature interactions. If we are to successfully implement such a holistic view, we need a more inclusive framework for making choices about identifying and protecting natural heritage. In particular, in the light of the recognition of native title and indigenous rights more generally, we need to displace the 'separate' vision of people and nature with a more integrative approach to natural heritage law.]

CONTENTS

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I WHAT IS NATURE: WHAT IS NATURAL HERITAGE?

> The basic problem is the dichotomy which remains at the heart of Western culture; that between 'people' (still often referred to as 'man') and 'nature'.[1]

A feature of the early stages of the environmental movement, and consequently environmental law, was the focus on protection of 'natural heritage'. 'Natural heritage' is an amorphous term,[2] but it captures the view that there is a natural environment, selected aspects of which are to be preserved into the future as a 'common heritage of mankind'.[3] If we are to understand what constitutes 'natural heritage' at law, we must presumably know what is nature. We must have a discrete idea (or perhaps ideal) of nature. This idea/ideal is then to be applied to specific areas determined on the basis of pre-ordained legal categories. These areas are then offered the protection of law to ensure preservation into the future for the benefit of all.

However, far from being unproblematic, the fundamental questions of *what* 'nature' *is*, and how it is constituted, are capable of many resolutions of meaning dependent upon the contingencies of time, culture and place.[4] Although difficult to define precisely, western concepts of nature, and consequently formulations of natural heritage, are distinguished by a constant distancing of the 'human' from 'nature'. In contrast to beliefs held by indigenous Australians, this cumulative disassociation of people from nature has been central to prevailing western humanist thought. C S Lewis described this development as 'that great movement of internalisation, and that consequent aggrandisement of man and desiccation of the outer universe, in which the psychological history of the West has so largely consisted.'[5]

Thus, within western society there has been a progressive relegation of nature to the status of an 'other': an object existing as a counterpoint to the individual human subject.[6] In the same conceptual discontinuity that saw the beginnings of humanism and the ascendancy of man over the 'created order' we can discern the nub of modern western understandings of nature that have underpinned its conception at common law.[7]

The modern concept of nature draws heavily on Enlightenment thought. As Jordanova states:

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1 Peter Dickens, *Society and Nature: Towards a Green Social Theory* (1992) 15.

2 See, eg, Gerry Bates, *Environmental Law in Australia* (4th ed, 1995) 339.

3 See the discussion in Trudie-Ann Atherton and Trevor Atherton, 'The Power and the Glory: National Sovereignty and the World Heritage Convention' (1995) 69 *Australian Law Journal* 631, 631.

4 Neil Evernden, *The Social Creation of Nature* (1992) 3–17.

5 C S Lewis, *The Discarded Image* (1967) 42, cited in ibid 35. The idea that western society has 'progressed' beyond nature and that many other cultures remain 'in nature' was central to the evolutionary model of history which was prominent in the 19th century and early 20th century. This teleology has been exposed by recent critical thought as having provided a conceptual justification for western dominance over both colonised peoples and the natural world.

6 Peter Fitzpatrick, *The Mythology of Modern Law* (1992) 50.

7 Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (1970) xv.

> While it is important to realise that nature was endowed with a remarkable range of meanings during the period of the Enlightenment ... there was also a common theme. Nature was taken to be that realm on which mankind acts, not just to intervene in or manipulate directly, but also to understand and render it intelligible. ... Such an interpretation of nature led to two distinct positions: nature could be that part of the world which human beings have understood, mastered and made their own. Here, through the unravelling of laws of motion for example, the inner recesses of nature were revealed to the human mind. But secondly, nature was also that which has not yet been penetrated (either literally or metaphorically), the wilderness and deserts, unmediated and dangerous nature.[8]

This two-strand approach to nature — joined by the underlying idea that nature is essentially separate from humans — has informed the dominant western legal understanding of nature. The first strand is clearly evident in property law. The second strand, which views nature as untouched 'wilderness', finds expression in concepts such as natural heritage. Thus, the legal understanding of the relationship of people and nature fundamentally reflects this general meaning of nature in western society:[9] that which Barthes has termed a 'symbolic ordering'.[10] The appropriated, and the yet to be appropriated, share in the same universal 'order of things'.[11]

If the dualistic conception of the people–nature relationship is accepted, then it represents a culturally specific understanding which is quite different from indigenous understandings of that relationship.[12] Moreover, the oscillation between these two strands of thought in western law provides an explanatory basis for the emergence of laws protecting natural heritage in Australia. The 'controlling/mastering/property' strand may be seen as central to the legal 'construction' of the Australian natural environment from colonisation to well into the 20th century. It was only in the second half of the 20th century that the 'wilderness' idea, in concert with concepts of 'ecological integrity', gained currency in international and domestic law. Subsequently, selected areas of wilderness were designated as natural heritage. While the preservationist ideal implicit in wilderness has been important in protecting the natural environment, there remain particular limitations in both aspects of the formulation of nature within Australian law and society. Recognition of these limitations has recently given rise to suggestions that we should seek to transcend a dualistic vision of 'nature' and 'people'. This new vision is intended to provide a more culturally inclusive conception that also acknowledges the interaction of people *with* nature. A discussion paper prepared by the Australian Heritage Commission

8 L Jordanova, 'Natural Facts: A Historical Perspective on Science and Sexuality' in Carole MacCormack and Marilyn Strathern (eds), *Nature, Culture and Gender* (1980) 66.

9 For a discussion of the powerful symbolism associated with nature in our society, see generally Clarence Glacken, *Traces on the Rhodian Shore* (1967); or more recently Max Oelschlaeger, *The Idea of Wilderness: From Prehistory to the Age of Ecology* (1991).

10 Roland Barthes, 'Myth Today' in Roland Barthes, *Mythologies* (1973) 109.

11 Foucault, above n 7, 56–7.

12 Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (1996)

('AHC'), following an extensive consultation process, provides the following definition of 'heritage':

> Our natural heritage is the physical landscape — the biological and physical elements such as plants, animals, mountains, rivers, deserts and oceans. This landscape is also imbued with human associations, stories, myths, personal histories and emotions. Aboriginal and Torres Strait Islander people ... and later settlers have helped to shape our physical environment and left tangible evidence in the form of archaeological remains, material objects, structures or remnants of infrastructure. They also left an intangible legacy — the stories of places and people, the meanings attached to places and objects and cultural practices and traditions. This cultural heritage, which provides the fabric, context and web of history, is as much a part of the Australian environment as our natural heritage.[13]

In this definition of heritage there is an explicit recognition of the interaction of the natural and the cultural (including indigenous cultural) dimensions of our perception of the environment. Whether legislation can be framed and then implemented to reflect this novel perspective remains a significant challenge.[14]

A *The Object of Environmental Regulation*

This article seeks to engage with Australian environmental law by considering the object of natural heritage regulation — the 'natural environment' — rather than the detail of any such regulatory framework. If we accept the essential contingency of any formulation of 'nature' and 'natural heritage', then we need to be clear about what is being regulated. Environmental law is distinguished by its reliance on statutory forms of regulation and reflects the pre-eminence of the modern administrative state.[15] Consequently, much legal scholarship in environmental law has focused on what might be termed the 'superstructure' of law and policy. It has treated the focus of that regulation as something of an unproblematic 'given', once a working definition of 'environment' has been established.[16]

The inadequacy of current approaches to natural heritage protection at the federal level has, however, been recognised. Much of the legislation that implemented the first phase of environmental protection has not been reviewed for many years. Widespread changes to Commonwealth environmental protection

[13] Purdie et al, *Australia: State of the Environment* (1996), cited in AHC, 'Australia's National Heritage' (Discussion Paper prepared for National Heritage Convention, July 1998) 4, at AHC, 'Concept of National Significance' (1998) Australia's National Heritage, AHC <http://www.environment.gov.au/heritage/publications/policy_papers/natlist/chapter2.html> (copy on file with author).

[14] On 2 July 1998, the Environment Protection and Biodiversity Conservation Bill was introduced into the Commonwealth Parliament. In formulating the Bill, there was input from the AHC regarding the definition of 'natural heritage'. However, this input notwithstanding, pursuant to s 12(4) of the Bill, 'natural heritage' is given the same meaning as in the *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1975, 1037 UNTS 151, art 2 (entered into force 17 December 1975) ('*World Heritage Convention*'). The Convention appears as a schedule to the *World Heritage Properties Conservation Act 1983* (Cth)

[15] Douglas Fisher, *Environmental Law: Text and Materials* (1993) 3.

[16] See especially *R v Murphy* (1990) 64 ALJR 593, 596–7.

and natural heritage legislation are currently under consideration.[17] These proposed legislative changes will provide a more holistic definition of 'biodiversity' which integrates many diverse elements of the natural environment, including world heritage. A single regulatory framework for biodiversity conservation is a welcome advance. The proposed legislation also provides for indigenous management of natural heritage areas. In addition to these changes, the AHC is currently undertaking a comprehensive review of heritage legislation through the 'Future Directions' process.[18] These new laws will be pivotal to the successful adoption of a more holistic approach to natural heritage.

Law has a multi-layered role with respect to natural heritage identification and protection. At the international level, it embodies classifications and procedures that set frameworks for determining natural heritage values.[19] Legal instruments at international and domestic levels largely reflect these values in their adoption of 'universal standards' for ascribing natural heritage value. To date, these values have given prominence to ideas of wilderness and 'untouched' ecological processes.

The purpose of this article is to question *what* 'natural heritage' *is* and to consider the ramifications of the cultural relativity of its legal formulation. The argument advanced is that, despite the appeal to 'universal standards' and 'neutral' scientific expertise, the current environmental law relating to natural heritage protection implicitly incorporates a conception of the 'natural environment' that is specific to western culture, and common law legal systems in particular. Further, while the adoption in many pieces of Australian legislation of 'holistic' definitions of environment has served to partially displace the instrumental 'proprietary' view of nature, the legal recognition of 'natural heritage' remains predicated upon the western humanist people–nature dichotomy. In many instances, modern western formulations of natural heritage draw upon ecological integrity concepts and wilderness symbolism. Consequently, these formulations regard the absence of human 'interference' in nature as the defining feature of natural heritage. We know what natural heritage is by reference to what it is not: it is not the human. The very fact that heritage has traditionally been divided into the 'natural' and the 'cultural' underscores this persistent dualism.[20]

The following discussion provides a brief outline of the development of the idea of nature as the 'other', before considering the specific Australian situation. In this context there is a general consideration of how western cultural attitudes toward the natural environment historically found expression through property law concepts, and the consequences of these attitudes for the development of ideas of natural heritage. The discussion is not strictly chronological; rather, it examines aspects of the increasing subjugation of nature through its objectification in culture and in law. Building on this foundation, the article then examines

[17] Environmental Protection and Biodiversity Conservation Bill 1998 (Cth). As at time of writing the Bill had been referred to a Senate committee.

[18] AHC, Discussion Paper, above n 13.

[19] See, eg, Atherton and Atherton, above n 3.

[20] See, eg, *World Heritage Convention*, above n 14, arts 1, 2.

the role of natural heritage law in perpetuating culturally specific views of the relationship between people and nature. Against this background there is an examination of the intersection of 'universal' (ie western) standards of natural heritage and emerging issues relating to self-determination for indigenous peoples. Finally, there is an overview of the move toward a less dualistic notion of natural heritage within Australian law.

II ORIGINS OF WESTERN CULTURAL ATTITUDES TOWARD NATURE

A *Separation of Nature and People*

Kelley considers how 'primary nature' has been distinguished from 'human nature' or 'custom' and how the idea of nature has formed the basis of countless historical and philosophical discussions in western culture. He notes:

> The contrast between nature and custom is evident in western thought and linguistic usage going back to the pre-Socratics. The story begins most explicitly with the crucial distinction between nature (physis) and law (nomos in the sense of man-made rules), a duality that also invaded the fields of language, art, literature, and especially law.[21]

Historically, legal classifications of the people–nature relationship, which were based largely on property law, effectively precluded recognition of the natural environment beyond the category of property, let alone any intrinsic valuing of that entity as 'natural heritage'. Indeed, the western conception of civil society and the institution of law are associated with the move from the 'natural' state.[22] In common law systems, the 'discourse of nature' finds expression in the personality–property and subject–object dichotomies. The common law is thereby underpinned by a basic division between the 'attributes' that pertain to the person and those of property. In this manner, developments in property law culminated in 'sole despotic dominion' of an individual over an object. The designation of rights in personam and rights in rem serves to underscore this division.[23] As a result, nature exists in a relationship as the objective 'other' to the classification of the 'person': the legal subject.

B *Regulating Nature: Nature as Object*

Traditional 'theories' of property law which emphasise property as a 'bundle of rights'[24] (the content of which has varied at particular historical junctures), clearly evidence a dichotomy of people and 'things' while simultaneously

[21] Donald Kelley, *The Writing of History and the Study of Law* (1997) 131.

[22] This view is a central conception of social contract theorists such as Hobbes, Rousseau and Locke. See, eg, John Locke, *The Second Treatise of Government* (first published 1690, Tim Peardon ed, 1952) 17–20.

[23] Fisher, above n 15, 179

[24] See generally Joseph Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711

reinforcing human control over those objects.[25] The separation of 'people' and 'nature' in western society was achieved by the notion of a human 'subject' who controlled the natural 'object' through the legal fiction of a 'bundle of rights'.[26] Eventually, this notion culminated in the concept of an individual's 'sole despotic dominion' over an object being regarded as the paradigm form of property. This paradigm had significant ramifications for later understandings of natural heritage that developed against the background of these accepted legal classifications. The common law regime of property interests has therefore been one of the most significant barriers to the recognition of natural heritage.

As Morgan suggests, the major impediment to the recognition of the 'intrinsic' value of nature, and hence to the legal protection of natural heritage, is that, 'at most, nature only has the status of property.'[27] Indeed, Morgan argues that law facilitates the dominion of humans over nature:

> Much responsibility for this can be attributed to the legal principle that rights attach only to entities that have legal status. This status, also termed legal personhood, tends to focus attention on what are the attributes of being human.[28]

Generally, whenever western law seeks to regulate 'nature', it starts from the premise of a subject that has 'control' over a nature object.[29] In this context, feminist scholars such as Merchant argue that the abstraction of the person from nature is also the result of a gendered construction of the people–nature relationship.[30] Ultimately, the valuing of nature by western society — whether as 'property' or as 'heritage' — has a conceptual basis in the attachment of value to nature as 'object': an object to be used or preserved.

We have come to regard the 'bundle of rights' theory of property as the preeminent way of 'knowing' nature through the common law.[31] The property 'bundle of rights' existed as a legal construct of abstract rights that were disembodied but were still seen as able to exert control over the natural 'other'.[32] When allied to western rationality, and British empiricism specifically, this legal orientation provided a basis for the largely exploitative view of the natural environment at common law.[33] This exploitative view of nature was linked to a particular epistemology. The British empiricist tradition ultimately held that we

25 Val Plumwood contends that the oppression of nature, women and indigenous/colonised peoples share a commonality of 'othering': Val Plumwood, *Feminism and the Mastery of Nature* (1993) 4

26 Fitzpatrick, above n 6, 58.

27 Gail Morgan, 'The Dominion of Nature: Can Law Embody a New Attitude?' (1993) 60 *Bulletin of the Australian Society of Legal Philosophy* 43, 46.

28 Ibid 55.

29 Kevin Gray and Susan Gray, 'The Idea of Property in Land' in Susan Bright and John Dewar (eds), *Land Law Themes and Perspectives* (1998) 16.

30 Carolyn Merchant, 'Ecofeminism and Feminist Theory' in Irene Diamond and Julia Orenstein (eds), *Reweaving the World. The Promise of Social Ecology* (1990) 100.

31 Donna Haraway, *Simians, Cyborgs, and Women: The Re-invention of Nature* (1991) 43–68.

32 For a discussion of the view that people 'do things to nature' (ie act upon it in a causal, determinative way), see generally Dickens, above n 1, ch 1.

33 Richard Routley and Val Routley, 'Human Chauvinism and Environmental Ethics' in Don Mannison, Michael McRobbie and Richard Routley (eds), *Environmental Philosophy* (1980) 96.

'know' nature through the senses, through actually experiencing nature and thereby perceiving its essential order. The equation of sensory perception with 'reality' — the view that 'seeing is believing'[34] — was predicated upon the ability to separate the 'observer' from the 'observed'. Enlightenment epistemology manifested a separation of people from nature — the 'knower' from the 'known'. This epistemology provided a basis for the 'practical' empiricism that facilitated British industrialisation and colonisation.[35] A consequence of this view at law was that it largely precluded any consideration of nature as natural heritage in Australia during the colonial period and into the 20th century.

III AUSTRALIA'S COLONISATION AND THE DISCOURSE OF NATURE

At the risk of oversimplification, when the British colonised Australia, the dominant attitude toward the natural environment was one of instrumental use and exploitation. The prevailing discourse of 'nature', when allied to ideas of civilisation and reason, and as promulgated in support of economic and technological systems of a colonial empire, effected a domination of both indigenous peoples and the natural world. Nature as 'other' was largely associated with the negative connotations of a lack of 'civilisation'. In such a state, the 'natural' required the application of British 'law, reason and civilisation' before it could even be legally acknowledged and legitimately appropriated.[36]

In colonial law, this value found expression in a number of ways. The legal fictions of 'terra nullius' and 'settlement' made possible the construction of the categorical opposition of civilisation, property and law to 'unimproved nature'. The effect was to achieve a nullification of Australia's indigenous peoples and their association with their 'country'. Both land and people were effectively collapsed into nature, nullified and thereby distinguished from the 'truly human', connoted by British civilisation and law. As civilisation at that time was associated with settled agricultural practices, concepts of 'property' could only pertain to a situation which exhibited those qualities.[37]

Concurrently, such fictional categories also constructed the notion of a state of pre-law 'naturalness' which, while sublimating the indigenous relationship with nature, prepared the ground for the reception of British property regimes and administrative institutions of land management. In this process, the reception of the common law in Australia transposed a British cultural conception of the people–nature relationship based on real property law in the place of existing indigenous understandings. As O'Donnell and Johnstone suggest, '[t]he history of indigenous land use in Australia — firestick farming, the domestication of plants, the ritual signing of place, seasonal habitation — has virtually no impact

[34] See generally Richard Rorty, *Philosophy and the Mirror of Nature* (1979).

[35] For a discussion of Enlightenment philosophy and epistemology see generally Sandra Harding, *The Science Question in Feminism* (1986) ch 4.

[36] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').

[37] See, eg, Barbara Arneil, 'Trade, Plantations, and Property: John Locke and the Economic Defense of Colonialism' (1994) 55 *Journal of the History of Ideas* 591.

on the structure of Australian land law.'[38] The extent to which imported British law effectively denied the prior indigenous relationship with the land can be judged from this absence. This denial allowed western concepts of nature to predominate.

Nature, thus conceived, represented inert matter requiring British law and culture to begin its path along the evolutionary cycle from nature to true civilisation. Griffiths describes the prevailing 19th century discourse of natural history in Australia in the following manner:

> The two dominant concepts of history in the nineteenth century were evolutionary theory and the idea of progress. They should have been contradictory with one another. One eliminated purpose from nature, the other asserted a reassuring and predictable continuity. But although they were formally contradictory, they came to be seen as synonymous. In the imperial context they merged into one powerful 'ethic of conquest', social Darwinism.[39]

Under this powerful 'ethic of conquest' at law, both nature and indigenous peoples suffered a similar legal obliteration until the latter part of the 20th century. The western discourse of 'nature' operated to effectively superimpose British law over an 'unresisting' *Terra Australis Incognitae*.[40]

Property law concepts were integral to the 'othering' of nature in colonial Australia as they represented one of the major points of transmission between 'culture' and 'nature'. Moreover, within Australia, bureaucratic and public processes were as important in shaping the relationship between people and nature as were more discrete doctrines of 'private property'. In this process, Australian 'nature' was masked by the importation of property law concepts from Britain, their later bureaucratic implementation in Australia, and by the desire to transpose the idyllic vision of nature inspired by the picturesque vision of the British rural landscape.[41]

A *Bureaucratic Property and the Abstraction of Nature*

1 *Property and the Labour Theory of Value*

Although the property regime that developed in Australia was different in many respects from that in England, it is argued that the dichotomous people–nature view was 'transposed' to Australia. Moreover, the property regime, as it developed within rural Australia particularly, may be said to have intensified the separation of people and nature by reliance upon 'bureaucratic' forms of property

[38] Anthony O'Donnell and Richard Johnstone, *Developing a Cross-Cultural Law Curriculum* (1997) 81.

[39] Tom Griffiths, *Hunters and Collectors: The Antiquarian Imagination in Australia* (1996) 10.

[40] The term tabula rasa draws upon the early formulation of Australia as a blank space in many early European maps where it was called *Terra Australis Incognitae* ('Unknown Southern Land'). Arguably this vision of an unknown, and perhaps unknowable land, at least according to British cultural constructions, was perpetuated during the early settlement phase. See also Glyndwr Williams and Alan Frost (eds), *Terra Australis to Australia* (1988).

[41] For a modern discussion of the hegemony of British land law, see especially Neil Blomley, *Law, Space, and the Geographies of Power* (1994) 76.

such as statutory title registration and statutory defined 'tenures'. When welded to an expanded bureaucratic framework of colonial administration, the land law regime promoted an instrumental perception that allowed for a rapid exploitation of the Australian continent by western technological culture.[42] Such a view was entirely consistent with the trend towards an instrumental view of nature, based upon the Lockean 'labour theory of value', that had emerged within English common law property regimes following the demise of feudalism and the movement towards the enclosure of common lands.[43]

The view that property concerns acquisition and possession of 'resources' was the logical extension of the labour theory of value; it was the focus on human use/domination over an inert nature that conferred the legal value or recognition of the property right. Moral approbation and subsequent legal recognition of these claims of (ironically) 'the natural rights of property' were conferred as part of the wider emphasis on 'materialism' during the 19th century. The labour theory of value was inextricably tied to the surrounding discourse which devalued nature itself.

Nature only took on 'value' through the application of a particular form of human labour, namely agriculture and, later, pastoralism. Legal discourse effectively 'devalued' nature in the raw. Nature was taken to have no intrinsic value. At law, land only attained value when 'man' exerted control over 'nature': the British colonisers' modification of the land through agriculture and pastoralism revealed their dominance as the fittest society to occupy that land. The land had to be a cultivated or at least permanently occupied land as a necessary step along the evolutionary path — it could not remain 'natural'.[44] This conception provided a powerful rationale to simultaneously displace indigenous people and exploit the natural environment.

The advent of the 'labour theory' of value and its association with empirically driven science were important factors contributing to increasingly 'bureaucratic' forms of property in colonial Australia. This process continued the sublimation of nature as an object to be controlled by the administration of the British Empire in its possession of the Australian continent. Early colonial patterns of executive control over the settlement process provided the basis for the later development of Australia as a 'regulatory state'.[45] Harnessing of science by the state was also apparent in the institutions established (after the initial penal phase) to exploit natural resources, of which land was the primary concern. 'Natural' scientists played a major role in attempts to transform the 'inhospitable' Australian natural

[42] David Mercer, *'A Question of Balance': Natural Resources Conflict Issues in Australia* (2nd ed, 1995) 57.

[43] Carolyn Merchant, *The Death of Nature* (1990) 78.

[44] Dickens, above n 1.

[45] See generally Rod Home, 'Science as a German Export to 19th Century Australia' (Working Papers in Australian Studies No 104, Sir Robert Menzies Centre for Australian Studies, University of London, 1995).

environment to one that would more closely approximate British cultural and legal expectations.[46]

2 *The Abstraction of Culture from Nature*

Indeed, given that in the early colonial period, the Australian continent was held to be a 'reversal of nature' (at least, as nature was understood in the 'Old World'), the colonial regulatory template of land, and later, resources law was imposed on the Australian natural environment with little consideration of whether such a regime was compatible with that environment. In addition, the predominant perception of the Australian landscape came to be the British cultural discourse of the 'picturesque', which was built upon an alienation from the physical characteristics of the Australian continent. As Ryan notes, '[l]and cannot exist before it is culturally assimilated.'[47] The beginnings of that cultural assimilation were still many years off.[48] Even now, we are still attempting to achieve a more inclusive cultural assimilation.

'Abstractions' of the Australian natural environment were in turn dependent upon technological innovations deriving from British empiricism. These innovations allowed the Australian natural environment to be inscribed in geometric survey diagrams, topographical maps and title documents[49] — all of which could then be readily transcribed into 'law' by the bureaucracy of an increasingly administrative state. Bureaucratic regimes of Australian land law (particularly as applied to non-urban land) were founded upon representations and registration processes which continued an alienation and appropriation of the natural environment to the increasingly capitalist demands of the Empire.[50] Nature, first reduced to 'land' and then to 'property' by means of administrative and legal forms, was progressively dislodged from any anchoring in a distinctive or intrinsically valuable physical substratum.

Ryan discusses the role of Cartesian representations of space in exploration, surveying and mapping and their utilisation by the forces of the Empire in the Australian colonies. He suggests that:

> Constructing a monolithic space allows imperialism to hierarchise the use of space to its own advantage. ... The construction of a universal space also allows a homogenous mapping practice to be applied to all parts of the world:

46 Joseph Powell, *Mirrors of the New World : Images and Image-makers in the Settlement Process* (1978).

47 Simon Ryan, *The Cartographic Eye: How Explorers Saw Australia* (1996) 17.

48 The growth of Australian 'nationalism' in the late 19th century was, ironically, connected with movements in literature and art to celebrate unique Australian characteristics, including those of the Australian bush landscape. For example, the Heidelberg plein-air school of painting in Victoria was one of the first group of artists to seek to paint a 'truly' Australian landscape rather than a transposed European landscape.

49 For a discussion of the centrality of inscription and technological changes to rational (ie Cartesian) thought, see generally Jack Goody, *Production and Reproduction: A Comparative Study of the Domestic Domain* (1976).

50 See, eg, Michael Tigar and Madeleine Levy, *Law and the Rise of Capitalism* (1977) for an account of the emergence of bourgeois conceptions of real property in 15th and 16th century England.

> maps become an imperial technology used to facilitate and celebrate the further advances of explorers, and display worldwide imperial possessions.[51]

The susceptibility of the Australian natural environment to being inscribed within such 'Cartesian space' is noted by Auster who argues that the Australian environment was perceived as 'homogenous'.[52] Ryan also discusses the extent to which concepts of Cartesian space served to alienate Australia's indigenous inhabitants.[53] Again, this adoption of a western stance toward nature precluded other cultural conceptions.

During the colonial period and in the early 20th century, the economic emphasis of the legal institution of property, reinforced by the imperatives of colonialism and industrialisation, and facilitated by legal instruments which dealt in abstract forms, favoured treatment of nature as an undifferentiated 'object', open to exploitation by an increasingly efficient colonial administrative regime. The rapid expansion of European settlement in Australia during this period was conceptually underpinned by the instrumental use of land as an entity, crucial to the survival of that European culture, but seen as existing 'beyond' that culture. European responses to *Terra Australis Incognitae* centred upon cultivating and civilising an alien land that existed beyond the contemporary understanding of 'the human'. The 'human' was characterised by law and 'civilisation' as that which did not exist in a state of 'nature'. The perception of indigenous people as existing in precisely such a 'state of nature' — and a declining state at that — also reinforced the need for 'civilised' intervention in the Australian environment. A homogenised natural world thus existed as an object that was increasingly sublimated to legal regimes of control and utilisation.

IV THE MOVE TOWARD CONSERVATION OF THE NATURAL ENVIRONMENT

In 20th century Australia, the characterisation of nature as a 'resource' has continued and been extended by the application of the administrative state to the exploitation of 'natural resources'. Examples include major irrigation and electricity generation infrastructure projects such as the Snowy Mountains scheme.[54] Australia's economy and its cultural identity (at the time of that project overwhelmingly white and British) was dependent in many respects on an overtly instrumental view of the natural environment. Especially at the level of official policy, nature was perceived as a perverse and potentially hostile environment, to be 'overcome' by independent, rational 'man' aided by the tools of an increasingly technological society. Indeed, the extent to which western economic systems and technology have promoted an exploitative rather than conservationist (or even preservationist) attitude toward the natural environment is a familiar

[51] Ryan, above n 47, 4

[52] Martin Auster, 'The Regulation of Human Settlement: Public Ideas and Public Policy in New South Wales, 1788–1986' (1986) 3 *Environmental and Planning Law Journal* 40, 40.

[53] Ryan, above n 47, 101–27.

[54] W S Robinson, 'Foreword' in G L Wood (ed), *Australia: Its Resources and Development* (1949) vii.

thesis.[55] As noted in the introductory discussion, while this 'mastery over nature'[56] is arguably a potent cultural value, it is not the only approach to nature within western culture.

Nature could not always be regarded as an unresisting and endlessly bountiful substratum to the development of western civilisation. The emergence of the environmental movement in the mid-20th century sought to reverse the predominately instrumental conception of nature and to afford nature legal protection.[57] Concerns about unbridled economic growth,[58] and the loss of many natural areas to 'development', together with scientific concerns about an impending ecological crisis,[59] spurred international action to protect the natural environment.

Environmentalism[60] emerged as a potential counterpoint to the accepted understanding of nature as an object purely for instrumental use.[61] In addition, the rise of ecology as a prominent discipline,[62] with its emphasis on systemic understandings, offered the possibility of disrupting the people–nature dualism implicit in common law formulations by postulating humans as just one element in a complex set of interrelationships.

With respect to natural heritage issues, the need to preserve pristine areas of 'wilderness' and to arrest the decline of flora and fauna (in terms of both population and diversity) was increasingly accepted. At the international level, the work of organisations such as the United Nations Educational Scientific and Cultural Organisation ('UNESCO') and the International Union for the Conservation of Nature ('IUCN') were decisive in mobilising international opinion and coordinating action for natural heritage protection through the *World Heritage Convention* process.[63]

A *Legal Protection for World Heritage*

With growing acceptance of the necessity to protect the natural environment

55 See, eg, John Dryzek, *The Politics of the Earth: Environmental Discourses* (1997).

56 Plumwood, above n 25

57 See generally David Grinlinton, 'The "Environmental Era" and the Emergence of "Environmental Law" in Australia — A Survey of Environmental Legislation and Litigation 1967–1987' (1990) 7 *Environmental and Planning Law Journal* 74.

58 See, eg, Max Horkheimer and Theodor Adorno, *Dialectic of Enlightenment* (1973) xiv-xv.

59 See, eg, Barry Commoner, *The Closing Circle: Confronting the Environmental Crisis* (1972), Garrett Hardin, 'Tragedy of the Commons' (1968) 162 *Science* 1243; Murray Bookchin, *Toward an Ecological Society* (1980) 57–71

60 The word 'environment' is French in origin and was first used in the late 19th century. It acquired its contemporary wider meaning only in the second part of the 20th century. See generally Marguerite Bowen, 'Ecology and Ethics: Strange Attractors in a New Paradigm' (Paper presented at the Australian Association for Philosophy and Applied Ethics National Conference, Brisbane, September 1995)

61 For a discussion of the contrasting views about humans 'in' nature or, alternatively, 'above' nature, see Freya Dawson, 'What Is the Value of Biodiversity? Scientific and Philosophical Perspectives' in Nicole Rodgers (ed), *Green Paradigms and the Law* (1998) 94, 116–18.

62 Initially much of the concern about the environment was voiced by population biologists and only later did ecology as a separate scientific discipline gain pre-eminence in this area: see especially Dryzek, above n 55, 23.

63 See generally Keith Suter, 'The UNESCO World Heritage Convention' (1991) 8 *Environmental and Planning Law Journal* 4

there was a further recognition of a need for laws to be enacted to preserve natural heritage. Commencing in the early 1970s, a growing volume of international agreements stipulated norms and standards for the conservation and management of natural heritage areas.[64]

Protection of natural heritage initially centred upon removing natural areas from mainstream instrumental use. Once identified, such areas could be afforded varying levels of legal protection. A considerable overlap between 'natural heritage' and 'wilderness values' came to be embedded in the legal and regulatory framework for the protection of these areas. While natural heritage is associated with the environmental movement generally, its roots can be traced to aesthetic and historic values propagated by the movements that established national parks in the late 19th century.[65] The concept of 'wilderness', and its association with an absence of human presence, came to figure prominently in definitions of natural heritage.[66]

As Frawley notes:

> One of the most fascinating areas in the study of the relationship between humans and their environment is the changing concept of 'wilderness'. Today the word is much used by the tourist industry in Australia and is given widely diverse and confused meanings which bear little relationship to the historical meanings, which all have in common a sharp edge of contact with nature, either terrifying at one extreme, or benign and spiritually uplifting at the other.[67]

The idea of a 'sharp edge' of contact embodied in the concept of wilderness reinforces the separation of people and nature.[68] This separation sets up a further dichotomy of 'touched' and 'untouched' nature: what is to be preserved are those areas largely untouched by human agency. At first instance, this understanding of natural heritage appears diametrically opposed to the earlier instrumental views of nature that had predominated in Australia.

B *Natural Heritage in Australia*

The most significant of the international instruments relating to natural heritage in Australia has been the *World Heritage Convention*, which was ratified by Australia in 1974. Significant aspects of the treaty were incorporated in Australian domestic law by the *World Heritage Properties Conservation Act 1983* (Cth). The World Heritage cases,[69] which have interpreted the application of this

64 Lee Godden, 'The Emergence of Ecologically Sustainable Development in Environmental Law as a Form of Natural Law' (Paper presented at the Australasian Law Teachers' Association Conference, Adelaide, July 1996) 1–2.

65 For a history of the national parks/tourism movement, see, eg, Mercer, above n 42, ch 3.

66 Michael Hall, *Wasteland to World Heritage: Preserving Australia's Wilderness* (1992) 158–97.

67 Kevin Frawley, 'The History of Conservation and the National Park Concept in Australia: A State of Knowledge Review' in Kevin Frawley and Noel Semple (eds), *Australia's Ever Changing Forests* (1989) 395, 402.

68 See, eg, AHC, *The National Wilderness Inventory* (1995).

69 *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams Case*'); *Queensland v Commonwealth* (1989) 167 CLR 232 ('*Wet Tropics Case*'); *Richardson v Forestry Commission of Tasmania* (1988) 164 CLR 261.

legislation, represent some of the most contentious disputes in recent Australian legal history. While Australian moves to protect natural heritage to date have been concentrated upon high profile World Heritage areas, the focus is now shifting to a more comprehensive biodiversity principle.[70] The very definition of World Heritage areas as sites of 'outstanding universal value'[71] gives primary emphasis to areas which exhibit ecological integrity: ie 'untouched' areas. There is also a comprehensive domestic governmental framework for the identification and registration of natural heritage, such as that established for the protection of National Estate areas.[72] However, it is acknowledged that the management of natural heritage areas, once identified, often involves concepts of multi-use.[73]

The call to preserve pristine natural areas for the future benefit of humanity has been identified by some commentators as reinforcing the conception of nature as 'other' by emphasising the separation of people from the natural environment. As Young notes:

> [T]oday, because they are no longer protected by the harshness of their environments or the community's fear of the dangers within them, wild areas are protected by legislation, and the boundaries around them are politically derived and sometimes seem arbitrarily drawn.[74]

Again we see a need to draw boundaries, to set nature apart, and to accord the dichotomy legal protection. These measures underscore that western ideals of nature preservation often hinge on separation.

One of the most prominent and influential definitions of wilderness is one which employs terms specified by the IUCN as an area set aside primarily for ecosystem protection but permitting minimal impact recreation.[75] Similar definitions can be seen in Australian legal and regulatory mechanisms designed to identify and register natural heritage. For example, the AHC is a statutory body[76] charged with the responsibility of maintaining a register of the National Estate.[77] As part of its overall registration of natural heritage areas, the AHC undertook a national wilderness inventory.[78] The procedure used in the inventory recognised two essential attributes of wilderness: 'remoteness' and 'naturalness'. These criteria were further articulated as involving: (1) remoteness from settlement, (2) remoteness from access, (3) aesthetic naturalness, and (4) biophysical natural-

[70] See, eg, Ben Boer, 'World Heritage Disputes in Australia' (1992) 7 *Journal of Environmental Law and Litigation* 247.

[71] *World Heritage Convention*, above n 14, arts 1, 2.

[72] *Australian Heritage Commission Act 1975* (Cth) pt IV.

[73] See, eg, the current management plans for the Great Barrier Reef World Heritage Area by the Great Barrier Reef Marine Park Authority pursuant to the *Great Barrier Reef Marine Park Act 1975* (Cth) pt VB.

[74] Ann Young, *Environmental Change in Australia since 1788* (1996) 188.

[75] See, eg, David Mercer, 'Victoria's National Parks (Wilderness) Act 1992: Background and Issues' (1992) 24(1) *Australian Geographer* 25, 25.

[76] Created pursuant to the *Australian Heritage Commission Act 1975* (Cth) pts II, III

[77] *Australian Heritage Commission Act 1975* (Cth) pt IV. Note, however, that a comprehensive review of the AHC is being undertaken, and changes to its function have been proposed.

[78] AHC, *The National Wilderness Inventory*, above n 68.

ness.[79] The adoption of these criteria reinforces the association between wilderness and protection of the natural environment, and separation of nature from people. This association has been prominent in Australian designations of natural heritage. These criteria continue the trend to classify nature as the 'other' to people and their creations, such as settlements.

C *Science and the Separation of Nature and Culture*

1 *Wilderness Values*

In association with wilderness values, understandings of the natural environment through the parameters set by scientific methodology have been particularly influential in the current legal and regulatory frameworks established for the identification and protection of natural heritage areas. The 'objective' processes encapsulated within legal procedures for natural heritage identification are largely predicated upon scientific understandings of the natural environment. This deference to scientific opinion has been extremely important in mobilising initiatives for the legal protection of natural heritage areas. However, while the identification of special natural areas on the basis of 'universal' scientific qualities has been effective in removing selected areas from particular forms of economic utilisation, its very basis in the separation of nature from the society which values such areas renders the concept problematic[80] — especially when the question of whose values are being adopted is unable to be explored. Furthermore, this identification process is consistent with the assumptions that nature is an object and that its qualities are readily accessible through empirical, scientific methods.[81]

Arguably, such a reliance upon scientific understandings is symptomatic of a more general societal emphasis upon scientific and rationalist thought within western culture — even though the focus has changed from an 'exploitative' to a 'preservationist' view of nature. The scientific paradigm which argues that natural areas should be preserved to maintain a 'balance' kept free from human intervention has also become influential. This paradigm is evident in ecological research and study generally.[82] It melds with other elements of western culture such as religion and mythology in theories such as Lovelock's Gaia thesis.[83] However, it is acknowledged that ecological thought has also emphasised the interdependence of all life forms, including humans. More recently the influence

[79] Ibid 8.

[80] See generally Peter Riggs, *Whys and Ways of Science: Introducing Philosophical and Sociological Theories of Science* (1992) 10.

[81] While scientific concern is employed here for a very different objective (ie the preservation of nature rather than its destruction) the same appeal to neutral methodologies is comparable to that of an earlier period which facilitated instrumental use of the natural environment: see generally Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (1991) 138–63.

[82] For a discussion of changing paradigms of ecological research, see, eg, Mark Sagoff, 'Ethics, Ecology and the Environment: Integrating Science and Law' (1988) 56 *Tennessee Law Review* 77

[83] Jim Lovelock, *Gaia A New Look at Life on Earth* (1979)

of indeterminacy and 'chaos' theory have tempered the 'balanced earth' model for natural heritage preservation.[84]

Nonetheless, scientific views of nature have remained paramount. A consequence of this is the idea that natural heritage value is a quality inherent to a natural area.[85] Arguably, if the value is seen as inherent in nature, rather than as a culturally assigned quality, it emphasises the prevailing western conception of 'humanity' as separate from 'nature'.[86] Indirectly, the adoption of 'objective' values may also preclude a more culturally inclusive view of the relationship between people and nature; one that could include indigenous perceptions of that relationship. In some respects, these western scientific definitions of natural heritage have the potential to generate a hegemonic effect that has parallels with the earlier exclusionary effect of terra nullius.

2 *The* World Heritage Convention

The influence of western science and expertise in defining nature is readily apparent in the *World Heritage Convention* and in the *World Heritage Properties Conservation Act 1983* (Cth). The Australian legislation had a particular political genesis in relation to the Tasmanian wilderness and the proposed damming of the Franklin River.[87] Within the Act, the expression 'natural heritage' has the same meaning as in the Convention.[88]

Article 2 of the Convention provides that the following shall be considered to be 'natural heritage':

> Natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Again, in these legal principles we see a pre-eminence attached to the view of nature as 'pristine' and removed from human processes. Two features appear to predominate — preservation of nature as wilderness, and the ascertainment of natural heritage value by reference to scientific and associated standards of

84 See, eg, Jonathon Weiner, 'Law and the New Ecology: Evolution, Categories and Consequences' (1995) 22 *Ecology Law Quarterly* 325.

85 See, eg, *World Heritage Convention*, above n 14, art 9, which provides for a committee of 'expert opinion' to determine world heritage values based upon the application of criteria to a given nominated area. Within Australia, the AHC has been very active in identifying national estate natural heritage areas based upon 'technical' evaluations of the extent to which nominated heritage areas meet identified criteria. For a representative publication, see AHC and Victorian Department of Conservation and Natural Resources, *Identification and Assessment of National Estate Values in the Central Highlands of Victoria* (1994).

86 See, eg, Mark Swadling and Timothy Baker, *Masterworks of Man and Nature: Preserving Our World Heritage* (1992).

87 See, eg, *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 69 FCR 28, 33, 58 (Sackville J).

88 *World Heritage Properties Conservation Act 1983* (Cth) s 3(1).

expertise.

3 *A Common Cultural Basis for Perceiving Nature*

The central point advanced here is that 'law' largely accommodates this new category of natural heritage by simply amending its basic formulation of nature as 'other'. Greater prominence is given to the 'wilderness/conservation' strand of western thought about nature. Effectively, the Australian legal system was able to include a value for nature by reference to the rationalist traditions and scientific expertise that had previously been invoked to promote a broadly based resource/property view.[89] However, it was through international legal instruments and domestic legislation, rather than the common law, that this accommodation was achieved.

Mercer argues that the successes of conservation groups that saw many natural heritage areas listed and protected within Australia were 'single issue conservation victories'. These victories, he argues, were strongly dependent upon the symbolic values attached to these places. Drawing on the work of Mandelker, he suggests that:

> [P]olitical symbolism [is] by far the dominant factor influencing the formulation of innovative legislation and programmes [for the protection of natural heritage]. In other words, new laws frequently are enacted simply because the values being appealed to have symbolic meaning to the main interest groups involved and not because there is any strong commitment to change.[90]

However, it has been necessary to provide a legitimate basis for those symbolic values. This basis has been founded upon the pre-eminent discourse of 'truth' in our western society — that of science.[91] Resort to 'objective' scientific criteria to designate natural heritage arose as part of an emphasis on globalisation and western rationalist traditions, but was also due to specific constitutional, political and historical circumstances within Australia. In this light, the dependency and reliance upon international law, administrative structures and scientific expertise which distinguished Australia's response to the environmental crisis and its measures to preserve the natural environment, did not represent a fundamental reshaping of attitudes toward the natural world but, in many ways, a continuity.

What has become classified as natural heritage is, in many instances, able to be classified due to the western discourse of science and its acceptance as the means of achieving objective truth.[92] Accordingly, it is suggested that western scientific norms predominate in 'universal' standards of natural heritage. Although it is often held that the identification procedures are culturally and politically neutral,[93] these standards, and the law which imports them, adopt a specific construction of the people–nature relationship. While clothed in the discourse of

[89] Bates, above n 2, 39–43 Bates argues that the common law is an inadequate legal basis for protection of the environment due to its emphasis on the protection of individual rights.

[90] Mercer, above n 42, 1.

[91] See generally Harding, above n 81.

[92] Foucault, above n 7, 344–8.

[93] Mark Parnell, 'Lake Eyre Basin World Heritage Proposal' (Paper presented to the Defending the Environment Conference, Adelaide, May 1994) 3.

'objective' scientific language, this construction is a re-working of the traditional humanist dualism in the context of the 'modern' philosophical and epistemological frameworks that underpin western culture and the common law.[94]

D *Nature as a Constructed Other in Australia*

Despite the reliance on 'objective' values in the protection of wilderness and pristine nature within natural heritage law in Australia, the very designation of what constitutes 'nature' is a culturally relevant construct. As Garden notes:

> It would probably come as a surprise to most Australians to learn that the human impact on the Australian environment is such that there is arguably no such thing in our country as a 'natural' landscape — all are, to at least some degree, created landscapes.[95]

Despite the recognition that much of Australia was altered by indigenous land use practices prior to colonisation,[96] there has nonetheless been a continuing perception that we must preserve those places which embody 'wilderness' as it is understood within western culture and defined by western parameters.[97] As Griffiths notes:

> In much western thought, the natural world is seen as separate, as something there for humans to exploit or protect, but not to live with. Therefore we tend to see nature either as an artefact or as a wilderness — as something we made ourselves and that is in our control, or as something from which we are absent.[98]

Moreover, as Titchen notes:

> One of the distinguishing and frequently criticised features of Western heritage conservation is the separate labelling of elements, characteristics and values of the environment as being either cultural or natural. In general protected area management has concentrated on natural or cultural resource inventory, conservation and management, and little consistent attention (with some exceptions) has been given to the interactions and interplays between the natural and cultural environment, between people and place. The separate categorisation of nature and culture has done little to accommodate indigenous peoples' relationships and associations with the land, water and sea as part of protected area conservation.[99]

In summary, in developing laws to regulate the identification and management of Australia's natural heritage, the environmental movement has made significant inroads in terms of changing perceptions of the degree of instrumentality of

[94] See, eg, Commonwealth, *National Estate: Report of the Committee of Inquiry*, Parl Paper No 195 (1974) 34–7.

[95] Don Garden, 'Introduction' in Don Garden (ed), *Created Landscapes, Historians and the Environment* (1993) 4, 4.

[96] See, eg, O'Donnell and Johnstone, above n 38, 81.

[97] Sarah Titchen, 'Changing Perceptions and Recognition of the Environment — From Cultural and Natural Heritage to Cultural Landscapes' in Julie Finlayson and Ann Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (1996) 40.

[98] Tom Griffiths, 'Secrets of the Forest: Writing Environmental History' in Garden (ed), above n 95, 42, 50.

[99] Titchen, above n 97, 40–1

nature, but has had much less impact on the basic dichotomous construction of the relationship between nature and people. Given the entrenched approach to using nature as an object throughout much of Australia's history since colonisation, this change represents a major achievement. However, a further challenge to accommodate a coalescence of culture and nature represented by indigenous understanding of the relationship between people and nature still remains.

V INDIGENOUS UNDERSTANDINGS OF NATURE

The recognition of native title in Australia, together with an emerging appreciation of indigenous peoples' relationship with the natural environment, challenges the separation of nature and culture and the 'scientific' designation of natural heritage value. The full ramifications for co-management of the natural environment consequent to the recognition of native title in Australia are yet to be fully explored.[100] *Mabo*,[101] hailed as a landmark decision for its 'rejection' of terra nullius, has had profound implications for the recognition of native title and indigenous rights in Australia. Arguably, it also gave implicit recognition to another historical 'revision' of long-held views about the Australian natural environment. In rejecting the view that Australia was 'desert and uninhabited', *Mabo* provided space for a more complete awareness of the extensive indigenous land and sea resource management practices that were integral to Aboriginal and Torres Strait Islander culture.[102]

Indigenous land management practices did not leave the natural environment untouched. It is now acknowledged that while indigenous peoples did not undertake wholesale clearance of vegetation or establish permanent settlements, their impact upon the 'natural environment' was nevertheless considerable. Further, it is now accepted that aboriginal fire management practices made a significant impact upon native vegetation and possibly upon the distribution and numbers of species.[103] This history of modification of the natural environment blurs the distinction between 'natural' and 'unnatural' elements in the Australian landscape.

Thus, early colonial land use practices were superimposed on, and in many areas later obliterated, customary indigenous systems for the regulation of nature. Tehan has provided a comprehensive analysis of indigenous land management practices that illustrates the effectiveness of these customary regimes and their role in shaping Australia's natural environment.[104]

The historical expropriation of indigenous land by western 'civilisation' has

[100] See generally Susan Woenne-Green et al, *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia: A Review* (1994).

[101] (1992) 175 CLR 1

[102] See, eg, Nonie Sharp, 'Reimagining Sea Space: From Grotius to *Mabo*' (1996) 7 *Arena Journal* 111.

[103] Camilla Hughes, 'One Land. Two Laws — Aboriginal Fire Management' (1995) 12 *Environmental and Planning Law Journal* 37, 37–8

[104] Maureen Tehan, 'Indigenous Peoples, Access to Land and Negotiated Agreements: Experiences and Post-*Mabo* Possibilities for Environmental Management' (1997) 14 *Environmental and Planning Law Journal* 114.

had profound effects on the perception of specific parts of the Australian environment as 'natural heritage' and the manner in which these places are so perceived. Indeed, as argued above, the question of what is 'natural' is a problematic one. Nonetheless, the prevailing view of natural heritage still appears to be one that seeks to preserve 'natural' areas which do not evidence human contact, although it is acknowledged that any one area can be classified as both natural heritage and as indigenous cultural heritage.[105] While such concurrent designations are not uncommon, the effective integration of the *values* of cultural heritage and natural heritage may be more difficult to achieve within Australian law and society.

The 1980s saw a number of prominent disputes within Australia about the protection of natural heritage which ultimately reflected different views about the way people should relate to the natural environment. While the situation was often epitomised as a conflict between 'environment' and 'development', essentially what was being called into question in the environmental debate was Australia's previous history of the primarily instrumental use of nature as an 'object'.[106] In the 1990s, one of the most prominent debates in Australian society and law has been that over the recognition and extent of native title. Native title has its basis in the customs and traditions of indigenous people and their association with a given area of land and/or water. Brennan J described the relationship thus:

> Native title has its origins in and is given its content by the traditional laws acknowledged by and customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a question of fact by reference to those laws and customs.[107]

A *A More Inclusive View?*

Recognition of native title reflects international trends towards an acknowledgment of indigenous peoples' rights. In recent years, there has been an equation of human rights with the control of territories and resources as part of the indigenous peoples' capacity for self-determination. The Draft Declaration on the Rights of Indigenous Peoples contains a number of provisions which reflect the importance to indigenous peoples of traditional associations with land and sea.[108] As yet, the Draft Declaration awaits more comprehensive acceptance at an international level.

This movement toward some form of control and/or possession of traditional territories for indigenous peoples has implications as to what constitutes natural

[105] The Kakadu World Heritage Area is a prime example of this dual classification: see, eg, Tony Press et al (eds), *Kakadu, Natural and Cultural Heritage and Management* (1995).

[106] For an overview of these disputes, see generally Phillip Toyne, *The Reluctant Nation: Environment, Law and Politics in Australia* (1994).

[107] *Mabo* (1992) 175 CLR 1, 58.

[108] Adopted by resolution of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 46th Session on 26 August 1994: UN Doc E/CN.4/Sub.2/1994/45, arts 25–7.

heritage. The culturally specific origin of the process for designation of natural heritage has the potential to exclude consideration of indigenous cultures, although it is noted that under the *World Heritage Properties Conservation Act 1983* (Cth) there is a regime for the protection of sites of indigenous cultural significance. Nonetheless, Price has argued that the identification of environmental protection with wilderness areas, and thus in most instances with an absence of direct human use, has the potential to further dispossess indigenous people who have a traditional association with the country.[109]

The potential for dispossession of indigenous peoples remains to the extent that natural heritage concepts represent culturally relative constructs, and that these views are reinforced by the legal system at both international and domestic levels.[110] As Titchen notes:

> At various stages in the history of the implementation of the World Heritage Convention, the IUCN has expressed its discomfort with the recognition through World Heritage listing of what they termed 'human interference' with the natural environment.[111]

However, as an indication of emerging trends, in 1992 the World Heritage Committee adopted a broad definition of 'cultural landscapes' which recognised interactions between people and the natural environment. This more culturally inclusive definition can accommodate listings that reflect broad concerns about the spiritual, spatial and cultural dimensions of the interaction between indigenous peoples and the natural environment.[112]

A similar reworking of prevailing western concepts which emphasise a separation of people and nature can be discerned within Australia. In this context, the Chair of the AHC, Wendy McCarthy, made the following remarks:

> The Commission has also recognised the value of a broader view of heritage — the cultural landscape. It is a great challenge to conserve heritage in this holistic way, not just as fragments of the past. We have developed at a Commonwealth level, a single, integrated approach to caring for heritage places encompassing both natural and cultural heritage fields.[113]

In Australia, the need for a more culturally inclusive view of heritage has been recognised over the last two decades by the enactment of legislation designed to protect various aspects of Aboriginal and Torres Strait Islander heritage,[114] and by the involvement of indigenous peoples in the management of national parks and other protected areas. These practical measures have been supported by an

[109] Kerry Price, 'The Construction of Wilderness and the Rights of Indigenous Australians' (Paper presented at the Defending the Environment Conference, Adelaide, September 1996).

[110] See, eg, Fabien Bayet, 'Overturning the Doctrine: Indigenous People and Wilderness — Being Aboriginal in the Environmental Movement' (1994) 13(2) *Social Alternatives* 27.

[111] Titchen, above n 97, 43

[112] See generally UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention* (1996).

[113] Wendy McCarthy, 'Heritage: Who Benefits, Who Pays?' (Address to National Press Club, Canberra, 29 January 1998) <http://www.erin.gov.au/portfolio/ahc/ahc_site/html/general/speech1.htm> (copy on file with author).

[114] See, eg, the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 (Cth).

evolving conceptual framework for heritage that seeks to integrate natural and cultural values and, importantly, has begun to include indigenous understandings of the natural environment. As an indicator of these more broadly conceived heritage frameworks, McCarthy has also remarked:

> [C]ultural heritage includes indigenous heritage and many of these issues remain politically sensitive today, even for a politically correct and thoughtful agency like the Commission. The number of indigenous heritage places entered in the Register is relatively small. ... It has been a long and difficult struggle for the Commission to correct the imbalance and accept and recognise the unique relationship that indigenous Australians have with their land and heritage.[115]

VI CONCLUSION

While an evolving recognition of the relationship that indigenous Australians have with their land is to be welcomed, there remain significant limitations to a full integration of natural and cultural heritage in one legislative and regulatory regime. Western scientific and 'wilderness' parameters for the definition and management of the natural environment continue to drive the regulatory frameworks for the protection of natural heritage. Even under the extensive reforms currently being set in place at the federal level, heritage sites — including 'special' natural heritage areas — will continue to be subject to a separate legislative scheme to that which regulates the protection of the natural environment. It seems that we are yet to fully transcend the long and legally entrenched history of constructing nature as separate from people. Such an enduring conceptual construction within western society and law will be difficult, but not impossible, to dislodge. If it is not dislodged, it will remain a barrier to incorporating alternative conceptions of nature into natural heritage law. The proposed legislative changes may prove to be more culturally inclusive, but we are yet to judge their actual operation.

Something of a quandary arises if we wish to achieve the aims of protecting natural heritage and adopting a more culturally inclusive approach to heritage identification and management. At law, we have moved from a designation of the Australian continent as terra nullius to a broad-reaching protection of natural heritage. Protection for natural heritage has been achieved in association with the increasing prominence of the wilderness/ecological balance ideal — that is, by preserving nature in a state apart from human use. This second strand of western approaches to nature has largely been effective due to its reliance on rational science and objective criteria and, implicitly, through the denial of the cultural relativity of heritage value. Where protection of natural heritage has been achieved, it has displaced the more pervasive instrumental view of nature by appealing to a common conceptual methodology of rational science in order to derive universal natural heritage qualities. On the other hand, property law and its attendant instrumental view of nature remains prominent. The persistence of property law regimes which continue to regard nature primarily as an object of

[115] McCarthy, above n 113.

instrumental use remains a significant barrier to achieving a more integrated, holistic conception of the relationship between all Australians and their 'country'. If the cultural relativity of natural heritage is accepted, will this factor undermine the basis of laws for the protection of natural heritage and the associated regulatory and enforcement regimes? Will there still remain legally enforceable and socially acceptable ways of defining which areas constitute natural heritage if we recognise the essential contingency of our ways of defining and valuing nature? Overcoming this quandary by achieving the dual aims of protecting natural heritage and adopting a more culturally inclusive approach will require fundamental reshaping of the western concepts of 'nature' and 'law'. It will demand a recognition that humans, rather than existing separately from nature, are involved in a dynamic relationship *with* nature which in turn structures our very conceptions *of* nature.

In summary, emerging trends indicate that if we are concerned to allow for a coexistence of western and indigenous interests in the natural environment, there is a need for an evolution of the cultural and legal basis for identifying and managing natural heritage. Currently, the emphasis on western values, which construct nature as 'other', appears to predominate. In Australia, significant inroads have been made into the view of nature as an object open to exploitative use. However, in the manner that we have sought to protect natural heritage, by default we may be precluding other ways of understanding and implementing the relationship between people and nature. Therefore, we need to critically examine the classifications and procedures for natural heritage identification and protection, and analyse the law which reflects these processes. Critical analysis — specifically, an approach that transcends a subject–object understanding — is required to uncover the implicit choices that are being made about the kind of natural environment we leave to future generations of Australians. This approach can then be reflected in social and legal determinations as to what constitutes natural heritage.