Catholic Religious Australia

VOL. 15, 26 FEBRUARY 2024

JUST NOW

PROTECTING SEA COUNTRY

In a previous edition of Just Now, we explored the insufficiency of national protections for First Nations' Cultural Heritage. In particular, we laid bare the destruction of two rock shelters of great cultural significance to Traditional Owners of Juukan Gorge, WA, in 2020, by mining company Rio Tinto.

More recently, the current Barossa Gas Project, which will extract natural gas 285km offshore and pipe it back to Darwin, has highlighted the complexities with protecting First Nations' Cultural Heritage within 'Sea Country'.

As we progress through a new year, following the failed 'Voice' Referendum, it is pertinent to remember that injustices remain for Aboriginal and Torres Strait Islander Peoples, one of these being the destruction of their cultural heritage. This edition of *Just Now* will explore issues related to protecting 'Sea Country.'

This issue:

What is Sea Country?

"Sea Country" is a term used by First Nations' Peoples to refer to any environment within their traditional estate that is associated with the sea or saltwater, including coastal areas, estuaries, beaches, marine areas, and islands. It also captures the cultural, social, and economic values of these environments held by Traditional Owners, which can include sustainable use and management of marine resources and knowledge practices that conceptualize coastscapes, seascapes, animals, plants, and people as located within holistic kinship systems and ancestral and totemic domains. There is also a recognised connectedness of land and sea - an integrated cultural landscape/seascape that is conceptually very different from the broader Australian view of land and sea.

As First Nations Peoples have a history on the Australian continent that dates back at least 65,000 years, lands that are now underwater due to sea level rises approximately 19,000 to 6,000 years ago, were previously inhabited, and First Nations Peoples retain cultural connections with these places and ocean ecosystems, sometimes extending up to 300km offshore.

"Our cultural links with the coast and sea are vital to us.
To be able to come here and use them to swim and fish is part of our cultural heritage... Our sense of ownership is continuous."

Interview with Mr Merv Gower, Administrator, Mersey Leven Aboriginal Corporation, Devonport, Wednesday 24 October

Marine Rights

First Nations Peoples' recognised legal rights in marine areas of their Country are less developed than for the land components, with tenure distinctions between land and sea areas made under Australian legislation. The nature of their participation in marine governance is shaped by a complex matrix of native title, cultural heritage protection and environmental legislation and policy, and human rights norms.

Formal mechanisms for asserting and recognising native title in marine areas are laid out in the *Native Title Act 1993* (Cth), which also include the recognition of native title holders' rights to hunt, fish, gather, and trade marine resources for personal, domestic, or noncommercial use (section 211). Although native title on land can potentially amount to exclusive possession, native title in marine areas must always "yield" to other existing rights and interests, such as the right of licensed commercial fishers, commercial shipping, and 'Marine Protected Area' designation.

While all Australian jurisdictions have legislated some form of indigenous land claim and ownership process; only in the Northern Territory does indigenous ownership of coastal land include intertidal land. However, as 'Country' can extend far beyond the low tide mark, indigenous people are not recognised as the legal owners of the totality of their traditional marine estates.

All Australian jurisdictions recognise, to an extent, Indigenous customary and subsistence fishing and other marine resource rights. Legislated commercial fishing rights are limited, negatively impacting indigenous fishers. Statutory rights to use marine resources, where they exist, also enable Traditional Owners to be formally engaged in the management of those resources, albeit rarely beyond an advisory capacity.

There are however major gaps in how these laws, policies and norms support Indigenous peoples to protect marine cultural heritage sites.

"Where Indigenous and non-Indigenous laws meet in marine places, it remains a contested and artificial recognition space for Indigenous peoples."

Prof. Lee Gooden,, "The Evolving Governance of Aboriginal Peoples and Torres Strait Islanders in Marine Areas in Australia," in The Rights of Indigenous Peoples in Marine Areas.

Indigenous Cultural Heritage - what is it and how is it protected?

Australia's landscapes and seascapes are laden with First Nations Peoples' cultural sites. These can include 'tangible' heritage, such as archaeological sites including shell middens and stone quarries, as well as natural sites of significance such as headlands, river mouths, reefs and islands. Sites can also contain 'intangible' cultural heritage, with continuing significance because of their connection with Creation Stories, Dreaming Tracks, Songlines, ceremonial places, camping places and massacre sites. Some of these places have been afforded government status as National Heritage, others are recorded in State-based heritage registers, while many others are known only to Traditional Owners.

Mechanisms to recognise, evaluate and protect Aboriginal cultural heritage exist in a patchwork of local, state, and federal legislation, across cultural heritage, native title and environmental legislation. Despite this, First Nations' Cultural Heritage is being destroyed at an alarming rate. This was made clear by the parliamentary inquiry into the destruction of sacred caves at Juukan Gorge in Western Australia, which revealed how the current regulatory system favoured mining company Rio Tinto in their desire to destroy the caves, while disempowering the local First Nations peoples from being able to prevent it. This was deemed to be indicative of wider systemic problems that shun genuine consultation and the Indigenous right of free, prior and informed consent (FPIC).

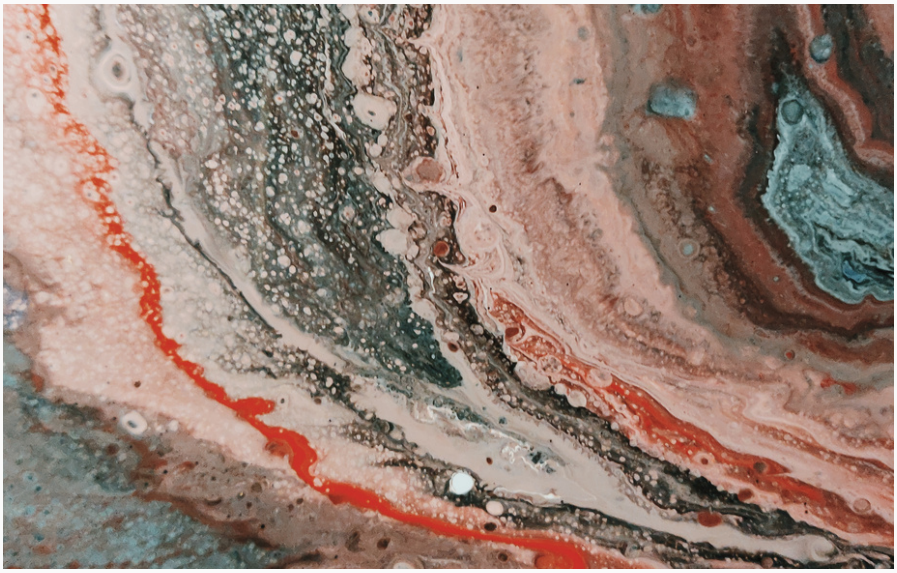
"Throughout the course of the inquiry, it became apparent that there are serious deficiencies across Australia's Aboriginal and Torres Strait Islander cultural heritage legislative framework, in all state and territories and the Commonwealth."

HON WARREN ENTSCH MP, FOREWARD, A WAY FORWARD, 2021.

Cultural Heritage Protection Co-Design

In response to the Recommendations of the Parliamentary Inquiry, in November 2021 a partnership between the First Nations Heritage Protection Alliance and the Morrison government was announced, aiming to jointly reform federal cultural heritage protections. The First Nations Heritage Protection Alliance is made up of Aboriginal Land Councils, Native Title Representative Bodies and Aboriginal and Torres Strait Islander Community Controlled Organisations from across Australia. A first round of consultations was undertaken with the Alliance, state and territory governments, peak industry bodies and other interested and affected First Nations groups, identifying possible options for legislative reform intended to improve cultural heritage protections and ensure these are consistent with the principles of the United Nations Declaration on the Rights of Indigenous Persons (UNDRIP).

An updated and renewed partnership agreement under the Albanese government was signed in November 2022 by Minister Plibersek and the Alliance, continuing the co-design process to reform cultural heritage protection. However, there is no set deadline for implementing the reform. You can hear more on the progress of the Reform from Jamie Lowe, CEO of the Native Title Council and member of the Leadership Working Group for the Alliance here.



"The Alliance is working to strengthen and modernise cultural heritage laws and to create industry reforms to ensure Indigenous Cultural Heritage is valued and protected for the future."

First Nations Heritage Protection Alliance

Case Study: The Barossa Gas Project

Recently, the Barossa Gas Project, which has already commenced, highlights ongoing issues with protecting First Nations' cultural heritage within 'Sea Country'.

Tiwi Island Traditional Owners argued to the Federal Court that project operators Santos had not properly consulted them on the project and possible risks it poses to food sources and continuous spiritual connection to Sea Country. This was the first case in Australia brought by First Nations people challenging an offshore project approval because of lack of consultation.

Under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth), companies proposing projects must develop environmental plans that consider potential impact on the surrounding environment and develop mitigation strategies. These plans are submitted to a regulator - The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) - for approval. Consultation with 'relevant persons' who are potentially impacted by the activities must take place in the development of the plan.

The Federal Court ultimately ruled that Santos' Environment Plan had not demonstrated adequate consultation with First Nations' Peoples (in this case, the Tiwi Land Council) and as a result, the acceptance given by the regulator NOPSEMA was legally invalid.

"We will fight for our land and Sea Country, for our future generations no matter how hard and how long. We will fight from the beginning to the end. Santos tried to get away with not consulting us, but today we have had our voices heard."

TIWI ELDER DENNIS TIPAKALIPPA

Protecting Sea Country - Legislative Reform

In light of the Federal Court decision, Greens Senator Dorinda Cox proposed a Bill - *Protecting the Spirit of Sea Country Bill 2023* - to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and the *Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011.*

The proposed amendments were:

- to include Traditional Owners and knowledge holders in First Nations communities in the definition of 'Relevant Person';
- to include a requirement for standards of consultation to be created, specifically providing for the free, prior and informed consent of traditional owners consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); and
- to ensure that underwater and intangible cultural heritage is identified in offshore project proposals and environment plans, alongside an evaluation of the impacts and risks that this project might pose and any potential alternative options.

"It is unacceptable that fossil fuel companies can submit Environmental Plans for offshore projects without consulting Traditional Owners and it is time to change that in favour of genuine and meaningful consultation."

SENATOR DORINDA COX

In a submission to a Senate Inquiry into the Bill, CRA called for strengthened protections for First Nations' Sea Country, highlighting particular concerns.

Who speaks for 'Country'?

There is no single identifier or legal definition for 'who speaks for Country' in Australian legislation, and various terminologies are used across numerous Commonwealth, State and Territory legislation and policy documents to refer to Indigenous people who should be consulted. National reform of cultural heritage protection will need to consider terminology, definitions and mechanisms to support Indigenous people to 'choose their own representatives' to 'maintain, control, protect and develop their cultural heritage,' who are legally recognised to do so.

Prescribing 'Free, Prior and Informed Consent (FPIC)'

At present, Australian native title laws engage with some elements of FPIC, but do not replicate it as reflected in the UNDRIP. Traditional Owners are not really 'free' in the sense that failure to accept developers' terms can mean foregoing the associated royalties, training, employment, and compensation for land impacts. Furthermore, there is no true iteration of 'consent' as there is no provision granted to Indigenous groups to veto such a decision or raise concerns, and the state or a company does not legislatively have to oblige to Traditional Owners' objections.

Ensuring that underwater and intangible cultural heritage is identified

By only including 'underwater' and 'intangible' cultural heritage in the Bill, the legislation bifurcates the more holistic notion of 'Country' which does not separate the land from the waters, but instead recognises the living connection between them. This points to the bigger problem of Indigenous Cultural Heritage legislation being placed into Settler-State categories that attempt to separate out components.

You can read CRA's submission in full here.

"The Bill is only a step in the right direction, with further legislative changes needed to truly secure the dignity and rights of First Nations Peoples in Australia. Ultimately, the national reform of the corpus of First Nations Cultural Heritage protections is urgently needed."

CRA Submission, Protecting the Spirit of Sea Country Bill 2023.

What can you do?

The *First Nations Cultural Heritage Protection Alliance* calls all Australians to embrace First Nations' cultural heritage as Australia's cultural heritage. Some practical ways to do this include learning more about cultural heritage, the fight to protect it by strengthening legislation, and what's happening now in the States and Territories, by visiting ANTaR's Cultural Heritage Protection Campaign page. Share ANTaR's cultural heritage explainer with your friends and networks.

The Voice Referendum may have failed, but Indigenous Voices still need to be heard. Mibu Fischer, a First Nations woman and marine ethnoecologist, says, "it is essential that Indigenous interactions with the marine environment and Indigenous science and knowledge are incorporated within marine ecology and management." Post-Referendum, we need to listen to key Indigenous yes campaigners who say that their support for the Uluru Statement from the Heart still stands, and work with them to find ways to elevate Indigenous voices.

> "Australia's past is complex and often defined by conflict. But as a modern nation, we can all be proud of the First Nations culture that is so deeply embedded in this place we all call home. It is time to celebrate and protect our unique heritage as one."
>
> *First Nations Cultural Heritage Protection Alliance*

On Another Note . . . A Message from Anne Walker, National Executive Director

The Voice Referendum loss in October 2023 was one of profound disappointment for many First Nations Peoples. CRA held a prayer service with our members for healing and hope, gathering together to voice an unwavering commitment to the path of reconciliation and unity. CRA also wrote to the Minister for Indigenous Australians, Linda Burney, committing ourselves to work with the government on the on-going task of First Nations' justice.

Entering the new year, CRA was a signatory to a Joint Submission with *Be Slavery Free* and other like-minded organisations to a Senate Inquiry into a proposed Bill to amend the *Modern Slavery Act* 2018 to establish the Australian Anti-Slavery Commissioner. The submission supported the Bill, while offering suggestions to strengthen the role of an anti-slavery commissioner further, however the Bill passed the House without any amendments. The submission can be read here.

We thank our member institutes for their continued support for the work CRA does in advocating for the marginalised in our society and welcome any feedback. Please email secretariat@catholicreligious.org.au

Warm regards,

Anne