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## Considering Cultural Processes and Rights in Repatriation

### An Australian Experience

*Abstract:* Major museums across the world are being approached by Indigenous communities for the return of Ancestral remains and other cultural property. Apart from a very small number of specialists, many museum professionals, in particular senior decision makers, have limited knowledge of the actual collections they hold and the cultural significance of those objects, both in the past, the present, and into the future. They thus apply limited and restricted criteria in assessing the merits of an application for repatriation. This paper discusses some of the forms of affiliation that enable Australian First Nations peoples to claim rights of affiliation and authority in Ancestral Remains and other cultural materials. It argues that there are many forms of affiliation and bestowal of rights and authority that legitimise First Nations claims to interests in Ancestral Remains and cultural heritage.

Large, multi-subject, collecting institutions, be they museums, galleries, or universities, are unusual places. On the surface, they display expertise and knowledge in a variety of fields and subjects. It is, however, easy to forget the corporate structures of such organisations. Often the experts in any single field of cultural subject are in the minority of the institution's employees, who may number in the hundreds, and who have skills in many different fields. The specialist curators and collection managers are far outnumbered by other business units within the institution, such as executive, administration and governance, human resources, marketing, media, public affairs, facility management, finance, public programs, education, and so on. While staff in these sectors are typically sympathetic to the wider social philosophy and aims of the institution, they do not necessarily have specific knowledge to hand informing them of specific subject matters or issues topical in collecting-institution debates, such as repatriation and decolonisation. This is unfortunate as experience shows that even a short briefing paper can raise their appreciation of issues they rarely engage with.

Further, while the specialist staff are there in the institution, their fields of knowledge will usually reflect the fields of study of that institution. An expert in one culture may have limited knowledge of another culture. This is apparent in the current debates around decolonising museums, where an institution of a once-colonial state will invariably have the majority of its collections, and its repatriation priorities, concentrated on engagements with its own ex-colonies. Knowledge of the cultural significance of other collections is likely to be relatively limited, in particular outside the field of ethnographic specialists. A researcher interested in Australian First Nations cultures (such as myself) is therefore unlikely to be deeply familiar with African, Asian, American, Oceanic, or European First Nations cultures and experiences, although aware of some of

the issues. As a result, there is no shame in asking for advice and assistance from others with suitable knowledge and experience.<sup>1</sup>

### ***The Nature of Engagements***

Unless applicants are aware of an internal specialist or advisor familiar with their culture and ambitions, a person or agent making an approach to an institution, for the purposes of requesting repatriation and/or access to collections embodying their heritage, will usually approach the executive management of that institution. This is particularly the case in government agency-to-museum engagements, where a government sympathetic to repatriation takes upon itself the role of approaching institutions in the role of advocate.<sup>2</sup> They will usually approach senior management first, in accordance with presumed formal process and diplomatic courtesies.

For those managers with little familiarity with the cultural issues stimulating the request, it is easy to see such approaches as driven by political or activist agendas, or not possible according to the institution's historic practices and traditions of not deaccessioning or repatriating materials. Older, larger, collecting institutions apply their own criteria for assessment of a request that reflects past, ageing, and conservative corporate policies. Protocols of consideration and assessment are applied that reflect often conservative corporate policy, philosophy, and/or traditional practice (that's the way we've always done it) rather than any appreciation of the cultural bases of the request, in both traditional and contemporary First Nations cultural contexts.

Further, in my own discussions with professionals in many domestic and international collecting institutions, and with many Australian First Nations people, applicants are sometimes dismissed as having no demonstrable direct familial or cultural connections to the materials under claim. Institutions take it upon themselves to make an assessment of the biological and cultural bases of the claim, with a decision often made by professionally and culturally unknowledgeable senior executives or council/board/trustee members.<sup>3</sup>

Further, the meetings between claimants/applicants and executives/collection managers are often short, with no real time for a claimant to fully present cultural evidence in their case for return/access. In Australia's international engagements in recent years, this has often been aggravated by excessive mediation by Australian government agencies, before, during, and after meetings between First Nations representatives and the collecting institutions, reducing the opportunity for First Nations people to make their case in their own words.

Thus, the first response to Australian First Nations requests is often to remain distant and/or refuse the request. Not necessarily because such a refusal is informed by evidence, but because caution, in the face of a new experience, invites

1 Cf. Michael Pickering: *First Principles*.

2 Cf. AIATSIS: *Indigenous Repatriation*; AIATSIS: *Return of Cultural Heritage*.

3 See, e.g., British Museum: *Request for Repatriation of Human Remains to the Torres Strait Islands, Australia*.

hesitation. It is easier to say no first, sometimes because a no can be turned to a yes, whereas it is harder to turn a yes into a no.

So, how do collecting organisations appropriately and respectfully engage with requests and claims for repatriation by Indigenous claimants? The aim of this paper is to provide a 'background briefing' for those museum and institutional executives, senior managers, collection managers, and other business units unfamiliar with the underlying cultural aspects of Australian First Nations cultures that impact on claims for repatriation of Ancestral remains, sacred objects, 'secular' objects, and documentary materials.<sup>4</sup> It describes mechanisms of affiliation, noting that these mechanisms have been recognised by Australian legal and policy processes. While these processes and legal debates are not applicable outside of Australia, they do demonstrate, and provide justifications for, the mechanisms of affiliation to heritage that First Nations repatriation/access claimants may assert.

### ***Australian First Nations***

There are over 350 Aboriginal and Torres Strait Islander First Nations.<sup>5</sup> Although neighbouring nations will share many common cultural features, each is more precisely defined by its own unique language, identity, spiritual affiliations, beliefs, history, and cultural expressions. The dominant characteristic of all nations is an affiliation to Country. The First Nations perspective of Country encapsulates not only the physical landscape but also the many spiritual aspects of that landscape. The Australian Institute of Aboriginal and Torres Strait Islander Studies defines Country as a

term often used by Aboriginal peoples to describe the lands, waterways and seas to which they are connected. The term contains complex ideas about law, place, custom, language, spiritual belief, cultural practice, material sustenance, family and identity.<sup>6</sup>

Attachment to Country manifests at the levels of the individual, the family, the clan group, and the corporate nation.

The First Nations world was created by the activities of sacred Ancestral Beings, who left their spirituality in everything. Thus, a sacred site, such as a hill, plain, river, waterhole, flora, and fauna, are sources of personal and corporate spiritual identity. Such sites are also sources for stone tools, plant, and animal resources. In the manufacture of cultural items, an element of the sacred ancestral power

4 This paper, as with many I've written, is heavily based on experience rather than published precedent. The target audience is the wider staff of collecting institutions not specialists in Australian Anthropology. See also Joseph Roche: *How to Support Academic Writing for Museum Professionals*.

5 Cf. AIATSIS: *Welcome to Country*. The term 'First Nations' is now commonly used to refer to the Aboriginal and Torres Strait Islander peoples of Australia. See the Australian Government Style manual, which states: "both Aboriginal and Torres Strait Islander peoples, use terms such as 'First Nations people', 'First Australians', or 'Aboriginal and/or Torres Strait Islander peoples'", Australian Government Style Manual.

6 AIATSIS: *Welcome to Country*.

can still be manifest in the finished item. Thus, even so-called ‘secular’ objects can be, to some extent, sacred in accordance with the cultural values of a claimant.<sup>7</sup> All are linked by, and co-dependent on, a common shared spiritual power. The spirituality of the Ancestral Being is present in, and shared by all, including humans, the natural world, and cultural materials.

One outcome of this ‘network of the sacred’, is that the sacred is present in all First Nations people and ‘things’, including the sorts of items that have attracted collectors – sometimes known as moveable cultural heritage. While sacred sites can be destroyed,<sup>8</sup> they cannot be relocated.

‘Collectables’ includes Ancestral remains, secret/sacred objects, sacred ceremonial objects, sacred art, and ‘secular’ objects; even secular objects, such as wood, stone, and bone tools, and economic raw resources. As noted, these can all have some manifestation of the sacred due to their creation by the sacred Ancestral Beings. Many First Nations Australians see that they have a responsibility to engage with, participate with, respect, and protect, both Country and its material outputs, manifest as ‘immoveable and moveable cultural heritage’, regardless of age and/or period of removal from their original cultural contexts.

The outcome is that all people, and all things, can be considered to have some lasting affiliation with Country and place.

### ***Land Rights and Rights to Land***

First Nations property, cultural and spiritual affiliation with, and rights to, lands have been formally recognised under several Australian state, territory, and federal government acts of legislation.<sup>9</sup> In some cases, these rights have been extended to include some or all categories of moveable cultural heritage.<sup>10</sup>

This recognition was initially informed through extensive scholarly Anthropological and legal research, though it was First Nations activism over many years that prompted this consideration of rights by non-Indigenous Australian governments. Over many years, the basic rights initially recognised by legislation (e.g., patrilineal descent) have been tested and expanded to allow for the recognition of a greater range of mechanisms of cultural affiliation to lands. For example, where claims to land under the original interpretation of the Northern Territory Land Rights Act<sup>11</sup> largely focussed on the demonstration of patrilineal affiliation to the local land-owning group, this has now been expanded to recognise matrilineal affiliation, adoption, religious associations, and succession, amongst others, as legitimate mechanism to claim ownership interests in land

7 Cf. Michael Pickering: *Qualifying the Sacred*.

8 See, e.g., Michael Pickering: *Corporate Damages and Sacred Site Protection*; Lorena Allam, Calla Wahlquist: *A Year on from the Juukan Gorge Destruction, Aboriginal Sacred Sites Remain Unprotected*.

9 See, e.g., Australian Government: *Land Rights (Northern Territory) Act*; Australian Government: *Native Title Act*.

10 Cf. Australian Government: *Aboriginal and Torres Strait Islander Heritage Protection Act*; Victorian Government: *Aboriginal Heritage Act*.

11 Cf. Australian Government: *Land Rights (Northern Territory) Act*.

and associated resources. Similarly, the recognition of Native Title<sup>12</sup> has allowed the definition, in a Western legal sense, of distinctive rights, being not only rights to land but also to rights to hunt, gather, hold ceremonies, be born, be buried, amongst many others. This has been defined as creating the concept of a 'bundle of rights' which the National Native Title Tribunal describes as:

Native title is sometimes referred to as a 'bundle of rights'. The content of that bundle of rights will depend on the native title holders' traditional laws and customs and Australian law's capacity to recognise the rights and interests they hold.<sup>13</sup>

This definition is also reflected by other government agencies.<sup>14</sup>

In summary, many First Nations cultural mechanisms have been formally recognised by Australian scholarly research, governments, legislation, policies, practices and philosophies, as bestowing certain rights to lands and seas, and their resources. These rights can include rights assigned by social systems, religious beliefs and practices, economic activity, and basic property rights as defined by Western law. Just as people are seen as affiliated to Country, so too are sacred sites, Ancestral Remains, secret-sacred objects, and 'secular' objects. All are, in some way, reflections of the creative, and educational, powers of Ancestral Beings that created the world. Australian First Nations peoples' claims to Ancestral Remains and cultural heritage, moveable, immovable, tangible, and intangible, are usually based on some aspect of this cultural system of affiliation. While not allowing for property rights, these recognised mechanisms can also apply to defining interests in Ancestral Remains and cultural heritage.

### **Tradition**

One issue often raised in conversations about repatriation is the question of how 'tradition' and 'traditional' beliefs and practices are defined. These are often used by collection managers as criteria for assessment of claimants' requests for repatriation. Do the claimants still have the same spiritual beliefs and practices associated with the material at the time of the original collection?<sup>15</sup> What is the time period over which something becomes a 'tradition' and/or a traditional practice?

These questions are largely irrelevant. Firstly, because there is no standard definition of tradition and, secondly, because while the expressions of tradition may change, the core tradition often remains constant. In the first case, the definition of tradition has been widely addressed, across the public, anthropological, and legal literature. While popular ideas of tradition have argued that it must be defined through reference to an old, historically documented and culturally continuous precedent, more formal definitions of tradition do not apply this qualification, acknowledging that historical definitions of tradition are secondary to cultural definitions of tradition. For example, as a public reference, the Concise

12 Cf. Australian Government: Native Title Act.

13 National Native Title Tribunal: Native Title.

14 See, e.g., Prescribed Body Corporate: Native Title and Land Rights, Australian Government: Connection to Country.

15 See Michael Pickering: The Big Picture.



Oxford Dictionary defines 'tradition' as "[o]pinion or belief or custom handed down, handing down of these, from ancestors to posterity esp. orally or by practice".<sup>16</sup> And online as the "transmission of beliefs, statements, customs, etc., from generation to generation; the fact of being passed on in this way".<sup>17</sup> Anthropological definitions conventionally define 'tradition' as the

patterns of BELIEFS, CUSTOMS, VALUES, behaviour and knowledge or expertise which are passed on from generation to generation by the socialization process within a given population.<sup>18</sup>

with the important qualifier that

Modern anthropologists and ethnologists however tend not to place so much emphasis on the centrality of the concept of tradition, since it does not allow for the essentially dynamic and adaptive nature of sociocultural systems. [...] the uncritical use of the concept of tradition may make us fail to examine the key problem of the relationship between cultural persistence or continuity and cultural change, a problem which is to be approached not only in terms of cultural elements in themselves but also in terms of the historical process of social reproduction and social change in the population concerned.<sup>19</sup>

While examples of Australian legal definitions, applied over nearly 50 years, define Aboriginal tradition as

the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships;<sup>20</sup>

[...] 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;<sup>21</sup>

and, in the case of Native Title:

the communal group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.<sup>22</sup>

It is also relevant to note that there are micro and macro manifestations of tradition. The micro are the specific minutiae of practices – the details of the ceremony, the specifics of day-to-day social practices, etc. The macro manifestations are such things as the social institutions of marriage, ceremonies, religion, etc. First Nations cultures are no different to other world cultures in that they have changed progressively over time and in the face of social and environmental processes. This is well described in oral histories and archaeological records.

16 Concise Oxford Dictionary: 'Tradition'.

17 Concise Oxford English Dictionary: 'Tradition'.

18 Charlotte Seymour-Smith: Macmillan Dictionary of Anthropology, pp. 279f.

19 Ibid.

20 Australian Government: Land Rights (Northern Territory) Act, p. 2.

21 Australian Government: Aboriginal and Torres Strait Islander Heritage Protection Act, p. 2.

22 Australian Government: Native Title Act, p. 450.

Nonetheless, in Australia, this change has been continuous within the First Nations cultures, allowing the nationally recognised statement that “Australia is home to the oldest continuing living culture in the entire world”.<sup>23</sup>

While details and aspects of some beliefs may have changed, the traditions of systems of kinship, spiritual belief, connection to Country, ceremony, marriage, connection to social and cultural heritage and history, remain strong.

To summarise, secular, anthropological, and legal definitions, at least as applied in Australia, are explicit that ‘tradition’ is defined by the beliefs, customs, and practices of the group. No definition imposes a temporal parameter upon the concept of tradition, except insofar as tradition is expected to be handed down from generation to generation. No definition prohibits change within tradition—nor the emergence of ‘new’ traditions due to the operation of social processes over time. There is therefore little support for arguments of opposition based on the premise that to be considered to have traditions groups must conform to patterns, customs, values, and beliefs of the distant past as captured and frozen in the historical literature. Tradition is dynamic and changing, defined by the contemporary beliefs of the community. Cultural authenticity is informed by, but not defined by, adherence to phenomena in ageing historical texts.

### ***Mechanisms of Affiliation to Country, Community, and Cultural Heritage***

The same cultural mechanisms that affiliate people with Country, apply to affiliation with Ancestral Remains, sacred ceremonial objects, and other forms of tangible and intangible culture. As noted, there are a number of modes of affiliation that have been tested and accepted through Australian anthropological research<sup>24</sup> and by government legislation and legislative testing and expansion; in both formally convened commissions<sup>25</sup> and courts.<sup>26</sup> While these modes of affiliation have not yet been fully tested judicially with regard to items of moveable heritage, the same modes of affiliation are culturally valid and should inform institutional assessments of repatriation and/or access requests.

Many of the forms of affiliation are straightforward and usually understandable to general audiences, often reflecting the forms of territorial affiliation that apply in their own, non-Indigenous, societies. These include biologically recognised forms of affiliation and ownership; including rights, responsibilities, and property transferred by patrilineal and matrilineal descent. However, other criteria that can assign culturally recognised rights to cultural identity, lands, spirituality, and heritage materials derived from those lands and peoples, include,

23 Australian Human Rights Commission; Australian Government: Closing the Gap, p. 6.

24 Cf. Nicholas Peterson, Ian Keen, Basil Sansom: Succession to Land; Nicholas Peterson: Australian Territorial Organization; Peter Sutton: Country: Aboriginal Boundaries and Land Ownership in Australia.

25 Cf. the Aboriginal Land Commissioners Office has produced many reports in which rights are addressed. The list is too long to cite, but access to reports can be made through the website of the National Library of Australia Trove: Aboriginal Land Commissioner’s Reports.

26 Cf. Graeme Neate: Aboriginal Land Rights Law in the Northern Territory.

- Place of conception – a sacred tie with the Ancestral Beings responsible for, and present at, the presumed place of conception.
- Place of birth – a sacred tie with the Ancestral Beings responsible for, and present at, the presumed place of birth
- Burial places of family members – affiliation with burial sites. Typically associated with ceremony sites.
- Land of spouse – Typically people are knowledgeable about the lands of their spouse. Often the history of long-term recruitment of marriage partners from a neighbouring group means that people have deep knowledge of their spouse's Country and regularly collaborate in religious activities such as ceremony and the teaching of sacred knowledge.
- Adoption – adoption is a legitimate mechanism that allows a distant or non-biological relative rights and responsibilities to the Country and heritage of the adopting family.
- Bestowal – rights, responsibilities and property can be bestowed by authorised individuals. For example, when there is no biological male heir, a culturally suitable person from an affiliated group may be given authority for the management and protection of the Country its sacred sites, its ceremonies, and its resources. Over generations, this can develop into full possession.
- Long-term residence – long-term residence on lands in itself bestows some rights and responsibilities. However, long-term residence is also likely to embrace other mechanisms of affiliation, such as ceremonial knowledge and experience, social ties, knowledge of Country, etc.
- Use of lands and resources.
- Religious and spiritual knowledge, and ceremonial activities – participation in ceremonies requires spiritual knowledge and wider cultural approval. The nature of the activities of the creative Ancestral Beings means that they often travelled across the lands of other groups. Affiliation with those spiritual beings at one or more points in their activities on one's own land can bestow ceremonial and religious rights to sites of their manifestation on other lands.
- Affiliation to a social category affiliated with lands – many Australian First Nations groups have systems of social categorization (kinship systems). These can extend to the classification of people not related biologically and include non-Indigenous workers, who are assigned to a class, often in accordance with their relationship with a community member (e.g., an informant will classify a researcher in a class commensurate with being a student (nephew, son in law, etc). These classes are affiliated with specific Ancestral Beings sites and objects.
- Fulfilment of social obligations and responsibilities – the more the person fulfils their social and cultural responsibilities the more they are granted authority.
- Socially acknowledged succession and or migration. As with bestowal, people can succeed to Country through socially recognised and acknowledged processes. The lands of a local family group can become vacant in the event of no biological descendants. In such cases, another person or group



can succeed to the lands. Usually, the colonising group is a close social and geographic neighbour to the extinct group and shares significant elements of social and religious organisation, such as similar totemic and ceremonial affiliations, as well as a familiarity with the social, economic, and spiritual topography and resources of the succeeded lands.

- Participation in territorial defence. This can include modern forms of defence such as Land Claims, Native Title applications, protection of cultural heritage sites and materials, and formal pursuit of repatriation of Ancestral Remains and cultural materials.
- Emotional links – places and objects provide an emotional connection to the histories and people of the past. As Neil Carter, a senior repatriation worker and Gooniyandi and Kidji elder states: “After the Elder passed away the boomerangs were kept in a special place because the Elder who made that boomerang, his spirit is still with us; the signature of that Elder is still here”.<sup>27</sup>

As a general principle, the more criteria a person can satisfy, the stronger their claims to lands and, by extension, sacred sites, Ancestral Remains and cultural materials associated with those lands. Of particular relevance to the topic of repatriation requests are those social criteria that do not involve a biological connection, such as succession, migration, bestowal, and rights and responsibilities acquired through long-term residence and knowledge. It may be demonstrable that a repatriation claimant is not biologically related to the Ancestral Remains or other materials that they are claiming. However, over time, and through appropriate First Nations cultural processes, they have legitimately acquired the right and responsibility to respect and protect the remains of cultural Ancestors on those lands, and the other sites and items of heritage that derive from that Country.

Finally, claimants will usually have the support of their wider community. The authority and responsibility of the individual to make a claim, and to speak on behalf of others, is dependent upon recognition of those rights by family, society, and neighbouring cultural groups. While there are occasionally individual approaches for repatriation, for the most part, the claimant will be an authorised member and representative of a First Nations community. This role as cultural ambassador should always be respected.

## **Conclusion**

There are a number of First Nations cultural and social values that bestow interests, rights, and responsibilities to promulgate, manage, respect, and defend tangible and intangible cultural heritage. Some or all of these values are typically amongst the motivators behind repatriation and access requests. Unfortunately, senior collecting institution executives and managers, as well as the wider museum employee community, are often unaware of this cultural background to requests.

27 Neil Carter, Joe Brown, Michael Pickering: *Cultural Processes in Repatriation*, p. 586.

When looked at closely, none of the First Nations' rationales for defending heritage are any different to those of other non-Indigenous societies. Throughout the world migrant communities take the pre-arrival natural and cultural heritage under their wing. Australian examples of non-Indigenous Australians embracing First Nations heritage include Uluru, Brewarrina Aboriginal Fish Traps, Budj Bim National Heritage Landscape, Cheetup Rock Shelter, Coranderrk, Dampier Archipelago, Kakadu National Park, and many more.<sup>28</sup> Non-Indigenous Australians have embraced such sites as an important part of Australia's, and their own, heritage.

All of the mechanisms identified in this paper have been practised by, and argued for, by First Nations people for generations. They have then been eventually recognised by Australian anthropological research and then through a number of judicial processes over more than 50 years.

None of these precedents of formal acknowledgement by Australian authorities necessarily makes recognition of such rights and interests a legal requirement, either within or outside of Australia. However, they do demonstrate that the issues have been rigorously discussed at length by impartial assessors and found to be valid. None have been formally applied to the repatriation of moveable cultural heritage, though they are raised as considerations in Australian repatriation literature.<sup>29</sup> However, when they are applied to the consideration of such heritage, they can be seen to be applicable as reasonable grounds for demonstrating affiliation.

Collecting institutions are free to engage with repatriation requests as they see fit. No Australian precedent imposes binding rules on agencies outside of Australia's jurisdiction. However, it is hoped that this paper will inform and encourage a more empathetic engagement between First Nations repatriation advocates and the executive management of collection-holding institutions.

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28 Cf. Australian Government: Australia's National Heritage List.

29 Cf. Michael Pickering: A Repatriation Handbook.

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