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Chapter 1

Introduction and Thesis Organisation

1.1 Aim of Thesis

The aim of this thesis is to compare and contrast repatriation processes in the United States and Australia to identify the factors that affect the outcome of cases of the repatriation of Indigenous human remains. By doing so, it is hoped that this study will help the outcome of future repatriation cases to be favourable for both archaeologists and Indigenous peoples.

1.2 Importance of the Study

One of the most important issues in archaeology today is the repatriation of ancestral remains and cultural property to Indigenous peoples in all parts of the world (Conaty & Janes 1997: 31). The issue of repatriation has pitted archaeologist against archaeologist, and some archaeologists against some Indigenous peoples (Garza & Powell 2001: 37). It has also reinforced Indigenous views of archaeology as being nothing more than a form of scientific colonialism (Zimmerman 1997: 108). Repatriation has split the discipline of archaeology and threatens to continue splitting the discipline unless a resolution is found. Identifying the factors that help to result in a favourable outcome for all concerned will aid in resolving, and ideally preventing, future conflicts that arise. Repatriation is an issue that has worldwide political and social implications (Watkins 2000: 155) and to a large extent will shape the way archaeology is practiced in the future.
1.3 Thesis Organisation

Chapter 2 consists of a review of the existing literature relevant to the thesis topic. The review will examine literature about repatriation in a global context, repatriation in the United States and finally repatriation in Australia. It demonstrates that to date there has been no literature written comparing repatriation in the United States and Australia.

Chapter 3 explains the methodology used in researching this thesis. It details the types of data used, how the data was selected and how it was analysed. It also discusses the limitations of the study.

Chapter 4 discusses the first of the case studies to be examined in this thesis. The 9,600 year old individual known as Kennewick Man discovered in 1996 has since become arguably the highest profile case of repatriation in the world. This chapter looks at the history of Kennewick Man since his discovery and the legal battle that ensued. His significance to the scientific community and to Native Americans is also discussed. How legislation and archaeological codes of ethics pertain to the case is examined before considering the outcomes of the case and discussing the issues involved.

Chapter 5 looks at the second case study to be discussed. Since her discovery in 1968, Lady Mungo has become one of the most significant finds to archaeologists not only in Australia but around the world. The successful return of her remains to the Willandra Lakes Indigenous community is an example of cooperation between Indigenous people and archaeologists that has been mutually beneficial to both parties. The chapter discusses Lady Mungo’s historical background, her significance to both Indigenous Australians and scientists, and the impact of applicable legislation and codes of ethics. Finally this chapter will examine the issues involved and how this case has affected archaeological research.
in the Willandra Lakes region.

Chapter 6 compares and contrasts the case of Kennewick Man with that of Lady Mungo and explains why Kennewick Man resulted in a fiercely fought struggle where Lady Mungo was repatriated with very little fuss. From the comparison of the two cases, this chapter then discusses what factors have the greatest influence on the outcomes of repatriation cases. Finally, the chapter discusses future directions for this research.
Chapter 2

Literature Review

2.1 Introduction

The repatriation of Indigenous human remains has become such a pressing and contentious issue in recent years that there has been vast amounts of literature written. It is an issue that affects Indigenous peoples the world over in both similar and dissimilar ways. There are some commonalities between issues that have been identified as problems by some Indigenous peoples. However, there are regional differences in how these issues are handled. While the existing literature is extensive, there are gaps in the current knowledge. Despite the issues and problems encountered in most countries being similar, very little has been written that compares repatriation processes in the different countries it affects. In order to understand these issues, the research undertaken for this thesis focuses on two countries in depth (the USA and Australia) and situates these debates within the wider field of international discussion of these issues.

2.2 Repatriation issues around the globe

In 1994, the United Nations released its Draft Declaration on the Rights of Indigenous Peoples. Article 13 of the Declaration affirms that:

“Indigenous peoples have the right to practice spiritual and religious customs, traditions and practices… and the right to the repatriation of human remains.” (UNESCO 1996).

While repatriation has been an issue in some countries, such as the United States
and Australia, long before this declaration was drafted, the declaration saw a recognition of repatriation as a public issue in some countries where it was formally not an concern.

Repatriation has only recently become a public issue in Argentina due to the fact that recognition of Indigenous rights to ownership of land and management of their cultural heritage only took place in 1994 following amendments to the National Constitution (Endere 2002: 266). Since then, several claims have been made for the return of the remains of well-known chiefs held in museums in Argentina. To date, only one, the remains of Inyakal, have been returned (Endere 2002: 271). The Indigenous people of Argentina have faced two main legal obstacles to repatriation. They have to prove they are the direct descendents of the people whose remains they want returned and there is currently no law in Argentina to change the status of museum collections (Endere 2002: 271). Proposed legislation changes to make repatriation possible have failed to become law despite approval by the senate in 1997 (Endere 2002: 278). The draft legislation only acknowledges the rights of direct descendents and not communities to submit claims for return of ancestral remains. Because most skeletal collections in Argentina are catalogued by ethnic characteristics and not name, the vast majority of the collections would remain in the museums that hold them (Endere 2002: 279).

The Saami, the Indigenous people of Norway, have also faced struggles to effect the return of ancestral remains after centuries of racial and cultural suppression (Schanche 2002: 47 – 55). Saami remains, and especially skulls, were very highly sought after by racial typologists until the 1930s and as such, thousands of Saami graves, pagan and Christian alike, were opened and plundered (Sellevold 2002: 61). With the increased rights recently recognised by the United Nations
Draft Declaration on the Rights of Indigenous Peoples, questions have been raised about the treatment of Saami remains in museums and universities, especially at the Institute of Anatomy at the University of Oslo, the holder of the largest collection of remains Sellevold 2002: 61). The Council of Saami Heritage put forward several proposals that were later approved by the university, putting the fate of the collection firmly in the hands of the Saami authorities. However, scientists at the institute felt that they owned the remains and felt threatened by the proposals (Schanche 2002: 56).

The issue of “ownership” of human remains is one at the heart of the repatriation debate. This issue became very clear in the case of the repatriation of ‘El Negro’ to Botswana in 2000. ‘El Negro’ is the name given to the stuffed body of an African man which was displayed in the Darder Museum in Spain since 1916 after his body was stolen the night after his burial. (Parsons and Segobye 2002: 246). When calls were made for his return before the 1992 Barcelona Olympic games, the curator of the museum said that “‘El Negro’ is our property” and that “human rights only apply to living people, not dead” (Parsons and Segobye 2002: 247). There was also controversy surrounding the identity of ‘El Negro’ and therefore to whom he should be returned.

This problem also arose at two excavations in South Africa. When two human burials were uncovered at Thulamela in 1993, disagreement arose between the two local tribal groups, the Venda and the Tsonga, not only over the identity of the individuals, but also how they should be treated (Nemaheni 2002: 257). Media involvement only made things worse (Nemahani 2002: 258).

At an excavation at Motoks in South Africa, no contemporary group could be identified which held any interest in the human remains uncovered (Fish 2002: 264). Despite the desire of the archaeologists to repatriate these remains, the
remains were not returned to the local communities because a clear connection with the human remains from this archaeological site could not be established. When this is the case, Fish asks to whom should the remains be returned and even if they should be returned at all. Fish also accuses some archaeologists of repatriating human remains without enough knowledge about the community involved, the archaeological context or both. He also believes some archaeologists use repatriation as a public relations tool to gain favour with communities to gain access to data or material they otherwise would not get (Fish 2002: 264).

The repatriation of Indigenous cultural property has been an issue in Canada long before the UN Draft Declaration was released. The approach that Canadian authorities have taken to address this issue are detailed by Conaty and Janes (1997). In 1989, a task force was set up jointly by the Canadian Museums Association (CMA) and the Assembly of First Nations (AFN). The task force produced a report that recommended the creation of equal partnerships between museums and First Nations and that museum personnel actively find ways for Indigenous people to be involved in all aspects of managing their museums (Conaty & Janes 1997: 31). With no legislative backing, this approach has resulted in repatriation being handled in Canada largely by discussion and negotiation, which in turn has resulted in a very positive experience overall (Conaty & Janes 1997: 31).

2.3 Repatriation in the United States

There are many different views and issues involved in the repatriation debate in the United States. According to Hubert (1989), the repatriation dispute was inevitable due to the polar opposite belief systems between western archaeologists and Indigenous peoples (Hubert 1989: 136). Some archaeologists
ascribe the source of conflict over repatriation to Western science’s belief system about the past being imposed on the belief systems of Indigenous peoples (Zimmerman 2000: 295). Some Native American scholars agree that archaeologists believing that they are the sole caretakers and owners of the past, rejecting all notions of Native Americans having their own history, is one of the main sources of conflict (Mihesuah 1996: 231, Deloria Jr. 1992b: 595). Meighan is one such archaeologist who claims that archaeology is primarily responsible for Native Americans having any pre-Columbian history at all (Meighan 1993: 18). This denies the legitimacy of all Native American tribal histories, which is another of Mihesuah’s criticisms of archaeologists, in that they uphold Christian notions of the dead that the soul and body separate after death and ignore Native American beliefs completely (Mihesuah 1996: 232). This lack of understanding of Indigenous beliefs is an issue at the heart of the repatriation debate.

Some archaeologists do not even see repatriation as a religious issue but rather as a purely political one due to the number of political votes that Native Americans hold (Meighan 1993: 11), as well as the claim that most Native Americans no longer hold traditional beliefs (Meighan 1993: 14). This view ignores the fact that all cultures change over time and denies the reality that Native American cultures have had to change radically since European colonisation. In fact if Native Americans do not fit the stereotype of the “Authentic Indian” (i.e. wear buckskin and feathered headdresses, live in tipis and hunt buffalo), then according to many archaeologists, they cannot be Native American (Crawford 2000: 222).

McGuire (1997) argues that this view of the “real” Native Americans being long dead and gone has guided archaeological practices in the past and, to a large extent, still does. It is the reason why some archaeologists are vehement that there
are no links between present-day Native Americans and the people of the distant past. Therefore any claims as such are pure mysticism, along with any claims to ancient human remains (Meighan 1992: 705). Because of this, Meighan suggests that a cut-off age needs to be inserted in any repatriation legislation, making anything older than this age impervious to repatriation claims (Meighan 1995: 125).

The Native American Graves Protection and Repatriation Act (NAGPRA) was enacted in 1990 with the goal of facilitating the return of human remains, associated and unassociated funerary objects and sacred objects to Indigenous communities and to allow the “freedom to worship through ceremonial and traditional rites” (Harjo 1996: 3). Watkins (2000) gives a detailed summary of NAGPRA and the process of repatriation that it entails. He also discusses the shortcomings and inadequacies of NAGPRA and how some Native Americans soon realised after the law was enacted that it wasn’t the compromise they initially thought. Some Native Americans felt that scientists were using the inventory process required by NAGPRA to conduct further scientific studies under the pretext of complying with NAGPRA. The legislation also requires scientific study of human remains to determine their cultural affiliation (Watkins 2000: 62). The fact that NAGPRA is only applicable to federal and tribal lands is also seen as a shortcoming, especially as all of the United States was once Native American land (Watkins 2000: 63). Where human remains are found on federal land, under NAGPRA archaeologists only need to consult with local Native American tribes rather than gain their permission to excavate the remains (Watkins 2000: 66). NAGPRA also applies only to federally recognised tribes. Some Native Americans feel that it should apply to all Native American nations, federally recognised or not (Watkins 2000: 65).
The introduction of NAGPRA in the United States brought with it much consternation and worry from scientists who felt that the new law would end their studies on Native American skeletons. Dongoske says that the increased participation of Native Americans in the excavation and analysis of burials, as dictated by NAGPRA, has increased the opportunities for osteological research and not brought about their end (Dongoske 2000: 291). As an example, Dongoske discusses that because of the increased dialogue between the Hopi and the archaeological community due to NAGPRA, research designs, including analysis of burials, that have been beneficial to both parties have been developed (Dongoske 2000: 282). Since NAGPRA was enacted, the Hopi have been actively consulted regarding the burials that have been discovered by major development work being conducted in the American Southwest.

Rose et al. (1996) argue that even though the implementation of NAGPRA has resulted in a reduction in the skeletal collections available for scientific analysis, the inventory process mandated by NAGPRA has increased the percentage of skeletons studied from approximately 30% to nearly 100% (Rose et al. 1996: 81). In addition to this, NAGPRA has prompted the development of a uniform and national osteological database system, the development of new techniques for identifying human remains, and the improvement of curation facilities. Most importantly, bioarchaeology will become more ethical and fair to the dead through consultation with the deceased’s descendents (Rose et al. 1996: 100).

NAGPRA has had other impacts on archaeologists and Native Americans. Grose (1996) discusses how, largely because of NAGPRA, Native Americans and archaeologists have been forced to divulge their beliefs about the nature of information, how they see the ownership of that information and how they would
like to use that information (Grose 1996: 630). For Native Americans, this can be difficult, especially if the information is of a secret or privileged nature. Grose also discusses how the implementation of NAGPRA has raised questions regarding the nature of information as an integral part of objects and any moral right to access that information (Grose 1996: 624). Control of information is one issue at the very heart of the repatriation debate.

While NAGPRA has given insurmountable aid to the repatriation issue, there are examples of the unlegislated repatriation of cultural property. Ferguson et al. (1996) describe the success that the Pueblo of Zuni have had in their efforts to repatriate their Ahayu:da (War-Gods) from museums and private collectors all over the United States. Rather than using the legal system, the Zunis approached museums on ethical and humanitarian grounds, a method that successfully saw the return of many Ahayu:da (Ferguson et al. 1996: 255). The earliest repatriations of Ahayu:da to Zuni occurred in the 1980’s (Ferguson et al. 1996: 253). This is significant because it is well before the implementation of NAGPRA, meaning that no legislation was in place to force the museums to return the Zunis’ cultural property.

It is undeniable that a lot of information can be gleaned from the study of human remains. Bones can contain information pertaining to age, diet, disease and health, genetics, lifestyle as well as burial rituals and population demography (Pardoe 1992: 135). Some archaeologists equate repatriation with reburial, assuming that all returned remains will be reburied, which, in their view, results only in the loss of scientific data. It is the loss of data and the prevention of replicable scholarship that reburial brings that these archaeologists are opposed against. Meighan compares the reburying of human remains to historians burning historical texts (Meighan 1993: 16). With new scientific tests and techniques being
developed all the time, Meighan maintains the necessity for the retaining of skeletal collections to make them available for any future tests that become available (Meighan 1993: 15). Zimmerman points out that while some archaeologists complain that with reburial comes some loss of the past, it is a past that is only lost to the archaeologist (Zimmerman 1996: 216).

Zimmerman describes the history of the repatriation debate as syncretic, in that both parties involved have, to an extent, reconciled their beliefs and incorporated some views of the other party into their own (Zimmerman 2000: 295). He sees archaeology as having to change more than Indigenous people because it has much more to lose if it does not (Zimmerman 2000: 303). However, Indigenous peoples also stand to lose a lot as well. There are undeniable gaps in some Indigenous histories due to colonisation. Ubelaker and Grant (1989) argue that archaeology and the study of human remains can help to fill these gaps (Ubelaker and Grant 1989: 250). This is true so long as the research is designed and carried out after consultation with the affected Indigenous people.

Goldstein and Kintigh (1990) argue that there is no one proper and correct way to treat the dead and that proper treatment is defined culturally (Goldstein & Kintigh 1990: 586). They argue that the reason why the reburial debate is so difficult to solve is because it involves ethical issues and moral principles that cross cultures. The authors suggest that the only way to solve such conflicts is by compromise and mutual respect and by accepting that the ethics and values held by an archaeologist are but one legitimate belief system (Goldstein & Kintigh 1990: 587). However, given that archaeological codes of ethics are written for archaeologists and not Indigenous peoples, this is a situation of competing ethical responsibilities. Smith and Burke (2003) discuss the ethical dilemma of Indigenous versus scientific stewardship of the past, an issue at the core of the repatriation
debate. The authors examine the issue in terms of the codes of ethics adopted by professional archaeological bodies, arguing that within the various codes, an ethical “spirit” can be found that transcends the literal interpretation. As case studies, Kennewick Man in the United States and Lady Mungo in Australia are discussed and how the codes of archaeological ethics in their respective countries can be applied to each case.

Zimmerman (1997) details several different ways that archaeologists have responded to the reburial issue. First is the denial reaction, where archaeologists have denied that repatriation is even an issue in the hope that it will soon go away (Zimmerman 1997: 97). The dialogue reaction is where archaeologists and Indigenous peoples meet face-to-face to discuss the issues to try to find a mutual understanding (Zimmerman 1997: 93). The analysis reaction has resulted in archaeologists trying to understand the ideological basis of the issue, while with the compromise reaction, archaeologists seek to reach mutual agreements with Indigenous peoples regarding repatriation issues (Zimmerman 1997: 94). Another reaction is for archaeologists to try to “educate” Native Americans about the benefits of archaeological studies in an effort to change their views (Goldstein and Kintigh 1990: 588). Landau and Steele (2000) attempt to explain, largely to Native Americans, why anthropologists study human remains. They detail what information about the lives of past people can be acquired, how they collect their data, why so many individuals are studied, why remains need to be restudied, as well as the benefits to living people. By doing so they argue they are preserving the memories of ancestors and solving mysteries about their lives (Landau & Steele 2000: 90). However, many Native Americans maintain that they already know their history through their tribal traditions and oral histories (Minthorn 1996).
Much literature has been written regarding Kennewick Man. Watkins (2000) and Thomas (2000) give detailed accounts of the battle for custody of Kennewick Man. Watkins discusses the scientific and legal issues surrounding the battle while Thomas outlines the history of Kennewick Man within the broader history of archaeology as a discipline in the United States. By doing so, he gives a broader picture of the issues surrounding Kennewick Man as well as the basis for the viewpoints of both parties involved in the legal battle over his bones. Both authors highlight the extreme complexity of the issues surrounding Kennewick Man.

The question of Kennewick Man’s racial affiliation came to the forefront of the debate. Chatters et al. (1999) conducted the first multivariate analysis of Kennewick Man’s cranial characteristics. The authors compared a cast of Kennewick Man’s skull with the modern population groups defined by Howell (Chatters et al. 1999: 87). They found that Kennewick Man displayed most affinity with Polynesian and Ainu skulls (Chatters et al. 1999: 89). Zimmerman and Clinton (1999) argue that if only Kennewick Man’s age was released to the press, he would have drawn little media attention. However, because he was said to have “caucasoid” attributes, the media went into overdrive. The authors see Kennewick Man as the latest effort to find a white, European history for the Americas (Zimmerman & Clinton 1999: 216). How NAGPRA affected the Kennewick Man legal battle is discussed as well as the problems that the legislation caused. The authors conclude by giving recommendations as to how future repatriation cases of this nature should be handled.
2.4 Repatriation in Australia

Unlike the United States, Australia has no legislation specifically designed to facilitate repatriation. In spite of this, Australian archaeologists and Indigenous Australians have faced similar challenges as their counterparts from the United States.

According to Fforde, the issue of Indigenous identity is central to the repatriation debate (Fforde 2002: 25). The return of human remains from institutions is seen as verification of Indigenous identity and an integral part of the continuing struggle for the recognition of Indigenous sovereignty (Turnball 1995). To scientists, however, the collection and study of human remains was what affirmed their identity as those who produce knowledge about the past (Fforde 2002: 40). Fforde and Turnbull also describe the history of bone-collecting throughout Australia’s history and how science portrayed Indigenous Australians as a primitive stone age race destined for extinction (Turnball 2002, Fforde 2002). Fforde draws comparisons between Australia and the United States in that Indigenous Australians were relegated to the pages of history just as Native Americans were. Because of this, the legitimacy of repatriation claims made by Indigenous people who are not living a “traditional” lifestyle are often questioned (Fforde 2002: 38). This also imposes western-derived identities on Indigenous people. Webb noticed how researchers have had little regard for the identity of Indigenous Australians, either as descendants of the human remains being studied or as people themselves (Webb 1987: 294).

Webb recalls how after listening to why Indigenous Australians do not want studies performed on the bones of their ancestors, he could not find a scientific reason to balance their moral one (Webb 1987: 293). He discusses how the Indigenous Australians that he has talked to are not necessarily against
archaeology; they see the benefits in regaining lost histories that archaeology can provide. However, it is the studying of the bones of their ancestors without permission that is objected to (Webb 1987: 295).

According to Langford, the issue is control. Indigenous culture and heritage belongs to Indigenous people and as such, they have the right to control and to share it on their own terms (Langford 1983: 2). Richardson states that all research carried out on Indigenous human remains must be under control of Indigenous people (Richardson 1989: 187). Pardoe has also found the Indigenous people that he has worked with to be very receptive to archaeological research on human remains, provided that it is undertaken on their terms and with their permission and involvement (Pardoe 1992: 137).

Pardoe has accepted complete Indigenous ownership of their ancestors’ remains and as such, he actively consults and involves Indigenous people during the course of his research (Pardoe 1992: 136 – 137). According to Pardoe, his acceptance has not reduced his studies on Indigenous human remains but has in fact increased the number of burials he has been allowed to study (Pardoe 1992: 138). Any remains he removes for study are returned for reburial and Pardoe himself has been involved in the reburial process in some instances (Pardoe 1990: 222, Pardoe 1992: 138). However, as a scientist, Pardoe is opposed to reburial of any skeletal remains, stating that the loss of data and replicable scholarship is immense (Pardoe 1992: 138). In spite of this view, Pardoe also realises that it is not his decision to make because he has accepted that the ownership of the remains rests with Indigenous people (Pardoe 1990: 222).

While some archaeologists have accepted the Indigenous control and ownership of relatively recent remains (Meehan 1984: 135), few of these have accepted the reburial remains dating back to the Pleistocene (Pardoe 1992: 135).
An excellent example of this is the return of the Kow Swamp burials to the Echuca Indigenous community in 1990. This prompted several prominent archaeologists to speak out against the reburial of Pleistocene human remains. Mulvaney argued that burials dating back to the Pleistocene cannot be linked to any one group or community of people alive today (Mulvaney 1991: 16). Gough claims that contemporary Indigenous people have no discernible link with the people of the past (Gough 1996: 131, 133), a view that largely mirror Meighan's from across the Atlantic. These views reflect the Western concept of ancestry, in that only direct lineal descendents can claim such human remains as ancestors. In contrast, the Indigenous concept of ancestry is of a more spiritual nature, in that most Indigenous Australians believe that any human remains discovered within their ancestral country are the remains of their ancestors (Cubillo, in Jones 2002: 39). In 1984, the Australian Archaeological Association (AAA) supported repatriation but only to the extent of the return of known individuals whose direct lineal descendents express wishes for the return of the remains (Meehan 1984: 135). This view precludes any Indigenous ideas of descent and ancestry and guarantees that the vast bulk of skeletal collections would remain in museums.

Piggott rejected the validity of Indigenous beliefs and claimed that the requests for the Kow Swamp reburial were purely politically motivated (Fforde 2002: 36). Webb argues that any claims that the reburial issue is purely fuelled by political motives are “facile and simplistic” (Webb 1987: 295). Mulvaney also argues that future generations of Indigenous people will mourn the loss of such skeletal material and the data that can be gleaned from them (Mulvaney 1991: 17). An alternate view on the Kow Swamp repatriation is presented by Bowdler (1992). She argues that there is a strong case for cultural continuity in the area as detailed by Pardoe (Bowdler 1992: 104). Bowdler accuses Mulvaney of “superior
maternalism”, in that he thinks he knows more about Indigenous communities and
Indigenous history than the Indigenous people themselves and that he knows what
is best for Indigenous people (Bowdler 1992: 104). Gough, like Meighan, also
argues for the value of retaining skeletal material for future testing with new and
refined techniques (Gough 1996: 134). Mulvaney agrees and argues that research
on bones is never complete because new scientific techniques are constantly being
developed (Mulvaney 1991: 17). This view would basically keep Indigenous
human remains in museum storage facilities indefinitely.

The views of the majority of Australian archaeologists at the time of the
Kow Swamp repatriation issue were expressed by Meehan (1984). Writing as the
president of AAA, Meehan describes the importance of Indigenous human remains
to archaeologists and why archaeologists should be allowed to study such remains
as well as maintaining existing collections of Indigenous human remains. Meehan
argues that Indigenous human remains have great scientific value because of the
wealth of scientific information they contain. They also hold great heritage value to
not only Indigenous Australians but to all Australians and indeed the entire world
(Meehan 1984: 128). Piggott also argued that Indigenous people should not be
allowed to destroy remains of “extra-national importance”, such as those of Kow
Swamp (Turnball 1995). Bowdler argues that this view automatically denies any
legitimate claims that Indigenous people have to their cultural property (Bowdler

Meehan also argues that studying the skeletons of past populations can have
health benefits to present day Indigenous communities, especially the study of past
diseases (Meehan 1984: 132). This reasoning is often cited by museum workers
who oppose repatriation as to why collections should be maintained (Turnball
2002: 64). However, as Turnball states, the benefits to health and spiritual well-
being for present day Indigenous communities arising from the return of ancestral remains and the practice of cultural freedom are rarely, if ever, considered (Turnball 2002: 64-65).

The literature written about the burials at Lake Mungo is extensive (e.g. Bowler et al. 1970, Thorne 1971, Bowler & Thorne 1976). However, all this literature deals with the discovery, excavation and scientific significance of the burials. Very little literature has been written regarding the repatriation of Lady Mungo. Sullivan (1999) and Smith and Burke (2003) detail the process undertaken to return Lady Mungo to the Willandra Lakes Indigenous communities. Sullivan points out that while Lady Mungo taught scientists a great deal about Pleistocene life in Australia, her excavation and scientific study were cause for offence and grief for the Willandra communities (Sullivan 1999). However, since Lady Mungo’s return, a relationship of trust has slowly been built up between archaeologists and the Indigenous communities. As a result, archaeologists have in recent years been given permission by the communities to carry out further research on the Willandra Lakes skeletal collection (Smith 2003: 10).

The repatriation issue in Australia also has an international aspect to it. Many institutions in Europe house Indigenous Australian human remains (Richardson 1989: 187). Calls for the return of such collections have increased in recent years as their full extent becomes better known to both the museums and Indigenous peoples. The repatriation from overseas institutions is often hampered by the commonly held view of scientists in those countries that Indigenous societies have experienced such a disruption and change since European colonisation that any claims on human remains in their possession on cultural grounds are void (Turnball 2002: 65). There is also the problem that, especially in Britain, museums are not legally able to de-access items from their collections.
In 1991, the University of Edinburgh decided to return 300 specimens derived from Indigenous human remains back to Indigenous Australian people (Turnball 1995).

2.5 Discussion

The amount of literature written about the repatriation debate around the world is extensive. There is a great variety and complexity of issues involved, which is to be expected given the vast variety of Indigenous cultures all over the world. While there are some similarities, these issues have been largely dealt with in different ways in the countries in which they have been raised. Views from all points of the Indigenous-science spectrum have been voiced, from those in full support of repatriation to those abjectly against it. The repatriation debate is often characterised as science vs. Indigenous religious beliefs (Meighan 1992: 707). This is an all too simplistic view of the debate and does not correctly describe the actual situation. There are many archaeologists who fully support repatriation (e.g. Zimmerman 1997), those who oppose repatriation but accept that it is now a necessary part of their research (e.g. Pardoe 1990, 1992), as well as those who are against any return of human remains (e.g. Meighan 1992, Gough 1992). Just the same, there are many Indigenous people who permit the study of ancestral human remains and feel that such study benefits them, as well as many Indigenous people who are against any scientific study of human remains. There is also an increasing number of archaeologists who are themselves Indigenous, giving them a unique view into the repatriation debate.

There has been more literature written about repatriation in the United States and Australia as it has been an issue in both countries since the early 1980s.
What becomes apparent when studying the arguments being made in both countries is that they are, for the most part, comparable as similar ideas and issues are in contention. There are, of course, differences due to issues local to each country (e.g. Indigenous land rights and the push for self-determination in Australia). What also becomes apparent is that the vast majority of the literature concerns only either the United States or Australia, but rarely both. Hubert (1989), Smith and Burke (2003) and Watkins (2000) discuss repatriation in both countries, but none of these works actually compare and contrast the repatriation practices in these countries. In particular, no direct comparison between Kennewick Man and Lady Mungo exists. It is this gap in the existing knowledge that this thesis will fill.
Chapter 3
Methodology and Limitations

3.1 Methodology

This study is based on a comparative analysis of two case studies: the repatriation of Lady Mungo in Australia, and the battle over Kennewick Man in the United States. Australia and the USA were selected as repatriation is a focus of contemporary archaeological discussion in both countries, though with different emphases in each. The two case studies were selected as they are both high-profile cases, each having had extensive literature written about them, both academic (e.g. Bowler et al. 1970, Thorne 1971, Bowler et al. 1972, Brown 1987, Zimmerman & Clinton 1999, Thomas 2000, Watkins 2000, Chatters 2001, Smith & Burke 2003) and journalistic (e.g. Schafer 1996, Cribb 1998, Lee 1998, Morell 1998, Mulick 2000, Mulick 2004, Smith 2003). In their respective countries, each case has also become a symbol of the wider question of whether Indigenous rights to control their cultural heritage supersede the rights of scientists to collect and analyse scientific data (Smith & Burke 2003: 178). In this study, the analysis of each case focuses on the relevant legislation and the codes of ethics adopted by professional archaeological organizations, journal articles, books and web sites, government reports, as well as newspaper and magazine articles in each country.

3.1.1 Database

For this study, a database was compiled consisting of previously published literature relevant to the two case studies. This database consisted of five categories of information:
1. Legislation

2. Archaeological Codes of Ethics

3. Journal articles, books and web sites

4. Government reports

5. Newspaper and magazine articles

The five categories were selected and analysed for differing reasons.

3.1.2 Methods of Selection and Data Analysis

Legislation

Legislation is analysed as a reflection of the contemporary political climate and attitudes towards the Indigenous people in each country (Lovell-Jones 1991: 16). It is also examined because legislation dictates what archaeologists legally have to do.

The legislation examined in this study are the laws that have had the greatest influence on each case study. In regards to Kennewick Man, NAGPRA was analysed. For Lady Mungo, both the New South Wales National Parks and Wildlife Act 1974 as well as the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 are examined.

In the United States, NAGPRA and the National Museum of the American Indian Act 1989 (NMAIA) are the two Congressional Acts that relate to repatriation. Of these two, only NAGPRA is relevant to Kennewick Man as the NMAIA only applies to the Smithsonian Institution. NAGPRA covers both Native American cultural heritage already held in museum collections as well as new discoveries such as Kennewick Man. The sections of the NAGPRA code detailing the procedures to follow after such a discovery is made as well as how ownership of such discoveries are determined are focused on in this study.
In regards to Lady Mungo, the *New South Wales National Parks and Wildlife Act 1974* was selected as this is the Act that provides protection to Indigenous cultural heritage at the State level in New South Wales. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* was selected for the same reason but this Act provides protection at the Commonwealth level. Both these Acts have sections pertaining to both protection of Indigenous human remains as well as the return of Indigenous cultural property from museums, both of which are relevant to Lady Mungo.

**Codes of Ethics**

Archaeological codes of ethics are examined as manifestations of the social milieu surrounding archaeology and related disciplines (Smith & Burke 2003: 193). As such, the archaeologists involved in the case studies do not necessarily have to be members of these organizations for the code of ethics to be included in this study. Codes of ethics are also examined because they contain guidelines as to what archaeologists morally *should* do.

This study examines the codes of ethics of the American Anthropological Association and the Society for American Archaeology in the United States, and the Australian Archaeological Association in Australia. These codes were selected as they represent the major professional archaeological associations in both the United States and Australia that handle Indigenous archaeology.

Also examined are the codes of ethics adopted by the consulting archaeology associations in both countries (i.e. the Register of Professional Archaeologists in the United States and the Australian Association of Consulting Archaeologists Inc. in Australia). These two codes are included as consulting archaeology is another facet of the discipline that impacts on Indigenous peoples.
The code of ethics of the American Anthropological Association are included because the tertiary teaching of archaeology comes under the umbrella of anthropology in the United States, and students usually have training in both disciplines (e.g. University of New Mexico – http://www.unm.edu/~anthro/). In Australia, however, archaeology is taught as a separate discipline. As such, the code of ethics of the Australian Anthropological Society is not designed with archaeological practice in mind. This code is therefore not included in this study.

Codes of ethics are not set in stone and are liable to change as the attitudes and opinions of an association’s members change. In this manner, the Australian Archaeological Association voted to change its code of ethics at its Annual General Meeting in 2003. This study, however, will concentrate on the code of ethics that was active at the time of Lady Mungo’s repatriation in 1992. The impacts of the new 2003 code on repatriation are discussed in Chapter 6.

*Journal articles, books and web sites*

Journal articles, books and web sites were analysed as they give direct information on the views held by archaeologists and Indigenous people in each country. Articles in journals are valuable because they are published only after they have been evaluated by peers. Books have also been ‘legitimated’ by a peer review process and provide in-depth analysis of particular issues. Web sites provide a direct view of opinions, which is particularly important for obtaining Indigenous perspectives. However, web sites are not subject to peer-review and therefore need to be scrutinised more carefully.

Articles, books and web sites were selected for inclusion with the intention of obtaining the wide range of views expressed by archaeologists and Indigenous peoples regarding repatriation in each country.
Government reports

Government reports provide information on specific aspects and issues regarding repatriation. They also are a measure of governmental attitudes towards the two case studies.

The National Parks Service (NPS) reports on Kennewick Man were included in the study as they provide key information regarding how the US government handled the Kennewick Man lawsuit. The reports are also contain the information that the Department of the Interior used to pronounce Kennewick Man to be Native American under NAGPRA as well as determining his cultural affiliation to present-day tribes. They also include the results of the majority of the scientific testing that has been carried out on Kennewick Man’s remains to date.

The Mungo National Park draft management plan produced by the NSW National Parks and Wildlife Service and the management plan for the Willandra Lakes World Heritage Property produced by World Heritage Australia were included in this study. Both reports contain information not so much about Lady Mungo specifically, but about how such a significant area is to be managed both now and in the future. Most importantly, they also detail the level of Indigenous involvement with the area’s management and future research projects. They also provide information regarding the recognition by the NSW government of the significance of the area to its traditional owners.

Newspaper and magazine stories

Journalistic articles in newspapers and magazines are important as they provide access to how repatriation issues are presented and perceived by the general public. They also often provide a forum for Indigenous people to express
their views on issues such as repatriation and how such issues affect them. However, because newspapers and magazines are not peer-reviewed, such sources must be scrutinised closer than journals and published books.

Newspaper and magazine articles were selected to demonstrate how the case studies were presented in the media and also as a measure of the impact that media involvement has had on the case studies.

### 3.1.3 Limitations of the Database

The database cannot include the vast amount of what has been already published about repatriation. To include the total of all previously published literature would be a vast undertaking that is well beyond the scope of this study. However, the material that is included in this study has been selected not only to include the most cited and influential publications in the repatriation debates in each country but also with the aim of obtaining a representation of all views and opinions surrounding repatriation and the two case studies.

### 3.2 Limitations of the Study

Repatriation is an issue in many countries in addition to Australia and the United States. Examining repatriation processes in additional countries would have increased the scope of the study beyond what was feasible to undertake in the time available. However, this is a potential area for further research.

Another limitation of this study relates to the quantity of information available on each case study. There is extensive literature written on Kennewick Man, both from the scientific and Native American perspective. The literature written on Lady Mungo is less extensive. This is especially true of the Indigenous Australian perspective, of which little has been published. This limitation is no
doubt due to the fact that the resolution of the Lake Mungo case was amicable, while the Kennewick debate is on-going.

A further limitation is that the analysis could have been deepened by conducting interviews. Interviews would have given access to first-hand perspectives on the case studies. However, to make the study fair to all involved (i.e. to provide equal coverage of the range of views available), interviews would have to be conducted with representatives from scientists and Indigenous people involved with both Kennewick Man and Lady Mungo. The logistics involved with organising four sets of interviews in the time available, two of which would have been international, made this unfeasible and put such interviews beyond the scope of this study.
Chapter 4

Kennewick Man

4.1 Background

On July 28th 1996, two young men stumbled across a skull eroding out of the banks of the Columbia River in Washington State (See Fig. 4.1). The coroner pronounced it to not be recent and proceeded to call in forensic anthropologist James Chatters (Watkins 2000: 135). After collecting an almost complete skeleton from the site, Chatters transported the bones to his laboratory. Chatters initially thought the skeleton to be that of a European settler as the skull looked “caucasoid” and showed “a lot of European characteristics”. It was also associated with several post-contact artefacts found near the bones (Schafer 1996). Chatters’ examination showed the individual to have been male, between 40 and 55 years old at the time of death and had lived a rough life, having sustained several injuries including a crushed chest and fractured skull (Thomas 2000: xx). There was also a foreign object lodged in the man’s pelvis. A CAT scan showed it to be the tip of a Cascade stone spear point, a type of stone tool not used for five thousand years (Thomas 2000: xx). Chatters sent off samples for radiocarbon dating, which returned an age of between 9,200 and 9,600 BP (Watkins 2000: 136).

When Chatters released the date to the media, it caused a frenzy. Here was a man (now dubbed “Kennewick Man”) who had lived many centuries before Columbus sailed to the New World but had “European” characteristics. Discover magazine spouted the headline “Europeans Invade America: 20,000 BC” while The
Fig 4.1 – Map showing the site where Kennewick Man was found (Chatters 2001: 20)
New Yorker asked, “Was someone here before the Native Americans?” (Thomas 2000: xxii).

On September 2nd, the Army Corp of Engineers (COE), the Federal agency with jurisdiction over the land where Kennewick Man was found, took possession of the bones from Chatters’ lab and halted all analysis (Watkins 2000: 136). After consultation with local Native American tribes, the COE announced its intent to repatriate Kennewick Man to an alliance of five tribes: the Umatilla, Yakama, Nez Perce, Colville and Wanapum tribes only five days after the C14 dates were released. This move angered scientists from different parts of the US. Since finds of human remains dating from early Holocene times are rare in North America, Kennewick Man was of immense scientific importance (Zimmerman & Clinton 1999: 213). Scientists argued that his great antiquity meant that he rightfully belongs to all American people and not a single “special interest group” (Thomas 2000: xxii). On October 17th, eight scientists filed suit for the right to study Kennewick Man. The scientists involved were Robson Bonnischen, Douglas Owsley, Dennis J. Stanford, C. Vance Haynes Jr, Richard L. Jantz, George W. Gill, D. Gentry Steele and C. Loring Brace; some of the most prominent anthropologists and archaeologists in the United States. The scientists argued that because of his caucasoid features, Kennewick Man cannot be culturally affiliated with any present-day Native Americans (Smith & Burke 2003: 179-180). The Umatilla argued that any scientific testing of human remains is offensive and sacrilegious to them (Thomas 2000: xxii).

At the same time, the Asatru Folk Assembly also filed for custody of Kennewick Man. The Asatru, a Californian based group who follow old Norse religions, claimed Kennewick Man as an ancestor based on his “Caucasian” appearance (Watkins 2000: 137).
It was at this time that Chatters, along with sculptor Tom McClelland, released a facial reconstruction of how Kennewick Man may have looked like in real life. The fact that the reconstruction bore a striking resemblance to British actor Patrick Stewart was pounced upon by the media and only served to reinforce the notion of an early Caucasian presence in the Americas (Thomas 2000: xxv – xxvi).

On April 6th 1998, in an unexpected move, the COE buried the site of Kennewick Man’s discovery under hundreds of tons of backfill and planted the area with trees in order to “prevent erosion” (See Fig. 4.2). This was done despite Congress hastily passing legislation forbidding the COE to do so (Thomas 2000: xxiv).

At this time, the Department of the Interior (DOI) agreed to take over the responsibility to find the “rightful” custodians of Kennewick Man’s remains from the COE (Lee 1998). The court case was put on hold until further study and analysis took place that could help determine the cultural affiliation of Kennewick Man.

On July 1st 1998, the DOI submitted a plan of the tests they wanted to carry out to determine whether Kennewick Man could be considered to be Native American under NAGPRA. The studies included an inventory and scientific measurement of the bones and teeth, overall assessment of the skeleton as well as analysis of the stone spear point in the pelvis (Watkins 2000: 143). Further radiocarbon dating and DNA analysis were not included as they would have required the destruction of bone which the tribes objected to. The scientists argued that important scientific issues were not being addressed by the proposed tests (Zimmerman & Clinton 1999: 215). After the tests were completed, the DOI felt it did not have enough chronological information to determine whether or not
Fig 4.2 Top – The site of Kennewick Man’s discovery as it looked at the time when he was found.
Bottom – The site after the COE dumped tons of rock and soil and planted the area with trees
(Friends of America’s Past 2000).
Kennewick Man was Native American under NAGPRA so in September 1999, the DOI ordered additional samples to be taken for further radiocarbon dating (Watkins 2000: 145).

The dates that were returned confirmed the previous C14 age of Kennewick Man and subsequently the Secretary for the Interior Bruce Babitt declared Kennewick Man to be a Native American under NAGPRA (McManamon 1999). However, this was not enough to determine the nature of his affiliation to present day tribes. To address this issue, the DOI took further samples for DNA testing, despite protests from the Native American claimants (Mulick 2000). The testing proved inconclusive as there was not enough DNA left in the bones to get a meaningful result (Merriwether et al. 2000). In spite of this setback, the Secretary for the Interior announced that Kennewick Man was culturally affiliated with the five claimant tribes due to the geographic location where he was found and the tribes’ oral histories (Associated Press 2000). With the DOI having come to its conclusions, the court case was resumed.

On August 30th 2002, Judge John Jelderks handed down his ruling. He ruled that the COE and DOI had erred in assuming that all human remains pre-dating Columbus were automatically Native American and therefore the Archaeological Resources and Protection Act (ARPA) and not NAGPRA applies to Kennewick Man, giving the scientists access to Kennewick Man’s remains (Jelderks 2002: 29). The tribes appealed this decision and in September 2003, the case was moved to the 9th District Court of Appeals (Cary 2003).

On February 4th 2004, Judge Jelderks upheld his previous ruling that Kennewick Man is not Native American under NAGPRA and that the scientific study of his remains must be allowed to proceed (Jelderks 2004: 1608). The tribes decided in July 2004 not to appeal to the supreme court stating that if they lost
there, it would set a dangerous precedent, possibly jeopardising the outcome of similar cases in the future (CTUIR 2004).

Despite being denied the right to rebury Kennewick Man, the tribes sought to be involved in the planned scientific study in an effort to minimise damage to his remains (King 2004). However, in August 2004, Judge Jelderks ruled that their can be no further tribal involvement with the case (Associated Press 2004). On 10th September 2004, the tribes formally asked for full party status to be directly involved in the plan of study (Mulick 2004).

4.2 Significance to Scientists

As of 2002, only twenty finds of human skeletal remains older than 8,000 years have been discovered in North America (Haynes 2002: 17). Nearly half of these finds are either just isolated bones or bone fragments (See Table 4.1). Therefore, when nearly all of Kennewick Man’s skeleton was uncovered and radiocarbon dated, he immediately became significant due to the rarity of such finds. To scientists, Kennewick Man represented a “book” to be read as “a history text written in bone”, to gain information about the lives of early North Americans (Zimmerman & Clinton 1999: 221).

When and how people first reached the New World is one of the primary questions of American archaeology (Watkins 2000: 146). For many years, the accepted theory was that humans first reached the Americas from Asia approximately 15,000 years ago through an ice-free corridor between the two continental glacial ice sheets (Fagan 1995: 77). However, discoveries at sites such as Monte Verde in Chile (Haynes 2002: 18–19) and Meadowcroft rock shelter in Pennsylvania (Fagan 1995: 74-75) that date prior to 15,000 BP have encouraged archaeologists to rethink their theories. What is now becoming apparent is that the
<table>
<thead>
<tr>
<th>LOCALITY</th>
<th>N</th>
<th>REMAINS</th>
<th>AGE (RCYBP)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anzick, Montana</td>
<td>2</td>
<td>cranial fragments</td>
<td>8,620 - 10,500; later redated</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>11,500</td>
</tr>
<tr>
<td>Arlington Springs, California</td>
<td>12</td>
<td>Femora</td>
<td>10,000 ± 310; collagen redated</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>10,960 - 11,500</td>
</tr>
<tr>
<td>Browns Valley, Minnesota</td>
<td>1</td>
<td>skeleton</td>
<td>8,700 ± 110</td>
</tr>
<tr>
<td>Buhl, Idaho</td>
<td>1</td>
<td>skeleton</td>
<td>10,000</td>
</tr>
<tr>
<td>Fishbone Cave, Nevada</td>
<td>1</td>
<td>postcranial fragments</td>
<td>10,900 - 11,200</td>
</tr>
<tr>
<td>Gordon Creek, Colorado</td>
<td>1</td>
<td>skeleton</td>
<td>9,700 ± 250</td>
</tr>
<tr>
<td>Horn Shelter, Texas</td>
<td>2</td>
<td>skeletons</td>
<td>9,000-10,000</td>
</tr>
<tr>
<td>Kennewick, Washington</td>
<td>1</td>
<td>skeleton</td>
<td>8,410 ± 60</td>
</tr>
<tr>
<td>La Brea, California</td>
<td>1</td>
<td>skeleton</td>
<td>9,000 ± 80</td>
</tr>
<tr>
<td>Marmes, Washington</td>
<td>3</td>
<td>cranial fragments</td>
<td>10,000 - 11,000</td>
</tr>
<tr>
<td>Mostin, California</td>
<td>1</td>
<td>bone fragments</td>
<td>10,000 - 11,000</td>
</tr>
<tr>
<td>Pelican Rapids, Minnesota</td>
<td>1</td>
<td>skeleton</td>
<td>-</td>
</tr>
<tr>
<td>Sauk Valley, Minnesota</td>
<td>1</td>
<td>skeleton</td>
<td>-</td>
</tr>
<tr>
<td>Shifting Sands, Texas</td>
<td>1</td>
<td>tooth fragments</td>
<td>-</td>
</tr>
<tr>
<td>Spirit Cave, Nevada</td>
<td>1</td>
<td>skeleton</td>
<td>9,400</td>
</tr>
<tr>
<td>Vero Beach, Florida</td>
<td>1</td>
<td>cranial fragments</td>
<td>-</td>
</tr>
<tr>
<td>Warm Mineral Springs, Florida</td>
<td>1</td>
<td>postcranial fragments</td>
<td>10,620 ± 190</td>
</tr>
<tr>
<td>Whitewater Draw, Arizona</td>
<td>2</td>
<td>skeletons</td>
<td>8,000-10,000</td>
</tr>
<tr>
<td>Wilson-Leonard, Texas</td>
<td>1</td>
<td>skeleton</td>
<td>9,000-11,000</td>
</tr>
<tr>
<td>Wizards Beach, Nevada</td>
<td>1</td>
<td>skeleton</td>
<td>9,200</td>
</tr>
</tbody>
</table>

Table 4.1 – Finds of human remains in the United States older than 8,000 BP (Haynes 2002: 17).
initial migration into the Americas was more complex than previously thought. Multiple theories now exist in an attempt to explain what appears to have been multiple migrations. Multiple migrations raise the possibility that at one time there were several different peoples inhabiting the New World. Scientists argue that Kennewick Man may represent a people distinct from present-day Native Americans due to his “caucasoïd” characteristics. To them, only scientific study can ascertain whether Kennewick Man is an ancestor of present day Native Americans. As well as how he looked and his genetic heritage, Kennewick Man’s bones have the potential to inform scientists about how such people lived, what they ate and what diseases they suffered from.

4.3 Significance to Native Americans

The Native American tribes of the Columbia Plateau, where Kennewick Man was found, believe that they have always lived there since the beginning of time (Minthorn 1996). Their oral history contains no accounts of migrations from other areas. Instead, they believe that the plateau became populated by people already living there in animal form (Boxberger 2000). The tribes believe their oral traditions go back to around 10,000 years ago (Minthorn 1996), a view that is supported through correlation between the traditions and geological events (Boxberger 2000). Therefore Kennewick Man, who lived in the area approximately 9,000 years ago, is seen by the present day tribes to be their direct ancestor. To the tribes, the bones of Kennewick Man are seen as the sacred remains of a human being and not just an object to study (Minthorn 1998). Indeed, the study of any human remains is considered a “desecration of the body and a violation of our most deeply-held beliefs”, as stated by Armand Minthorn, an Umatilla religious leader (Minthorn 1996). Minthorn also states that the elders of the Umatilla have “taught
us that once a body goes into the ground, it is meant to stay there until the end of time” (Minthorn 1998). These beliefs dictate that Kennewick Man should be returned to the earth as soon as possible (Sampson 1997).

Many archaeologists have claimed that archaeology is the only legitimate way of revealing Native American history, especially that of pre-contact societies (Clark 2000: 88, Meighan 1993: 18). This view dismisses all Native American oral histories and tribal traditions as purely mythological. To the five tribes involved in the Kennewick Man case, scientific claims that Kennewick Man was not Native American and that different people once inhabited the Columbia Plateau is just another case of scientists dismissing their histories (Minthorn 1996).

4.4 Legislation

The Native American Graves and Protection Act (NAGPRA) was enacted in 1990 largely to facilitate the return of human remains, associated and unassociated funerary objects and sacred objects to Native American communities from all federally funded institutions. Museums are required to inventory their collections and notify tribes of what they possess (25 USC 3003). However, NAGPRA also applies to newly discovered Native American human remains, such as Kennewick Man, as well.

Under section 3.d.1 (25 USC 3002[d][1]) of NAGPRA, any person who inadvertently discovers Native American human remains on federal land must notify the Secretary of the federal agency with jurisdiction over the lands or the appropriate tribal authority if the discovery is on tribal land. In the case of federal lands, the Secretary of the government agency must notify the appropriate Native American tribe or tribes. As Kennewick Man was discovered on federal lands that
the Army Corp of Engineers had jurisdiction over, Kennewick Man’s remains were seized under this section of NAGPRA.

The ownership of such discovered human remains is determined in section 3.a (25 USC 3002[a]) of NAGPRA. Ownership lies first and foremost with lineal descendents of the deceased. If no lineal descendents can be determined, then ownership depends largely on where the remains were found. If they were discovered on tribal land, then that tribe is deemed to have ownership of the remains. However, if the remains were found on lands under federal jurisdiction, then ownership lies with the Native American tribe that has the closest cultural affiliation with the remains. In the event that cultural affiliation cannot be ascertained, then ownership lies with the tribe on whose ancestral land the remains were found as judged by the Indian Claims Commission or the US Court of Claims, unless another tribe can be shown to have a stronger cultural relationship with the remains. With remains as old as Kennewick Man, lineal descendents are impossible to find. The COE therefore judged that Kennewick Man was most likely to be affiliated with the tribes local to the area due to where he was found. Because he was discovered on the ancestral lands of the Umatilla, Kennewick Man’s remains belong to the Umatilla according to the COE’s interpretation of Section 3.a.2.C of NAGPRA (25 USC 3002[a][2][C]).

4.5 Codes of Ethics

*American Anthropological Association*

The American Anthropological Association’s (AAA) Code of Ethics states that the primary ethical responsibility that members have is to the people and materials they study. This includes working for the long-term conservation of the archaeological record. While seemingly straightforward, this statement can create
conflicting ethical situations. The term “long-term conservation” is not defined. If it means curation in a museum or similar storage facility, as it seems to imply, what should be done if a Native American tribe wants ancestral human remains reburied, as in the case of Kennewick Man? Should the anthropologist comply with the wishes of the tribe with whom the anthropologist’s primary ethical obligation lies? This would go against their obligation to preserve the archaeological record. Should the anthropologist go against the tribe’s wishes and curate the remains anyway, thereby preserving the remains for the long term?

The fourth listed responsibility of researchers is to consult actively with affected group(s) with the goal of establishing a working relationship that can be beneficial to all parties involved. What constitutes active consultation is not defined. Does it mean carrying out what you wanted to do anyway after notifying the affected group(s)? Or does it mean modifying the research plan according to their wishes? What constitutes an affected group? Who decides which groups are affected? The plaintiff scientists in the Kennewick Man case argued that he is not Native American. Therefore, by their reasoning, the five tribes wanting his repatriation do not constitute affected groups. Researchers also only have to consult with the goal of developing a relationship that can be beneficial to everyone involved. This effectively gives anthropologists an escape clause because if they are not able to develop a relationship that is beneficial to all involved parties, then they can proceed with their research if they wish and not be in violation of the code.

_Society for American Archaeology (SAA)_

Principle No. 2 in the SAA’s Principles of Archaeological Ethics, “Accountability”, mirrors almost word for word the AAA code in regards to
consulting with affected groups. The primary responsibility of archaeologists under the SAA code is stewardship of the archaeological record, as described in the first principle. This puts archaeologists as the caretakers and advocates of the archaeological record. It does not, however, take into account other valid claims of stewardship (Zimmerman 1995: 65). Native Americans have just as much right, if not more so, to claim stewardship of their own cultural heritage. In fact Native Americans are only mentioned in the SAA’s code once and only then lists them as an “interested public” who “find in the archaeological record important aspects of their cultural heritage”. Going by the SAA’s Code, the prime position given to archaeologists as the stewards of the archaeological record would give custody of Kennewick Man to the plaintiff scientists.

Register of Professional Archaeologists (RPA)

Section I.1.1.c of the RPA Code of Conduct states that members shall be “sensitive to, and respect the legitimate concerns of groups whose culture histories are the subjects of archaeological investigations”. However, the code does not specify who decides what is and is not a legitimate concern. If, as the scientists argued, Kennewick Man is not Native American, then the concerns of the Umatilla and other tribes would not be considered to be legitimate.

4.6 Outcomes

Judge Jelderks’ rulings have put Kennewick Man in the custody of the scientists. His remains are currently in the Burke Museum’s storage facility awaiting the start of scientific analysis. Instead of appealing the decision and risking another unfavourable ruling, the Umatilla are going to work with all tribes starting in 2005,
in an effort to strengthen NAGPRA’s protection of future inadvertent discoveries such as Kennewick Man.

Jelderks’ ruling that human remain pre-dating 1492 are not necessarily Native American will mean that in future cases, scientific study is more likely to be required to not only determine cultural affiliation but biological affiliation as well. This will put tribes who are against the scientific study of human remains at more of a disadvantage in future cases similar to Kennewick Man.

Jelderks’ decision to allow the study of Kennewick Man against the wishes of the tribes will only serve to decrease the likelihood of the tribes allowing scientists to study any human remains discovered on their lands in the future or indeed any tribal human remains currently held in institutions. Ironically, the scientists sued to gain access to the information that Kennewick Man represented. However, by doing so they may have lost access to more information than just a single skeleton.

Before Kennewick Man, it was thought that only federally recognized Native American tribes were able to challenge federal NAGPRA decisions. However, when the court ruled that the scientists had standing to challenge the COE’s decision to repatriate Kennewick Man, it greatly broadened the range of parties able to challenge NAGPRA decisions (Zimmerman & Clinton 1999: 220). Now the way is open for non-tribal parties, such as the Asatru Folk Assembly in the Kennewick Man case, to become involved in NAGPRA cases. This, as well as the court’s favourable decision towards the plaintiff scientists, will increase the likelihood of scientists challenging NAGPRA decisions in the future.
4.7 Discussion

Kennewick Man would have garnered little media attention if only his antiquity was mentioned (Zimmerman & Clinton 1999: 215). However, because his racial affinity was called into question from the very start, the media sensationalized the story. When Chatters used the term “Caucasoid” to describe Kennewick Man’s cranial characteristics, the media took it to mean “Caucasian”. The fact that caucasoid is a purely anthropological term denoting certain cranial features and not race is not known outside of scientific circles. It was naïve of Chatters to use such obviously inflammatory language. The fact that in an interview just months after the initial discovery Chatters said that British actor Patrick Stewart looked like Kennewick Man only added fuel to the fire (Thomas 2000: xxi). Chatters later said that the reaction to his comparison in the media was “unanticipated” (Chatters 2001: 143).

The comparison to Patrick Stewart, as well as the idea in the eye of the media that Kennewick Man was European, was only reinforced by the facial reconstruction of Kennewick Man that Chatters and Tom McClelland produced (See Fig. 4.3). Chatters said that they wanted to avoid subjectivity as much as possible when creating the reconstruction (Chatters 2001: 143). However, as Deloria Jr. states, objectivity does not exist in social sciences due to “cultural blinders, professional training and personal background” (Deloria 1992a: 30). The fact that Chatters had an image of Kennewick Man looking like Patrick Stewart in his mind before creating the reconstruction would have guided his work, if only subconsciously. The extreme subjectivity of facial reconstructions such as this is shown in the reconstruction of Kennewick Man’s face produced by National Geographic with help from Douglas Owsley (Parfitt 2000: 59). Despite working
Fig. 4.3 – Left: The reconstruction of Kennewick Man produced by Chatters and McClelland (Thomas 2000: xxv).
Right: British Actor Patrick Stewart (Schneider 2003). Chatters’ reconstruction was said to bear a striking similarity.

Fig. 4.4 – Reconstruction of Kennewick Man produced by National Geographic and Douglas Owsley (Parfitt 2000: 59).
from exactly the same cranial data, this reconstruction looks very different from Chatters’ (See Fig. 4.4).

The argument put forward by the plaintiff scientists was that Kennewick Man is not a Native American based on his cranial measurements and apparent lack of cultural affiliation to present-day tribes. While it is true that Kennewick Man’s skull does not exhibit present-day Native American morphology, the same can also be said of all skulls dated to this time period that have been found in North America. This has led many anthropologists to believe that the earliest populations in North America were not ancestral to present-day Native Americans (Powell & Neves 1999: 177). There is also great variability within this very small group of discovered individuals (Morell 1998: 191). Many anthropologists believe that this is the result of multiple biologically distinct founder populations (Powell & Neves 1999: 177). However, the variation exhibited by the early skulls is no greater than the variation seen in the skulls of present-day Native Americans (Haynes 2002: 18).

The idea that cranial morphology can delineate people into distinct races is steeped in the racial roots of American anthropology. Early anthropological studies, such as those of Samuel Morton in 1839, focused on the idea that all the people of the world can be classified into one of several distinct races based on measurements of the physical characteristics of their skulls (Thomas 2000: 38 - 41). However, in 1911 anthropologist Franz Boas came to the conclusion that skull morphology was determined mostly by the environment and little on hereditary factors by studying immigrants arriving in the United States (Marks 1996: 127).

Boas’ findings were largely forgotten and most physical anthropologists have clung to the idea of racial determinism (Thomas 2000: 105). This view is still held by many anthropologists today despite mounting evidence to the contrary.
(Brown & Armelagos 2001: 34). Recent studies have not only confirmed Boas’ findings regarding the source of variation in skull morphology, but have also shown that approximately ninety percent of the total variation in the human species occurs within each race rather than between them (Relethford 1994: 60). These findings are supported by analyses of blood groups and DNA that have shown that the same intra-racial variation patterns also occur at a genetic level (Brown & Armelagos 2001: 35).

With environmental factors being the prime determiner of skull morphology, it is easy to see why the earliest skulls discovered in the United States do not all look alike. As Fig. 4.5 shows, early Holocene human remains have been found all over United States. The United States is not a uniform environmental zone. Many different climates and eco-systems are found today, just as they were thousands of years ago. Therefore, people living in what is now Florida would look different from those living in Nevada, who would in turn look different from Kennewick Man living hundreds of kilometres north in Washington. It should therefore also not be surprising that these people do not resemble present-day Native Americans due to the extensive climatic changes that have occurred in the 9,000 years since they were alive. The climate changes would not only dramatically change the local environments where people lived but would also affect their subsistence patterns and diet as well, also impacting on skeletal morphology (Thomas 2000: 116). Nine thousand years of the environment affecting cranial characteristics would result in the people of early Holocene North America looking very different from not only present-day Native Americans, but also every present-day “race” as well. The fact of the matter is that the racial categories that exist for people living today cannot be projected into the distant past (Thomas 2000: 116).
Fig 4.5 – Distribution of early Holocene finds of human remains.
The lack of actual biological races today as well as in the past make any supposed links made by the media between Kennewick Man and Europeans inappropriate and misleading. The people living in Europe 9,000 years ago would not have looked exactly like the people in Europe today, just as the people living in North America at the same time would not have looked exactly like present-day Native Americans. While the idea that race is not a biological concept is known in academic circles, the general public, including the media, are not aware of this.

Kennewick Man presented anthropologists with an excellent opportunity to educate the public about the fallacy of biological races. Unfortunately this was a missed opportunity. In the media there was no rebuttal to the claims of Kennewick Man’s supposed European heritage. The plaintiff scientists would have welcomed the controversy created by the media as it gave the public the impression that scientific analysis was needed. The media coverage also served to distance Kennewick Man from the Native American tribes claiming his remains for repatriation.

It was always going to be hard for the tribes to prove their cultural affiliation to Kennewick Man. As his remains were washed out of a riverbank, it was not possible to determine the burial practices he was interred with, or indeed if it was an intentional burial at all. In addition to this, no burial goods were found with his remains that could provide clues to his cultural “identity”. With these conditions it would be hard to determine cultural affiliation of human remains of any age. The problem is greatly compounded when remains are of great antiquity (Zimmerman & Clinton 1999: 218).

Under section 7.a.4 of NAGPRA (25 USC 3005.a.4), Native American tribes can use biological, archaeological, anthropological, geographical, linguistic, kinship, historical, folkloric or oral traditional evidence to show cultural affiliation
with human remains. Of these forms of evidence, seven are the product of western science while only two, oral histories and folklore, can be considered to be tribal information. This means that science plays a very predominant role when it comes to determining cultural affiliation. The general lack of acceptance of oral traditions as a legitimate form of evidence in western societies only compounds this problem. Most academically trained scholars are sceptical about the reliability of information transmitted verbally over long periods of time, believing that oral histories cannot withstand repetition over many generations without inaccuracies creeping in (Echo-Hawk 2000: 268). There is also a misconception that oral histories only contain information of a religious nature and are therefore often dismissed as pure myth (Deloria 1997: 36). While there are a small number of archaeologists who integrate oral histories with archaeological interpretations (e.g. Bahr et al. 1994, Begay & Roberts 1996, Echo-Hawk 1997, Dongoske et al. 1997), they are very much in the minority. Native Americans are therefore very reliant on western ways of knowing when trying to prove that something belongs to their culture under NAGPRA, putting tribes at a severe disadvantage. This is especially true in cases such as Kennewick Man where tribes are against all scientific testing of human remains.
Chapter 5

Lady Mungo

5.1 Background

Lake Mungo is part of the Willandra Lakes system, located in western New South Wales (See Fig 5.1). During the Pleistocene, the Willandra Lakes were an extensive system of freshwater lakes on a tributary of the Lachlan River, but climatic changes around 15,000 years ago dried out the lakes (Flood 2001: 40). The resulting dry lake beds and systems of sand dunes have been the subject of scientific research for decades. In 1968, geomorphologist Jim Bowler came across bone fragments eroding out of the southern end of the lunette at Lake Mungo (Thorne 1971: 85). Bowler initially thought the bones were the remains of an ancient meal but a group of archaeologists from the Australian National University (ANU) in Canberra examined the site in early 1969 and recognised the bones as human (Flood 2001: 42). A block of the surrounding calcrete containing the bones was excavated and removed to ANU.

Once back in Canberra, physical anthropologist Alan Thorne begun the task of reconstructing the skeleton of the individual. Although only 25% of the skeleton was present, Thorne was able to deduce that Mungo I (as the skeleton was formally labelled) was female, approximately 148 centimetres tall and had been cremated after death. The cremation fire was not intense enough to completely incinerate all of the bones (Bowler et al. 1970: 57). After cremation, the bones were thoroughly smashed before being deposited in a shallow pit approximately 20 centimetres deep (Mulvaney & Kamminga 1999: 161). Her skull was the most fragmented part of the skeleton, having been broken into 175 pieces (Bowler et al. 1970: 56). This
Fig 5.1 – Map of the Willandra Lakes region (Johnston & Clark 1998: 106).
Fig 5.2 – Aerial photograph of Lake Mungo, showing the crescent shaped lunette system (NSW National Parks & Wildlife Service 2004b).
made reconstructing the skull very difficult for Thorne, especially as the inner and outer surfaces of many of the cranial bones had split apart with the intermedial diploe tissue having eroded away (Thorne 1971: 85). Thorne managed to piece together most of the occipital bone as well as parts of the frontal and parietal bones. However, all of the facial bones were too fragmented to be reconstructed (Bowler et al. 1970: 56). Thorne described Mungo I as “extremely gracile” (Thorne 1971: 86). Radiocarbon dating of the skeleton returned a date of 24,170 ± 1,270 BP, making Lady Mungo (as she came to be known) the oldest set of human remains discovered in Australia (Bowler et al. 1972: 50).

In 1974, another burial was discovered 500 metres to the east of Lady Mungo. This burial, formally labelled Mungo III (Mungo II consisted of very fragmentary human remains found near Lady Mungo’s burial), was the complete skeleton of a male, approximately 50 years of age at the time of his death (Flood 2001: 44 – 45). Mungo Man, as he became known, was buried in a fully extended position with his hands clasped together. His bones, as well as the surrounding sand, were stained pink from ochre (Mulvaney & Kamminga 1999: 162). Initially dated to around 35,000 BP, this date was revised in 1998 to at least 42,000 BP (Bowler 1998: 149). Recent redating with Optically Stimulated Luminescence, Electron Spin Resonance and Uranium series methods pushed the age back to approximately 60,000 BP (Thorne et al. 1999: 609). However, this new age is still highly contentious (Gillespie & Roberts 2000: 727, Bowler & Magee 2000: 719).

Since these two high profile discoveries, over 130 burials have been found in the Willandra Lakes region, although the majority of these are only fragmentary (Webb 1989: 1). The burials, along with the abundance of archaeological sites, were a key factor in the Willandra Lakes being placed on the World Heritage list in 1981 (World Heritage Australia 1996: 4). It was at this time that the traditional
owners of the Willandra Lakes placed a twenty year moratorium on excavations in the Willandra region, angered by continued archaeological excavations of their ancestors without permission (Smith 2003: 10).

In 1990, the Murray Black skeletal collection (named after the collector, Mr Murray Black) was returned to Indigenous communities and reburied. This extensive collection consisted of the remains of over 1,800 Indigenous people from the Murray-Darling basin, dating from 14,000 BP to post-colonisation times (Mulvaney 1989: 66–68). In August of the same year, the Kow Swamp skeletal collection was handed back to the Echuca Indigenous Community in Victoria for reburial. This collection, comprising over forty burials dating from between 13,000 and 9,500 BP, was initially excavated in 1968 and was held since then by the Museum of Victoria. Some prominent archaeologists, such as John Mulvaney and Alan Thorne have been opposed to the repatriation of the Kow Swamp collection as they perceived no discernible links between the individuals in the collection and the present day Echuca community (Mulvaney 1991: 16).

Soon after these high profile collections were returned, members of the Indigenous communities from the Willandra Lakes began asking why Lady Mungo was not being returned to them like the Kow Swamp collection was to the Echuca community. In 1991, Sharon Sullivan, the director of the Australian Heritage Commission, set up a meeting between members of the Willandra communities, commission staff and anthropologist Alan Thorne. After listening to the concerns of the Willandra people, Thorne decided in ten minutes to offer to return Lady Mungo’s remains back to the Indigenous communities (Thorne, in Smith & Burke 2003: 186). In March 1992, after a private ceremony, Thorne handed the remains of Lady Mungo back to members of the Indigenous community on the spot where she was originally buried (Smith & Burke 2003: 186). However, Lady Mungo was
not reburied. Instead her remains are held inside a specially decorated on-site safe that requires two keys to open. One key is held by the Indigenous community, the other by the scientific community (Sullivan 1999). The remains cannot be removed without the consent of both parties. This constitutes a powerful symbol of archaeologists and Indigenous people sharing stewardship of the past.

5.2 Significance to Scientists

The Willandra Lakes contain one of the longest records of human habitation in Australia. After over thirty years since her discovery, Lady Mungo is still one of the oldest dated skeletons discovered in Australia and is the oldest example of cremation in the world (Johnston & Clark 1998: 107). Her discovery gave archaeologists an insight into the people who lived at the Willandra Lakes during the Pleistocene, especially in regards to their mortuary practices and their beliefs regarding treatment of the dead.

The biological origins of Indigenous Australians has been debated since the earliest European contact (Brown 1987: 41), a central issue of which is the variation of physical characteristics observed in both recent and ancient Australian populations. Along with the burial of Mungo Man, Lady Mungo has been instrumental in the development of theories by archaeologists trying to explain not only the migration patterns of the first people to reach mainland Australia but also the evolutionary patterns of the human species. Whether Homo sapiens evolved in Africa and migrated out or if our species evolved locally in multiple locations is still highly debated by scientists. Ancient burials such as those at Lake Mungo have provided scientists with valuable data as to the origin of our species (Nolch 2001: 29).
**Fig 5.3 – Map and table of Pleistocene and early Holocene human remains found in Australia.**

<table>
<thead>
<tr>
<th>Map No.</th>
<th>LOCALITY</th>
<th>N REMAINS</th>
<th>AGE (RCYBP)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Coobool Creek</td>
<td>126 Crania, tooth fragments</td>
<td>14,300 ± 1000 (Flood 2001: 68)</td>
</tr>
<tr>
<td>2</td>
<td>Kow Swamp</td>
<td>40 Skeletons</td>
<td>13,000 - 9,500 (Flood 2001: 61)</td>
</tr>
<tr>
<td>3</td>
<td>Cohuna</td>
<td>1 Cranium</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Keilor</td>
<td>1 Cranium, bone fragments</td>
<td>12,000 ± 100 (Brown 1987: 43)</td>
</tr>
<tr>
<td>5</td>
<td>Willandra Lakes</td>
<td>135 Skeletons, crania, bone fragments, tooth fragments</td>
<td>42,000 - 15,000 (Webb 1989: 1)</td>
</tr>
<tr>
<td>6</td>
<td>Talgai</td>
<td>1 Cranium</td>
<td>11,650 ± 100 (Brown 1987: 44)</td>
</tr>
<tr>
<td>7</td>
<td>Lake Nitchie</td>
<td>1 Skeleton</td>
<td>6,820 ± 200 (Flood 2001: 62)</td>
</tr>
<tr>
<td>8</td>
<td>Cossack</td>
<td>1 Cranium</td>
<td>6,500 (Flood 2001: 62)</td>
</tr>
<tr>
<td>9</td>
<td>Lake Tandou</td>
<td>1 Skull</td>
<td>15,210 ± 160 (Flood 2001: 67)</td>
</tr>
<tr>
<td>10</td>
<td>King Island</td>
<td>1 Skeleton</td>
<td>14,270 ± 640 (Flood 2001: 67)</td>
</tr>
</tbody>
</table>
5.3 Significance to Indigenous Australians

The traditional owners of the Willandra Lakes consist of three peoples: the Barkindji, Mutthi Mutthi, and the Ngyiampaa (See Fig. 5.4). They are accepted as having inhabited the region for more than 40,000 years (World Heritage Australia 1996: Appendix 1.1: 2). Lake Mungo is the most sacred site for the Mutthi Mutthi. This is one of their important Dreaming places and a meeting place for the tribes of the Willandra region. It is the place where they walk with the spirits of their ancestors (NSW National Parks and Wildlife Service 2004: 15). To the Willandra peoples, Lady Mungo is one of those ancestors.

Despite her remains being taken without permission, the Mutthi Mutthi recognise that her excavation and removal helped to reveal the length of Indigenous Australians’ history and educate European Australians about the richness of Indigenous culture (Smith 2003: 10). They believe that Lady Mungo came up to help them with their struggle for recognition. This view is significant as it incorporates Lady Mungo into a living heritage, giving her a role in the present and not just as part of a ‘lost’ past.

5.4 Legislation

Indigenous Australians only legally became citizens of Australia in 1967 (Powell 1996). It is therefore not surprising that when Lady Mungo was discovered in 1968, there was no legislation designed to protect Indigenous cultural heritage, let alone for repatriation. While Australia still has no specific repatriation legislation, it does have laws designed to protect Indigenous cultural heritage, including human remains. Each State and Territory of Australia has its own legislation designed to protect Indigenous Heritage, each with varying degrees of
Fig 5.4 – Map of the Willandra Lakes showing the administrative boundaries of the three traditional owners (World Heritage Australia 1996: Appendix 7: 1).
success. The Commonwealth government of Australia passed the *Aboriginal and Torres Strait Islander Heritage Protection Act in 1984* to serve as a last resort for when the protection offered by State and Territory legislation fell short (Evatt 1996: 149). The Act was designed only as an interim measure until proposed national land rights legislation was enacted (Janke 1999: 283). The proposed legislation was never introduced, resulting in the 1984 Act never being repealed.

Evatt’s review of the Act in 1996 included many criticisms of the Act and its lack of proper protection of Indigenous cultural heritage. The concerns voiced by Indigenous people included a lack of clear procedures to follow, no obligation for the presiding Minister to make a declaration of protection and that the Act does not cover all aspects of cultural heritage (e.g. intellectual property) (Evatt 1996: 155–158). The Act also does not take into account emerging Indigenous issues such as native title and the push for self-determination (Evatt 1996: 158). Janke’s report of 1999 voices similar concerns, especially that of the lack of any acknowledgment of ownership of Indigenous cultural heritage by Indigenous Australians in current heritage legislation (Janke 1999: 79).

The stated purpose of the Act is “the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition” (Part I Section 4). Part 1 Section 3.2.b states that objects are considered to be injured or desecrated if they are “used or treated in a manner inconsistent with Aboriginal tradition”. As archaeological excavation and study of human remains is most definitely inconsistent with Indigenous tradition, it could be argued to constitute desecration under the Act.

While not designed with repatriation in mind, Division 3 of the Act dictates that when any Indigenous human remains discovered, the presiding Minister shall
either “return the remains to an Aboriginal or Aboriginals entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition” (Section 21.1.a), or “otherwise deal with the remains in accordance with any reasonable directions of an Aboriginal or Aboriginals referred to in paragraph (a) (Section 21.1.b). If no Indigenous people are identified as being entitled to the remains, then the remains should be transferred to a “prescribed authority for safekeeping” (Section 21.1.c). The Act does not detail who gets to determine who are the Indigenous people entitled to remains or even how they are to be deemed entitled. Under this section, any Indigenous community who believes that any institution holds remains that are ancestral to them, can request the presiding Minister to negotiate for the return of those remains (Janke 1999: 284). However, there are no procedures to follow or any obligation for the minister to do so (Evatt 1996: 155-156). As it stands, there is no effective federal legal framework present for Indigenous Australians to effect the return of ancestral human remains.

Indigenous cultural heritage in New South Wales is protected by the National Parks and Wildlife Act of 1974. The purpose of this Act, amongst other things, is to protect “places, objects and features of significance to Aboriginal people” (Section 2A), including human remains. However, the Act only protects Indigenous cultural heritage after the director-general of the National Parks Service proclaims the relevant area protected. Section 85 states that the director-general is responsible “for the proper care, preservation and protection of any Aboriginal object or Aboriginal place on any land reserved under this Act”. The act does, however make it an offence to disturb or excavate any object without permission or to damage or destroy any objects covered by the Act (Janke 1999: 290). Under section 85A of the Act, the director-general has the power to return any Indigenous object (including human remains) in possession of the Crown to “an Aboriginal
owner or Aboriginal owners entitled to, and willing to accept possession, custody or control of the Aboriginal objects in accordance with Aboriginal tradition”. However, like the Commonwealth heritage law, there are no procedures to follow nor any obligation for the director-general to return anything in possession of the Crown.

As Lake Mungo is within the Lake Mungo National Park, all discoveries of Indigenous cultural heritage made within the park’s borders after it’s declaration in 1979 are protected under the Act.

5.5 Codes of Ethics

*Australian Archaeological Association*

The Australian Archaeological Association (AAA) Code of Ethics was adopted by the association in 1992 and largely mirrors the code of ethics of the World Archaeological Congress. The code is divided into Principles to Abide by and Rules to Adhere To that outline the obligations members of AAA have to Indigenous peoples.

Most importantly, the code acknowledges that “Indigenous cultural heritage rightfully belongs to the Indigenous descendants of that heritage” (Principle 5). However, how descendents of Indigenous heritage are to be determined is not specified. The code also emphasizes the importance of Indigenous cultural heritage to Indigenous people. Principle 3 acknowledges the “special importance of Indigenous human remains, and sites containing and/or associated with such remains to the Indigenous people”.

The code also places great importance on the Indigenous control of their own cultural heritage. Principle 6 acknowledges and recognises Indigenous methods of interpreting, managing and protecting their cultural heritage. Rule 2 of
the Rules to Adhere To states that members shall negotiate and obtain the informed consent of Indigenous peoples whose cultural heritage they are studying. Under Rule 5, members agree to never “interfere with and/or remove human remains of Indigenous peoples without the written consent of representatives authorised by the Indigenous people whose cultural heritage is the object of investigation”. Rule 7 states that members should “endeavour to involve Indigenous peoples at all stages of their projects”. This does not mean that members have to involve Indigenous people, but that they have to at least attempt to.

Since under the 1992 AAA code of ethics ancestral human remains rightfully belong to Indigenous people, Lady Mungo rightfully belongs to the Indigenous people of the Willandra Lakes. The code also supports their wish to have her remains repatriated to them as an Indigenous method of managing and protecting Indigenous cultural heritage.

_Australian Association of Consulting Archaeologists Inc._

Unlike AAA, the code of ethics adopted by the Australian Association of Consulting Archaeologists Inc. (AACAI) is not specifically designed with Indigenous concerns in mind. Only section 3.1 can be said to apply to archaeologists working with Indigenous people, stating that members shall “be sensitive to, and respect the legitimate concerns of groups whose cultural background is the subject of investigations”. This statement raises the question of what consists a “legitimate” concern and who judges what is and is not legitimate. AACAI does, however, have a policy document for members consulting with Indigenous communities. The first clause of this document “recognises that Aboriginal sites are of significance to Aboriginal people as part of their heritage and as part of their continuing culture and identity”, while the second clause
acknowledges that Indigenous communities “should be involved decision-making concerning Aboriginal sites”. It also states that Indigenous opinions and management recommendations should be considered alongside those of the archaeologist. The policy document, however, does not define what constitutes an Indigenous site and if artefacts and human remains are covered by this policy. As it is just a policy document and not part of a formal code of ethics, it can be considered to be less binding than a formal code (Smith & Burke 2003: 189).

5.6 Outcomes

The special safe where Lady Mungo now resides represents a true compromise. The wishes of the Indigenous community to have her returned to them as well as those of the archaeologists wanting her available for future research are both met. Because both parties have one of the two keys required to open the safe, neither side has lost complete control of her remains and both sides have a say in what happens to the remains in the future. This compromise has led to some very positive outcomes for both the Indigenous peoples of the Willandra region and the archaeological community.

Because of Lady Mungo’s return, the Indigenous community is now open to research on the skeletal collection from the Willandra Lakes. Scientists were allowed to redate Mungo Man’s skeleton using new techniques after gaining permission from the Willandra peoples (Finkel 1998: 1342). DNA testing of Mungo Man’s bones yielded the oldest mitochondrial DNA ever extracted, the results of which have had global implications for the study of human evolution (Nolch 2001: 29). The continuing study of the Willandra skeletal collection with Indigenous consent will yield valuable information about past life at the Willandra Lakes for both Indigenous people and archaeologists alike.
Since Lady Mungo’s return, a relationship of mutual trust between the Indigenous peoples and scientists has been gradually built, leading to the recent lifting of the moratorium on excavations at the Willandra Lakes. In 2003 when Indigenous elders inspecting an area of the Willandra lakes discovered the remains of two men eroding out of a sand dune, the elders gave permission for scientists to excavate and study them (Smith 2003: 10). The remains of the two men, estimated to be approximately 18,000 years old, are significant not only because one of them had been buried in a fashion not seen before, but also because scientists were allowed to study them. The positive relationship developing between archaeologists and the Willandra Indigenous peoples is one of the most valuable outcomes of the repatriation of Lady Mungo.

5.7 Discussion

Australian Archaeology is a relatively young discipline, only having been formally established in the 1960s (Flood 2001: 9). Consequently, Lady Mungo and the archaeological finds at the Willandra Lakes played a very prominent role in the shaping of Australian archaeology. Along with the finds at Kow Swamp, the Willandra Lakes discoveries were instrumental in the development of archaeological theories to explain the biological origins of Indigenous Australians.

The Kow Swamp skeletal collection was excavated between 1968 and 1972. The forty individuals found were remarkable because they exhibited extreme robusticity of the skull. Their faces were long and wide with projecting jaws and flat, receding foreheads. The cranial bone was very thick and exhibited very prominent eyebrow ridges (Thorne 1971: 87-88). This contrasted with the “extremely gracile” characteristics of Lady Mungo and Mungo Man. The different morphological variations seen in ancient Australian skeletons were classified into
two categories: robust and gracile. All other human skeletal finds (where possible) were placed into these two categories (Donlon 1994: 75). Alan Thorne advocated that the differences between the gracile and robust skeletons represented the migration of two physically distinct populations into Australia, with the robust group representing the earlier, more ‘archaic’ population (Thorne 1971: 88). Thorne maintains that the robust Australian skeletons are direct descendents of Javanese *Homo erectus* due to similarities in their morphologies (Thorne & Walpoff 1992: 30). He also maintains that the ancestry of the gracile Australian skeletons lies with *Homo sapiens* from southern China and Borneo for the same reasons (Flood 2001: 77). However, there are some problems with this line of reasoning.

The idea that the Kow Swamp people represent an older, more “archaic” form is ostensibly negated by the fact that Kow Swamp is much younger than the gracile people living at Lake Mungo. Thorne countered this fact by claiming that Kow Swamp represented a “relic population” (Lahn 1996: 26). The discovery of the WL-50 cranium at the Willandra Lakes in 1980 seemed to support Thorne’s argument. Eventually dating to 29,000 ± 5,000 BP (Owen 2002: 70), this cranium exhibited “much more robust and archaic” features than any previously found (Thorne, in Flood 2001: 69). However, after examining the WL-50 cranium, Webb concluded that the cause of the increased thickness of the cranial vault was not morphological but pathological in nature (Webb 1995: 65).

It is actually very difficult to split the skeletal evidence into either the robust or gracile categories (Owen 2002: 69). This is because grouping all skeletons into one of two categories essentialises the data, overlooking the morphological gradations that exist in all populations. No room for the grey areas.
Assuming that robust features are always “archaic” and gracile features are “modern” makes human evolution a purely one-way street. This view puts human evolution above that of all other species, in that it eliminates natural selection and environmental adaptation as evolutionary triggers. The effects of environmental change on human morphology has already been shown (Thomas 2000: 116). After humans first reached Australia approximately 60,000 years ago, they would have experienced slowly deteriorating climatic conditions, culminating in the last glacial maximum. At this time, western New South Wales would have resembled inner Mongolia or Tierra del Fuego (Bullbeck, in Flood 2001: 78). The harsh environment would have resulted in tougher, fibrous plants being available to eat and this, as well as abrasive dust and grit in the air sticking to food, would result in larger bone and muscle structure needed to process such foods (Mulvaney & Kamminga 1999: 165).

The main problem when trying to model early human migrations into Australia from skeletal evidence is that there is only a very small sample size of individual skeletons available for study. This means that any comparison made between individual skeletons (i.e. comparative robusticity) is only applicable to those individual skeletons: the variations seen in individuals cannot be applied to whole populations (Pardoe 1991: 83). The sample size of Pleistocene skeletons from Australia is not sufficiently large enough to say anything meaningful about diversity amongst early Australian populations.

Recently, scientists managed to successfully extract mitochondrial DNA (mtDNA) from several sets of ancient Australian human remains, including Mungo Man and some remains from Kow Swamp. While much work still needs to be done refining the techniques of extracting mtDNA from such ancient remains, comparison of these mtDNA sequences has shown that there is no genetic
difference between the robust and gracile morphologies (Adcock et al. 2001: 540). This means that despite looking very different morphologically, the people living at Kow Swamp shared the same origins as the people at Lake Mungo.

The mounting evidence against the dual migration model has left the theory with few supporters (Flood 2001: 8). However, the prominent roles played by the Lake Mungo and Kow Swamp burials in the development of Australian archaeology cannot be underestimated. As Horton put it, “after Mungo and Kow Swamp, there could be no more talk of unchanging people in an unchanging land – both land and people had changed radically over an inconceivably long time. Australian archaeology had also changed forever” (Horton 1991: 301). It is no wonder that when calls for the return of the Kow Swamp collection to the Echuca community were made that protests from several prominent archaeologists were voiced. These archaeologists were loathe to lose such a scientifically important skeletal collection to an Indigenous community who “cannot be presumed to have shared the same cultural values or religious concepts of this generation” (Mulvaney 1991: 16). This is in spite of other archaeologists arguing that there are strong indications of cultural continuity in the Murray-Darling region near Kow Swamp (Bowdler 1992: 104). For scientists, the demonstration of ancestry requires there to be evidence of direct lineal descent. DNA evidence is the most definite way of showing this. However, most Indigenous Australians have a different view: any human remains within their country are considered to be their ancestors (Cubillo, in Jones 2002: 39). While, this idea is often hard for scientists to accept, the belief systems of the people scientists study must be respected. It was also argued that the Kow Swamp remains belong to a universal cultural heritage of all humankind, placing the remains above the concerns of any one group of people (Mulvaney 1991: 18-19). Bowdler argues that by “defining something as belonging to that
transcendent category is a means of excluding anyone who might have a particular interest in it” (Bowdler 1988: 521). Langford argues that the idea of a global cultural heritage implies that the human race is unified, a view that is nice in theory, but one that hardly relates to reality (Langford 1983: 4).

Not only did the discoveries at Lake Mungo and Kow Swamp help to shape Australian archaeology, their repatriations are continuing to shape not only archaeology, but also the psyche of the archaeologists who practice it. The return of the Kow Swamp burials to the Echuca community made archaeologists realise that they have to actively consult with Indigenous communities in regards to human remains (Bowdler 1992: 104). The repatriation of Lady Mungo made archaeologists realise that active consultation and repatriation do not necessarily have to mean loss of research potential.

The notion that repatriation automatically means a curtailment of research is the result of the belief that many archaeologists hold that Indigenous people have no interest in archaeology and do not “fully appreciate the future implications of reburial” (Mulvaney 1991: 17). This is often not the case. There are many Indigenous communities who support archaeological research and see it as a means of gaining knowledge about their past (Webb 1987: 295). It is not archaeological research that Indigenous people are opposed to. It is archaeological research that is carried out without active consultation or their permission that they resent. When Pardoe was invited to Denilquin, NSW by the local Indigenous community to take part in the reburial of part of the Murray Black collection, he took with him a copy of Brown’s research on the collection. The Indigenous people found the results of the scientific research fascinating and asked many questions (Pardoe 1991: 83). Pardoe states that since accepting Indigenous control of ancestral remains and
always seeking permission prior to undertaking research, the number of burials he has been allowed to study has actually increased (Pardoe 1992: 138).

The joint research now being undertaken at the Willandra Lakes is a positive example of Indigenous people and archaeologists working together for mutual benefit. Now that the Willandra people have control of their own heritage, they are now more than willing to allow scientists to carry out scientific research into their past. As Pardoe states,

“the opportunities for field-based (or for that matter, museum-based) research on human remains will not be lost by talking with Aboriginal people and seeking permission; it will be lost by intransigence over the complete acceptance of Aboriginal ownership and control” (Pardoe 1991: 83).
Chapter 6

Results and Conclusions

6.1 Introduction

The repatriation debate is often portrayed as a struggle between Western science and the religious beliefs of Indigenous peoples (Meighan 1992: 707). However, as the examination of the repatriation cases of Kennewick Man and Lady Mungo has shown, the issues surrounding repatriation are much more complex than this. The factors that have affected the outcomes of these two cases are just as complex. These factors resulted in Kennewick Man being fought over in the courts for over eight years, and Lady Mungo being repatriated within a year in a spirit of compromise. A comparison of these two cases reveals the range of factors that had the greatest impacts on each case.

6.2 Comparison

There are obvious similarities between the cases of Kennewick Man and Lady Mungo. Both cases involve ancient human remains that are considered by present-day Indigenous peoples to be the remains of an ancestor. Both are also considered to be very important to scientists in each country and around the globe as ‘windows’ into the distant past. They are also both high-profile cases in both the professional and public arenas. Regardless of these similarities, the cases had vastly different outcomes.

It could be argued that the timeframe of the cases affected the outcomes. Kennewick Man had only been discovered six weeks before the Corp of Engineers announced their plans to repatriate his remains. In this short time, only very
preliminary scientific analysis had taken place. In contrast, it was twenty-four years before Lady Mungo was returned. This allowed time for a thorough analysis and re-analysis of her remains to take place. Therefore because more scientific analysis of Lady Mungo had already taken place, scientists may have been more willing to part with her remains. However, as some scholars maintain, scientific analysis is never complete due to the constant development of new and increasingly refined techniques (Gough 1996: 134, Meighan 1993: 15, Mulvaney 1991: 17). This counteracts the argument for the longer timeframe surrounding the repatriation of Lady Mungo being a factor in the outcome of her case.

The impact of media involvement cannot be discounted as affecting the outcome of Kennewick Man’s case. The media were, for the most part, more interested in propagating the idea that Kennewick Man was European than accurately relaying the facts because this made a more profitable story. Kennewick Man would have garnered little media attention if only his antiquity was mentioned (Zimmerman & Clinton 1999: 215). However, because his racial affinity was called into question, the media was able to focus on this aspect, sensationalising the case completely out of proportion.

Questioning Kennewick Man’s racial affinity only racialised the issues at hand, which only served to aggravate the situation. Chatters’ use of the term “caucasoid” (and its subsequent misinterpretation) set up an opposition from the very beginning of the case, diminishing any chance that may have existed for the parties to come to an amicable agreement. This is because racial issues are very sensitive topics and people often take them personally. While race may not exist biologically (See Goodman 1998: 52), racism does exist.

In any repatriation case, the individuals involved, along with their viewpoints, obviously have a huge impact on how the situation will be resolved.
Both parties involved in Lady Mungo’s case were willing to compromise, which allowed them a greater chance of coming to an amicable agreement that both could live with. The compromise has had the added bonus of allowing further scientific research to be carried out at the Willandra Lakes. In contrast, neither party involved in the Kennewick Man lawsuit seemed willing to give any ground, and a compromise would have been much harder to come to. With federal legislation being debated, a compromise could have set precedents for similar cases in the future to either side’s disadvantage. From a purely legal viewpoint, there was much more at stake in the Kennewick Man lawsuit.

Along with the willingness to compromise, one of the greatest factors that affected the return of Lady Mungo was the level of meaningful consultation between Indigenous people and archaeologists. Alan Thorne met face-to-face with Indigenous people from the Willandra Lakes and listened to their concerns before deciding to return Lady Mungo’s remains. In the Kennewick Man case, there was very little communication between the scientists and the tribes, meaningful or otherwise. Douglas Owsley claims he wrote the Umatilla a letter to request permission to examine the skeleton before the commencement of the lawsuit but got no response. This very impersonal approach, which was not followed up by a phone call or a personal visit to the tribe, would be very unlikely to produce a response at all (Zimmerman & Clinton 1999: 225).

By writing the letter, however, Owsley was inadvertently admitting that the Umatilla exercise moral ownership, or at the very least some degree of control, over Kennewick Man’s remains. Having been denied permission to study the remains, Owsley and the other plaintiffs subsequently argued that Kennewick Man was not Native American as a way of gaining access to his remains. This course of action suggests that Owsley’s efforts in contacting the tribes were token at best.
Due to the nature of the case, legislation had a much greater impact on Kennewick Man’s case than Lady Mungo’s. Examination of relevant legislation from both the United States and Australia has shown that Native Americans exercise much greater legislative control over their cultural heritage than Indigenous Australians. Under NAGPRA, Native Americans are legally recognised as the rightful owners of their heritage and are given express control over the disposition of ancestral human remains and sacred objects. NAGPRA covers not only new discoveries such as Kennewick Man but also requires museums and other institutions to repatriate culturally affiliated items from their collections. Clear procedures are in place for both institutions and Native American tribes to follow to effect repatriation. Under Australian cultural heritage legislation, however, Indigenous Australians are not recognised as the rightful owners of their heritage. While Australian legislation does allow for repatriation to take place, there is no obligation to do so. There are no clear procedures to follow and the onus is on Indigenous Australians to approach museums to find out what their collections contain. The greater legislative recognition of Native American cultural heritage is a reflection of the acknowledgment of Native American sovereignty. Self-determination of Indigenous Australians is currently not recognised by the Australian government.

Lack of repatriation legislation in Australia did not prevent the return of Lady Mungo. While there was no legislation in place, there was a greater professional and social acceptance of Indigenous ownership and control of Indigenous heritage, as is reflected in Australian archaeological codes of ethics at the time. The 1992 code of ethics of the Australian Archaeological Association acknowledges Indigenous ownership of Indigenous cultural heritage. Both the AAA code and the Australian Association of Consulting Archaeologists Inc.
Indigenous policy document acknowledge the importance of Indigenous involvement in managing and protecting their cultural heritage. In the United States, on the other hand, no archaeological codes of ethics acknowledge Native American ownership of their cultural heritage. The level of Native American involvement in cultural heritage management matters required by the US codes is ambiguous and largely left to the discretion of the researcher. In fact, Native Americans are barely even mentioned in any archaeological codes of ethics from the United States. This is not to suggest that all archaeologists and anthropologists in the US are against repatriation, or that all archaeologists in Australia are in favour of it. However, codes of ethics are manifestations of the general trends and attitudes of the social milieu in which they are formed (Smith & Burke 2003: 193). As the case of Lady Mungo has demonstrated, accepting Indigenous control of Indigenous heritage does not automatically mean the end of research.

6.3 Discussion

The comparison of the cases of Kennewick Man and Lady Mungo has highlighted the numerous factors that have affected the outcome of each case. Each of these factors impacted on each case to varying degrees. By far, however, the factor that had the greatest impact on the two cases is the level of acceptance of Indigenous control of Indigenous cultural heritage. In both the United States and Australia there is a level of acceptance of Indigenous control. In Australia it is generally accepted socially and professionally, whereas in the United States, it is mandated by law. This is a significant difference. Doing something because you want to or because you feel like it is the right thing to do is very different from doing something because the law tells you to do it. Accepting Indigenous control puts the archaeologist in a position closer to the Indigenous perspective. Because
the distance between the attitudes of both sides is lessened, the chance of disagreement is decreased. Accepting Indigenous control also allows for positive relationships built on mutual respect to develop between archaeologists and Indigenous people. Therefore, it can be argued that the Australian situation is less likely to result in confrontations such as Kennewick Man.

It was the recognition of the Willandra communities’ legitimate jurisdiction over Lady Mungo’s remains that led to her successful repatriation. The active and meaningful communication between archaeologists and Indigenous people that stemmed from this recognition allowed for a compromise to be reached that both parties could accept. In turn, this has strengthened the relationship that developed between the two parties, which has resulted in more research being allowed to take place at the Willandra Lakes.

By contrast, the scientists who sued to gain access to Kennewick Man did not accept any notion that the five Native American tribes had any jurisdiction over Kennewick Man’s remains. The tribes contended that because he was found in their ancestral lands, he is one of their ancestors and therefore they exercise control over his remains. By rejecting any notion that the tribes have any links with Kennewick Man, or that Kennewick Man was even Native American at all, the scientists were also rejecting the validity of the oral histories of the tribes, as well as their religious and spiritual customs. Views such as this automatically make science the only valid method of finding out about Kennewick Man. This can be characterised as a form of superior paternalism, in which non-Indigenous scholars assume they can know more about a culture they study than the members of that culture themselves, including defining the limits of that culture and its heritage. This sort of attitude is bound to result in confrontation (Pardoe 1991: 120).
Such uncritical faith in the validity of Western science is the result of religion being supplanted by science as the only way of explaining the world around us. Where the bible was once taken as literal truth, now scientific findings are taken as literal truth. As Vine Deloria Jr. states, “nature” has replaced “God” and “science says” has replaced “God’s will” (Deloria Jr. 1992a: 37). Along the way, science has come to reject any notion of spirituality. Imposing this view on other cultures is scientific colonialism. Many archaeologists, such as those involved in the Kennewick Man lawsuit, appear to only believe in an archaeological (i.e. scientific) past, dismissing any religious or spiritual elements. This position holds no room for other interpretations of the past. While science may have forgotten the spiritual side of life, scientists cannot forget the spiritual and religious beliefs of the cultures they study. Archaeologists need to realise that theirs is not the only legitimate view of the past and that their views impact those whose cultures they study. As Zimmerman notes, archaeologists need to learn to share the past with Indigenous peoples (Zimmerman 1997: 105). Continuing to deny Indigenous peoples their legitimate stake in the construction of the past will only result in more clashes such as that over Kennewick Man.

Social attitudes, however, are always in a state of flux. As attitudes change, so too will codes of ethics be changed to reflect new ways of thinking. An example of this process of change is reflected in the new code of ethics of the Australian Archaeological Association, ratified at their 2003 annual general meeting. This new code still recognises the importance of ancestral human remains to Indigenous people (Principle 3.3), and now the code also specifically acknowledges the importance of the repatriation of archaeological materials (Principle 2.4). However, most of the guiding principles contained in the 1992 code are either completely absent or have been watered down in the weight they carry. Most importantly, the
code no longer acknowledges the ownership of Indigenous cultural heritage by Indigenous people. Instead, the new AAA code promotes stewardship of the archaeological record by archaeologists, a move that reflects the Society for American Archaeology code of ethics. Principle 2.1 states that members will “advocate the conservation, curation and preservation of archaeological sites, assemblages, collections and archival records”. Principle 2.2 reinforces this, stating that “members will endeavour to ensure that archaeological sites and materials which they investigate are managed in a manner which conserves the archaeological and cultural heritage values of the sites and materials”. This puts the practice of archaeology in a position of greater importance than the concerns of Indigenous people. Although Principle 3.4 of the 2003 code acknowledges “Indigenous approaches to the interpretation of cultural heritage and to its conservation”, it is a far cry from Principle 6 from the 1992 that stated that members “acknowledge and recognise Indigenous methodologies for interpreting, curating, managing and protecting Indigenous cultural heritage”.

The 2003 AAA code of ethics recognises the importance of the repatriation of Lady Mungo to the Indigenous people of the Willandra Lakes. However, as for actually supporting her repatriation, the new code’s position is far from certain. The 1992 code’s prime concern was Indigenous ownership and control of Indigenous cultural heritage. The 2003 code emphasises archaeological stewardship of the past. Stating that ancestral human remains rightfully belong to descendent Indigenous communities is not the same as only acknowledging a special importance of ancestral remains to Indigenous peoples, especially when archaeological stewardship of the past is promoted alongside such a statement. The lack of acknowledgement of Indigenous ownership and control over Indigenous
cultural heritage can be interpreted to mean that Indigenous Australians have less standing to make claims for repatriation from museums.

This study has shown that having legislation in place is not necessary for effective and amicable repatriation to take place. Sometimes legislation itself can be the source of conflict, as Kennewick Man has shown. However, this should not be taken to mean that governments should not enact repatriation legislation. Clearly, there have been innumerable benefits for museums, archaeologists and Native Americans since NAGPRA was enacted. The main benefit for Native Americans is, quite obviously, the return of their ancestors’ remains and their sacred items. Under NAGPRA, there have been many examples of successful repatriation, including the return of over 2,000 ancestors to Pecos Pueblo in New Mexico from the Peabody Museum (Thomas 2000: 216-218), the return of the Zuni War Gods (see Ferguson et al. 1996), and the return of Ishii’s brain to the Pit River tribe in California (see Scheper-Hughes 2001). NAGPRA has increased communication between archaeologists and Native Americans by making consultation a legal requirement. The fact that museums had to inventory their entire collections and then notify the affected tribes themselves put the onus on the institutions to approach tribes and not the other way around. The inventory process also meant that museums found out exactly what was in their storage facilities. NAGPRA also allocated federal funding for tribal repatriation programs. Most importantly, it also put in place clear procedures for all parties involved to follow.

There have been calls from Indigenous Australians to legislate repatriation from museums and other institutions in Australia (Janke 1999: XXXIII). While Australian museums are developing their own policy documents to handle repatriation requests, such documents are not legally binding. Having federal legislation in place that covers all institutions and standardises procedures is
preferable. Such legislation needs to put in place clear procedures for archaeologists, museums and other institutions and Indigenous people to follow to effect repatriation. Any proposed legislation will need to listen to the concerns and respect the beliefs of the people whose cultural property needs to be returned. It would also need to require museums to approach Indigenous peoples to inform them of what is contained in their collections and to put in place measures to assist Indigenous communities once remains are repatriated to them. This is what is lacking from current Australian legislation. Having such legislation in place would act as a trigger to initiate many cases of repatriation. However, while legislation can act as the trigger, acceptance of Indigenous control of Indigenous heritage by archaeologists and other professionals is what will ensure that future repatriation cases have conclusions more like Lady Mungo than Kennewick Man.

6.4 Further Research

This study should be seen as a basis for a more extensive study that examines repatriation issues in a global context. Repatriation is becoming an important issue in more countries than just Australia and the United States (e.g. Canada (Conaty & Janes 1997), Norway (Schanche 2002), Argentina (Endere 2002), South Africa (Nemaheni 2002, Fish 2002). As this study has shown, the issues surrounding repatriation are numerous and complex in nature. Each country has dealt with the issues in different ways accordingly. Further research comparing repatriation processes in more countries would give a more comprehensive picture as to what affects repatriation outcomes as well as how repatriation issues are handled all over the world.
References


Appendix A

Native American Graves Protection and Repatriation Act (NAGPRA)

An Act

To provide for the protection of Native American graves, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Section 1
This act may be cited as the “Native American Graves Protection and Repatriation Act”

Section 2
For purposes of this Act, the term—

25 U.S.C. 3001, Definitions

<table>
<thead>
<tr>
<th>Section 2</th>
<th>For purposes of this Act, the term—</th>
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<tbody>
<tr>
<td>(1)</td>
<td>“burial site” means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.</td>
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<td>(2)</td>
<td>“cultural affiliation” means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.</td>
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<td>(3)</td>
<td>“cultural items” means human remains and—</td>
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<td>(A)</td>
<td>“associated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.</td>
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<td>(B)</td>
<td>“unassociated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,</td>
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(C) “sacred objects” which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) “cultural patrimony” which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) “Federal agency” means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) “Federal lands” means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.].

(6) “Hui Malama I Na Kupuna O Hawai‘i Nei” means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) “Indian tribe” means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) “museum” means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) “Native American” means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) “Native Hawaiian” means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) “Native Hawaiian organization” means any organization which—
(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai‘i Nei.

(12) “Office of Hawaiian Affairs” means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) “right of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7(c) of this Act [25 U.S.C. 3005(c)], result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to 28 U.S.C. 1491 in which event the “right of possession” shall be as provided under otherwise applicable property law.

The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) “Secretary” means the Secretary of the Interior.

(15) “tribal land” means—

(A) all lands within the exterior boundaries of any Indian reservation;

(B) all dependent Indian communities;

(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920 [42 Stat. 108], and section 4 of Public Law 86-3 [note preceding 48 U.S.C. 491].

Section 3
(a) The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)—

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—

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(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—

(1) [sic] in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) [sic] if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

(b) Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8 of this Act [25 U.S.C. 3006], Native American groups, representatives of museums and the scientific community.

(c) The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if—

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979, as amended, [16 U.S.C. 470cc] which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section; and

(4) proof of consultation or consent under paragraph (2) is shown.
25 U.S.C. 3002(d),
Inadvertent discovery of Native American remains and objects

(d)(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.], the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

25 U.S.C. 3002(e),
Relinquishment

(e) Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

18 U.S.C. 1170,
Illegal trafficking in Native American human remains and cultural items

Section 4
(a) Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section:

Section 1170
“(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.”

“(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act
25 U.S.C. 3003, Inventory for human remains and associated funerary objects

Section 5

(a) Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

(b) The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new item:

“1170. Illegal Trafficking in Native American Human Remains and Cultural Items.”

(b)(1) The inventories and identifications required under subsection (a) of this section shall be—

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after November 16, 1990, [the date of enactment of this Act], and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8 of this Act [25 U.S.C. 3006].

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term “documentation” means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

(c) Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B) of this section. The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and
(d)(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information—

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

(e) For the purposes of this section, the term “inventory” means a simple itemized list that summarizes the information called for by this section.

Section 6

(a) Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

(b)(1) The summary required under subsection (a) of this section shall be—

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

(C) completed by not later than the date that is 3 years after November 16, 1990, [the date of enactment of this Act].

(2) Upon request, Indian Tribes and Native Hawaiian
25 U.S.C. 3005, Repatriation

25 U.S.C. 3005(a), Repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums

organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

Section 7

(a)(1) If, pursuant to section 5 of this Act [25 U.S.C. 3003], the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6 of this Act [25 U.S.C. 3004], the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5 of this Act [25 U.S.C. 3003], or the summary pursuant to section 6 of this Act [25 U.S.C. 3004], or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) of this section and, in the case of unassociated funerary objects, subsection (c) of this section, such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e) of this section, sacred objects and objects of cultural patrimony shall be expeditiously returned where—

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian
organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendents, upon notice, have failed to make a claim for the object under this Act.

25 U.S.C. 3005(b), Scientific study

(b) If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

25 U.S.C. 3005(c), Standard for repatriation

(c) If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

25 U.S.C. 3005(d), Sharing of information by Federal agencies and museums

(d) Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

25 U.S.C. 3005(e), Competing claims

(e) Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

25 U.S.C. 3005(f), Museum obligation

(f) Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

Section 8

(a) Within 120 days after November 16, 1990, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7 of this Act [25 U.S.C. 3003, 3004, and 3005].

25 U.S.C. 3006, Review committee

25 U.S.C. 3006(a), Establishment

25 U.S.C. 3006(b), Committee membership

(b)(1) The Committee established under subsection (a) of this section shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious
leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) of this section shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5 [United States Code].

25 U.S.C. 3006(c), Committee responsibilities

(c) The committee established under subsection a) of this section shall be responsible for—

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 of this Act [25 U.S.C. 3003 and 3004] to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to—

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;

(6) consulting with Indian tribes and Native Hawaiian
organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this Act;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

25 U.S.C. 3006(d), Admissibility of records

(d) Any records and findings made by the review committee pursuant to this Act relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 15 of this Act [25 U.S.C. 3013].

25 U.S.C. 3006(e), Recommendations and report

(e) The committee shall make the recommendations under paragraph (c)(5) of this section in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

25 U.S.C. 3006(f), Committee access

(f) The Secretary shall ensure that the committee established under subsection (a) of this section and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

25 U.S.C. 3006(g), Duties of the Secretary, regulations, and administrative support

(g) The Secretary shall—

(1) establish such rules and regulations for the committee as may be necessary, and

(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

25 U.S.C. 3006(h), Annual report to Congress

(h) The committee established under subsection (a) of this section shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

25 U.S.C. 3006(i), Committee termination

(i) The committee established under subsection (a) of this section shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

25 U.S.C. 3007, Penalty assessment, museums

Section 9

(a) Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

25 U.S.C. 3007(a), Penalty

(b) The amount of a penalty assessed under subsection (a) of this section shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other

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(1) the archaeological, historical, or commercial value of the item involved;

(2) the damages suffered, both economic and noneconomic, by an aggrieved party, and

(3) the number of violations that have occurred.

(c) If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) of this section and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

(d) In hearings held pursuant to subsection (a) of this section, subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

Section 10
(a) The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

(b) The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6 of this Act [25 U.S.C. 3003 and 3004].

Section 11
Nothing in this Act shall be construed to—

(1) limit the authority of any Federal agency or museum to—

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;

(2) delay actions on repatriation requests that are pending on November 16, 1990;

(3) deny or otherwise affect access to any court;

(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) limit the application of any State or Federal law pertaining to theft or stolen property.
Section 12
This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

Section 13
The Secretary shall promulgate regulations to carry out this Act within 12 months of November 16, 1990.

Section 14
There is authorized to be appropriated such sums as may be necessary to carry out this Act.

Section 15
The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.
Appendix B

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

Act No. 79 of 1984 as amended

This compilation was prepared on 13 June 2001
taking into account amendments up to Act No. 15 of 2001

The text of any of those amendments not in force
on that date is appended in the Notes section

Prepared by the Office of Legislative Drafting,
Attorney-General’s Department, Canberra

An Act to preserve and protect places, areas and objects of particular significance to Aboriginals, and for related purposes

Part I—Preliminary

1 Short title [see Note 1]

This Act may be cited as the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

2 Commencement [see Note 1]

This Act shall come into operation on the day on which it receives the Royal Assent.

3 Interpretation

(1) In this Act, unless the contrary intention appears:

Aboriginal means a member of the Aboriginal race of Australia, and includes a descendant of the indigenous inhabitants of the Torres Strait Islands.

Aboriginal remains means the whole or part of the bodily remains of an Aboriginal, but does not include:

(a) a body or the remains of a body:

(i) buried in accordance with the law of a State or Territory; or

(ii) buried in land that is, in accordance with Aboriginal tradition, used or recognized as a burial ground;

(b) an object made from human hair or from any other bodily material that is not readily recognizable as being bodily material; or

(c) a body or the remains of a body dealt with or to be dealt with in accordance with a law of a State or Territory relating to medical treatment or post-mortem examinations.
Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

area includes a site.

Australian waters means:
(a) the territorial sea of Australia and any sea on the landward side of that territorial sea;
(b) the territorial sea of an external Territory and any sea on the landward side of that territorial sea; or
(c) the sea over the continental shelf of Australia.

Federal Court means the Federal Court of Australia.

significant Aboriginal area means:
(a) an area of land in Australia or in or beneath Australian waters;
(b) an area of water in Australia; or
(c) an area of Australian waters;
being an area of particular significance to Aboriginals in accordance with Aboriginal tradition.

significant Aboriginal object means an object (including Aboriginal remains) of particular significance to Aboriginals in accordance with Aboriginal tradition.

(2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:
(a) in the case of an area:
(i) it is used or treated in a manner inconsistent with Aboriginal tradition;
(ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
(iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or
(b) in the case of an object—it is used or treated in a manner inconsistent with Aboriginal tradition;
and references in this Act to injury or desecration shall be construed accordingly.

(3) For the purposes of this Act, an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.

4 Purposes of Act

The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

5 Extension to Territories

This Act extends to every external Territory.
6 Act binds the Crown

This Act binds the Crown in right of the Commonwealth, of each of the States, of the Northern Territory and of Norfolk Island.

6A Application of the Criminal Code

Chapter 2 (other than Part 2.5) of the Criminal Code applies to all offences against this Act.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

7 Application of other laws

(1) This Act, except Part IIA, is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

(1A) Part IIA is not intended to exclude or limit the operation of:

(a) any provision of the Archaeological and Aboriginal Relics Preservation Act 1972 of Victoria in so far as it applies to or in relation to an entry made in a register, or a declaration made, under that Act before the commencement of the Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987; or

(b) any other law of Victoria (other than a law for the preservation or protection of Aboriginal cultural property within the meaning of Part IIA) except as referred to in paragraph (a);

that is capable of operating concurrently with that Part.

(2) A law of a Territory has effect to the extent to which it is not inconsistent with a provision of the regulations, or of a declaration under this Act, having effect in that Territory, but such a law shall not be taken for the purposes of this subsection to be inconsistent with such a provision to the extent that it is capable of operating concurrently with that provision.

(3) Where:

(a) a law of a State or Territory deals with a matter dealt with in this Act; and

(b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act or an offence referred to in paragraph 23(1)(b);

the person may be prosecuted and convicted under that law or under this Act, the Criminal Code or the Crimes Act 1914, as the case may be, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

(4) Nothing in this Act derogates from the rights of any person to any remedy consistent with this Act that he or she would have apart from this Act.

8 Application of Act

(1) Subject to subsection (2), this Act applies, according to its tenor, to all persons, including foreigners, and to all vessels, including foreign vessels, whether or not they are within Australia or Australian waters.

(2) This Act has effect subject to the obligations of Australia under international law, including obligations under any agreement between Australia and another country or other countries.
8A Application of Part II to Victoria

(1) The Minister shall not make a declaration under Division 1 of Part II in relation to an area or object in Victoria unless the Minister is satisfied that:
   (a) the applicant for the declaration has made an application in relation to the area or object under Part IIA and the application has been rejected; or
   (b) such an application would be inappropriate or could not be made.

(2) An authorised officer shall not make a declaration under Division 2 of Part II in relation to an area or an object in Victoria unless the authorised officer is satisfied that an application in relation to the area or object under Part IIA would be inappropriate or could not be made.

Part II—Protection of significant Aboriginal areas and objects

Division 1—Declarations by Minister

9 Emergency declarations in relation to areas

(1) Where the Minister:
   (a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration; and
   (b) is satisfied:
      (i) that the area is a significant Aboriginal area; and
      (ii) that it is under serious and immediate threat of injury or desecration;

he or she may make a declaration in relation to the area.

(2) Subject to this Part, a declaration under subsection (1) has effect for such period, not exceeding 30 days, as is specified in the declaration.

(3) The Minister may, if he or she is satisfied that it is necessary to do so, declare that a declaration made under subsection (1) shall remain in effect for such further period as is specified in the declaration made under this subsection, not being a period extending beyond the expiration of 60 days after the day on which the declaration under subsection (1) came into effect.

10 Other declarations in relation to areas

(1) Where the Minister:
   (a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration;
   (b) is satisfied:
      (i) that the area is a significant Aboriginal area; and
      (ii) that it is under threat of injury or desecration;
   (c) has received a report under subsection (4) in relation to the area from a person nominated by him or her and has considered the report and any representations attached to the report; and
   (d) has considered such other matters as he or she thinks relevant;

he or she may make a declaration in relation to the area.

(2) Subject to this Part, a declaration under subsection (1) has effect for such period as is specified in the declaration.
(3) Before a person submits a report to the Minister for the purposes of paragraph (1)(c), he or she shall:

(a) publish, in the *Gazette*, and in a local newspaper, if any, circulating in any region concerned, a notice:

(i) stating the purpose of the application made under subsection (1) and the matters required to be dealt with in the report;

(ii) inviting interested persons to furnish representations in connection with the report by a specified date, being not less than 14 days after the date of publication of the notice in the *Gazette*; and

(iii) specifying an address to which such representations may be furnished; and

(b) give due consideration to any representations so furnished and, when submitting the report, attach them to the report.

(4) For the purposes of paragraph (1)(c), a report in relation to an area shall deal with the following matters:

(a) the particular significance of the area to Aboriginals;

(b) the nature and extent of the threat of injury to, or desecration of, the area;

(c) the extent of the area that should be protected;

(d) the prohibitions and restrictions to be made with respect to the area;

(e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aboriginals referred to in paragraph (1)(a);

(f) the duration of any declaration;

(g) the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law;

(h) such other matters (if any) as are prescribed.

11 Contents of declarations under section 9 or 10

A declaration under subsection 9(1) or 10(1) in relation to an area shall:

(a) describe the area with sufficient particulars to enable the area to be identified; and

(b) contain provisions for and in relation to the protection and preservation of the area from injury or desecration.

12 Declarations in relation to objects

(1) Where the Minister:

(a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified object or class of objects from injury or desecration;

(b) is satisfied:

(i) that the object is a significant Aboriginal object or the class of objects is a class of significant Aboriginal objects; and

(ii) that the object or the whole or part of the class of objects, as the case may be, is under threat of injury or desecration;

(c) has considered any effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aboriginals referred to in paragraph (1)(a); and
(d) has considered such other matters as he or she thinks relevant; he or she may make a declaration in relation to the object or the whole or that part of the class of objects, as the case may be.

(2) Subject to this Part, a declaration under subsection (1) has effect for such period as is specified in the declaration.

(3) A declaration under subsection (1) in relation to an object or objects shall:
(a) describe the object or objects with sufficient particulars to enable the object or objects to be identified; and
(b) contain provisions for and in relation to the protection and preservation of the object or objects from injury or desecration.

(4) A declaration under subsection (1) in relation to Aboriginal remains may include provisions ordering the delivery of the remains to:
(a) the Minister; or
(b) an Aboriginal or Aboriginals entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition.

13 Making of declarations

(1) In this section:

*declaration* means a declaration under this Division.

*Minister*, in relation to Norfolk Island, means an executive member as defined by the *Norfolk Island Act 1979*.

(2) The Minister shall not make a declaration in relation to an area, object or objects located in a State, the Northern Territory or Norfolk Island unless he or she has consulted with the appropriate Minister of that State or Territory as to whether there is, under a law of that State or Territory, effective protection of the area, object or objects from the threat of injury or desecration.

(3) The Minister may, at any time after receiving an application for a declaration, whether or not he or she has made a declaration pursuant to the application, request such persons as he or she considers appropriate to consult with him or her, or with a person nominated by him or her, with a view to resolving, to the satisfaction of the applicant or applicants and the Minister, any matter to which the application relates.

(4) Any failure to comply with subsection (2) does not invalidate the making of a declaration.

(5) Where the Minister is satisfied that the law of a State or of any Territory makes effective provision for the protection of an area, object or objects to which a declaration applies, he or she shall revoke the declaration to the extent that it relates to the area, object or objects.

(6) Nothing in this section limits the power of the Minister to revoke or vary a declaration at any time.

14 Publication and commencement of declarations

(1) A declaration under this Division:
(a) shall be published in the *Gazette* and in a local newspaper, if any, circulating in any region concerned; and
(b) comes into operation on the date of publication in the Gazette or such later date as is specified in the declaration.

(2) As soon as practicable after making a declaration under this Division, the Minister shall:
   (a) take reasonable steps to give notice, in writing, of the declaration to persons likely to be substantially affected by the declaration; and
   (b) in the case of a declaration in relation to an area—serve a copy of the declaration on the Australian Institute of Aboriginal Studies and, if the Institute maintains a register of significant Aboriginal areas, it shall enter the area in the register.

(3) Any failure to publish a declaration in a newspaper or failure to comply with subsection (2) does not affect the validity of a declaration.

15 Declarations reviewable by Parliament

Sections 48 (other than paragraphs (1)(a) and (b) and subsection (2)), 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901 apply to declarations as if in those sections references to regulations were references to declarations, references to a regulation were references to a provision of a declaration and references to repeal were references to revocation.

16 Refusal to make declaration

Where the Minister refuses to make a declaration under this Division in pursuance of an application, he or she shall take reasonable steps to notify the applicant or applicants of his or her decision.
Division 2—Declarations by authorized officers

17 Authorised officers

(1) The Minister may, by instrument in writing, designate persons to be authorized officers for the purposes of this Division.

(2) The Minister shall cause to be issued to each authorized officer an identity card in the form prescribed, containing a photograph of the officer.

(3) Where an authorized officer notifies a person of a declaration made under section 18, he or she shall:
   (a) if it is reasonably practicable to do so—produce his or her identity card for inspection by that person; or
   (b) in any other case—give that person such particulars of his or her identity card as are prescribed.

(4) A person who ceases to be an authorized officer shall forthwith return his or her identity card to the Minister.

18 Emergency declarations in relation to areas or objects

(1) Where:
   (a) at any time, an authorized officer is satisfied that:
      (i) an area is a significant Aboriginal area, an object is a significant Aboriginal object or a class of objects is a class of significant Aboriginal objects;
      (ii) the area or object is, or objects are, under serious and immediate threat of injury or desecration; and
      (iii) in the case of an area—the circumstances of the case would justify the making of a declaration under section 9, but the injury or desecration is likely to occur before such a declaration can be made; and
   (b) no declaration has been made under this section in relation to the area, object or objects within 3 months before that time by reason of a threat that is substantially the same as the threat referred to in subparagraph (a)(ii);

the officer may make a declaration for the purposes of this section.

(2) A declaration under subsection (1):
   (a) shall be in writing;
   (b) shall specify the period, not exceeding 48 hours, for which it is to remain in effect;
   (c) shall:
      (i) where the declaration relates to an area—describe the area with sufficient particulars to enable the area to be identified; or
      (ii) where the declaration relates to an object or a class of objects—describe the object or objects with sufficient particulars to enable the object or objects to be identified; and
   (d) shall contain provisions for and in relation to the protection and preservation of the area, object or objects from injury or desecration, including, in the case of Aboriginal remains, provisions for their custody.

(3) A declaration under subsection (1) may be revoked or varied at any time, by instrument in writing, by the Minister or any authorized officer.
19 Notification of declarations

(1) An authorized officer shall, as soon as practicable after making a declaration under section 18:
   (a) in such manner as he or she thinks appropriate in the circumstances, notify the Minister of the making of the declaration, the terms of the declaration and the reasons for which it was made; and
   (b) take reasonable steps to give notice of the declaration to persons likely to be substantially affected by the declaration.

(2) Any failure to comply with subsection (1) does not invalidate a declaration.

Division 3—Discovery and disposal of Aboriginal remains

20 Discovery of Aboriginal remains

(1) A person who, except in Victoria, discovers anything that he or she has reasonable grounds to suspect to be Aboriginal remains shall report his or her discovery to the Minister, giving particulars of the remains and of their location.

(2) Where the Minister receives a report made under subsection (1) and he or she is satisfied that the report relates to Aboriginal remains, he or she shall take reasonable steps to consult with any Aboriginals that he or she considers may have an interest in the remains, with a view to determining the proper action to be taken in relation to the remains.

21 Disposal of Aboriginal remains

(1) Where Aboriginal remains, other than remains discovered in Victoria, are delivered to the Minister, whether in pursuance of a declaration made under section 12 or otherwise, he or she shall:
   (a) return the remains to an Aboriginal or Aboriginals entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition;
   (b) otherwise deal with the remains in accordance with any reasonable directions of an Aboriginal or Aboriginals referred to in paragraph (a); or
   (c) if there is or are no such Aboriginal or Aboriginals—transfer the remains to a prescribed authority for safekeeping.

(2) Nothing in this section shall be taken to derogate from the right of any Aboriginal or Aboriginals accepting possession, custody or control of any Aboriginal remains pursuant to this section to deal with the remains in accordance with Aboriginal tradition.
Part IIA—Victorian Aboriginal cultural heritage

Division 1—Preliminary

21A Interpretation

(1) In this Part:

Aboriginal cultural heritage agreement means an agreement made in accordance with section 21K.

Aboriginal cultural property means Aboriginal places, Aboriginal objects and Aboriginal folklore.

Aboriginal folklore means traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

Aboriginal object means an object (including Aboriginal remains) that is in Victoria and is of particular significance to Aboriginals in accordance with Aboriginal tradition.

Aboriginal place means an area in Victoria that is of particular significance to Aboriginals in accordance with Aboriginal tradition.

community area, in relation to a local Aboriginal community, means the area in Victoria declared by the regulations to be the area of that community for the purposes of this Part.

local Aboriginal community means an organisation that is specified in the Schedule.

magistrate means a magistrate of the State of Victoria.

police officer means:

(a) a member or special member of the Australian Federal Police; or
(b) a member of the Police Force of the State of Victoria.

State Minister means a Minister of the Crown of the State of Victoria.

(2) The regulations may amend the Schedule by adding, omitting or varying the name of an organisation that is incorporated in, or carries on business in, Victoria.

21B Delegation

(1) The Minister may, either generally or as otherwise provided by the instrument of delegation, by writing signed by the Minister, delegate all or any powers that are conferred on the Minister by or under this Part to:

(a) a State Minister;
(b) an officer of the Department; or
(c) the Chief Executive Officer of, or a member of the staff of, the Aboriginal and Torres Strait Islander Commission.

(2) A State Minister to whom a power has been delegated under subsection (1) may, by writing signed by that Minister, authorise another person to exercise the power so delegated.

(3) An authority under subsection (2) may be given to:
(a) a specified person; or
(b) the person for the time being occupying or performing the duties of a position in the public service of the State of Victoria, being a position specified in the instrument by which the authority is given.

(4) Any act or thing done in the exercise of a power by a person to whom that power has been delegated by the Minister under subsection (1) or by a person authorised by a delegate of the Minister under subsection (2) to exercise that power has the same force and effect as if it had been done by the Minister.

(5) Where the exercise of a power by the Minister is dependent upon the opinion, belief or state of mind of the Minister in relation to a matter and that power has been delegated under subsection (1), that power may be performed or exercised by the delegate or by a person authorised by the delegate under subsection (2) upon the opinion, belief or state of mind of the delegate or of the authorised person, as the case may be, in relation to that matter.

(6) A delegation under subsection (1) does not prevent the exercise of a power by the Minister.

(7) The giving of an authority under subsection (2) does not prevent the exercise of a power by the person by whom the authority was given.

(8) Where a person purports to exercise a power conferred or expressed to be conferred on the Minister by this Act, it shall be presumed, unless the contrary is established, that the person is duly authorised by a delegation under subsection (1), or by an authority under subsection (2) given pursuant to such a delegation, to exercise the power.

Division 2—Preservation of Victorian Aboriginal cultural property

21C Emergency declaration of preservation

(1) An emergency declaration in the prescribed form may be made in relation to an Aboriginal place or Aboriginal object:
(a) by:
   (i) an inspector appointed under section 21R; or
   (ii) the Minister;
   whether after an application is made to him or her by a local Aboriginal community or any person or on his or her own motion; or
(b) by a magistrate on an application by a local Aboriginal community;
if the inspector, Minister or magistrate has reasonable grounds for believing that the place or object is under threat of injury or desecration of such a nature that it could not properly be protected unless an emergency declaration is made.

(2) An emergency declaration ceases to be in force at the end of 30 days after it is made or such longer period, not exceeding 44 days, after it is made as the Minister fixes in any case unless it is sooner revoked or replaced by a temporary declaration under section 21D or a declaration under section 21E.

(3) An emergency declaration may be varied or revoked:
(a) if made by an inspector—by the inspector;
(b) if made by the Minister—by the Minister; or
(c) if made by a magistrate—by the magistrate on the application of the local Aboriginal community.

(4) If an emergency declaration is made, varied or revoked by an inspector or the Minister, the inspector or Minister shall, without delay, notify:
   (a) the local Aboriginal community (if any) of the area where the Aboriginal place or Aboriginal object is found; and
   (b) in the case of an emergency declaration made by an inspector—the Minister;
   and shall take all reasonable steps to notify any person who is likely to be affected.

(5) If an emergency declaration is made by a magistrate on the application of a local Aboriginal community, the community shall, without delay, take all reasonable steps to notify any person who is likely to be affected.

21D Temporary declaration of preservation

(1) If a local Aboriginal community decides, whether after an application is made to it or on its own motion, that:
   (a) a place or object in the community area is an Aboriginal place or Aboriginal object; and
   (b) that place or object is under threat of injury or desecration;
   the community may advise the Minister that it considers a temporary declaration of preservation should be made.

(2) On receiving advice under subsection (1) or determining on his or her own motion that a temporary declaration of preservation should be made, the Minister:
   (a) shall, within 14 days, cause notice of the advice or determination to be given to any person who is likely to be affected by the making of a declaration; and
   (b) shall give any such person an opportunity to be heard.

(3) After notice is given under subsection (2) and any objections are heard and the Minister has consulted with any State Minister whose responsibility may be affected by the making of a declaration, the Minister shall:
   (a) if the Minister considers that, in all the circumstances of the case, it is reasonable and appropriate that a temporary declaration be made for the preservation of the place or object—make the declaration in writing, and, in the declaration, specify the terms of the declaration and the manner of preservation to be adopted in relation to the place or object, including prohibition of access to, or interference with, the place or object; or
   (b) refuse to make the declaration.

(4) The Minister may, at any time, on the application of the local Aboriginal community or on his or her own motion, vary or revoke a temporary declaration or any matters specified in it.

(5) The Minister shall cause appropriate notice to be given of the making, variation or revocation of a temporary declaration.

(6) A person affected or likely to be affected by the making, variation or revocation of a temporary declaration of preservation may request the Minister to appoint an arbitrator to review the Minister’s decision.
(7) If the Minister refuses to make, or revokes, a temporary declaration of preservation or makes or varies a declaration, the local Aboriginal community may request the Minister to appoint an arbitrator to review the Minister’s decision.

(8) The Minister shall, after receiving a request under subsection (6) or (7), appoint an arbitrator, being a person whom the Minister considers to be in a position to deal with the matter impartially.

(9) Subject to section 21F, a temporary declaration of preservation ceases to be in force at the end of 60 days after it is made, or such longer period, not exceeding 120 days, after it is made as the Minister, on the advice of the local Aboriginal community, fixes unless it is sooner revoked or replaced by a declaration under section 21E.

21E Declaration of preservation

(1) If a local Aboriginal community decides, whether after an application is made to it or on its own motion, that:
   (a) a place or object in the community area is an Aboriginal place or Aboriginal object; and
   (b) it is appropriate, having regard to the importance of maintaining the relationship between Aboriginals and that place or object, that a declaration of preservation should be made in relation to that place or object;

   the community may advise the Minister that it considers a declaration of preservation should be made.

(2) On receiving advice under subsection (1) or determining on his or her own motion that a declaration of preservation should be made, the Minister:
   (a) shall within 14 days cause notice of the advice or determination to be given to any person who is likely to be affected by the making of a declaration; and
   (b) shall give any such person an opportunity to be heard.

(3) After notice is given under subsection (2) and any objections are heard and the Minister has consulted with any State Minister whose responsibility may be affected by the making of a declaration, the Minister shall:
   (a) if the Minister considers that, in all the circumstances of the case, it is reasonable and appropriate that a declaration be made for the preservation of the place or object—make the declaration and, in the declaration, specify the terms of the declaration and the manner of preservation to be adopted in relation to the place or object, including prohibition of access to, or interference with, the place or object; or
   (b) refuse to make the declaration.

(4) The Minister may, at any time, on the application of the local Aboriginal community or on his or her own motion, vary or revoke a declaration or any matters specified in it.

(5) A person likely to be affected by the making, variation or revocation of a declaration of preservation may request the Minister to appoint an arbitrator to review the Minister’s decision.

(6) If the Minister refuses to make, or revokes, a declaration of preservation or makes or varies a declaration, the local Aboriginal community may request the Minister to appoint an arbitrator to review the Minister’s decision.
(7) The Minister shall, after receiving a request under subsection (5) or (6), appoint an arbitrator, being a person whom the Minister considers to be in a position to deal with the matter impartially.

(8) The making, variation or revocation of a declaration under this section:
   (a) shall be done by notice published in the *Gazette*; and
   (b) comes into operation on the date of publication or such later date as is specified in the notice.

**21F Arbitration**

(1) An arbitrator appointed under section 21D or 21E to review a decision of the Minister shall make a decision:
   (a) confirming the decision of the Minister;
   (b) varying the decision of the Minister; or
   (c) setting aside the decision of the Minister and making a decision (being a decision that the Minister could have made under section 21D or 21E, as the case requires) in substitution for the decision of the Minister.

(2) Subject to subsection (3), a decision of the Minister as varied by an arbitrator, or a decision made by an arbitrator in substitution for a decision of the Minister, shall, except for the purposes of subsection 21D(7) or 21E(6), be deemed to be a decision of the Minister and has effect, unless the arbitrator otherwise determines, on and from the day on which the decision of the Minister had effect.

(3) Where the decision of an arbitrator results in the making of a declaration under section 21D or 21E, or the variation of a declaration made by the Minister under one of those sections, the declaration or variation, as the case may be, has effect on and from the day on which the decision of the arbitrator is made.

**21G Notices**

(1) A local Aboriginal community may cause notices to be placed on or near an Aboriginal place or Aboriginal object in the community area that is the subject of a declaration indicating that the place or object is subject to a declaration of preservation.

(2) A person authorised in writing by the relevant Aboriginal community may at all reasonable times enter upon any land for the purpose of placing a notice under subsection (1).

(3) A person is guilty of an offence if:
   (a) the person engages in conduct; and
   (b) the conduct:
      (i) destroys or causes damage to a notice placed under this section; or
      (ii) causes interference with or the removal of a notice placed under this section.

Penalty:
   (a) if the person is a natural person—$500; or
   (b) if the person is a body corporate—$2,500.

(4) In subsection (3):

*engage in conduct* means:
   (a) do an act; or
21H Offence to contravene declaration

(1) A person is guilty of an offence if:
   (a) the person engages in conduct; and
   (b) the conduct contravenes the terms of a declaration under this Part relating to an Aboriginal place.

Penalty:
   (a) if the person is a natural person—$10,000 or imprisonment for 5 years, or both; or
   (b) if the person is a body corporate—$50,000.

(2) A person is guilty of an offence if:
   (a) the person engages in conduct; and
   (b) the conduct contravenes the terms of a declaration under this Part relating to an Aboriginal object.

Penalty:
   (a) if the person is a natural person—$5,000 or imprisonment for 2 years, or both; or
   (b) if the person is a body corporate—$25,000.

(3) In this section:

   engage in conduct means:
       (a) do an act; or
       (b) omit to perform an act.

21J Obligation to protect land

The making of a declaration relating to an Aboriginal place does not affect any obligation under any Act or law relating to the protection or conservation of land unless the obligation is inconsistent with the declaration.

21K Aboriginal Cultural Heritage Agreements

(1) A local Aboriginal community may enter into an Aboriginal Cultural Heritage Agreement with a person who owns or possesses any Aboriginal cultural property in Victoria.

(2) An agreement may cover the preservation, maintenance, exhibition, sale or use of the property and the rights, needs and wishes of the person and of the Aboriginal and general communities.

(3) Subsection (1) does not apply to any Aboriginal cultural property in the possession of an Aboriginal if the property has been handed down from generation to generation to that person unless that person expressly agrees that the property should be the subject of an agreement under this section.

(4) If an agreement under this section relating to land contains a provision requiring its registration under this section, the local Aboriginal community shall without delay:
   (a) if the land is under the operation of the Transfer of Land Act 1958 of Victoria—lodge with the Registrar of Titles under that Act a notice of the agreement in the prescribed form; or
(b) in the case of other land—lodge with the Registrar-General under the
Property Law Act 1958 of Victoria a notice of the agreement in the
prescribed form.

(5) If the Registrar of Titles receives a notice of an agreement, the Registrar may
make such entries in the Register Book as the Registrar thinks appropriate for
the purposes of this section.

21L Compulsory acquisition

(1) The Minister may, in accordance with the regulations, compulsorily acquire
any Aboriginal cultural property if the Minister is satisfied, whether on the
advice of a local Aboriginal community or otherwise, that:
(a) the property is of such religious, historical or cultural significance that it
is irreplaceable; and
(b) no other arrangements can be made to ensure its proper continuing
preservation and maintenance.

(2) Property acquired under this section is, upon acquisition, vested in the local
Aboriginal community of the area where the property is found to be held on
trust for it or, if there is no such community, in the Minister on trust for
Aboriginals in Victoria.

21M Compensation for acquisition of property

(1) Where, but for this section, the operation of this Part would result in the
acquisition of property from a person otherwise than on just terms, there is
payable to the person by the Commonwealth such reasonable amount of
compensation as is agreed upon between the person and the Commonwealth
or, failing agreement, as is determined by the Federal Court.

(2) In subsection (1), acquisition of property and just terms have the same
respective meanings as in paragraph 51(xxxi) of the Constitution.

21N Compensation may be paid in certain circumstances

(1) The Minister may, from moneys appropriated by the Parliament for the
purpose, pay compensation to a person who is or is likely to be affected by a
declaration of preservation under section 21E.

(2) The amount of compensation payable is such amount as is agreed upon
between the Minister and the person or, failing agreement, as is determined by
an arbitrator appointed by the Minister.

Division 3—Discovery and disposal of Aboriginal remains

21P Discovery of Aboriginal remains

(1) A person who, in Victoria, discovers anything that he or she has reasonable
grounds to suspect to be Aboriginal remains shall report the discovery to the
Minister, giving particulars of the remains and of their location.

Penalty: $500.

(2) Where the Minister receives a report made under subsection (1) and is
satisfied that the report relates to Aboriginal remains, the Minister shall take
reasonable steps to consult with any local Aboriginal community that he or
she considers may have an interest in the remains, with a view to determining
the proper action to be taken in relation to the remains.
21Q Disposal of Aboriginal remains

(1) Where Aboriginal remains discovered in Victoria are delivered to the Minister, he or she shall:

(a) return the remains to a local Aboriginal community entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition;

(b) otherwise deal with the remains in accordance with any reasonable directions of a local Aboriginal community referred to in paragraph (a); or

(c) if there is or are no such community or communities—transfer the remains to a prescribed authority for safekeeping.

(2) Nothing in this section shall be taken to derogate from the right of any local Aboriginal community, Aboriginal or Aboriginals accepting possession, custody or control of any Aboriginal remains pursuant to this section to deal with the remains in accordance with Aboriginal tradition.

Division 4—Miscellaneous

21R Inspectors

(1) The Minister may, in writing, appoint any person after consultation with a local Aboriginal community to be an inspector for the purposes of this Part if the Minister is satisfied that the person has knowledge and expertise in the identification and preservation of Aboriginal cultural property and is able to undertake the duties of an inspector under this Part.

(2) The Minister shall cause to be issued to each inspector an identity card in the form prescribed, containing a photograph of the inspector.

(3) An inspector who notifies a person of a declaration made by the inspector under section 21C shall:

(a) if it is reasonably practicable to do so—produce his or her identity card for inspection by that person; or

(b) in any other case—give that person such particulars of his or her identity card as are prescribed.

(4) A person who ceases to be an inspector shall forthwith return his or her identity card to the Minister.

Penalty: $100.

21S Power to enter, search etc.

(1) If a Magistrate is satisfied, on information on oath by a police officer, that there are reasonable grounds for suspecting that any Aboriginal objects on or in any land, premises or vehicle are under threat of injury or desecration, the Magistrate may issue a warrant authorising any police officer together with the inspector named in the warrant, by such force as is necessary and reasonable:

(a) to enter the land, premises or vehicle;

(b) to search the land, premises or vehicle;

(c) to take possession of, or secure against desecration, any Aboriginal objects that appear to the inspector to be under threat of injury or desecration; and
(d) to deliver any objects possession of which is so taken into the possession of a person authorised by the Minister to receive them.

(2) A police officer, together with an inspector, may:
   (a) enter upon land, or upon or into premises;
   (b) search the land or premises for Aboriginal objects; and
   (c) seize or secure against desecration any property found in the course of the search that the inspector believes, on reasonable grounds, to be an Aboriginal object;
   but only if acting:
   (d) with the consent of the occupier of the land or premises; or
   (e) under a warrant issued under this section.

(3) There shall be stated in a warrant issued under this section:
   (a) a statement of the purpose for which the warrant is issued;
   (b) a description of the kind of property authorised to be seized; and
   (c) a date (not being later than 7 days after the issue of the warrant) upon which the warrant ceases to have effect.

(4) It shall also be stated in a warrant issued under this section whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night.

(5) If possession is taken of an object under this section:
   (a) the inspector shall forthwith inform the local Aboriginal community (if any) of the area where the object is found; and
   (b) the object shall be returned to the owner within 60 days after the possession was taken (or such longer period, not exceeding 120 days, after possession was taken as the Minister authorises) unless it is compulsorily acquired under section 21M or otherwise becomes the property of the local Aboriginal community.

(6) If:
   (a) an object is taken into possession under this section;
   (b) the object is required to be returned to the owner under paragraph (5)(b); and
   (c) the whereabouts of the owner cannot be ascertained after careful inquiry;
   the object is vested in the Minister on trust for Aboriginals in Victoria.

(7) The powers conferred by this section are in addition to any other powers conferred by law.

21T Honorary keepers or wardens

(1) A local Aboriginal community may, in writing, appoint honorary keepers or wardens for that community.

(2) The function of an honorary keeper or warden is to record and maintain Aboriginal cultural property, either generally or as specified by the local Aboriginal community from time to time.

(3) If an honorary keeper or warden is an Aboriginal who has the responsibility of being custodian for any Aboriginal cultural property, the local Aboriginal community shall not require the honorary keeper or warden to carry out any
function that is inconsistent with the duties of the keeper or warden as the custodian.

**21U Defacing property**

(1) A person is guilty of an offence if:

(a) the person:

(i) does an act; and

(ii) the act causes damage to, the defacing of, or interference with, an Aboriginal object or an Aboriginal place; or

(b) the person does an act likely to endanger an Aboriginal object or Aboriginal place.

Penalty:

(a) if the person is a natural person—$10,000 or imprisonment for 5 years, or both; or

(b) if the person is a body corporate—$50,000.

(2) Subsection (1) does not prevent an Aboriginal from entering on or interfering with an Aboriginal place or Aboriginal object in accordance with Aboriginal tradition.

(3) A person may apply to a local Aboriginal community for consent for the excavation of any Aboriginal place or Aboriginal object in a community area of that community or for the carrying out of scientific research on Aboriginal objects in that area.

(4) A local Aboriginal community may consent, in writing, to the doing of an act referred to in subsection (1) or (3) in its community area and may, in the consent, specify terms and conditions subject to which the consent is given.

(5) If:

(a) a local Aboriginal community does not, within 30 days after receiving an application for consent under subsection (4), either grant consent or refuse consent; or

(b) an application is made to the Minister for consent to the doing of an act referred to in subsection (1) in an area in relation to which there is no local Aboriginal community;

the Minister may consent, in writing, to the doing of an act referred to in subsection (1) in the community area or other area, as the case may be, and may, in the consent, specify terms and conditions subject to which the consent is given.

(6) The Minister shall not grant consent under subsection (5) unless:

(a) the Minister has sought a recommendation on the matter from any person or body that in the Minister’s opinion should consider the matter; and

(b) the Minister has considered any recommendations made and is of the opinion that, in all the circumstances of the case, consent should be granted.

(7) A person is not guilty of an offence if the person does an act referred to in subsection (1) in accordance with consent given under subsection (4) or (5).

**21V Register**

(1) The Minister shall cause to be kept a register containing a summary of particulars of declarations of preservation made under this Part.
(2) The register shall not be open for inspection except by prescribed persons or in prescribed circumstances.

21W General meetings of local Aboriginal communities

There may be convened, in accordance with the regulations, general meetings of representatives of each local Aboriginal community and of prescribed Aboriginal organisations in Victoria for the purpose of:

(a) providing advice to the Minister on issues relating to Aboriginal cultural property in Victoria; or

(b) making recommendations to the Minister on the operation of this Part, including recommendations for its review or amendment.

21X Negotiation for return of Aboriginal remains

If a local Aboriginal community has reason to believe that any Aboriginal remains held by a university, museum or other institution were found or came from its community area, the local Aboriginal community may request the Minister to negotiate with the university, museum or institution for the return of the remains to the community.

21Y Indictable offences

(1) Subject to subsection (2), the following offences are indictable offences:

(a) an offence against section 21H or 21U; or

(b) an offence against:

(i) section 6 of the *Crimes Act 1914*; or

(ii) section 11.1, 11.4 or 11.5 of the *Criminal Code*; in relation to an offence referred to in paragraph (a) of this subsection.

(2) A court of summary jurisdiction may hear and determine proceedings in respect of an offence referred to in subsection (1) if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.

(3) Where, in accordance with subsection (2), a court of summary jurisdiction convicts a person of an offence referred to in that subsection, the penalty that the court may impose is:

(a) if the person is a natural person—a fine not exceeding $2,000 or imprisonment for a period not exceeding 12 months, or both; or

(b) if the person is a body corporate—a fine not exceeding $10,000.

21Z Evidence

(1) In any proceedings for an offence against section 21H in relation to a declaration under this Part, the proof of the declaration is *prima facie* evidence that the place or object concerned is an Aboriginal place or Aboriginal object, as the case may be.

(2) For the purposes of subsection (1), a declaration made under section 21E may be proved by the production of the *Gazette* purporting to contain it.

(3) In proceedings for an offence against section 21H or 21U, where there is evidence that, at the relevant time, the defendant neither knew, nor had reasonable grounds for knowing:

(a) in the case of an offence against section 21H—of the existence of the declaration alleged to have been contravened; or
(b) in the case of an offence against section 21U—that the object or place concerned was an Aboriginal object or an Aboriginal place, as the case may be;

the defendant shall not be committed for trial or convicted unless the prosecution proves that, at the time, the defendant knew, or ought reasonably to have known, of that fact.

21ZA Alcoa smelter site exempted

This Part does not apply to any site, land, act or activity to which section 13 of the Alcoa (Portland Aluminium Smelter) Act 1980 of Victoria applies.
Part III—Offences, penalties and legal proceedings

22 Offences and penalties

(1) A person is guilty of an offence if:
(a) the person engages in conduct; and
(b) the conduct contravenes a provision of a declaration made under Part II
   in relation to a significant Aboriginal area.

Penalty:
(a) if the person is a natural person—$10,000 or imprisonment for 5 years,
   or both; or
(b) if the person is a body corporate—$50,000.

(2) A person is guilty of an offence if:
(a) the person engages in conduct; and
(b) the conduct contravenes the terms of a declaration under this Part
   relating to a significant Aboriginal object or significant Aboriginal
   objects.

Penalty:
(a) if the person is a natural person—$5,000 or imprisonment for 2 years, or
   both; or
(b) if the person is a body corporate—$25,000.

(3) A person who contravenes subsection 20(1) is guilty of an offence punishable,
on conviction, by a fine not exceeding $500.

(4) A person who contravenes subsection 17(4) is guilty of an offence punishable,
on conviction, by a fine not exceeding $100.

(5) In this section:

engage in conduct means:
(a) do an act; or
(b) omit to perform an act.

23 Indictable offences

(1) Subject to subsection (2), the following offences are indictable offences:
(a) an offence referred to in subsection 22(1) or (2);
(b) an offence against:
   (i) section 6 of the Crimes Act 1914; or
   (ii) section 11.1, 11.4 or 11.5 of the Criminal Code;
in relation to an offence referred to in paragraph (a) of this subsection.

(2) A court of summary jurisdiction may hear and determine proceedings in
respect of an offence referred to in subsection (1) if the court is satisfied that it
is proper to do so and the defendant and the prosecutor consent.

(3) Where, in accordance with subsection (2), a court of summary jurisdiction
convicts a person of an offence referred to in that subsection, the penalty that
the court may impose is:
(a) if the person is a natural person—a fine not exceeding $2,000 or
   imprisonment for a period not exceeding 12 months, or both; or
(b) if the person is a body corporate—a fine not exceeding $10,000.

24 Evidence

(1) In any proceedings for an offence referred to in subsection 23(1), the proof of a declaration made under Part II in relation to an area, object or objects is \textit{prima facie} evidence that the area is a significant Aboriginal area, the object is a significant Aboriginal object or the objects are significant Aboriginal objects, as the case may be.

(2) For the purposes of subsection (1), a declaration made by the Minister under Part II may be proved by the production of the \textit{Gazette} purporting to contain it.

(3) In proceedings for an offence referred to in subsection 23(1), where there is evidence that, at the relevant time, the defendant neither knew, nor had reasonable grounds for knowing, of the existence of the declaration alleged to have been contravened, the defendant shall not be committed for trial or convicted unless the prosecution proves that, at that time, the defendant knew, or ought reasonably to have known, of the existence of the declaration.

25 Body corporate responsible for acts of servants and agents

(1) Where, at a particular time, a member of the governing body, director, servant or agent of a body corporate:
   \begin{itemize}
   \item[(a)] intends to do, or not to do, a particular act; or
   \item[(b)] knows, or ought reasonably to know, of the existence of a declaration made under Part II or IIA;
   \end{itemize}
paragraph (a) or (b), as the case may be, shall be deemed to apply to the body corporate at that time.

(2) Any conduct engaged in on behalf of a body corporate by a member of the governing body, director, servant or agent of the body corporate, or by any other person at the direction or with the consent or agreement (whether express or implied) of one of the first-mentioned persons, shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

(3) In subsection (2), a reference to engaging in conduct is a reference to doing, or failing or refusing to do, any act or thing.

(4) In relation to a body corporate that does not have a governing body, a reference in this section to a member of the governing body is a reference to a member of the body corporate.

26 Injunctions

(1) Where, on the application of the Minister, the Federal Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:
   \begin{itemize}
   \item[(a)] a contravention of a provision of a declaration made under Part II or IIA;
   \item[(b)] attempting to contravene such a provision;
   \item[(c)] aiding, abetting, counselling or procuring a person to contravene such a provision;
   \item[(d)] inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;
   \item[(e)] being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
   \end{itemize}
(f) conspiring with others to contravene such a provision;
the Court may grant an injunction in such terms as the Court determines to be
appropriate.

(2) Where in the opinion of the Court it is desirable to do so, the Court may grant
an interim injunction pending determination of an application under
subsection (1).

(3) The Court may rescind or vary an injunction granted under subsection (1) or
(2).

(4) The power of the Court to grant an injunction restraining a person from
engaging in conduct may be exercised:
(a) whether or not it appears to the Court that the person intends to engage
again, or to continue to engage, in conduct of that kind;
(b) whether or not the person has previously engaged in conduct of that
kind; and
(c) whether or not there is a serious and immediate threat of injury to, or
desecration of, the relevant area, place, object or objects, as the case
may be, if the person engages in conduct of that kind.

(5) The power of the Court to grant an injunction requiring a person to do an act
or thing may be exercised:
(a) whether or not it appears to the Court that the person intends to refuse or
fail again, or to continue to refuse or fail, to do that act or thing;
(b) whether or not the person has previously refused or failed to do that act
or thing; and
(c) whether or not there is a serious and immediate threat of injury to, or
desecration of, the relevant area, place, object or objects, as the case
may be, if the person refuses or fails to do that act or thing.

27 Proceedings in camera

In any proceedings in a court arising under this Act, except Part IIA, the court,
on application, may, if it is satisfied that it is desirable to do so, having regard
to:
(a) the interests of justice; and
(b) the interests of Aboriginal tradition;
order the exclusion of the public, or of persons specified in the order, from a
sitting of the court and make such orders as it thinks fit for the purpose of
preventing or limiting the disclosure of information with respect to the
proceedings.

28 Compensation for acquisition of property

(1) Where, but for this section, the operation of a provision of this Act (except a
provision of Part IIA) or of a declaration made under Part II would result in
the acquisition of property from a person otherwise than on just terms, there is
payable to the person by the Commonwealth such reasonable amount of
compensation as is agreed upon between the person and the Commonwealth
or, failing agreement, as is determined by the Federal Court.

(2) In subsection (1), acquisition of property and just terms have the same
respective meanings as in paragraph 51(xxxi) of the Constitution.

29 Powers of courts not limited

Nothing in this Act shall be taken to limit or restrict any powers conferred on
a court by any other law.
30 Legal assistance

(1) A person:
   (a) who wishes to apply for a declaration under section 9, 10 or 12;
   (b) who considers that his or her proprietary or pecuniary interests:
       (i) are likely to be adversely affected by a declaration proposed to be
           made under section 9, 10, 12 or 18; or
       (ii) are adversely affected by a declaration so made; or
   (c) against whom proceedings have been instituted:
       (i) for an offence referred to in subsection 23(1); or
       (ii) under section 26 (not being proceedings in relation to a declaration
           under Part IIA);

may apply to the Attorney-General for a grant of assistance under subsection (2).

(2) Where an application is made by a person under subsection (1), the Attorney-General, or a person appointed or engaged under the Public Service Act 1999 (the public servant) authorized in writing by the Attorney-General, may, if he or she is satisfied that it would involve hardship to that person to refuse the application and that, in all the circumstances, it is reasonable that the application should be granted, authorize the grant by the Commonwealth to the person, either unconditionally or subject to such conditions as the Attorney-General or public servant determines, of such legal or financial assistance as the Attorney-General or public servant determines.
Part IV—Miscellaneous

31 Delegation

(1) The Minister may, either generally or as otherwise provided in the instrument of delegation, by writing signed by him or her, delegate to a person all or any of his or her powers and functions under this Act (other than sections 9, 10 and 12, subsection 13(2) Part IIA and section 26), the regulations, or a declaration, other than this power of delegation.

(2) A power or function delegated under this section, when exercised or performed by the delegate, shall, for the purposes of this Act, the regulations or the declaration, as the case may be, be deemed to have been exercised or performed by the Minister.

(3) A delegation under this section does not prevent the exercise of a power or performance of a function by the Minister.

(4) In this section, declaration means a declaration made under Part II.

32 Regulations

The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

(a) required or permitted by this Act to be prescribed; or
(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Schedule—Local Aboriginal communities

Section 21A

Ballarat and District Aboriginal Co-operative Ltd.
Bendigo Dja Dja Wrung Aboriginal Association Incorporated
Brambuk Incorporated
Camp Jungai Co-operative Ltd.
Central Gippsland Aboriginal Health and Housing Co-operative Ltd.
Dandenong and District Aborigines Co-operative Ltd.
Echuca Aboriginal Co-operative Ltd.
Far East Gippsland Aboriginal Corporation
Framlingham Aboriginal Trust
Gippsland and East Gippsland Aboriginal Co-operative Ltd.
Goolum-goolum Aboriginal Co-operative Ltd.
Gunditjmara Aboriginal Co-operative Ltd.
Healesville and District Aboriginal Co-operative Ltd.
Kerrup-Jmara Elders Aboriginal Corporation
Lake Condah Aboriginal Co-operative Ltd.
Lake Tyers Aboriginal Trust
Lakes Entrance Aboriginal Corporation
Moogji Aboriginal Council East Gippsland Incorporated
Murray Valley Aboriginal Co-operative Ltd.
Rumbalara Aboriginal Co-operative Ltd.
Shepparton Aboriginal Arts Council Co-operative Ltd.
Sunraysia and District Aboriginal Corporation
Swan Hill and District Aboriginal Co-operative Ltd.
Wamba-Wamba Local Aboriginal Land Council
Wathaurong Aboriginal Co-operative Ltd.
West Gippsland Aboriginal Co-operative Ltd.
Wurundjeri Tribe Land Compensation and Cultural Heritage Council Incorporated
Yorta-yorta Cultural Heritage Council Incorporated
Yorta Yorta Murray Goulburn Rivers Clans Incorporated

Notes to the

Note 1

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* as shown in this compilation comprises Act No. 79, 1984 amended as indicated in the Tables below.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* was amended by the *Aboriginal and Torres Strait Islander Heritage Protection Regulations (Amendment)*. The amendments are incorporated in this compilation.

For all relevant information pertaining to application, saving or transitional provisions see Table A.

### Table of Acts

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<td><em>Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987</em></td>
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The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 was amended by Schedule 5 (items 1-3) only of the Statute Law Revision Act 1996, subsection 2(1) of which provides as follows:

(1) Subject to subsections (2) and (3), this Act commences on the day on which it receives the Royal Assent.

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 was amended by Schedule 1 (items 20 and 21) only of the Public Employment (Consequential and Transitional) Amendment Act 1999, subsections 2(1) and (2) of which provide as follows:

(1) In this Act, **commencing time** means the time when the Public Service Act 1999 commences.

(2) Subject to this section, this Act commences at the commencing time.

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 was amended by Schedule 1 (items 1-11) only of the Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2001, subsection 2(1)(c) of which provides as follows:

(1) Subject to this section, this Act commences on the latest of the following days:

(c) the day on which item 15 of Schedule 1 to the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 commences.

### Table of Amendments

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Table A  

**Application, saving or transitional provisions**


4 Application of amendments

(1) Each amendment made by this Act applies to acts and omissions that take place after the amendment commences.

(2) For the purposes of this section, if an act or omission is alleged to have taken place between 2 dates, one before and one on or after the day on which a particular amendment commences, the act or omission is alleged to have taken place before the amendment commences.
Appendix C

National Parks and Wildlife Act 1974

This appendix contains sections of the National Parks and Wildlife Act 1974 that are relevant to the case of Lady Mungo. For the full legislative act, please refer to the included CD-Rom volume.

An Act to consolidate and amend the law relating to the establishment, preservation and management of national parks, historic sites and certain other areas and the protection of certain fauna, native plants and Aboriginal objects; to repeal the Wild Flowers and Native Plants Protection Act 1927, the Fauna Protection Act 1948, the National Parks and Wildlife Act 1967 and certain other enactments; to amend the Local Government Act 1919 and certain other Acts in certain respects; and for purposes connected therewith.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the National Parks and Wildlife Act 1974.

5 Definitions

(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

Aboriginal has the same meaning as Aboriginal person has in the Aboriginal Land Rights Act 1983.

Aboriginal area means lands dedicated as an Aboriginal area under this Act.

Aboriginal object means any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.
**Aboriginal owner board members**, in relation to lands reserved or dedicated under Part 4A, means the Aboriginal owners who are members of the board of management for the lands.

**Aboriginal owners** has the same meaning as in the *Aboriginal Land Rights Act 1983*.

**Note.**

The term *Aboriginal owners* of land is defined in the *Aboriginal Land Rights Act 1983* to mean the Aboriginal persons named as having a cultural association with the land in the Register of Aboriginal Owners kept under Division 3 of Part 9 of that Act.

**Aboriginal place** means any place declared to be an Aboriginal place under section 84.

**Aboriginal remains** means the body or the remains of the body of a deceased Aboriginal, but does not include:

(a) a body or the remains of a body buried in a cemetery in which non-Aboriginals are also buried, or

(b) a body or the remains of a body dealt with or to be dealt with in accordance with a law of the State relating to medical treatment or the examination, for forensic or other purposes, of the bodies of deceased persons.


**adaptive reuse** of a building or structure on land means the modification of the building or structure and its curtilage to suit an existing or proposed use, and that use of the building or structure, but only if:

(a) the modification and use is carried out in a sustainable manner, and

(b) the modification and use are not inconsistent with the conservation of the natural and cultural values of the land, and

(c) in the case of a building or structure of cultural significance, the modification is compatible with the retention of the cultural significance of the building or structure.

**advisory committee** means an advisory committee constituted under this Act.

**amphibian** means any frog or other member of the class amphibia that is native to Australia and includes the eggs and the young thereof and the skin or any other part thereof.
animal means any animal, whether vertebrate or invertebrate, and at whatever stage of development, but does not include fish within the meaning of the *Fisheries Management Act 1994* other than amphibians or aquatic or amphibious mammals or aquatic or amphibious reptiles.

approval includes a consent, licence or permission and any form of authorisation.

bird means any bird that is native to, or is of a species that periodically or occasionally migrates to, Australia, and includes the eggs and the young thereof and the skin, feathers or any other part thereof.

board of management means a board of management established under Division 6 of Part 4A.

commencement day means the day appointed and notified under section 2 (2).

community service includes the supply, provision or maintenance of access roads, parking areas or mooring areas, an electricity, gas or water service and a sewerage or garbage disposal service.

conservation agreement means an agreement entered into under Division 7 of Part 4.

conservation area means land subject to a conservation agreement.

Council means the National Parks and Wildlife Advisory Council constituted under this Act.

critical habitat has the same meaning as in the *Threatened Species Conservation Act 1995*.

Crown lands means:

(a) Crown land within the meaning of the *Crown Lands Act 1989*, and

(b) those parts of the seabed and of the waters beneath which it is submerged that are within the territorial jurisdiction of New South Wales and not within the Eastern Division described in the Second Schedule to the *Crown Lands Consolidation Act 1913* (as in force immediately before its repeal).

Director-General means the Director-General of National Parks and Wildlife holding office as such under Part 2 of the *Public Sector Management Act 1988*. 
**ecological community** has the same meaning as in the *Threatened Species Conservation Act 1995*.

**egg** includes any part of an egg or eggshell.

**emu** means any bird of the species *Dromaius novaehollandiae*.

**emu breeder** means a person who exercises or carries on the business of breeding emus (including the rearing of emu chicks lawfully taken in the wild) or dealing in live emus, whole emu eggs or other emu products.

**emu products** means products (such as eggs, meat, skin, feathers, claws and oil) derived from emus or from the processing of emu carcases.

**endangered ecological community** has the same meaning as in the *Threatened Species Conservation Act 1995*.

**endangered population** has the same meaning as in the *Threatened Species Conservation Act 1995*.

**endangered species** has the same meaning as in the *Threatened Species Conservation Act 1995*.

**ex-officio ranger** means a person who, by the operation of section 16, is a ranger by virtue of the person’s office.

**explosive** means an explosive within the meaning of the *Dangerous Goods Act 1975*.

**fauna** means any mammal, bird, reptile or amphibian.

**fauna dealer** means a person who exercises or carries on the business of dealing in fauna, whether by buying or selling or by buying and selling, and whether on the person’s own behalf or on behalf of any other person, and whether or not the person deals in other things, and whether or not the person exercises or carries on any other business.

**flora reserve** means a flora reserve within the meaning of the *Forestry Act 1916*.

**Forestry Commission** means the Forestry Commission of New South Wales constituted under the *Forestry Act 1916*.

**Fund** means the National Parks and Wildlife Fund referred to in section 137.
**game animal** means any of the following animals that is not husbanded in the manner of a farmed animal and is killed in the field:

(a) any goat, kid, swine, deer, rabbit, hare, camel, donkey, horse or bird,

(b) any fauna permitted to be harmed for the purposes of sale in accordance with a licence under this Act.

**game bird** means a wild duck, wild goose or wild quail, or a bird of any other species that the Governor, by order, declares to be a species of game bird for the purposes of this Act.

**harm** an animal (including an animal of a threatened species, population or ecological community) includes hunt, shoot, poison, net, snare, spear, pursue, capture, trap, injure or kill, but does not include harm by changing the habitat of an animal.

**historic site** means lands reserved as a historic site under this Act.

**honorary ranger** means a person appointed as an honorary ranger under this Act.

**interim protection order** means an order made under Part 6A.

**Jenolan Caves Reserve Trust** means the Jenolan Caves Reserve Trust established by this Act.

**Jenolan Caves Reserve Trust lands** means the lands reserved under section 58U as the Abercrombie Karst Conservation Reserve, the Jenolan Karst Conservation Reserve and the Wombeyan Karst Conservation Reserve, and any other lands reserved as, or as part of, a karst conservation reserve the care, control and management of which is vested in the Jenolan Caves Reserve Trust.

**karst conservation reserve** means lands dedicated as a karst conservation reserve under this Act.

**karst environment** means an area of land, including subterranean land, that has developed in soluble rock through the processes of solution, abrasion or collapse, together with its associated bedrock, soil, water, gases and biodiversity.

**lands of the Crown** means lands vested in a Minister of the Crown or in a public authority.

**local council** means the council of a local government area.

**mammal** means any mammal, whether native, introduced or imported, and includes an aquatic or amphibious mammal, the eggs
and the young of a mammal, and the skin or any other part of a mammal, but does not include any introduced or imported domestic mammal or any rat or mouse not native to Australia.

management principles, in relation to land reserved under this Act, means the management principles set out in Division 2 of Part 4 for the land.

marine mammal means all animals of the orders of Cetacea, Sirenia and Pinnipedia.

member of the Jenolan Caves Reserve Trust Board means a person holding office under section 58ZA.

minerals includes coal, shale and petroleum.

modified natural area means an area of land where the native vegetation cover has been substantially modified or removed by human activity (other than activity relating to bush fire management or wild fire) and that is identified in a plan of management as not being appropriate for or capable of restoration.

motor vehicle means a motor car, motor carriage, motor cycle or other apparatus propelled on land, snow or ice wholly or partly by volatile spirit, steam, gas, oil or electricity.

national park means lands reserved as a national park under this Act.

National Parks and Wildlife Reserve Trust means the National Parks and Wildlife Reserve Trust established under section 9 of the Forestry and National Park Estate Act 1998.

native plant means any tree, shrub, fern, creeper, vine, palm or plant that is native to Australia, and includes the flower and any other part thereof.

nature reserve means lands dedicated as a nature reserve under this Act.

officer of the Jenolan Caves Reserve Trust means a person referred to in section 58Y.

officer of the Service means a person referred to in section 6.

owner, in relation to lands, includes every person who jointly or severally, whether at law or in equity:

(a) is entitled to the lands for any estate of freehold in possession,
(b) is a person to whom the Crown has lawfully contracted to sell the lands under the *Crown Lands Consolidation Act 1913* or any other Act relating to the alienation of lands of the Crown, or

(c) is entitled to receive, or is in receipt of, or if the lands were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession or otherwise.

*pick* a native plant (including a threatened species, population or ecological community) means gather, pluck, cut, pull up, destroy, poison, take, dig up, remove or injure the plant or any part of the plant.

*plan of management* means a plan of management under Part 5.

*population* has the same meaning as in the *Threatened Species Conservation Act 1995*.

*premises* includes building, store, shop, tent, hut or other structure, or place, whether built upon or not, or any part thereof.

*prescribed* means prescribed by this Act or the regulations.

*principles of ecologically sustainable development* means the principles of ecologically sustainable development described in section 6 (2) of the *Protection of the Environment Administration Act 1991*.

*prohibited weapon* means:

(a) a gun, rifle, weapon or other article:

(i) from which a bullet, shot or other hurtful thing or material may be discharged, whether by an explosive or by any other means whatever, or

(ii) that is designed to be used to discharge, whether by an explosive or by any other means whatever, a dart or other thing or material containing, coated or impregnated with a drug or other substance, for the purpose of tranquillising or immobilising an animal by means of the administration to the animal of the drug or other substance,

and any telescopic sight, silencer or other accessory attached to the gun, rifle, weapon or article,

(b) any other weapon prescribed for the purposes of this paragraph, and

(c) an article or device that, but for the absence of, or a defect in, some part thereof, or some obstruction therein, would be a gun,
rifle, weapon or article referred to in paragraph (a) or a weapon prescribed for the purposes of paragraph (b).

**prospect** means search for any mineral by any means and carry out such works and remove such samples as may be necessary to test the mineral bearing qualities of land.

**protected archaeological area** means lands declared to be a protected archaeological area under this Act.

**protected fauna** means fauna of a species not named in Schedule 11.

**protected native plant** means a native plant of a species named in Schedule 13.

**public authority** means a public or local authority constituted by or under an Act, a Government Department or a statutory body representing the Crown.

**regional advisory committee** means an advisory committee constituted under section 24 (2).

**regional park** means land reserved as a regional park under this Act.

**regional park trust** means a regional park trust established under section 47S.

**registered native title claimant** has the same meaning as it has in the *Native Title Act 1993* of the Commonwealth.

**regulations** means regulations under this Act.

**reptile** means a snake, lizard, crocodile, tortoise, turtle or other member of the class reptilia (whether native, introduced or imported), and includes the eggs and the young thereof and the skin or any other part thereof.

**rural lands protection board** means a rural lands protection board within the meaning of the *Rural Lands Protection Act 1989*.

**sell** includes:

(a) auction, barter, exchange or supply,

(b) offer, expose, supply or receive for sale,

(c) send, forward or deliver for sale or on sale,

(d) dispose of under a hire-purchase agreement,

(e) cause, permit or suffer the doing of an act referred to in paragraph (a), (b), (c) or (d),
(f) offer or attempt to do an act so referred to,

(g) cause, permit or suffer to be sold,

(h) attempt to sell or offer to sell, or

(i) have in possession for sale.

*Service* means the National Parks and Wildlife Service constituted by this Act.

*skin*, in relation to fauna, means the whole or part of the integument of any fauna, whether dressed or tanned or otherwise processed, but does not include any manufactured article.

*skin dealer* means a person who exercises or carries on:

(a) the business of dealing in the skins of protected fauna, whether by buying or selling or by buying and selling, and whether or not the person deals in other things, or

(b) the business of tanning the skins of protected fauna, whether or not the person tans other skins,

or both, and whether on the person’s own behalf or on behalf of any other person, and whether or not the person exercises or carries on any other business.

*species* has the same meaning as in the *Threatened Species Conservation Act 1995*.

*specified*, in relation to a licence or other instrument under this Act, means specified in the licence or other instrument.

*state conservation area* means land reserved as a state conservation area under this Act.

*state conservation area trust* means a state conservation area trust established under section 47GA in respect of Cape Byron State Conservation Area.

*State forest* means a State forest within the meaning of the *Forestry Act 1916*.

*threatened interstate fauna* means protected fauna of a species named in Schedule 12.

*threatened species* has the same meaning as in the *Threatened Species Conservation Act 1995*. 139
threatened species, populations and ecological communities and threatened species, population or ecological community have the same meanings as in the Threatened Species Conservation Act 1995.

timber reserve means a timber reserve within the meaning of the Forestry Act 1916.

trust board means a trust board established under:

(a) section 47GB in respect of a state conservation area trust, or
(b) section 47T in respect of a regional park trust.

Valuer-General means the valuer-general appointed under the Valuation of Land Act 1916.

vehicle includes:

(a) a boat or other object that, while floating on water or submerged, whether wholly or partly, under water, is wholly or partly used for the conveyance of persons or things,

(b) an apparatus that, while propelled, or directed or controlled, in the air by human or mechanical power or by the wind, is wholly or partly used for the conveyance of persons or things,

(c) a motor vehicle,

(d) an apparatus propelled, or directed or controlled, upon land, snow or ice by human or animal power or by the wind, and

(e) a trailer or caravan, whether or not it is in the course of being towed.

vulnerable species has the same meaning as in the Threatened Species Conservation Act 1995.

wild, in relation to any species of fauna, means not domesticated.

wild river means a river declared to be a wild river under this Act.

wilderness area means land (including subterranean land) that is reserved under this Act and is declared to be a wilderness area under the Wilderness Act 1987.

wilderness protection agreement has the same meaning as it has in the Wilderness Act 1987.

wildlife means fauna and native plants.

wildlife management area means lands declared to be a wildlife management area under this Act.
**wildlife refuge** means lands declared to be a wildlife refuge under this Act.

**world heritage property** means property of outstanding universal value that is inscribed on the World Heritage List under Article 11 of the Convention for the Protection of the World Cultural and Natural Heritage done at Paris on 23 November 1972, as in force in Australia.

**world heritage values** means natural, heritage and cultural values contained in a world heritage property that are of outstanding universal value as described by the Convention for the Protection of the World Cultural and Natural Heritage done at Paris on 23 November 1972, as in force in Australia.

(2) In this Act, a reference to the Minister administering the *Crown Lands Consolidation Act 1913* is:

(a) in relation to lands that are not within an irrigation area within the meaning of that Act—a reference to the minister for lands, or

(b) in relation to lands that are within such an irrigation area—a reference to the Minister for the time being administering the *Water Management Act 2000*.

(2A) In this Act, a reference to a person convicted of an offence includes a reference to a person in respect of whom an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* is made after the commencement of this subsection.

(3) In this Act, a reference to a licence or certificate under Part 9 or a licence under the *Threatened Species Conservation Act 1995* is a reference to such a licence or certificate that is valid and in force.

(4) Without affecting the generality of any of the definitions in subsection (1), a reference in this Act to protected fauna includes fauna in New South Wales that is of a species not named in Schedule 11 and that has been imported, or is being imported, into New South Wales.

(5) In this Act, a reference to sustainable visitor use and enjoyment includes a reference to appropriate public recreation.

(6) Nothing in this Act shall be construed as operating to affect the law from time to time in force with respect to the navigation of the waters referred to in paragraph (b) of the definition of *Crown lands* in subsection (1).

(7) (Repealed)

7 Functions of Director-General relating to reservation of land
(1) The Director-General is to consider, and may investigate, proposals for the addition of areas to any land reserved under Part 4 or for the reservation of any new areas under Part 4.

(2) When considering or investigating any such proposal, the Director-General is to have regard to the following:

(a) the desirability of protecting the full range of natural heritage and the maintenance of natural processes,

(b) whether the proposal is consistent with the establishment of a comprehensive, adequate and representative reserve system,

(c) the desirability of protecting cultural heritage,

(d) providing opportunities for appropriate public appreciation and understanding, and sustainable visitor use and enjoyment, of land reserved under this Act,

(e) the opportunities for promoting the integration of the management of natural and cultural values,

(f) the desirability of protecting wilderness values,

(g) the objects of this Act,

(h) the desirability of protecting world heritage properties and world heritage values.

8 Miscellaneous functions of Director-General

(1)–(2A) (Repealed)

(3) The Director-General shall in the case of every national park, historic site, state conservation area, regional park, nature reserve, karst conservation reserve and Aboriginal area:

(a) promote such educational activities as the Director-General considers necessary in respect thereof,

(b) arrange for the carrying out of such works as the Director-General considers necessary for or in connection with the management and maintenance thereof, and

(c) undertake such scientific research as the Director-General considers necessary for or in connection with the preservation, protection, management and use thereof.

(4) The Director-General may promote such educational activities, and undertake such scientific research, in respect of Aboriginal objects and Aboriginal places as the Director-General thinks fit, either separately or in conjunction with other persons or bodies.

(5) As soon as practicable after an Aboriginal object is discovered on any land reserved under this Act, the Director-General, after such
consultation with the Australian Museum Trust as appears necessary or expedient, is required to assess the scientific importance of the Aboriginal object.

(6) The Director-General may consider and investigate proposals in relation to existing or proposed Aboriginal places, wilderness areas, wild and scenic rivers, protected archaeological areas, wildlife districts, wildlife refuges, wildlife management areas and interim protection orders.

(6A) The Director-General may:

(a) consider and investigate proposals in relation to existing or proposed conservation areas,

(b) enter into negotiations on behalf of the Minister in relation to existing or proposed conservation areas, and

(c) in the case of every conservation area, but subject to the terms of the conservation agreement concerned:

(i) promote such educational activities as the Director-General considers necessary in respect of the area,

(ii) arrange for the carrying out of such works as the Director-General considers necessary for or in connection with the management and maintenance of the area,

(iii) undertake such scientific research as the Director-General considers necessary for or in connection with the preservation, protection, management and use of the area, and

(iv) take such other action as the Director-General considers necessary for or in connection with the carrying out of directions by the Minister relating to existing or proposed conservation agreements.

(7) The Director-General:

(a) may promote such educational activities as the Director-General considers necessary to awaken and maintain an appreciation of the value of and the need to conserve animal and plant life, including to conserve threatened species, populations and ecological communities, and their habitats,

(b) may enter into arrangements for the carrying out of such works as the Director-General considers necessary for or in connection with the protection and care of fauna and the protection of native plants,

(c) may undertake such scientific research as the Director-General considers necessary for or in connection with the preservation, protection and care of fauna and the protection of native plants.
and other flora, either separately or in conjunction with other persons or bodies, and

(d) shall co-operate with the trustees of any lands dedicated or reserved under the *Crown Lands Consolidation Act 1913*, or the Closer Settlement Acts, in connection with:

(i) the preservation of, the protection and care of, and the promotion of the study of, fauna, and

(ii) the protection of, and the promotion of the study of, native plants and other flora,

and generally shall co-operate with any other persons or bodies in the establishment, care and development of areas of lands set apart for the conservation and preservation of wildlife.

(8) The Director-General may promote such educational activities as the Director-General considers necessary for the instruction and training of ex-officio rangers, honorary rangers, prospective honorary rangers and (with the concurrence of the Jenolan Caves Reserve Trust) officers of the Jenolan Caves Reserve Trust.

(9) Without affecting the generality of any other provision of this Act conferring powers on the Director-General, the Director-General may make and enter into contracts with any person for the carrying out of works or the performance of services or the supply of goods or materials in connection with the exercise or performance by the Director-General or the Service of the Director-General’s or its responsibilities, powers, authorities, duties or functions conferred or imposed by or under this or any other Act.

(10) The Director-General shall, in the exercise and discharge of the powers, authorities, duties and functions conferred or imposed on the Director-General by or under this or any other Act, be subject to the control and direction of the Minister.

(11) Despite subsections (3) and (9), the Director-General’s powers and duties under those subsections are, in relation to Jenolan Caves Reserve Trust lands, to be exercised and discharged by the Jenolan Caves Reserve Trust and not by the Director-General.

(12) Accordingly, a reference to the Director-General in subsection (3) or (9) is, to the extent that the subsection relates to Jenolan Caves Reserve Trust lands, taken to be a reference to the Jenolan Caves Reserve Trust.

**Part 4A Aboriginal land**

**Division 1 Preliminary**

71B Definitions
In this Part:

**Aboriginal Land Council, Local Aboriginal Land Council** and **New South Wales Aboriginal Land Council** have the same meanings as in the **Aboriginal Land Rights Act 1983**.

**Aboriginal negotiating panel** means a panel appointed in accordance with section 71G or 71H of Division 2.

**Aboriginal owner board members**—see section 5 (1).

**Aboriginal owners**—see section 5 (1).

**ALR Act lands** means lands to which section 36A of the **Aboriginal Land Rights Act 1983** applies that are granted to one or more Aboriginal Land Councils under that Act.

**Note.** Part 2 of the **Aboriginal Land Rights Act 1983** makes provision as to land rights and the grant of claims to Crown lands. Section 36A, within that Part, makes provision for the grant of certain land claims, despite the fact that the lands involved are needed, or likely to be needed, for the essential public purpose of nature conservation, if the claimant Aboriginal Land Councils are prepared to lease the lands to the Minister administering this Act and are agreeable to the reservation or dedication of the lands under this Act and in accordance with the requirements of this Part.

**board of management**—see section 5 (1).

**native title** or **native title rights and interests** has the same meaning as it has in the **Native Title Act 1993** of the Commonwealth.

**Registrar** means the Registrar appointed under the **Aboriginal Land Rights Act 1983**.

**Schedule 14 lands** means lands reserved under this Act that are listed in Schedule 14.

### 71C Purpose of Part

(1) The purpose of this Part is to make provision as to the lease to the Minister, and the reservation, under this Act of Schedule 14 lands and ALR Act lands.

(2) So far as Schedule 14 lands are concerned, this Part provides for the recognition of the cultural significance of those lands to Aboriginals and the revocation of their reservation under this Act to enable them:

(a) to be vested, on behalf of the Aboriginal owners, in one or more Local Aboriginal Land Councils or the New South Wales Aboriginal Land Council, and

(b) to be leased by the Aboriginal Land Council or Councils to the Minister, and

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(c) to be then reserved under this Act in accordance with this Part.

(3) So far as ALR Act lands are concerned, this Part provides for the lease of the lands by the Aboriginal Land Council or Councils in which they are vested to the Minister and the reservation of the lands under this Act in accordance with this Part.

(4) The taking of any action referred to in this section in relation to Schedule 14 lands or ALR Act lands is subject to any native title rights and interests existing in relation to the lands immediately before the taking of the action and does not extinguish or impair such rights and interests.

71D Recognition of cultural significance of certain lands to Aboriginals

(1) Parliament recognises that certain lands reserved under this Act are of cultural significance to Aboriginals. Land is of cultural significance to Aboriginals if the land is significant in terms of the traditions, observances, customs, beliefs or history of Aboriginals.

(2) The lands listed in Schedule 14 are identified as being of cultural significance to Aboriginals.

Part 6 Aboriginal objects and Aboriginal places

83 Certain Aboriginal objects to be Crown property

(1) Subject to this section:

(a) an Aboriginal object that was, immediately before the commencement day, deemed to be the property of the Crown by virtue of section 33D of the Act of 1967, and

(b) an Aboriginal object that is abandoned on or after that day by a person other than the Crown,

shall be, and shall be deemed always to have been, the property of the Crown.

(2) Nothing in this section shall be construed as restricting the lawful use of land or as authorising the disturbance or excavation of any land.

(3) No compensation is payable in respect of the vesting of an Aboriginal object by this section or section 33D of the Act of 1967.

84 Aboriginal places

The Minister may, by order published in the Gazette, declare any place specified or described in the order, being a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture, to be an Aboriginal place for the purposes of this Act.
85 Director-General’s responsibilities as to Aboriginal objects and Aboriginal places

(1) The Director-General shall be the authority for the protection of Aboriginal objects and Aboriginal places in New South Wales.

(2) In particular, the Director-General shall be responsible:

(a) for the proper care, preservation and protection of any Aboriginal object or Aboriginal place on any land reserved under this Act, and

(b) subject to section 87, for the proper restoration of any such land that has been disturbed or excavated for the purpose of discovering an Aboriginal object.

85A Transfer of Aboriginal objects

(1) The Director-General may, despite any other provision of this Act, dispose of Aboriginal objects that are the property of the Crown:

(a) by returning the Aboriginal objects to an Aboriginal owner or Aboriginal owners entitled to, and willing to accept possession, custody or control of the Aboriginal objects in accordance with Aboriginal tradition, or

(b) by otherwise dealing with the Aboriginal objects in accordance with any reasonable directions of an Aboriginal owner or Aboriginal owners referred to in paragraph (a), or

(c) if there is or are no such Aboriginal owner or Aboriginal owners—by transferring the Aboriginal objects to a person, or a person of a class, prescribed by the regulations for safekeeping.

(2) Nothing in this section is taken to limit the right of an Aboriginal owner or Aboriginal owners accepting possession, custody or control of any Aboriginal object pursuant to this section to deal with the Aboriginal object in accordance with Aboriginal tradition.

(3) The regulations may make provision as to the manner in which any dispute concerning the entitlement of an Aboriginal owner or Aboriginal owners to possession, custody or control of Aboriginal objects for the purposes of this section is to be resolved.

86 Offences relating to Aboriginal objects

A person, other than the Director-General or a person authorised by the Director-General in that behalf, who:

(a) disturbs or excavates any land, or causes any land to be disturbed or excavated, for the purpose of discovering an Aboriginal object,
(b) disturbs or moves on any land an Aboriginal object that is the property of the Crown, other than an Aboriginal object that is in the custody or under the control of the Australian Museum Trust,

(c) takes possession of an Aboriginal object that is in a national park, historic site, state conservation area, regional park, nature reserve, karst conservation reserve or Aboriginal area,

(d) removes an Aboriginal object from a national park, historic site, state conservation area, regional park, nature reserve, karst conservation reserve or Aboriginal area, or

(e) erects or maintains, in a national park, historic site, state conservation area, regional park, nature reserve, karst conservation reserve or Aboriginal area, a building or structure for the safe custody, storage or exhibition of any Aboriginal object,

except in accordance with the terms and conditions of an unrevoked permit issued to the person under section 87, being terms and conditions having force and effect at the time the act or thing to which the permit relates is done, is guilty of an offence against this Act.

87 Permits relating to Aboriginal objects

(1) Subject to section 88, the Director-General may, upon such terms and conditions as the Director-General thinks fit, issue a permit to do any act or thing referred to in section 86 (a), (b), (c), (d) or (e).

(2) Terms and conditions imposed by the Director-General under subsection (1) may include terms and conditions relating to the proper restoration of land disturbed or excavated.

(3) A failure to comply with a term or condition authorised by subsection (2) shall be deemed to be a contravention of section 86.

(4) The Director-General may, at any time:

(a) revoke a permit issued under this section, or

(b) vary the terms and conditions of such a permit.

88 Australian Museum Trust to have custody of certain Aboriginal objects

(1) Nothing in section 87 shall be construed as authorising the Director-General to permit an Aboriginal object to be removed from a national park, historic site, nature reserve, karst conservation reserve, Aboriginal area, state conservation area or regional park to the custody or control of a person other than the Australian Museum Trust, except where:
(a) the Aboriginal object remains in the custody or under the control of the Director-General, or

(b) the Aboriginal object is being moved from a national park, historic site, nature reserve, karst conservation reserve, Aboriginal area, state conservation area or regional park to any or any other national park, historic site, nature reserve, karst conservation reserve, Aboriginal area, state conservation area or regional park.

(2) An Aboriginal object that is the property of the Crown, other than an Aboriginal object:

(a) in a national park, historic site, nature reserve, karst conservation reserve, Aboriginal area, state conservation area or regional park,

(b) being moved from a national park, historic site, nature reserve, karst conservation reserve, Aboriginal area, state conservation area or regional park to any or any other national park, historic site, nature reserve, karst conservation reserve, Aboriginal area, state conservation area or regional park,

(c) in the custody or under the control of the Director-General, or

(d) acquired by the Minister or the Director-General pursuant to section 89 or by the Minister pursuant to Part 11,

shall be deemed not to be in the possession of the Crown unless it is in the custody or under the control of the Australian Museum Trust.

(3) The Director-General may arrange with the Australian Museum Trust for the deposit or exhibition of an Aboriginal object in a building or structure in a national park, historic site, nature reserve, karst conservation reserve, Aboriginal area, state conservation area or regional park and, where an Aboriginal object is so deposited or exhibited, section 86 does not apply to the Australian Museum Trust in relation to that Aboriginal object.

(4) Nothing in this Act shall be construed as affecting the powers, authorities, duties or functions conferred or imposed on the Australian Museum Trust by the Australian Museum Trust Act 1975.

89 Preservation or exhibition of certain Aboriginal objects

(1) Subject to this section, the Minister or the Director-General may, by agreement with a person having the ownership or possession of:

(a) an Aboriginal object that is not the property of the Crown, or

(b) an Aboriginal place,
acquire the Aboriginal object or take such other action as the
Minister or the Director-General thinks is practicable for the
preservation or exhibition of the Aboriginal object or Aboriginal
place.

(2) An Aboriginal object acquired under this section shall be the
property of the Crown.

(3) An Aboriginal object that is real property shall not be acquired
under this section, but nothing in this section affects anything
contained in Part 11.

(4) Any Aboriginal object acquired by the Minister or the Director-
General prior to the commencement day shall be deemed to have
been acquired under this section.

90 Destruction etc of Aboriginal objects or Aboriginal places

(1) A person who, without first obtaining the consent of the Director-
General, knowingly destroys, defaces or damages, or knowingly
causes or permits the destruction or defacement of or damage to, an
Aboriginal object or Aboriginal place is guilty of an offence against
this Act.

Maximum penalty: 50 penalty units or imprisonment for 6 months,
or both (or 200 penalty units in the case of a corporation).

(1A) Subsection (1) does not apply with respect to an
Aboriginal object that is dealt with in accordance with Aboriginal
tradition pursuant to section 85A.

(2) The Director-General may give consent for the purposes of
subsection (1) subject to such conditions and restrictions as are
specified therein.

(3) A person whose application for consent is refused, or who is
dissatisfied with any condition or restriction subject to which the
consent is given, may appeal to the Minister.

(4) The Minister:

(a) may refuse to grant the appeal, or

(b) may grant the appeal wholly or in part, and may give such
directions in the matter as seem proper.

(5) The decision of the Minister on the appeal is final and is binding on
the Director-General and the appellant, and shall be carried into
effect accordingly.

(6) Where the regulations prescribe:

(a) the manner in which an appeal is to be made under this
section—the appeal shall be made in that manner, or
(b) the period within which an appeal is to be made under this section—the appeal shall be made within that period.

(7) Where the Director-General fails to grant an application (other than an application for approval in respect of integrated development within the meaning of section 91 of the Environmental Planning and Assessment Act 1979) for consent, the application shall, for the purposes of this section, be deemed to be refused upon the expiration of:

(a) subject to paragraph (b)—7 days after the application was received by the Director-General, or

(b) where the regulations prescribe some other period—that other period.

91 Notification of sites of Aboriginal objects

A person who is aware of the location of an Aboriginal object that is the property of the Crown or, not being the property of the Crown, is real property, and does not, in the prescribed manner, notify the Director-General thereof within a reasonable time after the person first becomes aware of that location is guilty of an offence against this Act unless the person believes on reasonable grounds that the Director-General is aware of the location of that Aboriginal object.
Appendix D

Code of Ethics of the American Anthropological Association
(http://www.aaanet.org/committees/ethics/ethcode.htm)

Approved June 1998

I. Preamble

Anthropological researchers, teachers and practitioners are members of many different communities, each with its own moral rules or codes of ethics. Anthropologists have moral obligations as members of other groups, such as the family, religion, and community, as well as the profession. They also have obligations to the scholarly discipline, to the wider society and culture, and to the human species, other species, and the environment. Furthermore, fieldworkers may develop close relationships with persons or animals with whom they work, generating an additional level of ethical considerations.

In a field of such complex involvements and obligations, it is inevitable that misunderstandings, conflicts, and the need to make choices among apparently incompatible values will arise. Anthropologists are responsible for grappling with such difficulties and struggling to resolve them in ways compatible with the principles stated here. The purpose of this Code is to foster discussion and education. The American Anthropological Association (AAA) does not adjudicate claims for unethical behavior.

The principles and guidelines in this Code provide the anthropologist with tools to engage in developing and maintaining an ethical framework for all anthropological work.

II. Introduction

Anthropology is a multidisciplinary field of science and scholarship, which includes the study of all aspects of humankind--archaeological, biological, linguistic and sociocultural. Anthropology has roots in the natural and social sciences and in the humanities, ranging in approach from basic to applied research and to scholarly interpretation.
As the principal organization representing the breadth of anthropology, the American Anthropological Association (AAA) starts from the position that generating and appropriately utilizing knowledge (i.e., publishing, teaching, developing programs, and informing policy) of the peoples of the world, past and present, is a worthy goal; that the generation of anthropological knowledge is a dynamic process using many different and ever-evolving approaches; and that for moral and practical reasons, the generation and utilization of knowledge should be achieved in an ethical manner.

The mission of American Anthropological Association is to advance all aspects of anthropological research and to foster dissemination of anthropological knowledge through publications, teaching, public education, and application. An important part of that mission is to help educate AAA members about ethical obligations and challenges involved in the generation, dissemination, and utilization of anthropological knowledge.

The purpose of this Code is to provide AAA members and other interested persons with guidelines for making ethical choices in the conduct of their anthropological work. Because anthropologists can find themselves in complex situations and subject to more than one code of ethics, the AAA Code of Ethics provides a framework, not an ironclad formula, for making decisions.

Persons using the Code as a guideline for making ethical choices or for teaching are encouraged to seek out illustrative examples and appropriate case studies to enrich their knowledge base.

Anthropologists have a duty to be informed about ethical codes relating to their work, and ought periodically to receive training on current research activities and ethical issues. In addition, departments offering anthropology degrees should include and require ethical training in their curriculums.

No code or set of guidelines can anticipate unique circumstances or direct actions in specific situations. The individual anthropologist must be willing to make carefully considered ethical choices and be prepared to make clear the assumptions, facts and issues on which those choices are based. These guidelines therefore address general contexts, priorities and relationships which should be considered in ethical decision making in anthropological work.

III. Research

In both proposing and carrying out research, anthropological researchers must be open about the purpose(s), potential impacts, and source(s) of support for research projects with funders, colleagues, persons studied or providing information, and with relevant parties affected by the research. Researchers must expect to utilize the results of their work in an appropriate fashion and disseminate the results through appropriate and timely activities. Research fulfilling these expectations is ethical, regardless of the source of funding (public or private) or purpose (i.e., "applied," "basic," "pure," or "proprietary").

Anthropological researchers should be alert to the danger of compromising anthropological ethics as a condition to engage in research, yet also be alert to
proper demands of good citizenship or host-guest relations. Active contribution and leadership in seeking to shape public or private sector actions and policies may be as ethically justifiable as inaction, detachment, or noncooperation, depending on circumstances. Similar principles hold for anthropological researchers employed or otherwise affiliated with nonanthropological institutions, public institutions, or private enterprises.

A. Responsibility to people and animals with whom anthropological researchers work and whose lives and cultures they study.

1. Anthropological researchers have primary ethical obligations to the people, species, and materials they study and to the people with whom they work. These obligations can supersede the goal of seeking new knowledge, and can lead to decisions not to undertake or to discontinue a research project when the primary obligation conflicts with other responsibilities, such as those owed to sponsors or clients. These ethical obligations include:

- To avoid harm or wrong, understanding that the development of knowledge can lead to change which may be positive or negative for the people or animals worked with or studied
- To respect the well-being of humans and nonhuman primates
- To work for the long-term conservation of the archaeological, fossil, and historical records
- To consult actively with the affected individuals or group(s), with the goal of establishing a working relationship that can be beneficial to all parties involved

2. Anthropological researchers must do everything in their power to ensure that their research does not harm the safety, dignity, or privacy of the people with whom they work, conduct research, or perform other professional activities. Anthropological researchers working with animals must do everything in their power to ensure that the research does not harm the safety, psychological well-being or survival of the animals or species with which they work.

3. Anthropological researchers must determine in advance whether their hosts/providers of information wish to remain anonymous or receive recognition, and make every effort to comply with those wishes. Researchers must present to their research participants the possible impacts of the choices, and make clear that despite their best efforts, anonymity may be compromised or recognition fail to materialize.

4. Anthropological researchers should obtain in advance the informed consent of persons being studied, providing information, owning or controlling access to material being studied, or otherwise identified as having interests which might be impacted by the research. It is understood that the degree and breadth of informed consent required will depend on the nature of the project and may be affected by requirements of other codes, laws, and ethics of the country or community in which the research is pursued. Further, it is understood that the informed consent process is dynamic and continuous; the process should be initiated in the project design and continue through implementation by way of dialogue and negotiation with those studied. Researchers are responsible for identifying and complying with the various informed consent codes, laws and regulations affecting their projects. Informed consent, for the
purposes of this code, does not necessarily imply or require a particular written or signed form. It is the quality of the consent, not the format, that is relevant.

5. Anthropological researchers who have developed close and enduring relationships (i.e., covenantal relationships) with either individual persons providing information or with hosts must adhere to the obligations of openness and informed consent, while carefully and respectfully negotiating the limits of the relationship.

6. While anthropologists may gain personally from their work, they must not exploit individuals, groups, animals, or cultural or biological materials. They should recognize their debt to the societies in which they work and their obligation to reciprocate with people studied in appropriate ways.

B. Responsibility to scholarship and science

1. Anthropological researchers must expect to encounter ethical dilemmas at every stage of their work, and must make good-faith efforts to identify potential ethical claims and conflicts in advance when preparing proposals and as projects proceed. A section raising and responding to potential ethical issues should be part of every research proposal.

2. Anthropological researchers bear responsibility for the integrity and reputation of their discipline, of scholarship, and of science. Thus, anthropological researchers are subject to the general moral rules of scientific and scholarly conduct: they should not deceive or knowingly misrepresent (i.e., fabricate evidence, falsify, plagiarize), or attempt to prevent reporting of misconduct, or obstruct the scientific/scholarly research of others.

3. Anthropological researchers should do all they can to preserve opportunities for future fieldworkers to follow them to the field.

4. Anthropological researchers should utilize the results of their work in an appropriate fashion, and whenever possible disseminate their findings to the scientific and scholarly community.

5. Anthropological researchers should seriously consider all reasonable requests for access to their data and other research materials for purposes of research. They should also make every effort to insure preservation of their fieldwork data for use by posterity.

C. Responsibility to the public

1. Anthropological researchers should make the results of their research appropriately available to sponsors, students, decision makers, and other nonanthropologists. In so doing, they must be truthful; they are not only responsible for the factual content of their statements but also must consider carefully the social and political implications of the information they disseminate. They must do everything in their power to insure that such information is well understood, properly contextualized, and responsibly utilized. They should make clear the empirical bases upon which their reports stand, be candid about their qualifications and philosophical or political biases, and recognize and make clear
the limits of anthropological expertise. At the same time, they must be alert to possible harm their information may cause people with whom they work or colleagues.

2. Anthropologists may choose to move beyond disseminating research results to a position of advocacy. This is an individual decision, but not an ethical responsibility.

IV. Teaching
Responsibility to students and trainees

While adhering to ethical and legal codes governing relations between teachers/mentors and students/trainees at their educational institutions or as members of wider organizations, anthropological teachers should be particularly sensitive to the ways such codes apply in their discipline (for example, when teaching involves close contact with students/trainees in field situations). Among the widely recognized precepts which anthropological teachers, like other teachers/mentors, should follow are:

1. Teachers/mentors should conduct their programs in ways that preclude discrimination on the basis of sex, marital status, "race," social class, political convictions, disability, religion, ethnic background, national origin, sexual orientation, age, or other criteria irrelevant to academic performance.

2. Teachers'/mentors' duties include continually striving to improve their teaching/training techniques; being available and responsive to student/trainee interests; counseling students/trainees realistically regarding career opportunities; conscientiously supervising, encouraging, and supporting students/trainees' studies; being fair, prompt, and reliable in communicating evaluations; assisting students/trainees in securing research support; and helping students/trainees when they seek professional placement.

3. Teachers/mentors should impress upon students/trainees the ethical challenges involved in every phase of anthropological work; encourage them to reflect upon this and other codes; encourage dialogue with colleagues on ethical issues; and discourage participation in ethically questionable projects.

4. Teachers/mentors should publicly acknowledge student/trainee assistance in research and preparation of their work; give appropriate credit for coauthorship to students/trainees; encourage publication of worthy student/trainee papers; and compensate students/trainees justly for their participation in all professional activities.

5. Teachers/mentors should beware of the exploitation and serious conflicts of interest which may result if they engage in sexual relations with students/trainees. They must avoid sexual liaisons with students/trainees for whose education and professional training they are in any way responsible.
V. Application

1. The same ethical guidelines apply to all anthropological work. That is, in both proposing and carrying out research, anthropologists must be open with funders, colleagues, persons studied or providing information, and relevant parties affected by the work about the purpose(s), potential impacts, and source(s) of support for the work. Applied anthropologists must intend and expect to utilize the results of their work appropriately (i.e., publication, teaching, program and policy development) within a reasonable time. In situations in which anthropological knowledge is applied, anthropologists bear the same responsibility to be open and candid about their skills and intentions, and monitor the effects of their work on all persons affected. Anthropologists may be involved in many types of work, frequently affecting individuals and groups with diverse and sometimes conflicting interests. The individual anthropologist must make carefully considered ethical choices and be prepared to make clear the assumptions, facts and issues on which those choices are based.

2. In all dealings with employers, persons hired to pursue anthropological research or apply anthropological knowledge should be honest about their qualifications, capabilities, and aims. Prior to making any professional commitments, they must review the purposes of prospective employers, taking into consideration the employer's past activities and future goals. In working for governmental agencies or private businesses, they should be especially careful not to promise or imply acceptance of conditions contrary to professional ethics or competing commitments.

3. Applied anthropologists, as any anthropologist, should be alert to the danger of compromising anthropological ethics as a condition for engaging in research or practice. They should also be alert to proper demands of hospitality, good citizenship and guest status. Proactive contribution and leadership in shaping public or private sector actions and policies may be as ethically justifiable as inaction, detachment, or noncooperation, depending on circumstances.

VI. Epilogue

Anthropological research, teaching, and application, like any human actions, pose choices for which anthropologists individually and collectively bear ethical responsibility. Since anthropologists are members of a variety of groups and subject to a variety of ethical codes, choices must sometimes be made not only between the varied obligations presented in this code but also between those of this code and those incurred in other statuses or roles. This statement does not dictate choice or propose sanctions. Rather, it is designed to promote discussion and provide general guidelines for ethically responsible decisions.

VII. Acknowledgments

This Code was drafted by the Commission to Review the AAA Statements on Ethics during the period January 1995-March 1997. The Commission members were James Peacock (Chair), Carolyn Fluehr-Lobban, Barbara Frankel, Kathleen Gibson, Janet Levy, and Murray Wax. In addition, the following individuals participated in the Commission meetings: philosopher Bernard Gert, anthropologists Cathleen Crain, Shirley Fiske, David Freyer, Felix Moos, Yolanda Moses, and Niel Tashima; and members of the American Sociological Association.
Committee on Ethics. Open hearings on the Code were held at the 1995 and 1996 annual meetings of the American Anthropological Association. The Commission solicited comments from all AAA Sections. The first draft of the AAA Code of Ethics was discussed at the May 1995 AAA Section Assembly meeting; the second draft was briefly discussed at the November 1996 meeting of the AAA Section Assembly. The Final Report of the Commission was published in the September 1995 edition of the *Anthropology Newsletter* and on the AAA web site (http://www.aaanet.org). Drafts of the Code were published in the April 1996 and 1996 annual meeting edition of the *Anthropology Newsletter* and the AAA web site, and comments were solicited from the membership. The Commission considered all comments from the membership in formulating the final draft in February 1997. The Commission gratefully acknowledge the use of some language from the codes of ethics of the National Association for the Practice of Anthropology and the Society for American Archaeology.
Appendix E

Principles of Archaeological Ethics
of the
Society for American Archaeology
(http://www.saa.org/aboutSAA/ethics.html)

At its April 10, 1996 meeting, the SAA Executive Board adopted the Principles of Archaeological Ethics, reproduced below, as proposed by the SAA Ethics in Archaeology Committee. The adoption of these principles represents the culmination of an effort begun in 1991 with the formation of the ad-hoc Ethics in Archaeology Committee. The committee was charged with considering the need for revising the society's existing statements on ethics. A 1993 workshop on ethics, held in Reno, resulted in draft principles that were presented at a public forum at the 1994 annual meeting in Anaheim. SAA published the draft principles with position papers from the forum and historical commentaries in a special report distributed to all members, Ethics and Archaeology: Challenges for the 1990s, edited by Mark. J. Lynott and Alison Wylie (1995). Member comments were solicited in this special report, through a notice in SAA Bulletin, and at two sessions held at the SAA booth during the 1995 annual meeting in Minneapolis. The final principles, presented here, are revised from the original draft based on comments from members and the Executive Board.

The Executive Board strongly endorses these principles and urges their use by all archaeologists "in negotiating the complex responsibilities they have to archaeological resources, and to all who have an interest in these resources or are otherwise affected by archaeological practice (Lynott and Wylie 1995:8)." The board is grateful to those who have contributed to the development of these principles, especially the members of the Ethics in Archaeology Committee, chaired by Mark. J. Lynott and Alison Wylie, for their skillful completion of this challenging and important task. The bylaws change just voted by the members has established a new standing committee, the Committee on Ethics, that will carry on with these crucial efforts.

**Principle No. 1:**

**Stewardship**

The archaeological record, that is, in situ archaeological material and sites, archaeological collections, records and reports, is irreplaceable. It is the responsibility of all archaeologists to work for the long-term conservation and protection of the archaeological record by practicing and promoting stewardship of the archaeological record. Stewards are both caretakers of and advocates for the archaeological record for the benefit of all people; as they investigate and interpret the record, they should use the specialized knowledge they gain to promote public
understanding and support for its long-term preservation.

Principle No. 2:
Accountability

Responsible archaeological research, including all levels of professional activity, requires an acknowledgment of public accountability and a commitment to make every reasonable effort, in good faith, to consult actively with affected group(s), with the goal of establishing a working relationship that can be beneficial to all parties involved.

Principle No. 3:
Commercialization

The Society for American Archaeology has long recognized that the buying and selling of objects out of archaeological context is contributing to the destruction of the archaeological record on the American continents and around the world. The commercialization of archaeological objects - their use as commodities to be exploited for personal enjoyment or profit - results in the destruction of archaeological sites and of contextual information that is essential to understanding the archaeological record. Archaeologists should therefore carefully weigh the benefits to scholarship of a project against the costs of potentially enhancing the commercial value of archaeological objects. Whenever possible they should discourage, and should themselves avoid, activities that enhance the commercial value of archaeological objects, especially objects that are not curated in public institutions, or readily available for scientific study, public interpretation, and display.

Principle No. 4:
Public Education and Outreach

Archaeologists should reach out to, and participate in cooperative efforts with others interested in the archaeological record with the aim of improving the preservation, protection, and interpretation of the record. In particular, archaeologists should undertake to: 1) enlist public support for the stewardship of the archaeological record; 2) explain and promote the use of archaeological methods and techniques in understanding human behavior and culture; and 3) communicate archaeological interpretations of the past. Many publics exist for archaeology including students and teachers; Native Americans and other ethnic, religious, and cultural groups who find in the archaeological record important aspects of their cultural heritage; lawmakers and government officials; reporters, journalists, and others involved in the media; and the general public. Archaeologists who are unable to undertake public education and outreach directly should encourage and support the efforts of others in these activities.
Principle No. 5:
Intellectual Property

Intellectual property, as contained in the knowledge and documents created through the study of archaeological resources, is part of the archaeological record. As such it should be treated in accord with the principles of stewardship rather than as a matter of personal possession. If there is a compelling reason, and no legal restrictions or strong countervailing interests, a researcher may have primary access to original materials and documents for a limited and reasonable time, after which these materials and documents must be made available to others.

Principle No. 6:
Public Reporting and Publication

Within a reasonable time, the knowledge of archaeologists gain from investigation of the archaeological record must be presented in accessible form (through publication or other means) to as wide a range of interested publics as possible. The documents and materials on which publication and other forms of public reporting are based should be deposited in a suitable place for permanent safekeeping. An interest in preserving and protecting in situ archaeological sites must be taken into account when publishing and distributing information about their nature and location.

Principle No. 7:
Records and Preservation

Archaeologists should work actively for the preservation of, and long term access to, archaeological collections, records, and reports. To this end, they should encourage colleagues, students, and others to make responsible use of collections, records, and reports in their research as one means of preserving the in situ archaeological record, and of increasing the care and attention given to that portion of the archaeological record which has been removed and incorporated into archaeological collections, records, and reports.

Principle No. 8:
Training and Resources

Given the destructive nature of most archaeological investigations, archaeologists must ensure that they have adequate training, experience, facilities, and other support necessary to conduct any program of research they initiate in a manner consistent with the foregoing principles and contemporary standards of professional practice.
Appendix F

Register of Professional Archaeologists

Code of Conduct
(http://www.rpanet.org/conduct.htm)

Archaeology is a profession, and the privilege of professional practice requires professional morality and professional responsibility, as well as professional competence, on the part of each practitioner.

The Archaeologist's Responsibility to the Public

1.1 An archaeologist shall:

- Recognize a commitment to represent Archaeology and its research results to the public in a responsible manner;
- Actively support conservation of the archaeological resource base;
- Be sensitive to, and respect the legitimate concerns of, groups whose culture histories are the subjects of archaeological investigations;
- Avoid and discourage exaggerated, misleading, or unwarranted statements about archaeological matters that might induce others to engage in unethical or illegal activity;
- Support and comply with the terms of the UNESCO Convention on the means of prohibiting and preventing the illicit import, export, and transfer of ownership of cultural property, as adopted by the General Conference, 14 November 1970, Paris.

1.2 An archaeologist shall not:

- Engage in any illegal or unethical conduct involving archaeological matters or knowingly permit the use of his/her name in support of any illegal or unethical activity involving archaeological matters;
- Give a professional opinion, make a public report, or give legal testimony involving archaeological matters without being as thoroughly informed as might reasonably be expected;
- Engage in conduct involving dishonesty, fraud, deceit or misrepresentation about archaeological matters;
- Undertake any research that affects the archaeological resource base for which she/he is not qualified.
The Archaeologist's Responsibility to Colleagues, Employees, and Students

2.1 An archaeologist shall:

- Give appropriate credit for work done by others;
- Stay informed and knowledgeable about developments in her/his field or fields of specialization;
- Accurately, and without undue delay, prepare and properly disseminate a description of research done and its results;
- Communicate and cooperate with colleagues having common professional interests;
- Give due respect to colleagues' interests in, and rights to, information about sites, areas, collections, or data where there is a mutual active or potentially active research concern;
- Know and comply with all federal, state, and local laws, ordinances, and regulations applicable to her/his archaeological research and activities;
- Report knowledge of violations of this Code to proper authorities.
- Honor and comply with the spirit and letter of the Register of Professional Archaeologist's Disciplinary Procedures.

2.2 An archaeologist shall not:

- Falsely or maliciously attempt to injure the reputation of another archaeologist;
- Commit plagiarism in oral or written communication;
- Undertake research that affects the archaeological resource base unless reasonably prompt, appropriate analysis and reporting can be expected;
- Refuse a reasonable request from a qualified colleague for research data;
- Submit a false or misleading application for registration by the Register of Professional Archaeologists.
The Archaeologist's Responsibility to Employers and Clients

3.1 An archaeologist shall:

Respect the interests of her/his employer or client, so far as is consistent with the public welfare and this Code and Standards;

Refuse to comply with any request or demand of an employer or client which conflicts with the Code and Standards;

Recommend to employers or clients the employment of other archaeologists or other expert consultants upon encountering archaeological problems beyond her/his own competence;

Exercise reasonable care to prevent her/his employees, colleagues, associates and others whose services are utilized by her/him from revealing or using confidential information. Confidential information means information of a non-archaeological nature gained in the course of employment which the employer or client has requested be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the employer or client. Information ceases to be confidential when the employer or client so indicates or when such information becomes publicly known.

3.2 An archaeologist shall not:

Reveal confidential information, unless required by law;

Use confidential information to the disadvantage of the client or employer;

Use confidential information for the advantage of herself/himself or a third person, unless the client consents after full disclosure;

Accept compensation or anything of value for recommending the employment of another archaeologist or other person, unless such compensation or thing of value is fully disclosed to the potential employer or client;

Recommend or participate in any research which does not comply with the requirements of the Standards of Research Performance.
Appendix G

1992 Code of Ethics of the Australian Archaeological Association
(Australian Archaeology Number 39, 1994, pp 129)

Members’ obligations to Australian Aboriginal and Torres Strait Islander people.

Principles to abide by:
Members agree that they have obligations to indigenous peoples and that they shall abide by the following principles:

1. To acknowledge the importance of indigenous cultural heritage, including sites, places, objects, artefacts, human remains, to the survival of indigenous cultures.
2. To acknowledge the importance of protecting indigenous cultural heritage to the well-being of indigenous people.
3. To acknowledge the special importance of indigenous ancestral human remains, and sites containing and/or associated with such remains, to the indigenous people.
4. To acknowledge that the important relationship between indigenous peoples and their cultural heritage exists irrespective of legal ownership.
5. To acknowledge that the indigenous cultural heritage rightfully belongs to the indigenous descendents of that heritage except items given as personal gifts to non-indigenous people or given or sold without force to non-indigenous institutions.
6. To acknowledge and recognise indigenous methodologies for interpreting, curating, managing and protecting indigenous cultural heritage.
7. To establish contractual arrangements between archaeologists and representatives authorised by indigenous communities whose cultural heritage is being investigated.
8. To see, at all times, representation of indigenous people in agencies funding or authorising research to be certain their view is considered as critically important in setting research standards, questions, priorities and goals.

Rules to adhere to:
Members agree that they will adhere to the following rules prior to, during and after their investigations:

1. Prior to conducting any investigation and/or examination, members shall define the subject of investigation. We do not recognise that there are any circumstances where there is no community of concern.
2. Members shall negotiate with and obtain the informed consent of representatives authorised by the indigenous people whose cultural heritage is the subject of investigation.
3. Members shall ensure that the authorised representatives of the indigenous peoples whose culture is being investigated are kept informed during all stages of the investigation and are able to renegotiate or terminate the archaeological work being conducted at that site.

4. Members shall ensure that copies of all completed reports, theses and published materials resulting from their work are presented to the representatives of the identified indigenous peoples as soon as possible.

5. Members shall not interfere with and/or remove human remains of indigenous peoples without the written consent of representatives authorised by the indigenous people whose cultural heritage is the object of investigation.

6. Members shall not interfere with and/or remove artefacts or objects of any cultural significance, as defined by all associated indigenous peoples whose cultural heritage is the object of investigation without the written consent of their authorised representatives.

7. Members shall endeavour to involve indigenous peoples in all stages of their projects.

8. All research shall result in written reports produced in simple legible English and where possible in language for those particular communities.

9. In joining the Australian Archaeological Association members agree to accept these principles and rules.
Appendix H

2003 Code of Ethics of the Australian Archaeological Association
(http://www.australianarchaeology.com/codeofethics.html)

1. FOREWORD

1.1 Members will serve the interests of the Association by adhering to its objects and purposes as defined by this Code of Ethics and the Constitution, specifically:

- to promote the advancement of archaeology;
- to provide an organisation for the discussion and dissemination of archaeological information and ideas in archaeology;
- to convene meetings at regular intervals;
- to publicise the need for the study and conservation of archaeological sites and collections; and
- to publicise the work of the Association.

1.2 Members will negotiate and make every reasonable effort to obtain the informed consent of representatives of the communities of concern whose cultural heritage is the subject of investigation. Members cannot assume that there is no community of concern.

1.3 Members recognise that there are many interests in cultural heritage, but they specifically acknowledge the rights and interests of Indigenous peoples. AAA endorses and directs members to the current guidelines for ethical research with Indigenous parties published by the Australian Institute of Aboriginal and Torres Strait Islander Studies (www.aiatsis.gov.au/corp/docs/EthicsGuideA4.pdf).

1.4 Members whose actions are detrimental to the interests of the Association may be subject to disciplinary procedures as defined by the Constitution.

2. PRINCIPLES RELATING TO THE ARCHAEOLOGICAL RECORD

2.1 Consonant with their obligations arising from government and international agreements, legislation and regulations, members will advocate the conservation, curation and preservation of archaeological sites, assemblages, collections and archival records.

2.2 Members will endeavour to ensure that archaeological sites and materials which they investigate are managed in a manner which conserves the archaeological and cultural heritage values of the sites and materials.

2.3 Members will neither engage in nor support the illicit trade in cultural heritage.
2.4 Members recognise the importance of repatriation of archaeological materials for both Indigenous and non-Indigenous communities of concern and they support and advocate the necessity to properly manage archaeological materials in accordance with agreements with communities of concern.

3. PRINCIPLES RELATING TO INDIGENOUS ARCHAEOLOGY

3.1 Members acknowledge the primacy of Indigenous knowledge, intellectual property and cultural rights in respect of Indigenous heritage and the following articles reflect this principle.

3.2 Members acknowledge the importance of cultural heritage to Indigenous communities.

3.3 Members acknowledge the special importance to Indigenous peoples of ancestral remains and objects and sites associated with such remains. Members will treat such remains with respect.

3.4 Members acknowledge Indigenous approaches to the interpretation of cultural heritage and to its conservation.

3.5 Members will negotiate equitable agreements between archaeologists and the Indigenous communities whose cultural heritage is being investigated. AAA endorses and directs members to the current guidelines regarding such agreements published by the Australian Institute of Aboriginal and Torres Strait Islander Studies (www.aiatsis.gov.au/corp/docs/EthicsGuideA4.pdf).

3.6 Members recognise the Indigenous property rights of Indigenous peoples.

4. PRINCIPLES RELATING TO CONDUCT

4.1 Members will treat each other in a professional manner.

4.2 Members will disseminate the results of their work as widely as possible using plain language where appropriate.

4.3 Any person can notify the Executive Committee of a member's conduct which they believe to be detrimental to the interests of the Association. Complaints may activate procedures outlined in Section 32 (Expulsion of Members) of the Constitution, including rights of appeal.

4.4 Personal information provided to the Association by members will be kept confidential.
Appendix I

Code of Ethics
of the
Australian Association of Consulting
Archaeologists Inc.

Code of Ethics

Schedule 2 of the AACAI Constitution

1. FOREWORD

1.1 Members agree that as archaeologists we have certain responsibilities to the public, our employers and clients and our colleagues, and undertake to abide by the Code of Ethics as set out below to the best of our ability.

2. DUTY TO THE PUBLIC

2.1 A member should take a responsible attitude to the archaeological resource base and to the best of her/his understanding ensure that this, as well as information derived from it, are used wisely and in the best interest of the public.

2.2 A member shall not recommend or take part in any research which she/he is not qualified.

2.3 A member shall not recommend or take part in any research which she/he has good reason to believe may be sub-standard.

2.4 A member shall ensure that all relevant data pertaining to the resource base should be deposited with an appropriate government authority or archive.

3. DUTY TO CERTAIN GROUPS

3.1 A member shall be sensitive to, and respect the legitimate concerns of groups whose cultural background is the subject of investigations.

4. DUTY TO INFORMANTS

4.1 A member shall offer appropriate remuneration for time, expertise, personal cost and inconvenience incurred in the giving of information, sought by a member of the association.

5. DUTY TO THE PROFESSION
5.1 A member shall keep informed about developments in her/his field of expertise and be willing to share such knowledge to improve the general standard of archaeological work.

5.2 A member shall avoid discrediting the profession by knowingly undertaking work beyond her/his competence.

5.3 A member shall respect the professional interests of colleagues as far as is ethical in terms of the interests of the public and the discipline.

5.4 Where a member has been asked for a second opinion, she/he shall advise the first archaeologist that she/he has been so requested.

5.5 A member shall not refuse a reasonable request from a qualified colleague for research data and shall endeavour to pass on relevant information to interested colleagues and appropriate official bodies.

5.6 The consultant should not knowingly compete with another for employment to the detriment of professional standards.

5.7 A member must state clearly the evidence on which the report is based, to what extent it is a matter of personal observation and the qualifications and experience of any co-workers quoted.

5.8 A member shall plan and complete any work as carefully and competently as possible under the circumstances and remembering that the information gained matters in terms of the discipline of archaeology as well as the problems of the employer or client.

6. DUTY TO EMPLOYER OR CLIENT

6.1 A member shall report on work accurately, promptly and in the manner that best serves the public, the employer or client.

7. MATTERS OF FACT

7.1 The consultant's findings, recommendations, etc., shall be based upon professional knowledge and opinion and should avoid exaggerated and ill-founded statements.

8. MATTERS OF OPINION

8.1 A member shall not knowingly misrepresent the needs, problems or possible consequences of a project.

8.2 A member shall not attempt to discredit the competence or integrity of a colleague unless she/he considers it is professional or public duty to do so.

9. LIMITATION
9.1 A member shall advise the employer or client to engage other expert consultants for aspects of a project beyond her/his own competence. No concealed fee shall be accepted for such referrals.

10. TRAINING OF POTENTIAL ARCHAEOLOGISTS

10.1 A member shall give less qualified co-workers on a project every reasonable opportunity to gain skills and experience and shall negotiate adequate and appropriate remuneration for such work with regard to the skills of the co-worker and requirements of the job.

11. CREDIT TO COLLEAGUES

11.1 A member shall give due credit for work done by others (including subordinates) as consultants and/or researchers, and acknowledge ideas and methods originating from other persons unless such contributions have become generally known.

12. ACCEPTANCE OF FAVOURS

12.1 A member shall avoid placing her/himself under any obligation to any person or organisation if doing so could affect her/his impartiality in professional matters.

13. CONFIDENTIAL INFORMATION

13.1 A member shall not use confidential non-archaeological information acquired during work for an employer or client without due permission from that employer or client.

13.2 A member shall respect such information and ensure that co-workers do the same.

13.3 A member shall not disclose such information unless the law so requires.

14. CONSULTING PRACTICE

14.1 A member shall not be described as or claim to be an archaeological consultant unless she/he can act as an independent and unbiased adviser and has suitable qualifications and experience.

15. LEGAL REQUIREMENTS

15.1 A member shall take care to know of and comply with all relevant legal requirements.

15.2 A member shall refuse any request from an employer or client or any other persons, which involves illegal or unethical behaviour, such as suppression or misrepresentation of information.

15.3 A member shall not engage in any illegal or unethical conduct involving archaeological matters.
16. PREFERENCE OF EMPLOYMENT

16.1 On any job where a qualified archaeological assistant is necessary or required, a qualified archaeologist who is a member of this Association should be given preference of employment.

17. DUTY TO EMPLOYEES

17.1 The recommended fee scales of employees shall be regarded as a minimum and shall not be undercut.
Appendix J

Australian Association of Consulting Archaeologists Inc.

Consulting with Aboriginal Communities Policy Document

1. The Association recognises that Aboriginal sites are of significance to Aboriginal people as part of their heritage and as part of their continuing culture and identity.

2. The Association recognises that Aboriginal communities should be involved in decision-making concerning Aboriginal sites. Aboriginal opinions, concerns and management recommendations should be presented alongside those of the archaeological consultant.

3. The Association recognises that Aboriginal people have a right to be consulted about the intention to undertake archaeological work, to be consulted about the progress and findings of this work, and to be consulted about any recommendations arising from this work.

4. The Association supports the practice of directly involving Aboriginal people in archaeological work, particularly fieldwork.

5. The Association recognises that work undertaken by Aboriginal people on behalf of a member of the Association must be subject to appropriate remuneration in accordance with the Association's recommended scale of fees, or, where appropriate, subject to remuneration above the Association's fee scale where this has been derived from negotiations between the Member and the Aboriginal community.

6. The Association recognises that the circulation or publication of the results of archaeological work must be sensitive to Aboriginal concerns about the disclosure of confidential information about sites.

7. The Association recognises that assistance provided by Aboriginal people and communities should be acknowledged in subsequent written and verbal reports, publications and presentations.

8. The Association recognises that information and documentation derived from archaeological work should be returned to relevant Aboriginal people and their communities.
9. The Association recognises that consultation with Aboriginal communities should be via land councils, co-operatives or other organisations that are generally recognised as legitimately representing the interests and views of Aboriginal people in the relevant locality, area or region.
Appendix K

Legislation CD-ROM

This CD-ROM contains legislative acts relevant to this thesis that are too extensive to include in written format. The files are in .PDF format which requires Adobe Acrobat Reader to view. The Reader is included on the CD-ROM.

The Acts included on the CD-ROM:

- National Historic Protection Act 1966
- New South Wales National Parks and Wildlife Act 1974