The effect of the “public–private” dichotomy on the concept of Indigenous “sacred place” in the religious freedom and heritage protection laws of Australia, USA, Canada and New Zealand

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Abstract of Thesis

Laws relating to religious freedom and to protection of cultural heritage exist in many jurisdictions in Australia, USA, Canada and New Zealand. On the face of it, these laws could be used to provide legal protection for places by reason of their perceived sacredness to Indigenous peoples in those countries. However, despite differing forms of jurisprudence in each of the four countries, all have demonstrated doctrinal difficulties in applying such laws to the concept of Indigenous sacred places. This thesis examines one reason for this, namely the way in which these laws reflect "Western liberal" assumptions derived from a separation of spheres into private and public.

In such perceptions, religion and the sacred belong in the private sphere. As a result, religious freedom jurisprudence is premised on privatised concepts of religion and has failed to deal with those common Indigenous notions of the sacredness of places themselves, notions which raise issues beyond individual conscience and manifestation of beliefs. By contrast, laws relating to cultural heritage are designed to preserve heritage for the public and the legislative models that have developed in all the four countries are designed for the public sphere. These laws assume and apply principles reflecting objectivity, neutral secular public values and public judgment. Such laws too do not cope with Indigenous sacred places whose significance is a matter of particular religious belief. This thesis is an analysis of those key legal models and doctrines in religious freedom and heritage protection jurisprudence that reflect a division of private and public spheres and which cause problems for Indigenous sacred places.

Behind some of the pressure to restrict the sacred to a private sphere is a desire to limit its intrusion on private and government property interests. The competition for space between such property interests and the sacred is a recurrent theme in the analysis and has contributed to the shaping of the public–private dichotomy and the relevant laws.

Note: This thesis deals with the law as at the end of 2009.

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PART A – INTRODUCTION

Chapter 1 – Introduction to the Thesis

1.1 Summary and Structure of the Thesis

Places sacred to Indigenous people in Australia, USA, Canada and New Zealand are often under threat of damage and desecration from resource and other developments. Where Indigenous peoples do not have recognised legal ownership or control over such places, a form of legal protection is required simply on the basis of their religious or spiritual significance.[1] Many jurisdictions in these four countries have, in broad terms, some laws that are aimed at protecting religious concerns or places of religious significance.

The two main categories of laws that have been applied to Indigenous sacred places are, first, the laws protecting freedom of religion generally and, secondly, heritage laws specifically aimed at protection of sites or areas of significance. There are major variances in the jurisprudence and models adopted in each of the countries for these two categories of laws. Despite these differences, the results are very much the same, that is, they have been largely ineffective in providing protection. There are many reasons for this which cannot be covered here.[2] This thesis restricts itself to a study of *one* way in which the laws in Australia, USA, Canada and New Zealand ("the four countries") have mishandled the treatment of Indigenous sacred places, namely through the effects of an artificial division in Western[3] liberal legal thinking between a private religious sphere and public secular sphere.[4]

This dichotomy is between, on the one hand, a "public" governmental and institutional sphere, seen as the domain of neutral, generally applicable and secular values, and, on the other, a sphere of private autonomy, where people are free to follow their

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[1] Reasons for this are sumamrised at 1.3.

[2] For instance, the lack of political will to fashion comprehensive and effective protective legislation or constitutional provisions. Voluminous books could be written about all deficiencies of such laws, ranging from technical issues to lack of enforceability to limited statutory coverage.

[3] Throughout this thesis, the term "Western" is used in a non-geographical sense, to denote the dominant culture in the four countries in question, derived from a mainly British and Christian (especially Protestant) background. Naturally there are many different "Western" viewpoints, but this thesis is concerned with the liberal Enlightenment views summarised in Chapter 2 that have come to dominate legal and governmental thinking.

[4] This thesis does not purport to be a study of Indigenous sacred places but is about one aspect of the way the legal systems in the four countries have reacted to such places. There is no attempt to speak as an outsider for or about Indigenous peoples or beliefs, but the treatment of their sacred places can operate as a mirror to view the Western assumptions applied.

religions and other subjective beliefs as long as these do not intrude into the secular public domain. The laws of heritage are associated with the public sphere whereas religious freedom is seen as a protecting the private sphere. The division of public and private spheres is not mentioned in the relevant statutes or judgments, but these assumptions pervade those laws. Religious freedom principles assume that such freedom is about protecting private conscience and its manifestation. Heritage laws, with their origins in the promotion of nationalised values, assume that heritage is public and secular. Even when the relevant heritage significance is religious, such heritage is valued for its national or regional significance, under objective secular principles designed for public consumption, rather than on its own religious terms.

Indigenous sacred places[5] do not fall neatly into either of the above categories, being neither privatised nor individualistic, nor conforming to objective, “neutral” values or analyses. The resulting difficulties faced by such places under both the religious freedom laws and the heritage laws form the subject of this thesis.

This introductory Part A continues with Chapter 2 discussing the dominant Western liberal conceptions of the divisions of public and private, secular and religious realms and their characteristics. Contrasting Indigenous perspectives are outlined in Chapter 3.

Parts B and C then analyse the two categories of laws. Each part begins with an introduction to the key philosophical concepts behind the laws and an overview of the relevant statutes in each of the four countries. The remaining chapters of each part each discuss an issue that has caused difficulties for Indigenous sacred paces. Some alternatives to the public–private divide are canvassed in the final Part D. The main points in Parts B and C are previewed below.

The Religious Freedom Model (Part B)

Most religious freedom laws are set in the discourse of human rights. This discourse has developed as individualistic and privatised,[6] based on the rights of the individual, which are not to be impinged on by the state. Religious freedom has been conceived

[5] Nor for that matter do many sacred places of Judeo-Christian traditions and others.

[6] There has been criticism from some feminist legal scholars about one aspect of the public--private dichotomy in which human rights law is concerned only with the public sphere and gives no protection to the needs of many women in the private or domestic realm. See, for instance, the discussion in Sarah Pritchard, ‘The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice” [1995] *Australian Journal of Human Rights* 2. Religious freedom raises a different (but not necessarily contradictory) problem arising from the public--private dichotomy, and there will not be scope for discussion of the marginalisation of the domestic sphere.

as and has become restricted to rights to believe and to exercise religion. The emphasis is on what the individual (or a group of individuals) may or may not do rather than on any protection of the inherent value of sacred places themselves. The language of "free exercise of religion" may be appropriate in the typical religious freedom cases concerning difficulties experienced in some Western religions, such as, conscientious objections to engaging in certain acts, the ability to perform certain ceremonies, the penalties for working or not working on certain days. However, to limit protection to a person's exercise and action is not always appropriate where a place itself is seen as holy and in need of protection.

Part B also examines further difficulties that have emerged in considering where to draw the line, even when religiously-motivated activities are in question. The courts have often drawn such lines by also imposing different elements of religious freedom derived from notions of private religious autonomy and conscience. Those elements which have proven unsuitable for Indigenous sacred places include doctrines of centrality, coercion, narrow definitions of religious (as opposed to secular) activities and exemptions of neutral generally applicable laws.

The Heritage Model (Part C)

Heritage protection laws appear either in the form of general heritage legislation, which protects objects and places of significance to the wider community, or in specific Indigenous heritage legislation. General heritage legislation appears in all four countries, with specific Indigenous heritage legislation being most extensive in Australia. The discourse relating to religious heritage and sacred places is often treated as part of the wider concepts of social, historical or cultural significance. Even where it is specific to Indigenous matters, the model used is similar to that for general heritage. This gives rise to questions of *whose* heritage is protected and in particular *whose* criteria are applied to judge significance and the need for protection.

Part C also examines the particular elements of a secular public heritage understanding which have caused difficulties in applying such heritage legislation to Indigenous sacred places. As case law and debates show, a common problem is that the protection offered appears to require sacred places to conform to standard criteria for the heritage of the relevant state or nation, which are often not appropriate for protection of a place sacred only for a particular group. The heritage model has tended to require identification of specific defined places or sites for protection, emphasising boundaries around what has to be protected, with open slather over the rest of the

land. The heritage is often valued for its antiquity rather than for importance to believers today, raising questions of the longevity of the significance. The model also involves listing places on a government register and having ultimate assessments of sacredness and desecration made by a non-believer, that is, a government official representing the wider public. There is naturally a huge scope for ethnocentrism and misunderstanding, and a question of the cultural appropriateness of the whole model.

Property Concerns

The polarised thinking may have an ulterior motive or benefit. It is trite to conclude that in all the countries in question the interests of property owners and developers have usually been given precedence over the protection of Indigenous sacred places and that this has been a major cause of ineffective protection. Normally policy decisions about competing public interests are determined at the stage of a discretionary weighing-up of such interests. However, as a result of the inappropriateness of the laws for Indigenous sacred places, protection for such places has been excluded or compromised long before choices are required to be made between competing interests. Such sacred places have often faced difficulties in the process of assessment of heritage significance or in determining whether damage to such places can even amount to a breach of religious freedom. Running through the case law and political commentary is an awkwardness about openly saying that profits are more important than sacredness. The tactics used are often to deny sacredness or avoid it. This can be achieved through applying differing unsuitable criteria derived from a separation of spheres. Both Parts B and C discuss the way private and government property concerns affect the analysis of sacred places under the relevant model.

The Way Forward?

This thesis does not in any way call for any fusion of religion and state. Instead the basic thrust is to ensure that, as far as Indigenous sacred places are concerned, principles of human rights are not restricted to a privatised view of religion and that religious heritage is treated as *religious*.

No silver bullet or comprehensive remedies are proposed in this thesis. There is little doubt that a major overhaul to legislation in all the four countries is needed and that such a process requires the participation of Indigenous peoples to fashion what would be suitable for their sacred places. The concluding chapter in Part D examines the

various relevant critiques of the models used and seeks to open a discussion on ways of overcoming some of our inappropriate and divisive legal thinking.

1.2 The Four Countries

Australia, USA, Canada and New Zealand have been chosen for this study because of their cultural and historical similarities. All have a majority population of Anglo-Celtic background, political and legal institutions heavily shaped by the British models and legal systems derived from the English common law. These institutions claim to be based on democratic principles with an ideology of the rule of law, even if these are applied in different ways. The religious heritage of many of the people within the countries is Christian and they have a culture that can loosely be described as "Western".

All of the countries have a history of dispossession of their Indigenous peoples and now have Indigenous peoples living within them who form a numerical minority within the overall national populations. While the history of European contact and settlement of the countries varies substantially in kind and degree, one common thread in all four countries has been the marginalisation of the Indigenous peoples by the colonial and subsequent governments. This involved dispossession from ancestral lands (thus from sacred places), along with attempts to suppress Indigenous religions. The impact on sacred places of the Indigenous peoples has been particularly destructive. The loss of lands meant that many sacred places came to fall outside Indigenous control. Attempts to wipe out Indigenous religions in Australia, USA and Canada often took the form of removal of Indigenous children from their families and homelands and their placement in residential schools and the like. Missions were encouraged in attempts to absorb or assimilate Indigenous children into the dominant European society.[7] In some cases,

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[7] In Australia for example see National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home* (1997), especially Chapter 2.
For the US, see Allison M Dussais, 'Ghost Dance and Holy Ghost: the Echoes of Nineteenth Century Christianization Policy in the Twentieth Century Native American Free Exercise Cases' (1997) 49 *Stanford Law Review* 773; John Rhodes, 'An American Tradition: the Religious Persecution of Native Americans' (1991) 52 *Montana Law Review* 13; Francis Paul Prucha, *The Great Father: The US Government and the American Indian* (1986); Francis Paul Prucha, *Indians in American Society: From the Revolutionary War to the Present* (1985).
For the Canadian situation, see James Rodger Miller, *Skyscrapers Hide the Heavens: A History of Indian--White Relations in Canada* (1989).
There does not seem to have been the same type of policy of forced removal of children into residential schools in New Zealand: see for instance, Joseph Victor Williams, *Reparations and the Waitangi Tribunal* (Speech delivered at the Stolen Generations Conference, Sydney, 2001), Australian Human Rights Commission
<http://www.humanrights.gov.au/social_justice/conference/movingforward/speech_williams.html>. Apart from a short-lived attempt at mission boarding schools in the mid-19th Century, discussed in Alan Ward, *A Show of Justice. Racial Amalgamation in Nineteenth Century New Zealand* (1974), there is also no reference to forced removal into residential schools mentioned in New Zealand histories which discuss

regulations specifically prohibited Indigenous religious ceremonies;[8] generally a result of a belief that Indigenous religions were primitive heathen superstitions from which Indigenous people needed to be rescued.[9] To the extent that Indigenous beliefs were regarded as religious, they were seen as only elementary forms of religion.[10]

In all the countries there was a period of activism, often manifested in mass protests, by Indigenous peoples, particularly from the late 1950s and expanding throughout the 1960s to 1980s.[11] This influenced the development from about the 1970s of legislative reforms designed to promote various aspects of Indigenous cultural and religious concerns, many of which are discussed in Parts B and C. These often developed alongside other legislation dealing with land rights issues.

Maori missionary schools, eg, W H Oliver (ed), *The Oxford History of New Zealand* (1981); Michael King, *The Penguin History of New Zealand* (2003).

[8] For example, Indigenous dances were suppressed in the USA: see the major study of legal suppression of Native American religions in the USA by Dussais, above n 7; and also US Department of the Interior, *American Indian Religious Freedom Act Report 1979* (1979) ("*AIRFA* Report"); Prucha, *The Great Father,* above n 7; Prucha, *Indians in American Society,* above n 7; Rhodes, above n 7. In Canada the potlatch and other ceremonies were restricted: James Miller, above n 7; Canada, Royal Commission on Aboriginal Peoples, *Report* (1996).

[9] See for instance the analysis or comments in relation to Australia in Joint Standing Committee on Foreign Affairs Defence and Trade, Parliament of Australia, *Conviction with Compassion: A Report into Freedom of Religion and Belief* (2000); Peter Moir, 'God, Philosophy and the Rule of Law: A Shaky Foundation' in Barry Wright, Geraldine Fry, and Leon Petchkovsky (eds*), Contemporary Issues in Aboriginal Studie*s (1987). For the US situation, see Dussais, above n 7; US Department of the Interior, *AIRFA Report*, above n 8; James A Swan, *Sacred Places: How the Living Earth Seeks our Friendship* (1990); Russel Lawrence Barsh, 'The Illusion of Religious Freedom for Indigenous Americans' (1986) 65 *Oregon Law Review* 363; Thomas Jefferson, 'Second Inaugural Address' in Adrienne Koch and William Peden, *The Life and Selected Writings of Thomas Jefferson* (1943). Similar comments were made in Canada: see James Miller, above n 7; Canada, Royal Commission on Aboriginal Peoples, above n 8.

[10] Such as, in the description by Durkheim in his famous work: Emile Durkheim, *The Elementary Forms of the Religious Life*, (Joseph Ward Swain trans, 1976 ed) [first published 1915]. See discussion of the history of recognition of Aboriginal religions in such works as Maxwell John Charlesworth, *Introduction* in Maxwell John Charlesworth (ed), *Religious Business: Essays on Australian Aboriginal Spirituality* (1998).

[11] See in the US, Lee Irwin, 'Freedom, Law and Prophecy: A Brief History of Native American Religious Resistance' in Lee Irwin (ed), *Native American Spirituality: A Critical Reader* (2000); Matthew Glass, 'Alexanders All: Symbols of Conquest and Resistance at Mount Rushmore' in David Chidester and Edward T Linenthal (eds), *American Sacred Space* (1995); Vine Deloria, *God is Red* (1973); Vine Deloria, 'The Popularity of Being Indian' in Barbara Deloria, Kristen Foehner and Sam Scinta (eds), *Spirit and Reason: the Vine Deloria Jr Reader* (1999); Prucha, *The Great Father,* above n 7; Alexandra New Holy, 'The Heart of Everything That is: Paha Sapa, Treaties and Lakota Identity' (1998) 23 *Oklahoma City University Law Review* 317, and in Hawaii, Matthew Spriggs, 'God's Police and Damned Whores: Images of Archaeology in Hawaii' in Peter Gathercole and David Lowenthal (eds),*The Politics of the Past* (1990).

For the Canadian situation, see James Miller, above, n 7; James Treat, 'Intertribal Traditionalism and the Religious Roots of Red Power' in Lee Irwin (ed), *Native American Spirituality: A Critical Reader* (2000); Randy Kapashesit and Murray Klippenstein, 'Aboriginal Group Rights and Environmental Protection' (1991) 36 *McGill Law Journal* 926; Canada, Royal Commission on Aboriginal Peoples, above n 8; Evelyn Kallen, *Ethnicity and Human Rights in Canada* (1995).

For an Australian history, see Jennifer Clark, *Aborigines and Activism: Race, Aborigines and the Coming of the Sixties to Australia* (2008). See also Paul Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (1999).

New Zealand examples can be found in Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s* (2nd ed, 1997); Graeme Dunstall, 'The Social Pattern' in W H Oliver (ed), *The Oxford History of New Zealand* (1981); Michael King, above n 7; Havemann (ed), above n 11.

This was also the period marking the development of an international Indigenous movement: see United Nations Permanent Forum of Indigenous Issues, *State of the World's Indigenous Peoples,* UN Doc ST/ESA/328 (2009), at 2–3.

During this time, there was also a growing realisation in the countries in question, perhaps through changing views of what amounted to a religion, that Indigenous beliefs and spirituality did qualify as sophisticated, "proper" religions rather than mere heathenish or primitive beliefs.[12] There now seems little direct questioning in the case law of whether Indigenous beliefs in relation to sacred places are capable of being regarded as religious,[13] though some doubts may still linger about the degree of respect for such beliefs compared with more familiar religions and whether aspects of the religions are treated differently.

Due to their different forms of jurisprudence and the predominant uses of different causes of action, the four countries do not feature equally in Parts B and C. While the religious freedom provisions exist in all four countries, it is the US cases which have relied most heavily on these, for Indigenous sacred place cases as well as for other religious issues. On the other hand, while all four countries have heritage laws, Australia and New Zealand have the most specific provisions relating to Indigenous heritage places and thus the preferred method of seeking protection has been by use of the heritage model. The country with the least legislation or case law over Parts B and C is Canada. There the emphasis has been on Aboriginal title and rights and land claims in order to protect Indigenous rights, rather than relying on the sacredness of the place.

Apart from the obvious structural and jurisprudential differences between the four countries, however, this thesis does not dwell on them because of the greater commonalities that arise in the way polarised public–private thinking is used.

1.3 The Need to Protect Indigenous Sacred Places

This thesis assumes that the protection of Indigenous sacred places is a desirable outcome but space does not permit any significant discussion of the debate about this. There are obviously arguments made against encouraging "superstitious" and

[12] Manifested in such works as William Edward Hanley ("W E H") Stanner, *On Aboriginal Religion,* Oceania Monograph 36 (rev ed, 1989); W E H Stanner, 'Some Aspects of Aboriginal Religion' in Maxwell John Charlesworth (ed), *Religious Business: Essays on Australian Aboriginal Spirituality* (1998); W E H Stanner, 'Religion, Totemism and Symbolism' in W E H Stanner, *White Man Got No Dreaming, Essays 1938--1973* (1979). See overview discussion of the history of this in Australia in Joint Standing Committee, *Conviction with Compassion,* above n 9; Marion Maddox, *For God and Country: Religious Dynamics in Australian Federal Politics* (2001); Tony Swain, *Aboriginal Religions in Australia: A Bibliographical Survey* (1991); Ronald Berndt, *Australian Aboriginal Religion* (1974). For the US, see Prucha, *The Great Father,* above n 7; Ake Hultkrantz, 'The Contribution of the Study of North American Indian Religions to the History of Religions' in Walter Holden Capps (ed), *Seeing with a Native Eye: Essays on Native American Religion* (1976).

[13] The cases on this are mentioned in 4.2.3 below.

"outmoded" beliefs in religions or in the sacredness of places or objects.[14] There may also be extreme views questioning why beliefs and cultures of minorities should be of any concern to the dominant society. More subtle arguments contend that a secular society should not give any special consideration to religious concerns. On the face of it, the four countries have come to reject the extreme consequences of such arguments by all having ratified international covenants on human rights with clauses protecting minority rights,[15] and adopting legislation to protect religious freedom and cultural heritage. Some of the rationales for the protection of such religious freedom and cultural heritage are addressed in the introductory chapters in Parts B and C.

Sufficient arguments for the need to protect Indigenous sacred places, along with other aspects of Indigenous cultural and religious heritage, lie in the broad principles of human rights and responsibilities of individuals and communities. At the heart of basic human rights is the need to respect human dignity, worth and self-identity.[16] For a community of believers, their religions give them a framework through which to see and understand the world and give life significance.[17] In this account, the human rights argument for protecting what is sacred to people lies in the importance of the sacred to those peoples' sense of identity. The responsibility is to care for each other. To damage a community's sacred places is to damage what they hold dear and what gives meaning and motive to their lives.[18] This is more than just offence to people's

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[14] This has been noted as the common viewpoint of the modern age: see Mircea Eliade, *The Sacred and the Profane: The Nature of Religion* (William R Trask trans, 1959 ed) on the non-religious "man". Robert Retherford, 'Local Development Agreement on Access to Sacred Lands' (2004) 75 *University of Colorado Law Review* 963 speaks of the sacred in Euro-American culture as an "idea whose time has passed with saints and miracles". Marion Maddox refers to the common exotic or irrational image of religion: Maddox, *For God and Country,* above n 12.

[15] For instance, all four countries have ratified the *International Covenant on Civil and Political Rights,* open for signature on 19 December 1966, 999 UNTS 171 (entered into force on 23 March 1976) ("*ICCPR*") which recognises the right to freedom of religion (Article 18) and the right of minorities to enjoy their own culture and practise their own religion (Article 27): Canada in 1976, New Zealand in 1979, Australia in 1980 and USA in 1992. These clauses of the *ICCPR* are discussed in Chapter 6 at 6.2.2.

[16] For example, the preambles to the *ICCPR* and the the Vienna Declaration adopted by the World Conference on Human Rights on 25 June 1993 (United Nations, *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993) "Vienna Declaration") refer to the dignity and worth of the human person. See also Michael J Perry, 'A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture' (2004–5) 10 *Roger Williams University Law Review* 385, discussing the basic principle behind human rights as not denying that any human being lacks inherent dignity and not treating such a human being as if they lack it. Carolyn Evans in *Freedom of Religion under the European Convention on Human Rights* (2001) discusses the principle of self-identity. See also Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (1990) referring to the need for a person to able to maintain their identity; Robert Drinan, *Can God and Caesar Coexist? Balancing Religious Freedom and International Law* (2004), speaking of a person's freedom to embrace a "conception of life"; David Guinn, *Faith on Trial: Communities of Faith, the First Amendment and the Theory of Deep Diversity* (2002), referring to individual flourishing.

[17] See, for instance, Eliade, above n 14, and also the short summary of sociological analyses of religion in Robert Tonkinson, 'Spiritual Prescription, Social Reality: Reflections on Religious Dynamism' (2004) 14(2) *Anthropological Forum* 183. David Sinacore-Guinn, *Religious Pluralism and the Theory of Deep Diversity*, (PhD thesis, McGill University, 1997), drawing on sociologist Peter Berger, also discusses the "world-making" value of religious belief.

[18] This is even more the case in situations where Indigenous people might see themselves as belonging to the land and having spiritual connections with it so that their identity may be entirely bound up with it: see 3.1.2 below. See Naomi Kupuri, 'Culture,' in UN Permanent Forum of Indigenous Issues, '*State of the*

feelings; it goes to the destruction of their religion and the total loss of identity.[19] It is well documented that loss and damage of Indigenous sacred places has resulted in a great deal of distress and depression through the breakdown of systems of meaning and identity.[20]

There seems little dispute in the statutory and common law of all four countries that people's bodies and reputations deserve legal protection from injury and this extends to their possessions.[21] If there is a recognition that it is generally wrong to hurt or damage people and their property, then the logic follows that to cause them the immense pain of seeing their sacred places destroyed is just as, if not more, damaging and just as wrong. If the law is serious about protection of such features of human personality, then it is necessary to take Indigenous peoples' religious beliefs on their own terms in the public domain and eschew a narrow privatised and individualistic view of rights which are inapplicable.

The harder questions are not whether sacred places should be protected at all but where one draws the line. This thesis is about the inappropriateness of drawing a line based on a public–private dichotomy. Should religious values only be protected in the private sphere leaving the public domain to be governed by neutral public interests? This question assumes that it is possible for the dominant culture to maintain neutrality

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World's Indigenous Peoples', above n 11, 53–54 , 60–62. This concept of spiritual identity with their land found its way into the judgment of Brennan J, in *R v Toohey; Ex parte Meneling Station Pty. Ltd. (*1983) 158 CLR 327, at 356–7, citing the words of the anthropologist Stanner in his Boyer Lecture (reproduced in Stanner, *White Man Got No Dreaming,* above n 12): "*A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call "land" we took what to them meant hearth, home, the source and locus of life and everlastingness of spirit*."

[19] Ian Hunter, 'Sacrilege: from Public Crime to Personal Offence' in Elizabeth Burns Coleman and Kevin White (eds), *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society* (2006) spoke of how the Stoics saw avoiding sacrilege as matter of politeness towards those who worship the Gods and how this process involved a transformation of sacrilege from a public crime to a personal offence. In some limited senses, the personal offence argument in a largely secular society may well be sufficient as a basis for protection of sacred places from desecration, as long as it is recognised that the desecration of sacred places is qualitatively different from protection against blasphemy and hurt feelings. In the latter cases there are likely only to be hurt feelings but in the desecration situation, the damage goes to the heart of the survival of the religion and may be permanent and irreparable. Ultimately the degree of difference between these concepts may best be balanced against fundamental rights and freedoms of others. This is expanded in 6.5.3.

[20] See for example Terry Djiniyini and Don Carrington, 'Commentary on "Sacred Sites"' in Robert A Evans and Alice Frazer Evans, *Human Rights: A Dialogue between the First and Third Worlds* (1983); Russell Walter Fox (Commissioner), *Ranger Uranium Environmental Inquiry: Second Report* (1977), at 46–7 citing Silas Roberts of the Northern Land Council; Christopher Vecsey, 'American Indian Environmental Religions' in Christopher Vecsey and Robert W Venables (eds), *American Indian Environments: Ecological Issues in Native American History* (1980); Eliade, above n 14; Darlene M Johnston, 'Native Rights as Collective Rights: A Question of Group Self-Preservation' (1989) 2 *Canadian Journal of Law and Jurisprudence* 19. Commissioner Elliot Johnston for the Royal Commission on Deaths in Custody in Australia drew the links between the damage to sacred sites and alcohol and violence, imprisonment and death, through the loss of personal and family identity: Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report,* vols 2 and 5 (1991). A similar Canadian conclusion was suggested in Martin Tuesday and Violet Tuesday, 'The Effects of Loss of Traditional Lands in the Lac Seul and Lake St Joseph Areas' in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998) and also in Thomas Berger, *Report of the Mackenzie Valley Pipeline Inquiry: Northern Frontier, Northern Homeland* (rev ed, 1988).

[21] Protected, for example, by laws of assault, defamation, theft, willful damage, trespass etc.

and equality when considering political minorities. However, many commentators have observed that taking values of sacredness out of the legal equation favours the values (religious or anti-religious) of the dominant political forces, as it is their values that are defined as the status quo, or as "the neutral".[22] The obvious problem for Indigenous sacred places is that without legal protection (and even when lip service is given to it), they are likely to be destroyed[23] in the name of progress, development and property rights. The result is not neutrality or equality but the privileging of the dominant perspectives.

Whether or not substantive equality and respect are sensible aims is beyond the scope of this legal thesis and is ultimately a matter for value judgments. The point is that, having opted to legislate, at least nominally, for religious freedom and cultural heritage, it is inappropriate for legislators then to define such protection in ways that defeat or contradict it. As discussed in this thesis, this is an unfortunate result of the relegation of the sacred to the private sphere, thus excluding Indigenous places.

1.4 The Limits of the Thesis

The two legal categories chosen as the subject of this thesis, namely laws on religious freedom and heritage, are those for which the religious significance of a place should be relevant. This excludes a consideration of the many other types of laws that may give more effective legal protection to such places through rights of control, such as laws under which the place is vested in the Indigenous group, laws relating "native title", Aboriginal title or Aboriginal rights,[24] rights of easements[25] or trust principles.[26] It

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[22] See Sinacore-Guinn, above n 17; David N Cinotti, '*The Incoherence of Neutrality: A Case for Eliminating Neutrality from Religion Clause Jurisprudence',* (2003) 45(3) *Journal of Church and State* 499; Frederick Mark Gedicks, 'Public Life and Hostility to Religion' (1992) 78 *Virginia Law Review* 671; Stephen L Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993). Similar critiques of the legal system underlie the critical race theories: see K Upston-Hooper, 'Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi' [1998] *Victoria University of Wellington Law Review* 32 and also critical legal scholarship: see for example Allan C Hutchinson and Patrick J Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) *Stanford Law Review* 199; David M Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) *Stanford Law Review* 575. Arguments have been put in the US for a "substantive equality" that recognises difference and protects it: see Douglas Laycock, 'Formal, Substantive and Disaggregated Neutrality toward Religion' (1990) 39 *DePaul Law Review* 993; Michael W McConnell, 'Free Exercise Revisionism and the Smith Decision' (1990) 57 *University of Chicago Law Review* 1109. A similar argument has been put in Australia: see for instance Gaze and Jones, above n 16. See also 10.5 below.

[23] A point noted by commentators, such as Richard B Collins, 'Sacred Sites and Religious Freedom on Government Land' (2003) 5 *University of Pennsylvania Journal of Constitutional Law* 241; Richard Carson, 'Free Exercise of Native American Religions on Public Lands: The Development of and Outlook for Protection under the Free Exercise Clause of the First Amendment' (1980) 11 *Public Land and Resources Review* 181. See also Chapter 11.

[24] In his major work on sacred sites in Canadian courts, for example, Michael Lee Ross has analysed many attempts to protect sacred places where the cases have been run on the basis of Aboriginal rights relating to hunting, gathering and access at such places, in Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts* (2005). Most of these cases do not actually discuss the sacredness of the place at all

also does not address remedies under equal opportunity or racial discrimination legislation.[27] Neither is there any analysis of the various "public order" offences such as those against disturbance of religious rituals, blasphemy, sacrilege, religious vilification which turn more on the breach of the peace rather than on the protection of the sacredness of places.[28]

The emphasis on the religious relationship in this thesis is not intended to deny or detract from the proprietorial and economic rights or cultural or historic significance.[29]

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as this was not relevant to the cause of action relied on. Ross notes that the Aboriginal rights attached to sacred places are no different from those attached to non-sacred places.

[25] The use of such rights has been suggested by some commentators as a means of protecting religious practices and the need for access, eg, Ira Lupu, 'Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion' (1969) 102 *Harvard Law Review* 933; Michael F Brown, *Who Owns Native Culture?* (2003); Kevin Worthern, 'Protecting the Sacred Sites of Indigenous People in US Courts: Reconciling Native American Religion and the Right to Exclude' (2000–1) 13 *St Thomas Law Review* 239. One example of this was the case of *US ex rel Zuni Tribe of New Mexico v Platt,* 730 F Supp 318 (D Ariz, 1990) when the District Court in Arizona upheld an easement claim based on long–term history of pilgrimage through the same route to a sacred place. In this instance the relevant legal element was the long–term use of the route rather than the religious nature of the journey.

[26] Many US commentators have suggested the trust model as providing more chances of success in protecting sites, such as Jeri Beth K Ezra, 'Comment, the Trust Doctrine: A Source of Protection for Native American Sacred Sites' (1989) 38 *Catholic University Law Review* 705; Kristen A Carpenter, 'A Property Rights Approach to Sacred Site Cases: Asserting a Place for Indians as Non-owners' (2004–5) 52 *University of California Law Review* 1061. It has however been argued unsuccessfully in some US sacred place cases such as *Manybeads v US,* 730 F Supp 1515 (D Ariz, 1989), *Navajo Nation v US Forest Service and Ors,* 408 F Supp 2d 866 (D Ariz, 2006); and at the unsuccessful preliminary injunction application stage in *Northwest Indian Cemetery Protective Association v Peterson,* 552 F Supp 951 (ND Cal, 1982).

[27] While issues of different treatment do arise, this analysis is based on the problem of handling sacred places at all. The problem, however, is often not one of different treatment of people in the *same* position, because Indigenous sacred places are usually not in the same position as the sacred places of Western religions. The problem rather is often the incommensurability of the situations, remedies and approaches required.

[28] Offences against disturbing religious worship are found in many criminal statutes and there are the old offences too of blasphemy and sacrilege. Some statutes do specifically refer to desecration of places of worship. Most of these criminal provisions are seen as part of the public order criminal offences (and thus in the public sphere) or as aggravated property offences (and thus as protections of other people's private spheres). For a discussion of the philosophical development to see blasphemy and sacrilege as public order issues, see Hunter, above n 19. Given the emphases on public order and private property rather than the nature of sacredness, such offences do not assist on the matters of concern in this thesis.

[29] The focus on the *religious* significance of a place is not intended to fall into the trap of the Australian case of *Milirrpum v Nabalco* (1971) 17 FLR 141, at 166–167, 268–74, where a claim for rights in relation to the land was rejected because the relationship that Aboriginal people had with the land was classified as religious, rather than as flowing from proprietary or economic rights. Rodney Bobiwash in Canada has put the view that the real Indigenous struggle is not about "sacred" land but land itself and that using the language of sacredness frames that struggle in the discourse of colonialism, in Rodney Bobiwash, 'The Sacred and the Profane: Indigenous Lands and State Policy' in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998). See also the comment by Denis Byrne, Helen Brayshaw, Tracey Ireland, *Social Significance: A Discussion Paper* (2nd ed, 2003) to the effect that a Western emphasis on "the sacred" may force Indigenous people to describe things as sacred in order to make them fit in with such a discourse.

On the other hand, commentators have also criticised the need for Indigenous people to have to frame their rights, including those which are quite spiritually based, as proprietary in order to obtain remedies under the Western legal systems: see Nonie Sharp, 'No Ordinary Case: Reflections upon Mabo' (1993) 15 *Sydney Law Review* 143; Maddox, *For God and Country,* above n 12; Lori B Beaman, 'Aboriginal Spirituality and the Legal Construction of Freedom of Religion' (2002) 44 *Journal of Church and State* 135, at 143–144; Richard Pemberton, 'I Saw that it was Holy: The Black Hills and the Concept of Sacred Land' (1985) 3 *Law and Inequality* 287. It has been suggested that a recognition of Aboriginal cultural property needs to reflect Aboriginal values and be protected, not because of a proprietary interest but because of its sacredness: Gordon Christie, 'Aboriginal Rights, Aboriginal Culture and Protection' (1998) 36(3) *Osgoode Hall Journal* 448, or as religious rather than as a matter of cultural heritage: see Alice Diver, 'A Just War: Protecting Indigenous Cultural Property' (July 2004) 6(4) *Indigenous Law Bulletin* 7. This thesis does not

Rights can be religious *and* proprietorial *and* economic. These concepts are not mutually exclusive.[30]

This thesis is restricted to examining the treatment of one very small aspect of Indigenous religious beliefs and culture, that is, the sacred place. In doing so, I acknowledge that I am doing what myriads have heavily criticised, that is, the separation and compartmentalisation of one component of heritage or culture from others.[31] Time and space, however, permit only such a specific and limited example of the way courts and legislators have treated Indigenous beliefs. Nevertheless, as a case study, sacred places are a good illustration as they have served as the major flash points over the use of land, a point central to much Indigenous and non-Indigenous thinking, albeit often for quite different reasons.[32] Here we see the clash of deeply held ideals and conceptions over competing uses of land.[33] The litigation and analyses raise many good examples of how Indigenous notions of sacredness are treated by the courts and by various commentators.

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seek to express a preference for any one approach, but is only covering the approach based on sacredness.

[30] Kolig has suggested that there was no real distinction between believing and owning the land: Kolig, *The Noonkanbah Story* (1987), at 81.

[31] The consensus amongst most commentators is that Indigenous culture and heritage is holistic and interrelated: see Erica-Irene Daes, Special Rapporteur, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, for Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, United Nations, 45th sess, UN Doc E/CN.4/Sub 2/1993/28 (28 July1993); Erica-Irene Daes, *Preliminary Report of the Special Rapporteur: Protection of the Heritage of Indigenous Peoples,* UN Doc E/CN.4/sub.2/1994/31 (8 July1994); Marie Battiste and James [Sa'ke'j] Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (2000); Russel Lawrence Barsh, 'How do you Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property' (1998) 1 *International Journal of Cultural Property* 14; Janet Stephenson, *Conflict in the Landscape*, (2005); Rosemary J Coombe, 'The Properties of Culture and Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 6 *Canadian Journal of Law and Jurisprudence* 249; Henrietta Fourmile, 'Aboriginal Heritage Legislation and Self-Determination' (1989) 7(1–2) Special issue 45 *Australian-Canadian Studies* 45.
Such holistic heritage does not neatly fit into the legal compartments that have been created by the Western mind such as real property as opposed to personal property as opposed to intellectual property. As Erica-Irene Daes, Special Rapporteur, *Protection of the Heritage Preliminary Report* (1994), above n 31, has said:
"The heritage of indigenous people is not merely a collection of objects, stories and ceremonies, but a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity."
See also Waitangi Tribunal, *Te Roroa Report* (1992), at 6.2–6.3.

[32] Land is vital for Indigenous peoples. It has been called the "central and indispensable classroom" in which the heritage of Indigenous People has traditionally been taught: Daes, *Protection of the Heritage Preliminary Report* (1994), above n 31, at [9]. Heritage for Indigenous peoples has been said to include expressions of the relationship between the people, their land and other living beings and spirits which share the land and cannot be separated from the traditional territory of the people concerned: Daes, *Cultural and Intellectual Property of Indigenous Peoples* (1993), above n 31, esp at [164]. Land is also vital for economic development and valuable as property.

[33] See similar issues identified in Patrick T Noonan, 'Mining Desecration and the Protection of Indian Sacred Sites: A Lesson in First Amendment Hurdling' (1989) 50 *University of Pittsburgh Law Review* 1131; Ken Gelder and Jane M. Jacobs, *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation* (1998); David Chidester and Edward T Linenthal, 'Introduction' in David Chidester and Edward T Linenthal (eds), *American Sacred Space* (1995); Canada, Royal Commission on Aboriginal Peoples, above n 8.

1.5 The Use of Terms

1.5.1 Indigenous

The use of the term "Indigenous" in this thesis seeks to refer in the widest sense to communities descended from the peoples who were in occupation of the four countries at the time of colonisation by European settlers.[34] It is sufficient for current purposes to point to identifying factors suggested at an international level which include such things as priority in time with regard to occupation of a territory, cultural distinctiveness, an experience of marginalisation or dispossession and self-identification as Indigenous and recognition as such by others within those communities.[35]

As a result, the term as used in this thesis is intended to be an umbrella term, including the various peoples amongst the Aboriginal people and Torres Strait Islanders in Australia, Native Americans, Native Hawaiians and Inuit peoples of USA, the First Nations, Metis or Inuit in Canada and the Maori of New Zealand. More specific terms are used where relevant. Given the broad reach, this thesis necessarily uses generalisations when referring to Indigenous peoples. There are numerous diverse Indigenous societies and religious views and practices within each of the four countries, which in many ways differ substantially from one another.[36] The features of some Indigenous beliefs in relation to sacred places referred to throughout this thesis are some common ones, but there is no suggestion that these are universal or generally applicable to all Indigenous peoples.

1.5.2 Sacred

The use of the term "sacred" in this thesis is also intended to be deliberately wide and general. It is used interchangeably with "religious significance" or "spiritual significance"

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[34] The topics examined in this thesis do not require a consideration of the various definitions that have been proposed for the term "Indigenous peoples". Some of these are usefully summarised in Erica-Irene Daes, Special Rapporteur, *On the Concept of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/C.4/1996/2 (10 June 1996). Some other discussions of these issues can be found in Patrick Thornberry, *Indigenous Peoples and Human Rights* (2002); Battiste and Henderson, above n 31. Formal definitions have been rejected by Indigenous peoples in favour of self-identification, see UN Permanent Forum of Indigenous Issues, '*State of the World's Indigenous Peoples'*, above n 11, 4–6.

[35] These factors were suggested at the UN level by Special Rapporteur of the Working Group on Indigenous Populations: see Daes, *Concept of Indigenous Peoples* (1996), above n 34.

[36] Comments made to this effect can be found in Ronald M Berndt, 'A Profile of Good and Bad in Australian Aboriginal Religion' in Maxwell John Charlesworth (ed), *Religious Business: Essays on Australian Aboriginal Spirituality* (1998); Dean B Suagee, 'American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers' (1982) 10(1) *American Indian Law Review* 1; Vecsey, 'American Indian Environmental Religions', above n 20; Canada, Royal Commission on Aboriginal Peoples, above n 8.

and the term "sacred place" will be used for convenience. It is meant to encompass both open and secret sacred matters.

Just as the term "religion" is often thought insusceptible to any adequate definition,[37] so is the term "sacred". This thesis does not attempt any such feat of definition but seeks to encompass anything that people themselves identify or recognise as sacred.[38]

In many cases the concept is associated with some form of spiritual or divine presence or power.[39] Reference to sacred places includes those places where there is some form of power or access point to spiritual forces[40] but also covers places set apart for specifically religious uses only. This thesis deliberately does not restrict the concept of the sacred to the supernatural. A sacred place also does not have to be sacred for all time, but may be both sacred and non-sacred in different circumstances.[41]

Nevertheless, there is a distinction drawn in this thesis from places which may evoke feelings of awe or mystery but where there is no religious ideology or reasoning behind them. Grand buildings or works of art, magnificent natural scenes, battlefields or general cultural heritage[42] may evoke similar feelings as sacred places, but if the

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[37] A view suggested, for instance, by Latham CJ in Australia who said it would be difficult if not impossible to devise a definition of religion which would satisfy the adherents of all the religions that have existed in *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 123. See also the discussion at 4.2.3 below.

[38] It is important not to forget that sacredness is something that each Indigenous community needs to define for itself according to the applicable traditions and beliefs. For instance, in New Zealand it has been said that each iwi, hapu or whanau has their own view of what is tapu (loosely and poorly translated as sacredness) and no one is so presumptious as to define tapu for another group: Manatu Maori, *Wahi Tapu: Protection of Maori Sacred Sites* (1991).

[39] The concept of sacredness is also intended to encompass Otto's concept of "the Holy" referring to that sense of the numinous: in Rudolf Otto, *The Idea of the Holy: An Inquiry into the Non-Rational Factor in the Idea of the Divine and its Relation to the Rational* (J W Harvey trans, 1950) [first published, 1923] and Eliade's use of "hierophany" where there are manifestations of something qualitatively different from ordinary profane space, in Eliade, above n 14, or Van der Leeuw's sense of power, in Gerardus Van der Leeuw, *Religion in Essence and Manifestation* (1967). Tuan also identifies power as a mark of the sacred: Yi-Fu Tuan, 'Sacred Space: Exploration of an Idea' in Karl Butzner (ed), *Dimensions of Human Geography* (1978). The concept of the sacred is an ambiguous one, carrying with it a sense of power, but a power that brings both "awe and aversion, purity and danger", James C Livingston, *Anatomy of the Sacred: An Introduction to Religion* (5th ed, 2005).

[40] Hughes and Swan referred to sacred places as places where human beings find a manifestation of divine power and a sense of connectedness to the universe, a place where, in some special way, "spirit" is present to them, in J Donald Hughes and James Swan, 'How Much of the Earth is Sacred Space?' (1986) 10(4) *Environmental Review* 247. Swan also referred to it elsewhere as a place perceived as somehow able to energise within people feelings and concepts associated with spiritual dimensions of life: James Swan, 'The Spots of the Fawn: Native American Sacred Sites, Cultural Values and Management Issues' in James Swan (ed), *The Power of Place: Sacred Ground in Natural and Human Environments* (1991). Kelley and Harris have also relied on the concepts of power and accessibility when referring to Navajo sacred places: Klara B Kelley and Francis Harris, *Navajo Sacred Places* (1994).

[41] See Joel P Brereton, 'Sacred Space' in Lindsay Jones (ed), *Encyclopaedia of Religion*, vol 12, (2nd ed, 2005).

[42] Examples of environmentally important places have reached semi-religious overtones: see for example John Muir in the US who spoke of the valley at Hetch Hetchy as "a temple consecrated in the heart ", cited in J Donald Hughes, 'Spirit of Place in the Western World' in James Swan (ed), *The Power of Place: Sacred Ground in Natural and Human Environments* (1991), at 24–25. Bron Taylor has also traced the role of the environmental movement in the US and John Muir in the article Bron Taylor, 'Resacralising Earth: Pagan Environmentalism and the Restoration of Turtle Island' in David Chidester and Edward T. Linenthal

perception is not characterised as "sacred" in the mind of the perceiver or the relevant community,[43] then such places are not included in this study.[44]

Further, in this thesis no judgments are made about the validity of the beliefs about sacredness, although there is consideration of how the courts and others deal with questions of sincerity, fabrication and veracity of beliefs. Throughout this thesis the contents of the beliefs will be referred to simply as they are described by the relevant holders of those beliefs.

This thesis also does not enter into the debate regarding the extent to which sacred places are social constructs, nor about the functional purpose of such constructs.[45] However, from the point of view of the community to whom the place is sacred, this designation is usually far more than a construction or a political act, but is often seen as independent and outside of human control.[46] The main emphasis of this thesis is

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(eds), *American Sacred Space* (1995). There have been analyses of the religious features of ecological attitudes to nature and the wilderness, such as Linda H Graber, *Wilderness as Sacred Space* (1976); Kenneth A Erickson, 'Ceremonial Landscapes of the American West' (1978) 22 *Landscape* 39. Maddock, writing of Australians, has also said that the land in the form of the bush or the vast outback has been elevated to a sacred symbol: Kenneth Maddock, 'Metamorphosing the Sacred in Australia', [1991] (2) *Australian Journal of Anthropology* 213, at 231.

Places associate with sacrifice include Gallipoli or the Kokoda Trail for Australians or Arlington Cemetery or Gettysburg for Americans. Robert Bellah has mentioned Gettysburg and Arlington as the most hallowed places of civil religion, symbolising death and sacrifice and re-birth: see Robert Bellah, 'Civil Religion in America' (1967) 96 (1) *Daedalus* 1. See also US Department of the Interior, *AIRFA Report*, above n 8, at 90, Maddock, 'Metamorphosing', above n 42. For the connection with the concept of sacrifice: see Tuan, 'Sacred Space', above n 39.

Places associated with major human achievements could include Mount Rushmore in the USA with its sculptures of the heads of the leaders who symbolised democracy: see Glass, above n 11.

[43] Tuan has referred to such places as providing centres of meaning and vitality and says they can be described as having a "spirit of place" but in a different sense from holy places where spirits are said to dwell in them literally: Yi-fu Tuan, 'Space and Place: Humanistic Perspective' in John Agnew, David Livingstone and Alisdair Rogers (eds), *Human Geography: An Essential Anthology* (1996).

[44] At least not as sacred places. These places are included in the concept of public secular places of significance for the purposes of public heritage discussion in Part C.

[45] From the point of view of an observer, it may also be said of many sacred places, Indigenous and otherwise, that their significance is in effect socially constructed and also subject to contestation. See the description by Chidester and Linenthal of the establishment of sacred space as a political act in which sacred space is the result of a contest over space: in Chidester and Linenthal, 'Introduction', above n 33. They suggest that the most significant levels of reality in formation of sacred space are not mythological categories such as heaven or earth, but hierarchical power relations of dominance and dispossession. A similar political reading of sacred space is found in Roger Friedland and Richard D Hecht, 'The Politics of Sacred Place: Jerusalem's Temple Mount' in Jamie Scott and Paul Simpson-Housley, *Sacred Places and Profane Spaces* (1991). See also John Eade and Michael J Sallnow, 'Introduction' in John Eade and Michael J Sallnow (eds), *Contesting the Sacred: The Anthropology of Christian Pilgrimage* (1991) where it was said that particular importance attached to places may be based on bolstering of power of a local elite or a means of exclusion of outsiders, whether based on gender or faction or age. The contest then can be within the believing group, but can also involve a contest and political struggle with others outside the community, especially when conflicting land use issues arise. Jane Hubert has said that sacred sites become definable by the extent to which communities concerned will fight to preserve and protect them from disturbance, interference or destruction: Jane Hubert 'Sacred Beliefs and Beliefs of Sacredness' in David Carmichael et al (eds), *Sacred Sites, Sacred Places* (1994). The political and contested nature of sacred places has been raised squarely in the Indigenous context by Gelder and Jacobs: Gelder and Jacobs, *Uncanny Australia,* above n 33 and also in Ken Gelder, 'Coronation Hill: Contesting the Sacred', (1991) 96 *Arena* 14.

[46] Beldon Lane, *Landscapes of the Sacred: Geography and Narrative in American Spirituality* (2002). Lane has argued that there is no single all-encompassing perspective or discourse to describe the meaning and function of sacred places and the way they are experienced.

how such a place, perceived to be sacred by the relevant Indigenous community, is treated by the law, not how or why it becomes sacred in the first place.

1.5.3 Place

In a similar way, the term “place” is used in a broad and general way that could be interchangeable with “area” and is intended to encompass the more commonly used terms of sacred “site” or landscapes or space generally. When the terms “place” or “site” are used in this thesis, they are not intended to refer to any small or confined space, although some might argue that legal definitions do imply such confinement.[47] The word “place” is often preferred over “space” to reflect the fact that one is speaking of something that is not just an undifferentiated or abstract geographical area but has all the connotation of a “sense of place” as used by human geographers and others,[48] but both terms are used in this thesis with no intent to differentiate between them.

1.5.4 Public and Private Spheres

The public sphere as used in the Western dichotomy can include the narrower reference to the public or state institutions, such as the government and the legal system,[49] though it can sometimes extend to the “open market” of commerce and economic activity.[50] The private sphere includes the personal and the domestic as well as voluntary associations such as religious organisations. As used in this thesis, the terms “public” and “private” do not denote the distinction between visible and hidden, as the “private sphere” could be open to or visible by the public.[51] What enables those

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[47] The issue of boundaries and size is discussed further in Part C at Chapter 15.

[48] Examples of those who have described “place” as opposed to general “space” include Rowland A Sherrill, ‘American Sacred Space and the Contest of History’ in David Chidester and Edward T Linenthal (eds), *American Sacred Space* (1995); Lane, above n 46; Walter Brueggemann, *The Land* (1977); Miles Richardson, ‘Place and Culture: Two Disciplines, Two Concepts, Two Images of Christ, and a Single Goal’ in John Agnew and James Duncan (eds), *The Power of Place: Bringing Together Geographical and Sociological Imaginations* (1989) and in their introduction in John Agnew, David Livingstone and Alisdair Rogers (eds), *Human Geography: An Essential Anthology* (1996).

[49] Although it could be extended to such concepts as the public square or public opinion, but this is not necessary for this thesis. Sinacore-Guinn, above n 17, has referred to the term "public sphere" as encompassing governmental and larger social relationships. It has been suggested that the concept is a broad and vague one and may be understood more in Europe as the sphere of the state whereas in the US it tends to include also the common space of voluntary associations, and even civil society itself: Blandine Chelini-Pont, ‘Religion in the Public Sphere: Challenges and Opportunities’ [2005] *Brigham Young Law Review* 611. Both senses are used in this thesis but the “state-based” sense is the most relevant one. Casanova has canvassed the different conceptions of what falls within the public and private sphere and whether the public includes the market economy or civil society generally as well as the state: see Jose Casanova, *Public Religions in the Modern World* (1994).

[50] See Casanova, ibid. Evans and Gaze, for example, have referred to the public sphere as encompassing such activities as education, employment, supply of goods and services and accommodation, in Carolyn Evans and Beth Gaze, ‘Religious Freedom and Equality: Complexity and Context’ (2008) 49 *Harvard International Law Journal* 40, 47.

[51] Such as places of worship or lecture halls or which take place in public, such as in public rallies or proselytising and public debate. It is also not suggested that the term "private" carry any concepts of confidentiality as in some uses of the concept of privacy.

aspects to be considered as private is their voluntary nature, with no governmental enforcement. These spheres also do not equate to public and private land respectively although there will be much in common between the respective terms.[52] Religious groups, however, may carry out their activities on public land as well, albeit often as just another private group or person. These meanings of the public and private spheres are expanded in the next chapter.

[52] Instances of commonality between sphere and ownership will include the fact that government institutions operate on government land or domestic and voluntary associations like churches usually operate on privately owned or privately hired land. However, as mentioned above there is some ambiguity as to whether government-owned land is to be treated as public or private. See also Chapter 11.

Chapter 2 – The Public and the Private – Locations and Limits of the Sacred in Western Worldviews

2.1 Introduction

This chapter summarises some of the relevant views underlying the dualistic separation of a public secular from a private religious sphere in Western legal thinking. These concepts, particularly as they have developed from the time of the Enlightenment through liberal philosophy, have shaped the current laws dealing with places of religious significance in a manner that has sat uncomfortably with notions of Indigenous sacred places. This development was assisted by the growth in the West of individualised and internalised features of religious experience as well as the development of government and legal institutions that do not rely on specific religious underpinnings. In the West, concepts of "sacred place" have tended to be confined within the property of the individual or particular religious community and thus also seen as private. At the same time, the common law seems to have elevated private property and rights to a kind of sacred status which has regularly trumped the protection of sacred places that lie outside the adherents' private realm.

There have of course been and still are many contrasting views in the Western world,[53] including those deriving from Judeo-Christian traditions[54] which can only be mentioned briefly in this chapter. There is no suggestion that there is a systematic, monolithic or even consistent philosophy in the four countries making clear demarcations of public and private spheres. What exist are common but vague attitudes and assumptions about the place of things religious in Western society and similarly vague but contrasting attitudes to the public sphere that are reflected in the relevant case law and legislation (addressed in Parts B and C). This overview offers only simplified summaries, but this may be apt given that it is often only the simplistic understandings rather than the nuanced academic debates which are used in formulating the legal principles that will be analysed later.

[53] As noted in 2.2.1 below, the viewpoints of most religions, including Western Christian ones, will be contrary to dualistic views summarised in this chapter.
[54] This is the most familiar source of many of the Western concepts of sacredness. In this thesis what is referred to as "Judeo-Christian" traditions are primarily those traditions as adapted and Westernised, particularly within British cultures, rather than the original (some would say purer) Middle-Eastern mindset of those religions. The plural term "religions" is also sometimes used loosely to signify the many differing traditions or perspectives within the Judeo-Christian framework and to indicate that there is no single version.

The chapter starts by discussing the key perceptions which mark the dualistic separation of a private religious sphere from a public secular sphere. Next is an overview of where sacred places familiar in Judeo-Christian traditions fit into these Western perceptions. Finally there is a discussion of the influence of private property in this separation of spheres.

2.2 Privatised Aspects of Religion and the Shared Secular Values of the Public Sphere

2.2.1 Some Privatised Religious Concepts

There has been a long history of holistic Western worldviews which do not see religion as a private matter but as central to social, political and communal life[55] Some examples can be seen in the post-Constantinian Christian era in Europe in which ecclesiastical laws and courts were part of the law of the land[56] and the religious and political were often intertwined, albeit governed by different institutions.[57]

Nevertheless, there are some beliefs in the Western Christian tradition[58] which have enabled privatised views of religion to arise and which have contributed to the perceptions of distinct spheres, even if these did not in themselves amount to a confinement of religion into a private sphere.

One such example is the concept of personal salvation which emphasises heaven and eternal life after death as its reward, with the earth being seen primarily as a stage for the drama of individual salvation.[59] In this scheme what is important is correct belief

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[55] See, for example, Charles Taylor, *A Secular Age* (2007) and Wilfred Cantwell Smith, *The Meaning and End of Religion* (1962). These are further illustrated by the sacred places discussed in 2.3 below.

[56] They still are in England and are recognised as such by the English common law from which the laws of the four countries have derived: see Butterworths, *Halsbury's Laws of England*, 4th ed, Lord Hailsham of St Marylebone (ed), vol 14 (Ecclesiastical Law) (1975). Ecclesiastical courts also often sat in church buildings in medieval Europe: Dawn Marie Hayes, *Body and Sacred Place in Medieval Europe 1100–1389* (2003).

[57] With Christianity came a clear conceptual separation of church and state, of religious and civil authorities, but, in practice, these were often allied and such an institutional separation did not mean a distinction in spheres: see, for instance, the analysis of the “church and state double regime” stemming from ideas such as St Augustine's city of God and city of the world, in Jean-Luc Nancy, ‘Church, State, Resistance’ in Henk De Vries and Lawrence Sullivan (eds), *Political Theologies* (2006) and the idea of temporal and spiritual power both embracing the entire realm: see Talal Asad, ‘Trying to Understand French Secularism’ in Henk De Vries and Lawrence Sullivan (eds), *Political Theologies* (2006).

[58] See, for instance, the reference to Bernard Lewis's view that the separation of church and state and a clear distinction between private religious beliefs and public political duties is unique to Christianity, cited in Vincent P Pecora, *Secularization and Cultural Criticism* (2006).

[59] See David Kinsley, ‘Christianity as Ecologically Harmful’ in Roger S Gottleib (ed), *This Sacred Earth: Religion, Nature, Environment* (1996) and also Roderick Nash, ‘The Greening of Religion’ in Roger S Gottleib (ed), *This Sacred Earth: Religion, Nature, Environment* (1996), who trace some of the theologians who have referred to this. See also Pemberton, above n 29, 295–6 citing Jonathan Edwards, 18th century American theologian.

and action,[60] especially if eternal judgment is based on the state of one's soul. The stress on individual conscience and purity in the pietistic movements flourished amongst many Protestant evangelicals and Puritans,[61] and encouraged a view of religion as a private matter between individuals and their God.[62] Such a view was pivotal in the thinking of some of the leading Anglo-American philosophers of religious freedom, John Locke,[63] Thomas Jefferson[64] and James Madison.[65]

While more Catholic attitudes integrated notions of religion and the world, these too saw the growing popularity of internalised spiritual exercises involving individual piety which can be viewed as a development of more privatised aspects of religion.[66]

Another development during the Enlightenment of the late 17th and 18th Centuries within English, Continental European and US society was the idea of Deism and other such philosophies which emphasised a natural, rationalist religion.[67] Deistic and other

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[60] See Robert Bellah, 'Religious Evolution' (1964) 29 (3) *American Sociological Review* 358. This becomes important for what religious freedom is for: see Part B, especially Chapters 4 and 6.

[61] These terms are being used loosely to denote various Protestant groups, many of which have some pietistic strands. The terms are also intended to include those groups described by Weber as "ascetic Protestants" ie Calvinists, Pietists, Methodists and various Baptists sects: Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (1930). The movement became widespread in the Revivalist movements of the 18th and 19th Centuries in England, with the influence of Methodism and Calvinism, and particularly shaped popular religion in the USA: see, for example, in William C Placher, *A History of Christian Theology* (1983), chapters 15 and 16; Sydney E Ahlstrom, *A Religious History of the American People* (1972), Part II. See also Taylor, *Secular Age*, above n 55.

[62] See Eliade, above n 14, at 178–9; Hughes, 'Spirit of Place', above n 42, at 23; Constant J. Mews and Kate Rigby, *Introduction to Ecology, Gender and the Sacred* (1999) and in Peter Cock, Constant Mews and Sylvia Shaw (eds), *Social and Sacred Ecology 1 Reader* (2002); Robert S Michaelsen, 'We Also Have a Religion: The Free Exercise of Religion among Native Americans' (1983) 7 *American Indian Quarterly* 111; Hunter, above n 19. Sinacore-Guinn, above n 17, refers to such views as seeing religion essentially as humanity's effort to be in a right relationship with God.

[63] Locke in his key treatise on religious freedom, *A Letter Concerning Toleration* (1689), saw religion as being about the inward and full persuasion of the mind and faith and not outward things such as possessions, land or houses. He said that *"[t]he end of a religious society is public worship of God and acquisition of eternal life*", "*the only business of the church is salvation of souls*" and the "*business of true religion*" was about regulating people's lives and salvation of their souls. He saw the role of the Christian was above all things to "*make war upon his own lusts and vices*". A discussion of this is also found in Stanley Fish, 'Mission Impossible: Settling the Just Bounds between Church and State' (1997) 97 *Columbia Law Review* 2255, 2259.

[64] Jefferson in Thomas Jefferson, *Letter to Danbury Baptist Association* (1802), extracted in Michael S Ariens and Robert A Destro, *Religious Liberty in a Pluralist Society* (2nd ed, 2002), spoke of religion as being a matter solely between a man and his God. For the role of Jefferson in articulating principles of religious freedom, see 4.2.1 below.

[65] Madison said that the religion of every man must be left to the conviction and conscience of every man, in James Madison, *A Memorial and Remonstrance* (1784), extracted in Ariens and Destro, above n 64, at 66–70. For the role of Madison in articulating notions of religious freedom, see 4.2.1 below.

[66] Taylor, *Secular Age*, above n 55, has a summary of some of these features.

[67] Ahlstrom, above n 61, has a good discussion of the English Christian rationalists and the characteristics of an "Enlightenment theology" and their influence in the USA. So too does Taylor, *Secular Age*, above n 55. Peter Brown traces such tendencies back to the late Middle Ages: Peter Brown (ed), *Society and the Holy in Late Antiquity* (1982). There is some confusion between the Deists who may have posited an absentee landlord–type of God, and other non-Deistic rationalists, who may have emphasised natural law discernable by reason, without necessarily banishing the God to an absentee position. The latter saw God more as a providential guide operating within the natural and reasonable system. Locke was claimed by many of the Deists as their hero: see Placher, above n 61, chapter 15; though Locke himself would not have claimed the description: see Ahlstrom, above n 61. Others have argued that he clearly was not a Deist, for example Barbara A McGraw, *Rediscovering America's Sacred Ground: Public Religion and Pursuit of the Good in a Pluralistic America* (2003). In her book McGraw has also argued that the well-

Christian rationalistic thought posed an image of God as a kind of designer who set up a natural order and natural law governed by reason and designed to achieve human flourishing. Within these religious conceptions is the aim of living out that providential design through reason and moral conduct. Such strongly rationalist religious strands influenced the natural rights discourse in the Declaration of Independence and constitutional arguments in the founding of the USA.[68] It was also very much at the heart of a British conception of "Christian" civilisation, law and order and decency,[69] that would have influenced the thinking in the other three countries. Viewed externally, good and rational behaviour in public life could arise just as much without a religious underpinning. In other words, the difference between such conduct and non-religious conduct may lie primarily in internal motivations and beliefs, which were what made it religious. This separation of outward behaviour and inward motivation contributed in turn to the view that religion was a private matter.

Along with the growth of individual religious experiences and interpretations, a further Protestant development has been the evolution of many Christian denominations to reflect these differing approaches. This denominationalism aided the perception of churches and other religious organisations as voluntary associations that individuals choose to join rather than as a central institution unifying society.[70]

These pietistic and rationalist views did not in themselves mark the confinement of religion into a private sphere.[71] The religious viewpoint itself has usually not accepted

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known Founders of the US Republic, such as Jefferson, Franklin, Washington, Adams, Hamilton, although often claimed to be Deists were in fact not, but were just adherents of rationalist religion.

[68] See Placher, above n 61, chapters 15 and 16; Michael W McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion' (1990) 103 *Harvard Law Review* 1409, at 1433; Timothy L Hall, 'Religion, Equality and Difference' (1992) 65 *Temple Law Review* 1; Henry Steiner and Philip Alston, *International Human Rights in Context* (1996) at 167–8; Nick O'Neill, Simon Rice and Roger Douglas *Retreat from Injustice: Human Rights Law in Australia* (2004); Kathleen Brady, 'Fostering Harmony amongst the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Differences on the Court Regarding Religious Expression by the State' (1999–2000) 75 *Notre Dame Law Review* 433; Stephen Pepper, 'Reynolds – Yoder and Beyond: Alternatives for the Free Exercise Clause' (1981) *Utah Law Review* 341; William P Marshall, 'Truth and the Religion Clauses' (1993–4) 43 *DePaul Law Review* 243, 254; John Bannon, 'Legality of the Religious Use of Peyote by the Native American Church' (1997–8) 22 *American Indian Law Review* 475, 499–500.

[69] See Taylor, *Secular Age*, above n 55.

[70] See Taylor, *Secular Age*, above n 55, and Casanova, above n 49. Another phenomenon that results in increasing privatisation of religion is the commodification of religion from the large choice on the market: see Edward Foley, 'Engaging the Liturgy of the World: Worship as Public Theology' (2008) 38 *Studia Liturgica* 31, discussing the theories of Vincent Miller to this effect.

[71] For instance, many Puritans and later Evangelicals saw faith as playing a significant role in government and in their callings and everyday life. The English Revolution, with its Puritan government, and the governments of various US states demonstrate this clearly. Neither did they separate their work from faith. Max Weber in his famous '*The Protestant Ethic' and the Spirit of Capitalism'* (1930) illustrated the connection between the beliefs of ascetic Protestantism, including those of the Puritans, and their worldly occupations, seen as callings. (However, Weber also noted that amongst some Baptist and other sects, there was a refusal to accept offices from the state.) In a Deistic or rationalist system, even with a view that God was outside and overseeing the world, the public arena could be seen as part of the divine design and moral conduct and Christian behaviour obviously included behaviour in everyday life.

such a confinement,[72] a refusal more commonly articulated in recent times.[73] Nevertheless, individualised piety enabled the growth of a privatised view of the nature of religion. Robert Bellah noted that by the mid 19th century, such a privatised pattern of religious life emphasising individual piety and voluntary associations, was prevalent in the USA where religion and the family were seen as placed in a sphere of "private life".[74] Even into the 21st century there are court references to religion as a matter of individual conscience and at least as private.[75]

2.2.2 The Development of the Shared Secular Values of Public Sphere

[72] Cantwell Smith has pointed out that although there was this Western concept of "religion", it was not an appropriate concept because believers did not see themselves as primarily engaged in a religion but in a relationship with the Divine: Cantwell Smith, above n 55. It has been noted that most religious traditions have resisted privatisation and marginalisation, eg in Casanova, above n 49. There has always been extensive criticism of privatisation from those within the Judeo-Christian religions who have rejected the separation of the sacred or religious and the secular, such as in Richard John Neuhaus, *The Naked Public Square* (2nd ed, 1986); Sinacore-Guinn, above n 17; Bradley Pace, 'Public Reason and Public Theology: How the Church Should Interfere' (Spring 2009) 91(2) *Anglican Theological Review* 273.

[73] There has been a growing refusal by religions around the world, including the West, to be excluded from the public arena. The de-privatisation of religion from the 1980s is the central thesis of Casanova, above n 49. Jeff Haynes has traced the increasing role of religions in the public sphere in recent years, from religions like Islam, the Christian "Left" and the "Religious Right", despite the entrenched secularist position in the West in the preceding years, in Jeff Haynes, *Religion in Global Politics* (1998). See also the Editors' Preface to Henk De Vries and Lawrence Sullivan (eds), *Political Theologies* (2006), arguing that the strict separation of public and private spheres has foundered and no longer holds true. This has also been exemplified by the political rise of the Religious Right in the USA: see, eg, the discussion in McGraw, above n 67; and also in Australia, in Marion Maddox, *God under Howard* (2005); Anna Crabb, 'Invoking Religion in Australian Politics' (2009) 44 *Australian Journal of Political Science* 259.

There has also been extensive critique in recent times of the public–private dualism in the USA from such writers as Neuhaus, above n 72; Stephen L Carter, 'Reflections on the Separation of Church and State' (2002) 44(2) *Arizona Law Review* 293; Carter, *Culture of Disbelief,* above n 22; Gedicks, 'Hostility to Religion', above n 22; Sinacore-Guinn, above n 17; McGraw, above n 67; David Hollenbach, 'Civil Society: Beyond the Public–Private Dichotomy' (1994–5) 5 *The Responsive Community* 15; Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (1996); William E Connolly, 'Pluralism and Faith' in Henk De Vries and Lawrence Sullivan (eds), *Political Theologies* (2006); Wendy Brown, 'Subjects of Tolerance: Why We are Civilised and They are Barbarians' in Henk De Vries and Lawrence Sullivan (eds), *Political Theologies* (2006); Stephen M Tipton, 'Republic and Liberal State: The Place of Religion in an Ambiguous Polity' (1990) 39 *Emory Law Journal* 191. Many of these have argued that religion should not be confined to the private sphere but should have a role in public debate and involvement as part of civil society or as mediating institutions. Hamilton also points to the incorrect perception that the religious belief is internal and secular belief is public: Marci Hamilton, 'The Belief–Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct' (1993) 54 *Ohio State Law Journal* 713. See also Pace, above n 72, who provides a critique of this in favour of public theology.

[74] Robert N Bellah et al, *Habits of the Heart: Individualism and Commitment in American Life* (1985), especially 223–244. Bellah considered that this version of Christianity emphasised the emotional and sentimental and was thus individualistic and was legitimised as a matter of individual choice and experience. Bellah's research has been criticised: see, eg, by Sinacore-Guinn, above n 17; but it is still reflective of what is commonly thought to be the case, at least in the non-religious world: see, eg, Pace, above n 72, who summarises some of the common perceptions of religion as private and spiritual, and Foley, above n 70.

[75] For example, O'Connor J in her opinion concurring with the majority of the US Supreme Court in *McCreary County v American Civil Liberties Union of Kentucky* 545 US 844 (2005) kept referring to religion as private and a matter of individual conscience, eg, "we have kept religion a matter for the individual conscience" (at 882), "[O]ur guiding principle has been James Madison's: that the religion of every man must be left to the conviction and conscience of every man" (at 882). She also made references to non-interference with "private religious practices" and "private observance" (at 883).

Alongside the growth of some of the privatised and rationalised aspects of religion was the decline in influence of religious institutions and the dominance of liberal secular political and social discourses that have become prevalent in the four countries,[76] at least until recently. These have given rise to concepts of a non-sectarian public sphere that does not depend on religious underpinnings. In one of these views, the public sphere is the arena of shared, overarching values and common understandings[77] or a Rawlsian "overlapping consensus"[78] brought about by a mutual social contract.[79] This is the sphere of government and law which are assumed by their nature to be universal, or at least for the whole society.[80] The shared values in the four countries include such public institutional principles as parliamentary democracy, the rule of law, impartial judicial institutions, formal equality and neutrality before the law and personal freedom. The notion of shared national values has been influential in the principles of heritage as discussed in Part C.

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[76] See Maddox, *For God and Country,* above n 12, where Maddox describes Australia and New Zealand as claiming the status of the world's most secular societies. Frank Brennan too refers to Australia's secularism, in Frank Brennan, *Acting on Conscience* (2007). See also Marion Maddox, *Indigenous Religion in Secular Australia* (1999); Elizabeth Burns Coleman and Kevin White, 'Negotiating the Sacred in Multicultural Societies' in Elizabeth Burns Coleman and Kevin White (eds), *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society* (2006); Crabb, above n 73; Margaret O'Toole, 'From "Medieval Grail" to "Common Dish"? Catholic Theologies and Multiculturalism' in Norman C Habel (ed), *Religion and Multiculturalism in Australia* (1992). While Tom Frame disagrees with the description of Australia as a "secular state" and chooses to call it a "pluriform" one, he seems to be using the term "secular state" in a more purist separationist sense, as he also acknowledges that, while most people may acknowledge Christian denominational affiliations, they are generally indifferent to religious concepts and their participation and attachment is minimal: Tom Frame, *Church and State: Australia's Imaginary Wall* (2006).

This has been the thrust of many US commentaries such as Sandel, *Democracy's Discontent,* above n 73; Michael Walzer, 'Liberalism and the Art of Separation' (1984) 12 *Political Theory* 315; Gedicks, 'Hostility to Religion', above n 22; Harold Berman, 'Interaction of Law and Religion' (1980) 31 *Mercer Law Review* 405; Stephen V Monsma and J Christopher Soper, *The Challenge of Pluralism, Church and State in Five Western Democracies* (1997).

There is also a brief New Zealand reference to this in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995).

For a discussion of Canadian secularism, see John Von Heyking, 'The Harmonization of Heaven and Earth? Religion, Politics and Law in Canada' (2000) 33 *University of British Columbia Law Review* 663 and Iain T Benson, 'Notes Towards a (Re) Definition of the "Secular"' (2000) 33 *University of British Columbia Law* 519.

For similar comments about the Western world generally, see Haynes, above n 73, and Jonatas E M Machado, 'Freedom of Religion: A View from Europe' (2004–5) 10 *Roger Williams University Law Review* 451.

[77] See Robert Crotty, 'Multiculturalism and Religious Pluralism: Interaction and Overlap' in Norman C Habel (ed), *Religion and Multiculturalism in Australia* (1992).

[78] The term used by Rawls to describe the overlapping shared ideas which can be worked into a political conception of justice or into public reasoning despite conflicting religious and philosophical views: see, for example, John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14(3) *Philosophy and Public Affairs* 223.

[79] The most famous ideas of a social contract have been put forward by people such as Locke, in, for instance, John Locke, *A Second Treatise Concerning Civil Government* (first published 1690, 1946 ed) and Rousseau, in Jean-Jacques Rousseau, *The Social Contract,* (G Cole, trans, revised and augmented by J H Brumfit and John C Hall, 1973 ed) [first published, 1762]. A more modern analysis has been provided by Rawls, 'Justice as Fairness', above n 78. The notion of a covenant or contract also featured significantly in early US constitutional thought: see McGraw, above n 67; Donald Lutz, 'Religious Dimensions in the Development of American Constitutionalism' (1990) 39 *Emory Law Journal* 21.

[80] See also Maleiha Malik, 'Faith and the State of Jurisprudence' in Peter Oliver, Sionaidh Douglas Scott and Victor Tadros (eds), *Faith In Law: Essays in Legal Theory*, (2000) for a discussion of the various views of law as a secular public ritual that has an important role in maintaining common meanings. See also the analysis of the rule of law as a secular universalised replacement for the sacred: Paul W Kahn, *The Cultural Study of Law* (1999).

Another component of the public sphere is the arena of public opinion or the public forum.[81] This is where public argument takes place with a view to persuading people as to the truth and common good, namely as to what values should be taken up to be the shared values of the community, at least as far as what government and legislative policies should be adopted.[82]

The public sphere in this secular liberal system is associated with rationality and objectivity, which can be contrasted with the private sphere which is open to the arbitrary desire or belief that connotes subjectivity.[83] In particular what is valued in that most public institutional arena of law is "objective factual and scientific truth" as well as reasoning which other citizens are capable of sharing. This is also considered to be the appropriate nature of discourse in the public sphere.[84] Such ideals see legal and political principles as universal and neutral rather than culturally-conditioned.[85] This rational, objective worldview demands an open and scientific style of inquiry and debate. Such a style values the ability to question and test statements or propositions to ascertain the truth.

While the concept of a rational and objective public sphere, and indeed all public–private dualisms, has been challenged by post-modern and critical legal theories and the like,[86] it appears still to dominate in the realm of legal analysis, as is seen in the case studies dealing with Indigenous sacred places.

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[81] Described as the common space in which members of society meet through various media and face to face to discuss matters of common interest: see Taylor, *Secular Age*, above n 55.

[82] The later Rawls drew a distinction between the political sphere and the "background culture": John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) *The University of Chicago Law Review* 765.

[83] Gedicks, 'Hostility to Religion, above n 22; Guinn, *Faith on Trial,* above n 16; Gerard V Bradley, 'Dogmatomachy: A Privatization Theory of the Religion Clause Cases' (1986) 30 *St Louis University Law Journal* 275; Eilidh St John, 'The Sacred and Sacrilege: Ethics and Metaphysics' in Elizabeth Burns Coleman and Kevin White (eds), *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society* (2006); Hunter Baker, 'Competing Orthodoxies in the Public Square: Postmodernism's Effect on Church–State Separation' (2004–5) 20 *Journal of Law and Religion* 97; Suzanna Sherry, 'Religion in the Public Square: Making Democracy Safe for Religious Minorities' (1998) 47 *DePaul Law Review* 499; Machado, above n 76; Kahn, above n 80.

[84] Notable supporters of this position include John Rawls [eg, in Rawls, 'Public Reason Revisited' above n 82], Robert Audi [eg, in Robert Audi, 'The Place of Religious Argument in a Free and Democratic Society' (1993) 30 *San Diego Law Review* 677] and Kent Greenawalt [eg, in Kent Greenawalt, *Private Consciences and Public Reason* (1995)]. See also Sherry, above n 83, who argues that this position assists religious minorities. In Australia, the comment has been made that the non-religious nature of public discourse is the general presumption, see for instance Brennan, *Acting on Conscience,* above n 76. This was said to be the view that prevailed in Australia for most of the time until at least the 2ist century: Crabb, above n 73. For the critique of such views, see above n 73.

[85] This has been criticised by Wendy Brown, above n 73; Sinacore-Guinn, above n 17; Malik, 'Faith and the State of Jurisprudence', above n 80.

[86] For the critical legal scholarship's critique of the rational or objective legal system, see for example Hutchinson and Monahan, above n 22; Trubek, above n 22; G Edward White, 'The Inevitability of Critical Legal Studies' (1984) 36 *Stanford Law Review* 649; Ed Sparer, 'Fundamental Human Rights, Legal Entitlements, and the Social Struggle: Friendly Critique of the Critical Legal Studies Movement' (1984) 36 *Stanford Law Review* 509. For the challenge to private and public dichotomies, see Cinotti, above n 22; Guinn, *Faith on Trial,* above n 16; David Sinacore-Guinn, above n 17; Sarah Pritchard, above n 6.

2.2.3 The Separation of Church and State, Religious and Secular

The developments described above allowed for philosophies which separated church and state into different spheres. One of the key articulations of this separation was by John Locke in his 1689 "*Letter Concerning Toleration*". Locke set out to distinguish exactly the business of civil government from that of religion and to settle the just bounds that divide them. His purpose was to end religious controversies and wars which had no place within his ideal of a rational, ordered society. In this view, the concept of the public sphere was the realm of the commonwealth, being the mutual society formed to pursue and protect civil interests such as life, liberty and material possessions such as money, lands, houses and the like. This was the realm open to be governed by the civil magistrate who could punish those who violate any of these civil interest rights. The magistrate however had no power to intervene in the religious sphere and the church was seen as a free and voluntary society. The Letter went on to say that the church was absolutely separate and distinct from the commonwealth and the boundaries on both sides are "fixed and immovable", the jumbling of which was "a jumbling of heaven and earth".[87] As will be seen, Locke's concept of the religious sphere,[88] inaccessible to the magistrate, was a small privatised one.[89]

Locke's letter was about religious tolerance and he saw liberty as a human right, within a private sphere into which the state should not encroach.[90] The need to preserve this liberty led to the need to separate church and state.[91]

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[87] This idea was also addressed by James Madison who said that religion and government will both exist in greater purity the less they are mixed together: see letter from Madison to E. Livingston (10 July 1822), cited by Souter J for the majority in *McCreary County v American Civil Liberties Union of Kentucky* 545 US 844 (2005) at 878.

[88] There have, of course, been debates about whether Locke really did see religion as belonging in a private sphere. For example, while she concedes that this is how Locke is commonly understood, McGraw argues that Locke's whole understanding of civil rights was that they were religiously grounded and that a religious voice in public matters was appropriate, in McGraw, above n 67. McGraw, however, is using a narrower definition of private than I am, referring to domestic and hidden rather than just individualistic, voluntary and non-governmental.

[89] It has been suggested that this is not really a separation of church and state but simply squeezing the sphere of religion and allowing the state to take over the rest: see Carter, 'Reflections', above n 73; Bradley, above n 83.

[90] As will be outlined in Chapter 4, these ideas were taken up by Thomas Jefferson in the preamble to the *Virginia Act for Religions Freedom of 1786,* VA CODE ANN § 57-1 (2009)

[91] There have been differences of opinion as to whether the primary aim of such separation was to protect the church from the state or the state from the church: see discussions of this debate in McConnell, 'Origins'; above n 68; Carl H Esbeck, 'A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict or Chaos?' (1995) 70 *Notre Dame Law Review* 581; Frame, above n 76. Witte described the situation as a "one-sided separatism", that is, to keep politics and the state out of religion but not vice versa: see John Witte, 'The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay' (1991) 40 *Emory Law Journal* 489. This view has also been advocated by Pepper, 'Reynolds-Yoder', above n 68; Michael Sandel, 'Religious Liberty: Freedom of Conscience or Freedom of Choice?' [1989] *Utah Law Review* 597; Carter, 'Reflections', above n 73. See also Ahlstrom, above n 61

One feature of this was the disestablishment of religion. Such provisions are found in the constitutional prohibitions of religious establishment in the USA[92] and Australia.[93] In the USA, however, a far stricter view of separation of church and state has developed, possibly deriving from separatist Protestant views in 17th and 18th century USA.[94]

This stricter viewpoint appears to go well beyond separation of church and state to a separation of religion and politics and even to a separation of the public and private realms.[95] Theological support for this was found in the metaphor of "the garden" and "the wilderness" used by Roger Williams,[96] who saw the garden as representing the church which had to stay separate from the wilderness (signifying the "evil" world). He said that a wall of separation was required to keep the garden safe from the wilderness, a metaphor that was later used by Thomas Jefferson.[97] This in turn has been interpreted in the USA[98] as enunciating a principle whereby governments could not pass laws that aid one religion, or all religions, or prefer one religion over another. This view, attributed to the founders, was predicated on religion belonging to a private sphere distinct from government and the civil law, which belonged to a public sphere.[99]

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and Verna Sanchez, 'All Roads are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence' (1997) 8 *Hastings Women's Law Journal* 31.

[92] In the First Amendment to the Bill of Rights and a range of state constitutions: see Part B.

[93] In s 116 of the Australian *Constitution*: see Part B.

[94] See Ahlstrom, above n 61, describing the separatist trend in US Protestantism. This was obviously only one of various religious viewpoints at the time of the founding of the USA, see William W. Fisher 111, 'Ideology, Religion and the Constitutional Protection of Private Property 1760–1860' (1990) 39 *Emory Law Journal* 65; McConnell, 'Origins', above n 68; Witte, above n 91.

[95] There could of course be major distinctions between these divisions. Some have argued, for instance, that pluralism can exist with a separation between church and state and does not require a further division of religion and politics, public and private realms: see Chantal Mouffle, 'Religion, Liberal Democracy and Citizenship' in Henk De Vries and Lawrence Sullivan (eds), *Political Theologies* (2006); Connolly, above n 73.

[96] 17th Century founder of Rhode Island. The metaphor is from Roger Williams' letter, 'Mr Cotton's Letter Lately Printed, Examined and Answered' (1644), cited in Mark De Wolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (1965).

[97] Jefferson, *Danbury Baptist*, above n 64.

[98] Notably by the US Supreme Court in *Everson v Board of Education* 330 US 1 (1947). *Everson* referred to the wall of separation and proclaimed that it had to be kept "high and impregnable".

[99] This is now a popular but not universal view of the founders' beliefs: see Harold Berman, *Faith and Order: Reconciliation of Law and Religion* (1993). It has been noted that the view was probably not a majority view in America at the time and may in fact have been quite radical by comparison. There were also many others of the Founders, seen as taking a "civil republican" viewpoint, who may have leaned more to Establishment or civil religion and who saw religion as one of the pillars of society. They were not prime movers of the Religion Clauses and not particular influential on the philosophies and jurisprudence that eventually developed, particularly in the 20th Century when the scope of free exercise of religion expanded substantially: see Kathleen Brady, above n 68; Berman, *Faith and Order,* above; Mark Tushnet, 'The Constitution of Religion' (1986) 18 *Connecticut Law Review* 701; Sanchez, above n 91; Ariens and Destro, above n 64, 91, McConnell, 'Origins', above n 68, 1441–2; Fisher, above n 94; Tipton, above n 73; Sandel, *Democracy's Discontent,* above n 73; Laura Underkuffler-Freund, 'The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory' (1995) 36 *William and Mary Law Review* 837; Marc Galanter, 'Religious Freedom in the United States: A Turning Point' [1966] *Wisconsin Law Review* 217; Derek Davis, 'Rebuilding the Wall: Thoughts on Religion and the Supreme Court under the Clinton Administration' (1993) 35(1) *Journal of Church and State* 7; Bannon, above n 68.

Australia, Canada and New Zealand do not have any doctrines of strict separation of church and state as in the USA.[100] Nevertheless, the ideas of separation of religious from secular, private from public, do seem to be accepted in those countries, due perhaps to the influences of the privatised view of religion within secular liberalism and such ideas as those articulated by Locke.[101] Jane Hubert, writing of England,[102] was able to say that religion was seen by most people as occupying a compartment of its own, with little connection to economic and political life. So also, the concept of sacredness is specialised and restricted to that religious compartment.[103] This parallels a similar development underpinning the Western civil law and common law traditions.[104]

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[100] The *Canadian Charter of Rights and Freedoms* and the *New Zealand Bill of Rights Act* do not contain any reference to establishment and there is no clause prohibiting the establishment of religion in those countries. In Canada, Lacourciere JA in *Zylberberg v Sudbury Board of Education* (1988) 65 OR (2d) 641, 675, said that there is no firm wall of separation between church and state, though Lacourciere JA was dissenting and the majority in that case found religious observances in public schools to be in breach of the *Charter* because of their imposition on non-Christians. The New Zealand government specifically decided not to include a clause prohibiting establishment of religion because of the interpretations given to that in the US such as restricting prayers and aid to religious schools: New Zealand, *White Paper: A Bill of Rights for New Zealand* (1985); Jerome Elkind and Antony Shaw, *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (1986) at 51. The case of *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 suggested that the government had the power to take positive steps to protect or assist religions if it wished, at [20]–[22].

In Australia s 116 of the *Constitution* has been interpreted as only prohibiting a national church or, at least, prohibiting the conferring of special favours and advantages to a particular religion, rather than as a prohibition on funding religions: *A-G (Vic) ex rel Black v Commonwealth* (1981)146 CLR 559 (known as the "*DOGS case*"). The Court stressed that there was no concept of the separation of church and state.

[101] See Sinacore-Guinn, above n 17; Walzer, above n 76; Connolly, above n 73; Wendy Brown, above n 73; Sandel, *Democracy's Discontent,* above n 73. Also mentioned in Cantwell Smith, above n 55; Maddox, *For God and Country,* above n 12; Roberto Unger, *Knowledge and Politics* (1975); Brennan, *Acting on Conscience,* above n 76; Marion Maddox, *God under Howard,* above n 73. Casanova has called privatised religion "the liberal state's preferred form of religion": Casanova, above n 49. Machado, above n 76, suggests that this is the predominant European view, although the European view may be more extremely secular. Arguments in favour of retaining a strict separation and of keeping religion in the private sphere have been put by Derek Davis, above n 99.

While accepting that the dichotomy is often difficult to apply in cases of religious bodies, Evans and Gaze have also suggested using a public–private sphere divide in favouring the greater applicability of neutral laws to religious activities in the public sphere, as opposed to private sphere activities such as worship or the selection criteria for clergy and members: Evans and Gaze, above n 50, at 47. Ian Gillman, 'The "Culture" within Which Religion has been Found in Australia' in Norman C Habel (ed), *Religion and Multiculturalism in Australia* (1992), discusses the marginalisation of religion in Australia to be on par with service clubs. Coleman and White have said that individuals in such a society may hold different personas, eg as a Christian and as a citizen, where the society allows a (private) space for voluntary religious associations: Coleman and White, 'Negotiating the Sacred', above n 76. See also Crabb, above n 73, on the acceptance of the Rawlsian overlapping consensus for most of Australia's history in excluding religion from the public realm.

[102] Where there is an established church and clearly no separation between church and state.

[103] Hubert, above n 45. Anthony Bradney, in 'Faced by Faith' in Peter Oliver, Sionaidh Douglas Scott and Victor Tadros (eds), *Faith In Law: Essays in Legal Theory* (2000), also speaking of the UK, was able to say that religion is now a private matter with little significance in public life. See also St John, above n 83, discussing the sidelining of religion and theology into small idiosyncratic ghettos.

[104] H Patrick Glenn, *Legal Traditions of the World: A Sustainable Diversity* (2004), chapters 5 and 7 discusses the separation of religion into the private sphere as a feature of both traditions. See also comments on the secular nature of the law in Berman, 'Interaction' above n 76, who also described the law as a new secular religion. Bradney, above n 103, has set out how the British legal tradition of neutrality and tolerance to religion has translated into a legal system often deaf to religion. He says this has complemented the retreat of religion into the private realm. The result is the separation of church and state, religion and law, resulting in the unequal treatment of those who do not see their religion as private or peripheral.

The "master theory of secularisation" and all such dualisms as those outlined above came under challenge in the 20th century but still remain as one popular secular attitude to religion.[105]

2.2.4 Civil Religion

One possible exception to the USA's strict separation of spheres is the feature of civil religion, a kind of religion that appears in the public sphere. Robert Bellah identified the USA as a secular state in which religion was privatised, but where there was nevertheless a set of commonly held beliefs, symbols, rituals which he called American civil religion.[106] This civil religion was primarily about ethical and upright behaviour and citizenship, in which leaders could profess and use the symbols of religion without any perceived contradiction between these and the idea of a secular state. Within such a system, the sacred may be called upon in aid of patriotic rhetoric and an affirmation of unifying values, but is seen as something reflective of the dominant culture and not likely to make subversive demands on public or private property.[107]

In such a scheme, however, civil features of religion are now seen as cultural or traditional rather than religious. This was manifested in the way Sunday closing laws or statements like "In God We Trust" or a Christmas crèche with the Holy Family survived the Establishment tests in the USA by not being characterised as religious.[108] This may be because the symbols and rituals of religious majorities are so ingrained that they are thought of as neutral and normal public life rather than as specifically religious.[109]

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[105] Referring to the theory that religion will eventually fall away with growing progress away from superstition and towards a rational enlightenment. Charles Taylor has argued against any linear master narratives of secularisation, at least as far as marginalisation and privatisation of religion is concerned, but in doing so admits that these narratives are commonly assumed and he accepts that separation of secular spheres has occurred: Taylor, *Secular Age*, above n 55. See also Larry Cata Backer, 'There Can Be Only One: Law, Religion, Grammar and Social Organization in the United States' in Stephen M Feldman (ed), *Law and Religion: A Critical Anthology* (2000). There is of course the simple meaning of secularisation as connoting differentiation of religious and political institutions, which is still valid today: Casanova, above n 49.

[106] The term Civil Religion was borrowed by Robert Bellah from Rousseau's "*Social Contract*", above n 79, referring to a civil profession of faith enabling good citizenship, but was popularised by him in his famous article, Bellah, 'Civil Religion', above n 42. Bellah had a more positive view of civil religion which has also been called a "least common denominator Christianity" in Placher, above n 61, at 261.

[107] This view has been put in Note, 'Developments in the Law: Religion and the State' (1987) 100 *Harvard Law Review* 1606. See a discussion of civil religion in Kenneth D Wald, *Religion and Politics in the United States* (1987).

[108] In *McGowan v Maryland* 366 US 420 (1961), Sunday closing laws were upheld as secular and in *Lynch v Donnelly* 465 US 668 (1984), a Christmas crèche was said to be a celebration of cultural heritage and served the secular purpose of instilling a spirit of goodwill. Other examples include *Aronow v US* 432 F 2d 242 (9th Cir) upholding use of "In God We Trust" on coins and currency as patriotic rather than religious. Further examples are given below in n 1128 in 14.4.2. This is not to suggest that the original founders saw such features as non-religious. As described in relation to Deism and rational religion above, the natural order including government and the legal system was seen as underpinned by and as a working out of the design of God, rather than a purely secular exercise.

[109] See arguments to this effect in Note, 'Developments in the Law', above n 107. As it was said in Frederick M Gedicks, 'Towards a Constitutional Jurisprudence of Religious Group Rights' (1989) *Wisconsin Law Review* 99, public religion is often only protected when it can be characterised as

It has been suggested that the American civil religion concept is not replicated (at least not to the same extent[110]) in Australia, New Zealand or Canada, even though their institutions have tended to be formed originally by Christian, especially Protestant, traditions.[111] To the extent that there are elements of a kind of civil religion, these also tend to be justified by not being seen as overtly religious. In Canada, for instance, a statute to force Sunday closing laws was struck down when framed as being for a religious purpose,[112] but Sunday closing laws passed muster when a secular purpose of a common day of rest was the stated purpose.[113] In this way, the civil religion in the public sphere may too be considered as secular, an issue that has been reflected in the heritage discourse discussed in Part C.

2.3 Sacred Places Familiar to the West

The question then arises as to where sacred places fit into such a separation of spheres. The logical place in a strict dualism would be in the private realm of "religion".

This, of course, was not the understanding in many Judeo-Christian and classical traditions. For example, in perspectives prevalent in the West, especially in pre-modern times,[114] there were views of the world as "enchanted" with sacred power residing in places and things all around.[115] Such sacred places were often at the centre of government and public life.[116] Similarly, while there were distinctions drawn between

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something else. In *Marsh v Chambers* 463 US 783 (1983) Parliamentary prayers and "God Save America" were upheld as not an establishment, even though they were religious, because they were just part of the fabric of society. This is reminiscent of the attitude in most of the four countries that do not see white Anglo-Saxons as "ethnics" but as the norm.

[110] Australia, for instance, also has Parliamentary prayers, Anzac Day services, a reference to God in the preamble of its *Constitution.* The Canadian Charter of Rghts and Freedoms too refers the supremacy of God in its preamble. There are therefore some similarities, but certainly not to the same degree.

[111] See, for instance, the comments in Gary Bouma (ed), *Many Religions, All Australians: Religious Settlement, Identity and Cultural Diversity* (1997); Huscroft and Rishworth (eds), above n 76; Beaman, above n 29. While Maddox in *For God and Country,* above n 12, notes that Christianity is the dominant religious tradition in Australia, her analysis suggests that the mainstream secular society tends to have only "half-remembered" ideas of Christian categories. Bishop Tom Frame too speaks of religion to the vast majority in Australia as being "largely about formalised rituals of commemoration": Frame, above n 76.

[112] In *R v Big M Drug Mart* (1985) 18 DLR (4th) 321 where the Supreme Court struck down the *Lord's Day Act* for its obvious religious purpose of compelling Sabbath observance.

[113] In *R v Edwards Books And Art Ltd* (1986) 2 SCR 713 where the Supreme Court noted that the *Retail Business Holidays Act* was designed to provide a common secular pause day.

[114] This view, of course, still exists in the present and always has to some extent in the Western world. There are many studies which have identified the continuities of such viewpoints well beyond the medieval period, for example, Sarah Hamilton and Andrew Spicer, 'Defining the Holy: The Delineation of Sacred Space' in Andrew Spicer and Sarah Hamilton (eds), *Defining the Holy: Sacred Space in Medieval and Early Modern Europe* (2005).

[115] See, for instance, the descriptions in Taylor, *Secular Age*, above n 55; Hamilton and Spicer, above n 114.

[116] In an example from the ancient Roman world, Roman temples were often consecrated on state property in honour of a political deity (such as an emperor), with rites involving magistrates as well as priests: see Judi Loach, 'The Consecration of the Civic Realm' in Andrew Spicer and Sarah Hamilton (eds), *Defining the Holy: Sacred Space in Medieval and Early Modern Europe* (2005). In Roman times,

the sacred and the profane,[117] these did not reflect a difference of public and private spheres, but more of actions and purposes.[118] Nevertheless, a common feature of the distinction between sacred and profane was their physical separation, marked by clear compartments and boundaries.[119]

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sacred places were seen as belonging to the gods and not able to be owned privately: see Jonathan Z Smith, 'Topography of the Sacred' in Jonathan Z Smith, *Relating Religion: Essays in the Study of Religion* (2004). In early Greek cities too, temples, sanctuaries and altars were seen as public places with elected magistrates as priests: see Marcel Detienne, 'The Gods of Politics in Early Greek Cities' in Henk De Vries and Lawrence Sullivan (eds), *Political Theologies* (2006).

The sacred place has been analysed to be the centre of life around which all space is organised and orientated: see Eliade, above n 14, at 178–9; Harold W Turner, *From Temple to Meeting House: The Phenomenology and Theology of Places of Worship* (1979).

[117] The distinction may have been more of a conceptual one rather than the practical reality. It may also have been a later development in the Middle Ages: see Peter Brown, above n 67. The separation of the sacred and the profane has been identified as a key marker of religion by many well-known scholars who have treated these concepts as opposites, such as in Eliade, above n 14, at 178–9; Otto, above n 39; Durkheim, above n 10; van der Leeuw, above n 39; Peter Berger, *The Sacred Canopy* (1967). Davies, in the discussion of the secular uses of churches, has pointed to the Christian use of these concepts as antithetical, which require separation otherwise the sacred will consume the profane and the profane will contaminate the sacred. In this way of thinking, consecration is a careful way of introducing something into the realm of the holy and allowing a means of moving from the profane to the sacred: J G Davies, *The Secular Use of Church Buildings* (1968).

This distinction is still a common understanding of the sacred in Western thought, despite criticisms of the excessive polarisation of these concepts. It has been suggested that, rather than a clear demarcation, sacred places may "slide in and out" of ordinary and profane places around them: Jonathan Z Smith, *Map is Not Territory: Studies in the History of Religions* (1978). Shiner has challenged Eliade's idea of homogenous profane space by reference to people's senses of "lived space" and suggests that there is a continuum of human experience of place between the extremes of the sacred and the profane: Larry E Shiner, 'Sacred Space, Profane Space, Human Space' (1972) 40 *Journal of American Academy of Religion* 425. Recent scholarship has also highlighted the lack of a radical division between the two concepts in medieval and early modern Europe and it is more likely that throughout European history different views have competed or have been held in tension: see discussion in Hamilton and Spicer, above n 114; Hayes, above n 56; Michael Tavinor, 'Sacred Space and the Built Environment' in Philip North and John North (eds), *Sacred Space* (2007). See also Elizabeth Burns Coleman and Kevin White, 'Stretching the Sacred' in Elizabeth Burns Coleman and Kevin White (eds), *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society* (2006), criticising the Durkheimian assumptions.

[118] The distinction between sacred and profane places or uses does not mean that what one does in profane space is not of great spiritual or religious significance. Similarly, mundane "everyday" activities could also have religious significance, especially if the religious beliefs govern and pervade all of life and all of the earth. This separation was thus not a division into religious and secular spheres of life. The "profane" in this sense is similar to the original meanings of the term "secular", referring to what was ordinary: see Taylor, *Secular Age*, above n 55, on the derivation of the term secular from the Latin saeculum which referred to ordinary time or age or temporality, as in the distinction between Lords "spiritual" and "temporal" or between secular and monastic clergy. See also Brian Wilson, 'Secularization' in Lindsay Jones (ed), *Encyclopaedia of Religion* vol 12, (2nd ed, 2005) and Casanova, above n 49, on the origins of the term. In this understanding of the term, the secular is not exclusive of what is religious. McGraw, above n 67, has suggested that, in this sense, the "secular" could be "this-worldly-directed" aspects of religion.

[119] For example, the whole act of consecration imports a notion of separating the particular building or place from the land around it. The Latin terms "sacrum" and "sacer" carried connotations of the cult rituals and their locations, such as temples. The term "profanus" referred to the area in front of the temple precinct, that is, the surrounding space outside the place that was set apart. These terms originally applied specifically to places: Carsten Colpe, 'The Sacred and the Profane' in Lindsay Jones (ed), *Encyclopaedia of Religion* vol 12, (2nd ed, 2005). See also Jonathan Smith, 'Topography', above n 116; Hamilton and Spicer, above n 114; Arnold Angenendt, 'Holiness of the Person: Holiness of Space' (2008) 38 *Studia Liturgica* 53; Tuan, 'Sacred Space', above n 39; and Eric Isaac, 'God's Acre' (1964–5) 14 *Landscape* 28. It has been suggested that this is also implicit in the meaning of the Latin word "templum" which means a part cut off or a space marked out: see Hughes and Swan, 'Spots of the Fawn', above n 40; Hughes, 'Spirit of Place', above n 42, Harold Turner, above n 116; Tuan, 'Sacred Space', above n 39.

The boundary of the consecrated place or the temple marked the limit of that sacred area. These boundaries were often clearly marked, for instance by trees or walls and the like: Harold Turner, above n 116; Hughes and Swan, 'Spots of the Fawn', above n 40. It has been suggested that where there were no physical boundaries, activities like processions served to mark out the boundaries: Tuan, 'Sacred Space', above n 39.

Apart from some places outside private property made sacred by divine revelation,[120] many of the sacred places or objects familiar in the West can be equated with private property, in this case the property of the religious institutions. For example, churches, church burial yards and relics of saints are often on private church property.[121] In other words, such sacred places could easily be privatised in fact, even if they were not, in theory, private.[122] This, of course, means that such religions can rely on legal property rights rather than on protection of sacredness.

Further, the need for legal protection for such places is less in any event due to the lesser potential for damaging effects. Such sacred places tended not to be permanent or vulnerable in Judeo-Christian thinking. There were always theological tensions about the notion of sacredness constituted in specific places in the face of a belief in a transcendent God.[123] The location of a sacred object is sometimes one of convenience; such sacredness is not inherent in the place itself.[124] As far as the sacred appears in

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[120] Such as, appearances of God or saints or places of key religious events such as places associated with the life of Christ. Well-known places that spring to mind are Mount Sinai, Bethel, Lourdes, Fatima, Medjugorje and sites in Jerusalem which were not originally private property.

[121] Under ecclesiastical law, with the exception of private consecrated chapels, consecrated land usually had to be owned by the church as it could not be sold or transferred while consecrated: Norman Doe, *The Legal Framework of the Church of England* (1996); Garth Moore and Timothy Briden, *Moore's Introduction to English Canon Law* (2nd ed, 1985).

[122] It has been suggested that the sacral nature of church property, derived from its inalienability and the fact that it was held on trust for social and religious purposes, was not turned into a secular property ownership issue until the Protestant Reformation or French Revolution, presumably hand in hand with de-sacralisation: see Angenendt, above n 119.

[123] The theologies of such places do not see them as permanent locations of the sacred but more as places of a temporal revelation. The importance of the places lies more in the events that they signify: as illustrated in Eade and Sallnow, 'Introduction', above n 45, where a traditional pilgrimage journey to Jerusalem was not primarily about a journey to a holy place but a "journey through a sacred text". The tensions as to what sacred places are have been alluded to in Sara Japhet, 'Some Biblical Concepts of Sacred Place' in Benjamin Z Kedar and R J Zwi Werblowsky (eds), *Sacred Space, Shrine, City, Land* (1998) and Brereton, above n 41. See also Lane, above n 46; W D Davies, *The Gospel and the Land: Early Christianity and Jewish Territorial Doctrine* (1974); Hughes and Swan, above n 40.

[124] As suggested by Hubert, above n 45. This point is also made by Yi-Fu Tuan in *Topophilia: A Study of Environmental Perceptions Attitudes and Values* (1990) at 148 where he noted that Christian sacred places "owe their numen not to indwelling spirits of nature but to miraculous appearances" of saints. Angenendt, above n 119, notes that Christianity viewed holiness as vested in the person not a place, and that the beliefs about the sanctity of churches were an extension of the holiness of the martyrs and other saints buried there, that is, it is the saint that sanctified the place. Similarly Hughes, in 'Spirit of Place', above n 42, has suggested that Jewish people believed that the Temple was holy because it was sanctified by God's people at God's command, not because of any divine presence inherent in the spot.
One common view is that consecrated buildings or grounds are not sacred in themselves but it is their use that is sacred: J G Davies, above n 117. See also Paul Post, 'Re-inventing Liturgical Space as Public Space: The Jubilee Church in Tor Tre Teste (Rome) of Richard Meier' (2008) 38 *Studia Liturgica* 160 discussing theories of how it is the ritual practices or monumental occasions or events which create sacred space.
Similarly, there have been prohibitions against the removal of human remains from consecrated burial grounds, but these tend to be based on the finality of resting in peace rather than on the basis of any sacredness of the remains: see *Re Christ Church, Alsager* [1999] Fam 142, *Re Blagdon Cemetery* (16 April 2002, Court of Arches). Another basis is illustrated by Randall McGuire's study of different attitudes towards white and Native American burials in Binghamton, New York where he concluded that the reasons of the former against disturbing burial grounds was based on not upsetting blood-relatives of the deceased rather than any concern for the spiritual well-being or sacredness of the dead: Randal H McGuire, 'The Sanctity of the Grave: White Concepts and American Indian Burials' in Robert Layton (ed), *Conflict in the Archaeology of Living Traditions* (1989). See also Prue Vines, 'Resting in Peace? A Comparison of the Legal Control of Bodily Remains in Cemeteries and Aboriginal Burial Grounds in Australia' (1998) 20

sacraments and relics, it is small, portable and can be easily moved out of harm's way.[125] Also, despite the ideal of permanency in consecration, a consecrated building or land can be deconsecrated if necessary.[126] In all these cases, malicious or accidental damage to the sacred might be considered as sacrilege, but not as an act that damages the divine itself or destroys the religion or its effectiveness.[127] Damaged places can be rebuilt, alternative areas can be consecrated and the rituals and the worship can continue.[128] Desecration of such places may have religious consequences for the desecrator and may cause great upset to the church community, and perhaps to their God, but ultimately is not of any great long-term religious significance.

As discussed above, with the growth of emphases on individual piety, theologies grew which internalised the sacred into the heart and soul of faithful people who were the new living temples.[129] The rationalist and Deistic movements may have resulted in the banishment of the sacred from the world, with an emphasis instead on the mind and moral conduct. In such systems, the sacred was not located within physical places or objects. For instance, Locke saw true worship as not requiring temples or special (such as sacred) places.[130] Similarly, with the rise of Protestant reactions against the idea of magical or sacred things in the world, the whole world became seen as profane and

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Sydney Law Review 78 discussing the relatively low weight given by the common law and non-Indigenous Australian society generally to the right of the dead to stay where they have been buried.
Note that this does not mean that consecration is a purely human activity: consecration is usually seen as an action of the gods: Harold Turner, above n 116.

[125] It has been suggested that one of the hallmarks of early Christianity is the mobility of the sacred: see Edward Muir and Ronald F E Weissman, 'Social and Symbolic Places in Renaissance Venice and Florence' in John Agnew and James Duncan (eds), *The Power of Place: Bringing Together Geographical and Sociological Imaginations* (1989). In the case of relics, for instance, they have been traded and stolen in the past. If it is the relic that sanctifies the place, it follows that the place is no longer sanctified and sacred if the relic has been removed.

[126] Even under the English law which saw consecration as permanent, it was possible to deconsecrate the building or land by Act of Parliament or resolution of General Synod of the Church of England: Butterworths, *Halsburys Laws of England*, above n 56*;* Moore and Briden, above n 121; George H Newsom, *Faculty Jurisdiction of the Church of England* (2nd ed, 1993); Doe, above n 121; J G Davies, above n 117.

[127] The concept of the divine as omnipotent, omnipresent and transcendent has meant that damage to a particular location of past appearances, even if that place does hold some residual holiness or power, does not permanently damage God who is seen as beyond vulnerability to human or natural destructive forces: see Angenendt, above n 119.

[128] A point also noted by Hughes, 'Spirit of Place', above n 42.

[129] See discussion of the changes brought about by the Christian idea of the church community as the new temple: Harold Turner, above n 116 and of the idea of the holiness of the person rather than of places: Angenendt, above n 119.
Such a view fits with a universal utopian style of religion that is typical of people dispersed throughout the world with no need for particularity of place: Jonathan Smith, '*Map is Not Territory',* above n 117 discussing diasporic religions; Tuan, 'Sacred Space', above n 39; Harold Turner, above n 116. From another angle, W D Davies, above n 123, identified the early Christian emphasis on the holy person, that is, Christ, rather than on a holy place and the universalising of Christ into a cosmic figure.
The overemphasis on the eternal soul liberated from nature further encouraged a separation of the sacred from the landscape in Western thinking. See, for example, Kinsley, 'Ecologically Harmful', above n 59, referring to the writings of Origen, Aquinas and others down to Luther and Calvin. See also Kraft E von Maltzahn, *Nature as Landscape: Dwelling and Understanding* (1994).

[130] John Locke, *The Reasonableness of Christianity (*1695).

secular[131] and a culture of dealing with the sacred in physical public space diminished substantially.

2.4 The Place of Private Property

Lurking within the distinctions between private and public spheres and the treatment of sacred places that are discussed in this thesis is the concept of private property.

Private property has been seen as a natural human right in itself, as an extension of the person. Locke spoke of the natural rights of life, liberty and estate or property, which government was set up to protect.[132] The identification of property with the individual person leads to individual property rights being part of the "private" sphere immune from the reach of the government, along with religion.

The importance of property in relation to land within the Lockean scheme was related to the idea of value being added to that land by labour. There were also religious arguments along similar lines, in which the notion of taming wilderness was a means of bringing order and godliness, progress and prosperity.[133] This was aided by that

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[131] See the descriptions in Taylor, *Secular Age*, above n 55, where it was said that the aim of much Protestant reform was the abolition of the distinction between sacred and profane. This was certainly the attitude of leading Reformers like Luther and Calvin: see Andrew Spicer, '"God Will Have a House": Defining Sacred Space and Rites of Consecration in Early Seventeenth Century England' in Andrew Spicer and Sarah Hamilton (eds), *Defining the Holy: Sacred Space in Medieval and Early Modern Europe* (2005). See also examples cited by Simon Dixon, 'The Priest, the Quakers and the Second Conventicle Act: The Battle for Gracechurch Street Meeting House 1670' in Andrew Spicer and Sarah Hamilton (eds), *Defining the Holy: Sacred Space in Medieval and Early Modern Europe* (2005). James Walsh in his study of Puritan New England discusses the Puritan rejection of traditional Catholic and Anglican beliefs of consecrated or miraculous places and their insistence on the homogeneity of space, with no place more sacred than any other: James P Walsh, 'Holy Time and Sacred Space in Puritan New England' (1980) 32 *American Quarterly* 79. He noted that the Puritans built meeting houses, not churches, and ensured that these had no central sacred space like traditional churches. Routine business also took place in such meeting houses. Here then was a deliberate attempt to down-play any sense of special sacred places on earth. They also had a view of New England itself as being of special religious significance, a shrine to which they had made pilgrimage. This view of homogeneity of space and rejection of consecrated spaces in the USA has also been traced to the 18th Century religious movement, the Great Awakening: John Brinckerhoff Jackson, 'The Order of a Landscape: Reason and Religion in Newtonian America' in Donald William Meinig (ed), *The Interpretation of Ordinary Landscapes: Geographical Essays* (1979). See also Taylor, *Secular Age*, above n 55.

[132] Locke, *Second Treatise,* above n 79. Locke suggests that, even in the state of nature, humans had property in their own person and in the fruit of the labour of their own hands, including the land in which they had laboured. In this way, the rights of property were to be seen in the natural law, even before the existence of government, and were amongst the reserved human rights that were not transferred to the state. In fact, one of the chief purposes of government was to safeguard individual property.

[133] The wilderness, as in some Biblical imagery, was seen as wild and chaotic and in need of taming: see W D Davies, above n 123 on the concept of wilderness in Christian thought. This is also discussed in Tuan, *Topophilia,* above n 124, at 109–112, though Tuan points out that there are opposing views of wilderness in Christian traditions. The contrast between the wilderness and the garden was used in Roger Williams' metaphor mentioned above. The garden, with its control and ordered boundaries, was associated with godliness.

Taming was necessary because of the idea that God-given land must be settled and utilised. A helpful survey of the use of Biblical metaphors of the garden and the wilderness to justify the need to fence and cultivate land in in 17th Century England is found in Christopher Hill, *The English Bible and the Seventeenth Century Revolution* (1993), chapter 5.

component of some Judeo-Christian traditions which saw humans as superior to nature and called to dominate it.[134] With the bringing of untamed land under control came fencing and setting boundaries to that land as a symbol of ownership.[135] The reward of mixing one's labour with the land was to gain a property right in it, as suggested by Locke.[136] Land was now property and a commodity and therein lay its value.[137] The rights of ownership extended to the rights to use the land to obtain a profit from it and to change the nature of the land to do so.[138]

The Biblical metaphors and fervour invested the ownership and taming of land with overtones of a religious imprimatur. This seems to have persisted even when the logic is otherwise secular in kind. Chidester and Linenthal have described such attitudes as creating a "sanctity of property rights", representing a religious commitment to

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See also Nash, above n 59; Vecsey, 'American Indian Environmental Religions', above n 20; Rebecca Tsosie, 'Tribal Environmental Policy in an Era of Self Determination: The Role of Ethics, Economic and Traditional Ecological Knowledge' (1996) 21 *Vermont Law Review* 225; von Maltzahn, above n 129; Sarah B Gordon, 'Indian Religious Freedom and Governmental Development of Public Lands' (1985) 94 *Yale Law Journal* 1447; Retherford, above n 14; Patricia McCormack, 'Native Homelands as Cultural Landscapes: Decentering the Wilderness Paradigm' in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998). The comment has been made that although there is a religious basis for the view of humankind having authority over nature, this probably springs from the secular and rationalistic view of society: Waitangi Tribunal, *Finding of Waitangi Tribunal on the Manukau Claim* (1985), section 9.3.5.

[134] This came from the popular interpretation of the Biblical injunction to "fill the earth and subdue it, and have dominion over ... every living thing that moves upon the earth," in Genesis 1: 28 in the Bible. The theme was regularly taken up by many theological writers through the ages who saw nature as existing only to serve the needs of humans. Lynn White, 'The Historical Roots of our Ecological Crisis' (1967) 155 *Science* 1203–7, reproduced in Roger S Gottleib (ed), *This Sacred Earth: Religion, Nature, Environment* (1996) and Kinsley, 'Ecologically Harmful', above n 59, trace many of these ideas. See also Robert S Michaelsen, 'Sacred Land in America: What is it? How can it be Protected?' (1986)16 *Religion* 249.

[135] See Locke, *Second Treatise,* above n 79, referring to enclosing land. See also the discussion of the importance of boundaries in the legal understanding of property in Allen Abramson, 'Mythical Land, Legal Boundaries: Wondering about Landscape and Other Tracts' in Allen Abramson and Dimitrios Theodossopoulos (eds), *Land, Law and Environment: Mythical Land, Legal Boundaries* (2000).

[136] Locke in his Second Treatise on Civil Government in the chapter on "Property" said in effect that under the natural law property was held in common but when a person mixed their labour with it, for example, by hunting animals or picking fruit or enclosing and cultivating land, then that person acquired property in it: Locke, *Second Treatise,* above n 79. This is also referred to in Michaelsen, 'Sacred Land in America', above n 134; Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991); Paul Durman, 'Tract: Locke, Heidegger and Scruffy Hippies in Trees' in Allen Abramson and Dimitrios Theodossopoulos (eds), *Land, Law and Environment: Mythical Land, Legal Boundaries* (2000); Tsosie, 'Tribal Environmental Policy', above n 133. John Winthrop, the Governor of Massachusetts in the USA in 1629, spoke too of ownership of land necessitating improvement of it, as in buildings or farming, not mere occupancy: referred to in Eric Mazur, *The Americanization of Religious Minorities: Confronting the Constitutional Order* (1999) and also in Milner Ball, *Lying Down Together: Law, Metaphor and Theology* (1985).

[137] See the analysis of law as bulwark in Ball, above n 136. See also Donald W Large, 'This Land is Whose Land? Changing Concepts of Land as Property' [1973] *Wisconsin Law Review* 1039; Robert S Michaelsen, 'Dirt in the Court Room: Indian Land Claims and American Property Rights' in David Chidester and Edward T Linenthal (eds), *American Sacred Space* (1995); Retherford, above n 14. Chidester and Linenthal, 'Introduction', above n 33. Christopher Hill, above n 133, discusses the issue of the hedge as symbolising individual property in the Bible as read by 17th century Protestants.

[138] Large, above n 137. This continues through to current economic fundamentalist philosophies such as those underpinning free trade agreements. For discussions about this in the context of how the North American Free Trade Agreement reflects a doxa in which the primary identity of resources is instrumental and productive and how this has precedence over uneconomic values such as protecting Indigenous sacred places, see Terra Lawson-Remer, 'Values Under Siege: NAFTA, GATS, and the Propertization of Resources' (2005–6) 14 *New York University Environmental Law Journal* 481.

dominant Euro-American interests, and as a “fetishism of commodities”.[139] In this way the clash of property rights with religious freedom can be seen as a battle between two human rights and maybe even between two religions.[140]

Building on all these attitudes, the English common lawyers of the 17th century[141] led the successful push to protect individual property rights as the cornerstone of the common law. These rights were seen as the main bulwark against the encroachment of a centralised state on individual rights.[142] The result is that a significant component of the public sphere is designed to protect private property rights and such protection is seen as a public duty. In this way the issue of property straddles and can be seen as dominant in both spheres, as is demonstrated in the case studies in this thesis. It is contended that one of the effects of a distinction between private and public spheres in the context of Indigenous sacred places is to bolster the protection of property rights against the claims of people who have no such rights but only religious responsibilities and interests. This puts the dichotomy of spheres in line with the interests of those whose values currently dominate in the Western legal systems and no doubt influence the continued use and maintenance of principles reflecting such a division.

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[139] Chidester and Linenthal, 'Introduction', above n 33. An argument has been put that the notion of land as property itself may also have religious roots derived from sacred places, giving it religious overtones. As mentioned above, the concept of a sacred place in Western thought was of a place separated and cut off from profane space and often protected by walls and other well-guarded boundaries. Eric Isaac has argued that these bounded holy places were seen as the property of the gods and not to be encroached upon and these were the precursors of private property: Isaac, above n 119, though Jonathan Z Smith has on the other hand compared such property of the gods to common property, with the concept of profane property being compared with private property: Jonathan Smith, ‘Topography’, above n 116.

[140] Coleman and White, ‘Stretching the Sacred’, above n 117. These articles point out that Durkheim saw property and the individual as sacred in contemporary societies and, like the sacred, were set aside and protected by interdictions.

[141] Typified by people such as Edward Coke.

[142] See Lawrence Stone, *The Causes of the English Revolution 1529–1642* (1972). See also Large, above n 137. Mary Ann Glendon traces the American obsession with the rhetoric of rights to these concepts of Locke, but said they were emphasised even more in the legal writings of Blackstone (whose law books were crucial in framing legal education in the US) in which property rights were regarded as absolute: Glendon, above n 136. It is likely that this too influenced the attitudes to property rights in the common law of the other three countries as well.

Chapter 3 – Non-dualistic Approaches in Indigenous Worldviews: the Pervasiveness of the Sacred

This chapter provides a brief overview of contrasting aspects found in some Indigenous religions which defy any public–private sphere dualism. It also provides illustrations of types of Indigenous sacred places that are the subject of this thesis. As with the previous chapter, it will not be possible to deal in any depth with the Indigenous concepts of sacred place and a detailed coverage is best left to the experts, the Indigenous peoples themselves.[143] There are of course many different Indigenous views, hence matters discussed in this chapter are applicable to many groups in the four countries but are unlikely to be universal.

3.1 Interconnectedness of All of Life and Earth

3.1.1 Holistic Approach with No Religious–Secular Divide

It has been said of many Indigenous religions that sacred places and the sacredness of the earth are non-discrete aspects of a holistic worldview. This is a major contrast with the views discussed in the last chapter which separate the religious from the secular. In many Indigenous cultures there is no word for "religion" as a separate category from the rest of life.[144] What the West terms "religion" and "culture" and "society" are, for many Indigenous peoples, intertwined and inseparable.[145] It can also be said of most

[143] Unlike the previous chapter, there is no discussion of philosophical trends and influences due to the writer's ignorance of these. This is not to suggest there are none. The references here are also mainly to secondary sources, both anthropological and legal. As in the previous chapter, these are taken at face value. I acknowledge that some statements attributed to Indigenous people may not in fact be authentic, as cautioned in Richard White, 'Indian Peoples and the Natural World' in Donald Fixico (ed), *Rethinking American Indian History* (1997).

[144] See Joseph Epes Brown, *The Spiritual Legacy of the American Indian* (1982); Beaman, above n 29, citing Black Elk; Robert S Michaelsen, 'American Indian Religious Freedom Litigation: Promise and Perils' (1985) 3 *Journal of Law and Religion* 47; J Donald Hughes, from 'American Indian Ecology' in Roger S Gottleib (ed), *This Sacred Earth: Religion, Nature, Environment* (1996); Anastasia P Winslowe, 'Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites' (1996) 38 *Arizona Law Review* 1291; Rhodes, above n 7. This has been said to be common for most cultures outside of the Western world: Cantwell Smith, above n 55.

[145] For example, in the USA, see US Department of the Interior, *AIRFA Report*, above n 8; US Congress, Senate, *S 2269: Act to Protect Native American Cultures and to Guarantee the Free Exercise of Religion by Native Americans,* Sen Report 103-411, 103rd Congress (1994); Christopher Vecsey, 'Prologue' in Christopher Vecsey (ed), *Handbook of American Indian Religious Freedom* (1995); John A Grim, 'Cultural Identity, Authenticity, and Community Survival: The Politics of Recognition in the Study of Native American Religions' in Lee Irwin (ed), *Native American Spirituality: A Critical Reader* (2000); Raymond J DeMallie and Douglas R Parks (eds), *Sioux Indian Religion* (1976); Kelley and Harris, above n 40; Rennard Strickland, 'Implementing the National Policy of Understanding, Preserving and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects and Cultural Patrimony' (1992) 24 *Arizona State Law Journal* 175.
Similar comments have been made about Canadian First Nations viewpoints: see Battiste and Henderson, above n 31; John Borrows and Leonard Rotman (eds), *Aboriginal Legal Issues: Case and Commentary*

Indigenous religions that the sacred dominates all of life and the whole earth and that all of life and nature is religious.[146] Caring for country, hunting, gathering plants and herbs can be just as much religious acts as prayer as these can all be means of encountering the sacred and of performing spiritual obligations.[147] These religious duties are not for the purpose of personal salvation but are for the maintenance of all creation.[148] The consequences too are not for the individual only but for the community and the world.[149]

(2nd ed, 2003); Rebecca Clements, 'Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law' (1991) 49(1) *University of Toronto Faculty of Law Review* 1; Kapashesit and Klippenstein, above n 11.

In relation to Australian Aboriginal peoples, see Ronald M Berndt and Catherine H Berndt (eds), *Aborigines of the West: Their Past and Present* (2nd ed, 1980); Ronald Berndt, 'Profile of Good and Bad', above n 36; Stanner, 'Religion, Totemism and Symbolism', above n 12; Swain, *Aboriginal Religions in Australia,* above n 12; David Price and Bess Nungarrayi Price, 'Aboriginal Heritage: Some of the Issues' in Christine Debono (ed), *The National Trust into the New Millennium,* Conference Proceedings (2000).

For the New Zealand Maori worldview, see James Irwin, *Introduction to Maori Religion* (1984); Violet Cecilia Tomas, *Recognition of Maori Interests and Values in Resource Management Laws* (1990).

It has been acknowledged too at an international level, see Naomi Kupuri, 'Culture,' in UN Permanent Forum of Indigenous Issues, '*State of the World's Indigenous Peoples'*, above n11, 53–54.

[146] See Joseph Epes Brown, above n 144; Barsh, 'Illusion' above n 9; Kapashesit and Klippenstein, above n 11. It has been suggested that there is no real contra-distinction between the world of concrete daily life and the realm of the spirit: Deborah Bird Rose, 'Consciousness and Responsibility in an Australia Aboriginal Religion' in W H Edwards (ed), *Traditional Aboriginal Society* (2nd ed, 1998); David and Bess Price, above n 145. As the Berndts expressed it, sacredness is a "condition for living": Ronald M Berndt and Catherine H Berndt, *The World of the First Australians* (2nd ed, 1988); Ronald Berndt, *Australian Aboriginal Religion,* above n 12.

[147] As the Berndts put it in relation to Australian Aboriginal peoples, there is no distinction between religious life and social life and all religious ritual focuses on life: Ronald and Catherine Berndt, *World of the First Australians,* above n 146. Barbara Bodenhorn, 'Gendered Spaces, Public Places: Public and Private Revisited on the North Slope of Alaska' in Barbara Bender (ed), *Landscape, Politics and Perspectives* (1993) has a discussion of Inuit hunting as a sacred act. See also Deborah Bird Rose, 'Sacred Site, Ancestral Clearing and Environmental Ethics' in Alan Rumsey and James Weiner (eds), *Emplaced Myth: Space Narrative and Knowledge in Aboriginal Australia and Papua New Guinea* (2001); Rose, 'Consciousness and Responsibility', above n 146; Adolphus Peter Elkin, *The Australian Aborigines* (1974), in relation to hunting and gathering, Adolphus Peter Elkin, *Elements of Australian Aboriginal Philosophy* (1969) 40 Oceania 85; Ronald Berndt, *Australian Aboriginal Religion,* above n 12; Kelley and Harris, above n 40; Vecsey, 'Prologue', above n 145; Hughes, 'American Indian Ecology', above n 144. In *Milurrpum v Nabalco* (1971) 17 FLR 141, 167, it was acknowledged that there is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it are organic parts of one indissoluble whole and this was all part of the religious relationship to land.

[148] See, for example, the discussion in Vine Deloria, 'Sacred Places and Moral Responsibility' in Barbara Deloria, Kristen Foehner and Sam Scinta (eds), *Spirit and Reason: the Vine Deloria Jr Reader* (1999).

[149] David C Williams and Susan H Williams, 'Volitionalism and Religious Liberty' (1991) 76 *Cornell Law Review* 769; Howard Morphy, 'Colonialism, History and the Construction of Place: The Politics of Landscape in Northern Australia' in Barbara Bender (ed), *Landscape, Politics and Perspectives* (1993); Australian Law Reform Commission, 'Traditional Aboriginal Society and its Law' in W H Edwards (ed), *Traditional Aboriginal Society* (2nd ed, 1998). See, for example, the reference to an earthquake being attributed to the failure to protect places in Brian Reeves, 'Ninaistakis: The Nitsitapii's Sacred Mountain: Traditional Native Religious Activities and Land Use/Tourism Conflicts' in David Carmichael et al (eds), *Sacred Sites, Sacred Places* (1994) and a similar earthquake attribution mentioned in Peter Whitely, 'Paavahu and Paanaqawu: The Wellsprings of Life and the Slurry of Death' (1996) 19(4) *Cultural Survival.* In *Navajo Nation v US Forest Service* 408 F Supp 2d 866 (D Ariz, 2006), the court noted that Navajo religious practitioners had said that desecration by works at the Peaks had caused hurricanes and tornadoes and others feared that the punishment of the kachinas would cause droughts. In Veronica Strang, *Uncommon Ground: Cultural Landscapes and Environmental Values* (1997), there was a description of spiritual malevolence being manifested through environmental agency. See also Kolig, *Noonkanbah Story,* above n 30, describing the effects of upsetting the delicate balance of nature.

In a similar way, Indigenous traditional laws and politics are part of a sacred tradition; they are religious rather than secular in the Western sense.[150] The rules about what may occur at sacred places are laid down by spiritual laws, whether by way of the Dreaming or equivalents. The sanctions for breaching the laws too are often spiritual.[151]

3.1.2 Sacredness of All the Earth and Particular Places

A related idea to the pervasiveness of the sacred is that the whole earth itself is sacred.[152] Chief Seattle in the USA is attributed[153] as saying that "Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has been hallowed by some sad or happy event in days long vanished".[154] This notion led Kenneth Maddock to ask, for instance, if the whole of Australia was a sacred site.[155] Some Indigenous cultures see the universe as pervaded by a spirit or power, whether it is called wakantanka or manitou or mana.[156] Black Elk, quoted by Joseph

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[150] See Glenn, *Legal Traditions*, above n 104, discussing chthonic legal traditions, which he describes as "shot through with religion" and as "a divine legal order". See also the comment to the effect that the whole world is under spiritual authority: Australian Law Reform Commission, above n 149.

[151] See, for example Nancy Williams, 'Law' in Ronald M Berndt and Robert Tonkinson (eds), *Social Anthropology and Australian Aboriginal Studies: A Contemporary Overview* (1988); Strang, above n 149; David Biernoff, 'Safe and Dangerous Places' in Lester Richard Hiatt (ed), *Australian Aboriginal Concepts* (1978); Vecsey, 'American Indian Environmental Religions', above n 20; Elsdon Best, *Maori Religion and Mythology* (2005).

[152] See Ronald and Catherine Berndt, *World of the First Australians,* above n146; Hughes and Swan, above n 40; Hubert, above n 45; Kelley and Harris, above n 40; Borrows and Rotman (eds), above n 145; Bobiwash, above n 29; Ward Churchill, 'Yellow Thunder Camp: Forging a Strategy to Win' in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998); Robert S Michaelsen, 'The Significance of the *American Indian Religious Freedom Act of 1978*' (1984) 52 *Journal of American Academy of Religion* 93, describing the testimony of various Indigenous groups to the Federal Agencies Task Force; Eugene Stockton, *This Land Our Mother* (1986); Ngawini Keelan, 'Maori Heritage, Visitor Management and Interpretation' in Colin Michael Hall and Simon McArthur (eds), *Heritage Management in New Zealand and Australia* (1993). Such principles have also been referred to in a variety of legal articles such as Ann M Hooker, 'American Indian Sacred Sites on Federal Public Lands: Resolving Conflict between Religious Use and Multiple Use at El Mapais National Monument' (1994) 19 *American Indian Law Review* 133; Robert C Ward, 'The Spirits will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land' (1992) 19 *Ecology Law Quarterly* 795; Pemberton, above n 29.

[153] Doubts have been expressed as to whether he actually said it. Richard White refers to it as almost certainly a fabrication: see Richard White, above n 143, referring to Rudolf Kaiser, 'Chief Seattle's Speech(es): American Origins and European Reception' in Brian Swann and Arnold Krupat (eds), *Recovering the Word: Essays on Native American Literature* (1987). See also Charles H Bonham, 'Devil's Tower, Rainbow Bridge and the Uphill Battle Facing Native American Religion on Public Lands' (2002) 20 *Law and Inequality* 157.

[154] Cited by Hughes, 'American Indian Ecology', above n 144; Rhodes, above n 7. Similar comments were made by Navajo elders recorded in Kelley and Harris, above n 40. From New Zealand, Alex Nathan was quoted in Waitangi Tribunal, *Te Roroa,* above n 31, as saying that all of the area of Waipoua is tapu, including valley and streams feeding into river, because of mauri and mana imbued in them.

[155] Kenneth Maddock, *Your Land is Our Land: Aboriginal Land Rights* (1983), and Maddock, 'Metamorphosing', above n 42.

[156] "Wakantanka" is a term used by the Sioux in USA, "manitou" by the Ojibwas in North America, "mana" by Maori in New Zealand. See Ake Hultkrantz, *Belief and Worship in Native North America* (1981); Howard Harrod, *Renewing the World: Plains Indian Religion and Morality* (1987); William K Powers, *Oglala Religion* (1977); Vine Deloria, 'Tribal Religious Realities' in Barbara Deloria, Kristen Foehner and Sam Scinta (eds), *Spirit and Reason: the Vine Deloria Jr Reader* (1999); Swan, *Sacred Places,* above n 9; Nancy Bonvillain, *Native American Religions* (2003); DeMallie and Parks (eds), above n 145; Tui Cadogan, 'A Three-Way Relationship: God, Land People: A Maori Woman Reflects' in Helen Bergin and Susan Smith, '*Land and Place, He Whenua He Wahi: Spiritualities from Aotearoa New Zealand* (2004).

Epes Brown, said that the Great Spirit was within all things and that all created beings are sacred.[157]

While there are aspects of the earth's sacredness that carry danger and malign power that should not be trifled with,[158] the earth as a whole is nevertheless seen as essentially good and bountiful rather than "fallen" and in need of either salvation or taming and subduing.[159] In this world view, humanity is a part of the creation and does not have dominion over it. Animals, plants, mountains, trees, lakes and other natural features are all related to humanity and part of the same community, belonging together.[160] All have a responsibility for maintaining harmony,[161] at least within a particular territory.[162]

[157] In Joseph Epes Brown, above n 144.

[158] There is a chapter in Hultkrantz, *Belief and Worship,* above n 156, discussing the dangerous places for Native Americans especially at Yellowstone National Park. See also Biernoff, above n 151; Ian Keen, *Knowledge and Secrecy in Aboriginal Religion* (1994); David and Bess Price, above n 145; Strang, above n 149; Max Charlesworth, 'Introduction', above n 10; Howard Morphy, 'Landscape and the Reproduction of the Ancestral Past' in Eric Hirsch and Michael O'Hanlon (eds), *The Anthropology of Landscape* (1995); Bonvillain, above n 156; Thomas Andrews, John Zoe and Aaron Herter, 'On Yamqzhah's Trail: Dogrib Sacred Sites and the Anthropology of Travel' in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998); Powers, above n 156, who all mention the dangerous nature of sites and spiritual beings.

In a similar way, Irwin mentions, in relation to the concept of mana in Maori religion, that this power is also dangerous and requires the restrictions and protections that the concept of tapu carries: James Irwin, above n 145.

[159] It is often the case that there is no concept of "wilderness" as dangerous and what is called wilderness is not considered wild or dangerous but hospitable: Milner Ball quoting Chief Standing Bear in Ball, above n 136. See also McCormack, above n 133; Hughes, 'American Indian Ecology', above n 144.

[160] This has been said of the Canadian First Nations view: see Chief John Snow, *The Mountains Are Our Sacred Places* (1977), extracted in Borrows and Rotman (eds), above n 145 and also in the commentary by Borrows and Rotman, ibid, and by McCormack, above n 133.

In Australia, Ronald Berndt has described the Aboriginal world-view as not drawing distinctions between humans and other species as they are all manifestations of the same life force: see Ronald Berndt, 'The Gove Dispute: The Question of Australian Land and the Preservation of Sacred Sites' (1964) 1 *Anthropological Forum* 258; Ronald and Catherine Berndt, *World of the First Australians,* above n 146. See also Elkin, 'Australian Aboriginal Philosophy', above n 147; Kolig, *Noonkanbah Story,* above n 30; Rose, 'Consciousness and Responsibility', above n 146.

It is also the New Zealand Maori view: see Alexander Trapeznik and Gavin McLean, 'Public History, Heritage and Place' in Alexander Trapeznik (ed), *Common Ground? Heritage and Public Places in New Zealand* (2000).

It is also common to the US Native American views: see Hultkrantz, *Belief and Worship,* above n 156; Nash, above n 59; Dean B Suagee, 'Human Rights and the Cultural Heritage of Indian Tribes in the United States' (1999) 8(1) *International Journal of Cultural Property* 48 and also of Native Hawaiian views: see Michael Kioni Dudley, 'Traditional Native Hawaiian Environmental Philosophy' in Roger S Gottleib (ed), *This Sacred Earth: Religion, Nature, Environment* (1996).

[161] Vine Deloria, 'If You Think About It, You Will See That It Is True' in Barbara Deloria, Kristen Foehner and Sam Scinta (eds), *Spirit and Reason: the Vine Deloria Jr Reader* (1999); Borrows and Rotman (eds), above n 145.

[162] The relationship with land though does tend to be a relationship with a particular territory and particular sites rather than with the earth as a whole. As was suggested by Vine Deloria Jr, Native Americans usually do not embrace all trees or love all rivers and mountains, but what is important is the relationship they have with particular trees or particular mountains: Vine Deloria, 'Kinship with the World' in Barbara Deloria, Kristen Foehner and Sam Scinta (eds), *Spirit and Reason: the Vine Deloria Jr Reader* (1999), at 223. Russel Barsh has described Northern American Indigenous traditions as territorial and as existing to dictate conduct within particular geographic places and that tribes are part of the ecology assigned to them: Barsh, 'Illusion' above n 9. See also Vecsey, 'American Indian Environmental Religions', above n 20 (cited with agreement in Hultkrantz, *Belief and Worship,* above n 156, who speaks of Native Americans as having not vague concerns for the earth but attachments to specific places). Similar comments have been made about the traditional Australian Aboriginal understanding: Tony Swain, 'Reinventing the Eternal:

Nature in this scheme is a gift and not a commodity.[163] Land is for stewardship, not something to be owned. It is considered as animate and as having spirit.[164] Volumes have been written on the importance of land to Indigenous peoples and the special sense of identity with it and belonging to it.[165] This is the realm of relationship and connection rather than objective propositional truth, a factor discussed in Part C.

The holistic viewpoint has led various commentators to observe that there is no real distinction in much Indigenous thought between the sacred and the profane.[166] Nevertheless there clearly exist special places that are particularly "sacred" (or powerful or special), that have their own rules and prohibitions in relation to conduct.[167]

Aboriginal Spirituality and Modernity' in Norman C Habel (ed), *Religion and Multiculturalism in Australia* (1992).

It is this particular relationship that gives rise to the spiritual bond. As mentioned by UN Special Rapporteur Erica-Irene Daes in her preliminary report on the protection of Indigenous heritage, the special relationship Indigenous people have with their land is "not merely with the physical aspects of the land but is conceived of as a direct and personal kinship with each of the species of animals and plants that co-exist with people in the same territory": Daes, *Protection of the Heritage: Preliminary Report* (1994), above n 31.

[163] A point made in Canada, in Royal Commission on Aboriginal Peoples, above n 8; Mazur, above n 136 and Nash, above n 59. Borrows and Rotman cite the words of Shawnee leader Tecumseh who said that the land was made by the Great Spirit for the use of all his children and no tribe has the right to sell it, even to each other much less to strangers: see Borrows and Rotman (eds), above n 145.

[164] Joseph Epes Brown, above n 144; Leroy Little Bear, 'Aboriginal Relationships to the Land and Resources' in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998). See also Ronald and Catherine Berndt, *World of the First Australians,* above n 146; Ronald M Berndt, 'Traditional Concepts of Aboriginal Land in Academy of Social Sciences in Australia' in Ronald M Berndt (ed), *Aboriginal Sites, Rights and Resource Development* (1982), who described land as being "alive". Swain has referred to place being "conscious": see Tony Swain, *A Place for Strangers: Towards a History of Australian Aboriginal Being* (1993). See also Werner Muller, 'North America' in Walter Krickenberg et al (eds), *Pre-Columban American Religions* (1968); Jay Vest, 'Traditional Blackfeet Religion and the Sacred Badger–Two Medicine Wildlands' (1988) 6 *Journal of Law and Religion* 455; David Suzuki, *The Sacred Balance: Rediscovering Our Place in Nature* (1997).

[165] Just some examples are Erica-Irene Daes, Special Rapporteur, *Indigenous Peoples and Their Relationship to Land (Final Working Paper)*, UN Doc E/CN.4/Sub.2/2000/25 (30 June 2000); Erica-Irene Daes, Special Rapporteur, *Study on the Protection of the Heritage of Indigenous People (Final Report)*, UN Doc E/CN.4/Sub 2/1995/26 (21 June 1995); Morphy, 'Landscape', above n 158; Stanner, 'Some Aspects of Aboriginal Religion', above n 12; Maxwell John Charlesworth, 'Religion and Ethics in a Multicultural Society' in Norman C Habel (ed), *Religion and Multiculturalism in Australia* (1992); Kolig, *Noonkanbah Story,* above n 30; *Milirrpum v Nabalco* (1971) 17 FLR 141, 270–1; Vine Deloria, 'Sacred Lands and Religious Freedoms' in James Treat (ed), *For This Land: Writings on Religion in America* (1999); Strang, above n 149; Frank Pommersheim, 'The Reservation as Place: A South Dakota Essay' (1989) 34 *South Dakota Law Review* 246; Joseph Epes Brown, above n 144; Rodney Bobiwash, above n 29; Borrows and Rotman (eds), above n 145; quotes in Berger, *Northern Frontier,* above n 20; Annie L Booth and Harvey J Jacobs, 'Ties that Bind: Native American Beliefs as a Foundation for Environmental Consciousness' (1990) 12 *Environmental Ethics* 27 (cited in Tsosie, 'Tribal Environmental Policy', above n 133); quote from Carmen Kirkwood in Waitangi Tribunal, *Manukau Claim,* above n 133, section 3.2; quote from Emily Paiora in Waitangi Tribunal, *Te Roroa,* above n 31 at section 6.2; quote from Kekuni Blasdell in Spriggs, above n 11.

[166] See Max Charlesworth, 'Introduction', above n 10; Ronald Berndt, 'Profile of Good and Bad', above n 36; Rose, 'Consciousness and Responsibility', above n 146; Hubert, above n 45; Deloria, 'Tribal Religious Realities', above n 156; Battiste and Henderson, above n 31; DeMallie and Parks (eds), above n 145.

However, as previously mentioned, Eliade also saw the concept of living with the sacred as a way of viewing the whole world, so that, for such religious people, nature is never only natural but it is always fraught with a religious value and the cosmos as a whole is a real, living and sacred organism: Eliade, above n 14, at 116–7.

[167] Hubert, above n 45; Michaelsen, 'Dirt in the Court Room', above n 137; Kenneth Maddock, *Bibliography of Material Pertaining to Australian Aboriginal Sacred Sites 1976–1986* (1988). An illustration of the distinction was given in the dissenting opinion of Fletcher J in *Navajo Nation v US Forest Service* 535 F 3d 1058 (9th Cir, 2008) at 1097–8 where he discussed the evidence of Apache, Navajo and Havasupai

Some places may be regarded as particular foci of power[168] or sacred ambiences[169] or spiritual centres where the sacred is manifested, or interrupts and breaks in.[170] Alternatively, places may be sacred simply by virtue of their use.[171] It is these specific sacred places that are the particular subject of this thesis. However the existence of such special places does not derogate from the idea of the land as a whole being sacred. Also it has been said that sacred places cannot be isolated from the landscapes in which they are located and related.[172] There are therefore, no clear-cut boundaries between what is a sacred place and what is not,[173] and the existence of such particular sacred places does not create a conceptual dualism between such places and the rest of the land, nor any compartmentalisation of spheres.

3.2 Particular Sacred Places

The particular sacred places that this thesis will concentrate on are diverse in kind. As a generic class the terms used in Australia and North America are usually "sacred sites" and in New Zealand, the Maori term "wahi tapu"[174] or the less common wider term "waahi taonga"[175] is used. While there are many commonalities between Indigenous spiritualities, as discussed in the previous section, the types of sacred places do vary substantially between some of the countries in question and the

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witnesses who saw their entire territories as sacred but acknowledged that particular mountains were especially holy.

[168] Ronald and Catherine Berndt, *World of the First Australians,* above n 146; Kolig, *Noonkanbah Story,* above n 30; Hughes and Swan, above n 40; Vecsey, 'American Indian Environmental Religions', above n 20; Medicine Grizzleybear Lake, 'Power Centers' in James Swan (ed), *The Power of Place: Sacred Ground in Natural and Human Environments* (1991); Roger Neil and Murray Smith, 'Education and Sacred Land: First Nations, Metis and Taoist Views' in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998).

[169] Battiste and Henderson, above n 31; Stanner, 'Some Aspects of Aboriginal Religion', above n 12; Deward Walker, *Protection of American Indian Sacred Geography* in Christopher Vecsey (ed), *Handbook of American Indian Religious Freedom* (1995).

[170] Eliade, above n 14.

[171] Bobiwash, above n 29; Kelley and Harris, above n 40.

[172] Kelley and Harris, above n 40; Derek Elias, 'The Measure of Dreams' in James Weiner and Katie Glaskin (eds), *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives* (2007).

[173] Noted, for instance, by Woodward in his Aboriginal Land Rights Commission Report in Australia in 1974 where he said that, because all land was of significance, no clear dividing line could be drawn between those sites that are sacred and those which are not: Albert Edward Woodward, *Second Report of the Aboriginal Land Rights Commission* (1974) at [517]–[520]. Kingsley Palmer, in his unpublished report for the Aboriginal Legal Service in August 1978, '*Land in Aboriginal Religious Belief: Noonkanbah Station, West Kimberley Western Australia*" at page 12, cited in Stephen Hawke and Michael Gallagher, *Noonkanbah: Whose Land Whose Laws* (1989) at 119, said that the description of a site as a defined location is redundant because the whole land has spiritual essence. Daes, *Cultural and Intellectual Property of Indigenous Peoples* (1993), above n 31, at [166] said that identification of sacred sites is difficult as all lands and resources are to a greater or lesser extent sacred and integral to Indigenous peoples.

These issues are all relevant to the legal issues to be considered in defining sacred places and boundaries, and perhaps even to the notions of sacredness as something legally distinct from what is not sacred and is discussed below in Chapter 15.

[174] Also often spelt as "waahi tapu".

[175] "Wahi tapu" is the term used in New Zealand legislation to designate sacred places. The wider term "waahi taonga" is discussed in R Tau, *Waahi Taonga and Waahi Tapu*, (1992) 106 *Planning Quarterly* 11.

different Indigenous peoples within some of those countries. This section merely gives some of the different examples of such places. These illustrate that most places have social and public significance rather than individualistic or private.[176]

Starting with Australia, one familiar type of sacred place is the locations of important mythical[177] events associated with ancestral creatures, including places where ancestral creatures went into the ground and are believed to have metamorphosed into natural features or where they left objects behind and where the spiritual essence of the creatures may be retained.[178] These places are not just reminders of past events but places of current spiritual power which can be tapped by people today through recreating the mythical events.[179] In North America too there are mythic sites identified with events engaged in by heroic ancestors which are still places of power today.[180] Such places include places regarded as gods themselves,[181] places of manifestation or revelation of divine powers or places where spirits dwell[182] and sacred portals between

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[176] Issues of confidentiality or restricted knowledge are dealt with below in 3.3.

[177] The use of the term "myth" throughout this thesis is not intended in the pejorative sense of denoting something that is invented or not factually true but in the rich sense of a traditional metaphorical narrative used to illustrate a theological or spiritual explanation or truth.

[178] See, for instance, Ronald M Berndt, *The Sacred Site: the Western Arnhem Land Example* (1970); Ronald Berndt, 'Gove Dispute', above n 160; Ronald and Catherine Berndt, *World of the First Australians*, above n 146; Ronald Berndt, 'Profile of Good and Bad', above n 36; Elkin, 'Australian Aboriginal Philosophy', above n 147; Morphy, 'Landscape' above n 158; Nicolas Peterson, 'The Ownership of Sacred Sites' in Robert Edwards (ed), *The Preservation of Australia's Aboriginal Heritage* (1975); Robert Layton, 'Relating to the Country in the Western Desert' in Eric Hirsch and Michael O'Hanlon (eds), *The Anthropology of Landscape* (1995); Fox, *Ranger Uranium,* above n 20; Noel Wallace, 'Living Sacred Sites' in Robert Edwards (ed), *The Preservation of Australia's Aboriginal Heritage* (1975); Kolig, *Noonkanbah Story,* above n 30; Hubert, above n 45.

[179] See, for instance, Morphy, 'Landscape' above n 158; Stanner, 'Some Aspects of Aboriginal Religion', above n 12; Kolig, *Noonkanbah Story,* above n 30.

[180] Deward Walker, above n 169; Peter Nabokov, *Where Lightning Strikes: The Lives of American-Indian Sacred Places* (2006). Some examples of myths of monsters and deities associated with sacred mountains in Navajo beliefs are given in Gladys A Reichard, *Navaho Religion: A Study of Symbolism* (2nd ed, 1977); Kelley and Harris, above n 40. See also a study of the Badger Two Medicine area in Vest, above n 164.

[181] See *Sequoyah v Tennessee Valley Authority* 620 F 2d 1159 (6th Cir, 1980), concerning the drowning of Cherokee gods, or *Wilson v Block,* 708 F 2d 735 (DC Cir, 1983) and *Navajo Nation v US Forest Service,* 408 F Supp 2d 866 (D Ariz, 2006), relating to the mountains as sacred deities in themselves in Navajo tradition. Andrews, Zoe and Herter, above n 158, contains a discussion of Dogrib sites found along canoe and dog-sled routes that fit this description. See also comments by Michaelsen, 'Significance of the *AIRFA*', above n 152; Michaelsen, 'Dirt in the Court Room', above n 137; Tuan, *Topophilia,* above n 124.

[182] As in *Wilson v Block,* 708 F 2d 735 (DC Cir, 1983); *Navajo Nation v US Forest Service,* 408 F Supp 2d 866 (D Ariz, 2006) concerning the home of the kachinas in the San Francisco Peaks in Arizona in the Hopi tradition. See Deloria, 'Sacred Places and Moral Responsibility', above n 149; Deloria, 'Sacred Lands and Religious Freedom', above n 165; Kelley and Harris, above n 40; Bonvillain, above n 156. Clare Cummings, 'Sacred Landscapes from a Legal Perspective: Examples from the United States' in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998) contains a discussion about the spirits at Mount Graham, site of a controversial telescope project. Dudley, above n 160, gives the example from the Hawaiian religion of the goddess Pele who lives in a volcano. New Zealand examples include waterways where the taniwha, a powerful creature, lives: see *Shayron Lee Beadle and Ronald Wihongi and Riana Wihongi v Minister for Corrections* (Unreported, Environment Court, A74/02, 8 April 2002); *Friends and Community of Ngawha v Ronald Whongi* [2002] NZCA 322; *Mahuta v Waikato Regional Council* (Unreported, Environment Court, A91/98, 29 July 98), 3 NZED 712 and James Irwin, above n 145; David Williams, 'Purely Metaphysical Concerns' in Merata Kawharu (ed), *Whenua, Managing our Resources* (2002).

star systems or different universal systems where people have emerged into this world.[183] Similarly, places of miraculous events can be regarded as sacred.[184]

All the countries under discussion contain ritual ceremonial places which are regarded as sacred, not only through the activities carried out there but also because the places have been prescribed by ancestral beings or laws as places where such rituals are to be performed or people have found portals of access to sacred power at those places.[185] They are usually not places chosen for convenience. For many Australian Aboriginal groups, this type of sacred place would include grounds associated with initiation ceremonies.[186] In North America, these may include vision questing sites,[187] purification sites like sweat lodges[188] or smoke houses,[189] places for various dances[190] or ceremonial chambers,[191] or places where medicines or animals or resources are found for use in ceremonies.[192] In New Zealand, examples include baptismal places or pa (traditional fortified village sites especially where blood has been spilt).[193]

There may be places of sacred buildings or construction, like medicine wheels,[194] or temples and shrines.[195] Places of rock art are also commonly regarded as being of

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[183] See Vine Deloria and Richard W Stoffle, *Native American Sacred Sites and the Department of Defense* (1998), ch 3; Joseph Epes Brown, above n 144, in relation to the Pueblo places of emergence; see Muller, above n 164, and Tuan, *Topophilia,* above n 124, describing Pueblo and Zuni beliefs about the sacredness of places of emergence and descent. See also Michaelsen, 'Promise and Perils', above n 144; Lane, above n 46, discussing the Navajo beliefs.

[184] Deloria gives the example of Buffalo Gap in the Black Hills where buffalo emerged as being comparable to the miracles at the River Jordan: Deloria, 'Sacred Lands and Religious Freedoms', above n 165.

[185] Deward Walker, above n 169; Deloria and Stoffle, above n 183, ch 3; Scott Dalton, 'Saving the Native American Religious Sites: The Haskell Medicine Wheel' (1995) 4(2) *The Kansas Journal of Law and Public Policy* 61; Swan, 'Spots of the Fawn', above n 40, citing the reference by Sue Lanci in "Spirit of AlohaMo'okini Luakini Heiau" to the comment by Hawaiian kahuna, Momi Lum, that the land is not sacred because the temple is here but the temple is here because the land is sacred.

[186] See, for example, Bruce J Wright, 'Aboriginal Sites and their Protection' in Ronald M Berndt and Catherine H Berndt (eds), *Aborigines of the West: Their Past and Present* (2nd ed, 1980); James Renwick, 'Protection of Aboriginal Sacred Sites in the Northern Territory: A Legal Experiment' (1990)19(4) *Federal Law Review* 378.

[187] See Brian Reeves, above n 149; Powers, above n 156, discussing the sacred hill where vision quest takes place; Deward Walker, above n 169; Deloria and Stoffle, above n 183, ch 3; Swan, *Sacred Places,* above n 9; Canada, Royal Commission on Aboriginal Peoples, above n 8.

[188] Where people go in solitude to receive visions. These are said to be sacred places: see Deward Walker, above n 169; Powers, *Oglala Religion,* above n 156; Harrod, above n 156; Swan, *Sacred Places,* above n 9; Arthur Versluis, *Sacred Earth: The Spiritual Landscape of Native America* (1992).

[189] Gordon Mohs, 'Sto:lo Sacred Ground' in David Carmichael et al (eds), *Sacred Sites, Sacred Places* (1994).

[190] Such as the Sundance: see Deward Walker, above n 169. Examples are given in Hultkrantz, *Belief and Worship,* above n 156.

[191] Like the kiva of the Pueblo: see Joseph Epes Brown, above n 144; Muller, above n 164.

[192] Deward Walker, above n 169; Kelley and Harris, above n 40. See the examples discussed in Vest, above n 164. Such places could include quarries: see Swan, *Sacred Places,* above n 9; Swan, 'Spots of the Fawn', above n 40; Canada, Royal Commission on Aboriginal Peoples, above n 8. The example of salmon ceremonial sites was given in Mohs, above n 189. In New Zealand, fishing grounds and resource areas have been cited as sacred places: see Nick Tupara, 'Sacred Places to the Maori' (2000), though in Manatu Maori, above n 38, these are described as everyday sites rather than wahi tapu.

[193] Tupara, above n 192; Best, above n 151; Manatu Maori, above n 38.

[194] A famous one being in Wyoming, USA: Deloria, 'Sacred Places and Moral Responsibility' above n 182; Nicole Price, 'Tourism and the Bighorn Medicine Wheel: How Multiple Use Does Not Work for Sacred Land

sacred significance[196] as are ritual sand paintings.[197] In the Kimberly region in Western Australia, touching up Wanjina rock art paintings is a ritual to set forth spirit children.[198]

Burial places appear to be sacred in all the countries in question.[199]

There are also places of historical events that are sacred, ranging from battlefields where blood of warrior ancestors has been shed[200] or famous massacres have occurred,[201] to canoe-landing places (tauranga waka) where famous ancestors arrived in New Zealand.[202]

Sites' in David Carmichael et al (eds), *Sacred Sites, Sacred Places* (1994); Dalton, above n 185; Lane, above n 46.

[195] See Swan, 'Spots of the Fawn', above n 40.

[196] Ronald Berndt, *Australian Aboriginal Religion,* above n 12, speaks of such paintings as having been made by mythical beings or such beings becoming the paintings. See also Deward Walker, above n 169; Deloria and Stoffle, above n 183, ch 3; Georgia Lee, 'Wahi Pana: Legendary Places on Hawai'i Island' in Bruno David and Meredith Wilson (eds), *Inscribed Landscapes: Marking and Making Place* (2002); Swan, *Sacred Places,* above n 9; Versluis, above n 188; Renwick, above n 186; Bruce Wright, above n 186. Bryan Cummins and Kirby Whiteduck, 'Towards a Model for the Identification and Recognition of Sacred Sites' in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998), speak of pictographs as being sacred because they depict Native cosmology. In DeMallie and Parks (eds), above n 145, there is reference to a Northern Lakota tradition of replicating these sacred markings from petroglyphs on altars built.

[197] Lane, above n 46, describing the renewing and re-enacting of a ceremonial Hogan.

[198] See Elkin, *The Australian Aborigines,* above n 147; Ronald and Catherine Berndt (eds), *Aborigines of the West,* above n 145. Barbara Glowczewski, 'Dynamic Cosmologies and Aboriginal Heritage' (1999) 15(1) *Anthropology Today* 3, also cites the late David Mowaljarlai of the Ngarinyin who spoke of needing to keep repainting the Wanjina or they would become sad and not provide rain.

[199] See, for instance, Deward Walker, above n 169; Deloria, 'Sacred Places and Moral Responsibility' above n 182; Deloria and Stoffle, above n 183, ch 3; Michaelsen, 'We Also Have a Religion', above n 62; Canada, Royal Commission on Aboriginal Peoples, above n 8; Rhodes, above n 7 (citing various Native American Chiefs) and Ernest Turner, 'The Soul of my Dead Brothers' in Robert Layton (ed), *Conflict in the Archaeology of Living Traditions* (1989), citing Chief Seattle. Vines, above n 124, has pointed to the sacred character of the ground to Australian Aboriginal people even when a body has decomposed. These are mentioned in Howard Creamer, 'Aboriginal Perceptions of the Past: The Implication for Cultural Resource Management of Australia' in Peter Gathercole and David Lowenthal (eds), *The Politics of the Past* (1990). In New Zealand it is said that the burial places have intense tapu (a difficult term to translate into English, but involving concepts of sacredness, pollution and being set apart): see Best, above n 151; Cadogan, above n 156. This is similar to many Hawaiian beliefs about the soil being sanctified by the mana of the person buried there: see Deloria and Stoffle, above n 183, ch 3. There is also reference to burial places for placenta in Tupara, above n 192.

In what has been suggested as the Hopi and Zuni and some other Indigenous world-views, the deceased ancestors are on a journey and should not be disturbed: see Kurt E Dongoske and Roger Anyon, 'Federal Archaeology: Tribes, Diatribes and Tribulations' in Nina Swidler et al (eds), *Native Americans and Archaeologists: Stepping Stones to Common Ground* (1997); Clements, above n 145; Katosha Belvin Nakai, 'When Kachinas and Coal Collide: Can Cultural Resources Law Rescue the Hopi at Black Mesa?' (2003) 35 *Arizona State Law Journal* 1283.

In some cases, both the remains and the places where there are objects belonging to the deceased ancestors are sacred places, inhabited by strong spirits which are dangerous, such as the Hualapai mentioned in Bonvillain, above n 156.

In other accounts, burial places, where spirits of ancestors continue to abide, are places where the living can hear from and communicate with them: see *McCrady v Ontario* [1992] Ontario Sup CJ Lexis 1646, relating to the High Falls area where the Ojibway could hear the voices of the dead buried there. See also Marcia Langton, 'The Edge of the Sacred, the Edge of Death: Sensual Inscriptions' in Bruno David and Meredith Wilson (eds), *Inscribed Landscapes: Marking and Making Place* (2002) and see Strang, above n 149, discussing the Australian Aboriginal beliefs about the spirits of the deceased continuing to inhabit the land.

[200] Deward Walker, above n 169; Deloria and Stoffle, above n 183, ch 3; Tupara, above n 192; Manatu Maori, above n 38; Best, above n 151.

[201] Such as at Wounded Knee in the USA: see Deloria, 'Sacred Lands and Religious Freedoms', above n 165, at 207.

[202] Manatu Maori, above n 38.

3.3 Restricted Knowledge

The fact that things religious are "public" matters not confined to a private sphere does not mean they are generally known to the public or that they can be tested and ascertained by scientific and rational inquiry. In this way there are clear distinctions between the values of the Western public spheres or institutions.

A feature common to many Indigenous religions is the uneven distribution of knowledge, especially about sacred places, a matter that is significant in the discussion in Part C of the proof of sacredness.[203] Knowledge may be restricted to a class or group (often based on gender, age, clan or moiety).[204] In this sense, it is possible that no one person holds all the knowledge about a sacred place.[205] In some cases long periods of training may be required to acquire some kinds of knowledge.[206] In other cases, the knowledge could be a gift from spiritual beings, imparted in dreams or trances to particular people.[207]

Knowledge of holy places may be a closely guarded secret.[208] In other instances, many people may know that the place is sacred but the level of detailed knowledge its mythology varies.[209] This may also apply to ceremonies performed at such places, where details may be restricted to certain people.

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[203] At Chapter 17.

[204] Discussed, for example, in relation to Australian Aboriginal people in Keen, *Knowledge and Secrecy,* above n 158; Jurg Wassmann, 'The Politics of Religious Secrecy' in Alan Rumsey and James Weiner (eds), *Emplaced Myth: Space Narrative and Knowledge in Aboriginal Australia and Papua New Guinea* (2001); Kingsley Palmer, 'Religious Knowledge and the Politics of Continuity and Change' in Christopher Anderson (ed), *Politics of the Secret* (1995); Kolig, *Noonkanbah Story,* above n 30; Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (1996); Renwick, above n 186. For North America: see Elizabeth Brandt, 'On Secrecy and Control of Knowledge' in Stanton K Tefft (ed*)*, *Secrecy: A Cross-cultural Perspective* (1980) discussing Pueblo knowledge restrictions; Vine Deloria, 'Reflection and Revelation: Knowing Land, Places and Ourselves' in James Swan (ed), *The Power of Place: Sacred Ground in Natural and Human Environments* (1991). In New Zealand, the unwillingness of individual hapu to disclose their knowledge of wahi tapu has been noted in articles and reports such as Bridget Mosley, *Problems in Providing for Cultural Concepts through Legislation: Waahi Tapu as Cultural Heritage* (1999); Manatu Maori, above n 38; Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand* (1996).

[205] In practice, however, the fact that people of a particular gender are not meant to know something does not mean that they do not know it, but they nevertheless usually claim not to, as the issue may be more about the right to know than actual knowledge: Keen, *Knowledge and Secrecy,* above n 158; Erich Kolig, *The Silent Revolution: The Effects of Modernization on Australian Aboriginal Religion* (1981).

[206] See Brandt, 'On Secrecy', above n 204; Kolig, *Silent Revolution,* above n 205. Initiation in Australia was a common first step to revelation of some esoteric knowledge: Keen, *Knowledge and Secrecy,* above n 158.

[207] See example in Keen, *Knowledge and Secrecy,* above n 158.

[208] Deloria, 'Reflection and Revelation', above n 204. A Canadian example can be seen in the case of *Hupacasath First Nation v British Columbia* [2008] BCSC 1505 where it was noted by the court at [61]–[62] that the Hupacasath position was that in some instances it was culturally prohibited to reveal locations of sacred sites.

[209] Kolig, *Silent Revolution,* above n 205; Kolig, *Noonkanbah Story,* above n 30; Berndt, *Australian Aboriginal Religion,* above n 12; Renwick, above n 186. There may be different versions of a basic myth, with the version being told depending on the party hearing it, or different interpretations of ceremonies and

In this way, esoteric knowledge has been described as a kind of intellectual property.[210] It certainly gives force to the adage that knowledge is power, which power would be lost if all others held the information or were able to claim such knowledge. However knowledge can be dangerous and thus must be controlled so it does not fall into the hands of those who will misuse it.[211] Given the power associated with holding and passing on knowledge, people with the knowledge sometimes hold the power to punish by withholding it.[212]

The fact, then, that something is not widely known may not mean that it is unlikely to be part of the tradition or that a place is not likely to be sacred. On the contrary, the more sacred a place is, the less it is spoken of.[213] In addition to restricted information, there are other practical considerations that have led Indigenous people to be reticent about discussing sacred places and religious beliefs; fear of vandalism or that disclosure of ceremonial locations would lead to the sites becoming tourist spectacles, disrupting worship.[214]

The dispersed and restricted nature of knowledge does not lend itself to a systematic theology. Comments have been made that Indigenous people tend not to spend effort in clear definitions of their beliefs but tend to accept the spiritual reality as a "given".[215] Deloria, writing of the Native American situation, commented that the relationship with spirits in a particular place was not so much an article of faith but an experience. He said that it was never a case of having to believe certain things but of respecting the stories.[216] If the versions of the stories that different people are given are different, and

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songs performed in public: see examples in Keen, *Knowledge and Secrecy,* above n 158; Wassmann, above n 204; quote from Dr Morton by Hal Wootten, *Significant Aborignal Sites in Area of Iron Princess Mine, Iron Knob, South Australia, Report to Minister for Aboriginal Affairs Under s10(4) of Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (1993).

[210] Russel Lawrence Barsh, 'Grounded Visions: Native American Conceptions of Landscapes and Ceremony' (2000–1) 13 *Thomas Law Review* 127; Roger Anyon, T J Ferguson and John Welch, 'Heritage Management by American Indian Tribes in the Southwestern United States' in Francis P McManamon and Alf Hatton (eds), *Cultural Resource Management in Contemporary Society: Perspectives on Managing and Presenting the Past* (2000). See also Peter Gray, 'Do Walls Have Ears? Indigenous Title and Courts in Australia' (2000) 1(5) *Australian Indigenous Law Review* 1. To the extent that such knowledge was subject to economic exchange, the knowledge also gave commercial power: Keen, *Knowledge and Secrecy,* above n 158.

[211] Suggested in Biernoff, above n 151; Kolig, *Silent Revolution,* above n 205.

[212] Nancy Williams, 'Law', above n 151. The control of religious knowledge may also extend naturally to control over economic activities, perhaps by sacralising such things: Keen, *Knowledge and Secrecy,* above n 158.

[213] Cummings, above n 182.

[214] Mentioned in Vecsey, 'Prologue', above n 145.

[215] See Deloria and Stoffle, above n 183, ch 3. Stanner thought Aboriginal religions tended not to ask philosophical questions or make abstract propositions and did not see the Dreaming as an object of contemplation or inquiry, but preferred to operate at the level of poetry and art, based on visionary and intuitive insights into mysteries: Stanner, *White Man Got No Dreaming,* above n 12.

[216] Vine Deloria, in articles entitled 'Kinship with the World' and also 'The Concept of History', both in Barbara Deloria, Kristen Foehner and Sam Scinta (eds), *Spirit and Reason: the Vine Deloria Jr Reader* (1999). Angela Wilson has also made similar comments about Dakota culture, where people respected the

there are different levels of meaning, there would tend not to be a single systematic explanation or doctrine arising from it. Another point against the existence of codified creeds, authoritative texts or concepts of heresy is the nature of an oral tradition.[217] It is *the land* which is the sacred text and the object of the faith[218] rather than some written creed or scripture.

There is also a lack of detailed exegesis about Indigenous spirituality or rituals. A comment made by the Federal Agencies Task Force under the *American Indian Religious Freedom Act 1978* was that religions were designed to preserve ceremonies and beliefs, not spread them, and that what is relevant may not be community participation but proper performance (by implication, by the traditional leaders).[219] This makes the details or essence of the Indigenous religions less accessible to outsiders,[220] but that is obviously not the concerns of Indigenous peoples until it comes to litigation and arguments as to what is true or what is orthodox.

3.4 Summary

This chapter has highlighted the features common to Indigenous religions which contrast with dualistic Western views of public and private spheres referred to in the previous chapter. This contrast that has been noted by many commentators[221] and the following Parts provide examples of how the different Western perspectives have influenced the legal treatment of Indigenous sacred places.

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visions, stories and experiences given to others without searching for a single truth or reality: Angela Cavender Wilson, 'Power of the Spoken Word: Native Oral Traditions in American Indian History' in Donald Fixico (ed), *Rethinking American Indian History* (1997).

[217] Vecsey, 'Prologue', above n 145. Comment also made by US Department of the Interior, *AIRFA Report*, above n 8; Dussais, above n 7; Joshua D Rievman, 'Judicial Scrutiny of Native American Free Exercise Rights: Lyng and the Decline of the Yoder Doctrine' (1989) 17 *British Columbia Environmental Affairs Law Review* 169. The Resource Assessment Commission, in its inquiry in relation to Coronation Hill in the Northern Territory, noted that oral traditions often meant that beliefs would naturally be "differentially distributed" and be "subject to contingencies of individual personalities and experience": Resource Assessment Commission, *Kakadu Conservation Zone Inquiry Final Report* (1991) at [7.118].

[218] Dussais, above n 7; Rievman, above n 217. See also Kolig, *Noonkanbah Story,* above n 30, where the land and its features are spoken of as giving evidence of the fundamentals of belief, and where Aboriginal people are described as not given to metaphysical speculation unless it draws on tangible expressions in nature.

[219] US Department of the Interior, *AIRFA Report*, above n 8. The Plaintiffs in the case of *Attakai v US* 746 F Supp 1395 (D Ariz, 1990) at 1402 also said that their religion does not have a set of doctrines or dogma but has a set of rituals and ceremonies which must be conducted in the same manner and places as prescribed in the originating revelation.

[220] Including people writing theses!

[221] See, for example, Michaelsen, 'We Also Have a Religion', above n 62; Michaelsen, 'Promise and Perils', above n 144; Dussais, above n 7; Winslowe, above n 144; Sanchez, above n 91; Cummins and Whiteduck, above n 196.

PART B – THE FREEDOM OF RELIGION MODEL

Chapter 4 – Introduction to Part B and Philosophical Issues

4.1 Introductory Summary to Part B

This part examines the treatment of Indigenous sacred places in the context of the religious freedom jurisprudence. Despite the existence of statutory or constitutional religious freedom provisions in the four countries, in most cases, even the destruction of an Indigenous sacred place has not been considered an infringement of such laws. A major contributing factor has been the adoption of a jurisprudence unsuited to the protection of sacred places due to a privatised or individualised view of religious freedom. Such a view undermines one of the key aims of religious freedom in protecting minorities.[222]

One way this has occurred is by religious freedom being set within a private autonomy model of human rights, usually within a bill or charter of rights.[223] To treat such rights primarily as the means of protecting the private sphere of individual autonomy, such as an individual's right to carry out activities, ignores the protection of the objects of belief, such as the places necessary for the religion to survive. This is an issue that forms the basis of the analysis in Chapter 6.

Another way the jurisprudence is ineffectual is by seeing "things religious" as relating only to private and voluntary concepts like conscience, piety and worship. Matters of personal conscience are seen as subjective and idiosyncratic; not to be the subject of interference or judgement by courts or other officials operating in the public sphere, as discussed in Chapter 8. Restricting religious freedom to personal conscience has seen

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[222] The rationale of protecting minorities has been referred to, for example, in Australia in *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 124 where Latham CJ said that s 116 was not just to protect a majority religion but required to protect unpopular minorities. In Canada in *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 354 Dickson J said that the *Charter* safeguards religious minorities from the threat of tyranny of the majority. In the USA, Supreme Court in *West Virginia State Board of Education v Barnette,* 319 US 624 (1943) said that the Bill of Rights took certain subjects beyond the reach of majorities. In *Employment Division of Oregon v Smith,* 494 US 872 (1990) O'Connor J said that the First Amendment was aimed at protecting minority rights and the famous footnote 4 in *US v Carolene Products Co,* 304 US 144, 152–3 (1938) spoke of a more searching judicial inquiry being required in the case of powerless minorities. The protection of weaker factions against the tyranny of the majority or, as he described it, against 'anarchy', was also one of the aims behind James Madison's idea of a federation: see James Madison, *The Federalist Number 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments* (1788).

[223] As set out below in 4.2.1, this is the predominant characterisation of religious freedom in the four countries, with the possible exception of the Australian *Constitution*'s s 116.

the exclusion of matters that do not coerce the conscience, as discussed in Chapter 9. Limiting the sphere of religious freedom to acts of worship and piety that are not also typical secular public activities excludes the latter, as discussed in Chapter 7.

Apart from the model of religious freedom as a human right, there has always been at least one different approach in Australia, towards which the US Supreme Court has also swung in more recent times,[224] being the notion of religious freedom as an expression of non-discrimination or neutrality.[225] The notion of neutrality, however, has tended to be regarded as satisfied where the government actions and legislation do not have any *purpose* or *intent* of addressing religion or a particular brand of religion. This has resulted in the denial of protection of religious freedom when the government interference has not sought to intrude out of the public sphere to impact on the "forbidden" area of religion, which is the subject of Chapter 10.

This chapter examines those key philosophical difficulties with the models used as a result of the public–private dichotomy, and further expands upon them throughout this part. An introductory overview of the religious freedom provisions, their contexts and elements in the four countries, as well as a brief overview of the history of legislation and cases dealing specifically with Indigenous sacred places under a religious freedom model, is provided in Chapter 5. As the problems often lie more in the privatised interpretation of the freedom rather than in the general texts themselves, the most relevant provisions are those which have been the subject of this kind of judicial or other interpretation or commentary. Other provisions which have not been dealt with in this way are simply mentioned in passing in this overview.[226]

Chapters 6 to 10 each examine various legal elements arising from the privatised model of religious freedom which have prevented protection for Indigenous sacred places, that is, the restriction of the protection to belief and activities only, the centrality or indispensability tests, the classification of activities as secular or religious, the requirement of coercion and the "purpose" test respectively. Chapter 11 then studies what could be a real motivation behind the preference for a narrow model, namely the

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[224] It is not suggested that this and the human rights argument are mutually exclusive. In one sense, all the jurisdictions accept that the religious freedom clause is intended to ensure that the treatment of religion is to be non-discriminatory, but the difference lies in whether the clauses are about something more than that, i.e. a positive liberty as well as the prevention of discrimination against religions: see Michael J Perry, *Religion in Politics* (1997) discussing the US arguments. See below at 4.2.1 for further discussion of whether they are mutually exclusive.

[225] Discussed at 4.2.5 below.

[226] As the way they will be interpreted can only be largely speculative. In this regard, USA, Australia and Canada are federations but the major Indigenous sacred place cases have come under the federal provisions rather than those of states or provinces.

role of property interests.[227] The conceptual problems of the models in both Parts B and C and alternatives are examined in the concluding part of this thesis.

This Part B is dominated by the cases and commentary from the USA because this is the jurisdiction where most of the laws and cases relating to Indigenous sacred places have relied on religious freedom arguments and where there has been the most extensive case law, commentary and debate.

4.2 Some of the Conceptual Limitations in Privatised Models of Religious Freedom

4.2.1 The Human Rights Context

Most of the religious freedom provisions are set in the context of a human rights instrument and thus clearly in the context of a guarantee of such rights. In the USA, the religious freedom clause is part of the Bill of Rights,[228] and religious freedom was referred to by two of the key influences behind the clauses, Jefferson and Madison, as a fundamental liberty and natural right.[229]

In Canada and New Zealand, the key religious freedom provisions[230] appear in human rights legislation, largely modelled on international instruments developed in the wake of World War II, especially the *International Covenant on Civil and Political Rights* ('*ICCPR*')[231] which has clearly been recognised as a human rights document.[232]

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[227] As reflected in such matters as whether the protection applies, the remedies provided, the definition of the status quo and the balancing tests.

[228] The text of this clause is quoted in 5.2.1 below.

[229] Thomas Jefferson drafted a precursor of the Religion Clauses, *Virginia Act for Religious Freedom of 1786,* VA CODE ANN § 57-1 (2009), extracted in Ariens and Destro, above n 64, at 71–2. This described religious freedom as one of "the natural rights of mankind (sic)". It was probably considered as one of the inalienable rights of life, liberty and pursuit of happiness referred to in the Declaration of Independence which he also drafted.

James Madison promoted that Act in the Virginian Assembly and also played a key role in the drafting and debates over the Religion Clauses of the First Amendment. In his famous tract in which he opposed a bill for assessment in Virginia to pay for religion teachers, Madison, *Memorial and Remonstrance*, above n 65, he described religious freedom as being by its nature "an unalienable right' and a fundamental liberty, going well beyond mere toleration of difference as a matter of grace from those in power.

For Madison's role, see Ariens and Destro, above n 64, at 80–92; McConnell, 'Origins'; above n 68; David A Richards, 'Religion, Public Morality and Constitutional Law' in J Roland Pennock and John W Chapman, *Religion Morality and Law* (1988); Ellis Sandoz, 'Religious Liberty and Religion in the American Founding Revisited' in Noel Reynolds and W Cole Durham (eds), *Religious Liberty in Western Thought* (1996). (It is beyond the scope of this thesis to discuss the various drafts of the Religion Clauses but some of these are discussed in Ariens and Destro, above n 64, and McConnell, 'Origins'; above n 68, at 1481–4.)

[230] See details of these provisions below in 5.4 and 5.5.

[231] Open for signature on 19 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).

The *Canadian Charter of Rights and Freedoms of 1982* was enacted after Canada had ratified the *ICCPR* in 1976 and the earlier *Canadian Bill of Rights,* S.C. 1960, c 44 was enacted following the 1948 *Universal Declaration of Human Rights* [a resolution of the UN General Assembly, GA Res 217A(III), UN GAOR, 3rd sess,183 plen mtg, UN Doc A/RES/217 (III) (10 December 1948) ("*Universal Declaration of Human Rights*")] and at a time when the *ICCPR* was being formulated. For a brief summary of the history of the

Freedom of religion and belief was one of the well-accepted components of most human rights conventions and declarations developed by the United Nations.[233] These provisions are worded to proclaim freedoms that everyone has.

Unlike the *ICCPR* style of provisions, it could be argued that US Religion Clauses in their literal wording were framed only as limits on legislative power and not as guarantees of freedom or rights. These, however, were not necessarily seen as distinct or contradictory notions as they are both consistent with the Enlightenment concepts of human rights, especially from the 17th and 18th centuries. Particularly influential in this regard was the philosophy of John Locke, whose ideas were picked up by Jefferson, in his theory of natural rights of life, liberty and property as those private aspects which

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enactments, see Maxwell Cohen and Anne Bayefsky, 'The *Canadian Charter of Rights and Freedoms* and Public International Law' (1983) 61 *Canadian Bar Review* 265; Walter S Tarnopolsky, 'A Comparison between the Canadian *Charter of Rights and Freedoms* and the *International Covenant on Civil and Political Rights*' (1982–3) 8 *Queens Law Journal* 21 and Mark L Berlin and William F Pentney (eds), *Human Rights and Freedoms in Canada* (1987). It appears to be commonly accepted that the federal Canadian legislation which has provisions dealing with freedom of religion borrowed heavily from the international instruments, though the borrowing is incomplete: see, for instance, Cohen and Bayefsky, above; Tarnopolsky, 'A Comparison', above; Tarnopolsky J in *R v Videoflicks* (1984) 48 OR (2d) 395, 420; M Ann Hayward, 'International Law and the Interpretation of the *Canadian Charter of Rights and Freedoms*' (1985) 23 *University of Western Ontario Law Review* 9. A notable deficiency in relation to the freedom of religion is the ability in the *Canadian Charter* to derogate from the freedom in a way that is much more general than the specific limitations set out in Article 18(3) of the *ICCPR,* criticised, for instance, by Tarnopolsky, 'A Comparison', above, and by John Humphrey, 'The *Canadian Charter of Rights and Freedoms* and International Law' (1986) 50 *Saskatchewan Law Review* 13. The issue of the more limited Article 18(3) of the *ICCPR* is mentioned in 11.4 below. Other *ICCPR* provisions, such as the "minorities article" in Article 27 which is discussed in Chapter 6, are also not included in the *Charter*.
Religious freedom in the earlier *Canadian Bill of Rights 1960* has been construed even more narrowly, as only reflecting rights existing in Canada at the time: see *Robertson and Rosetanni v Queen* [1963] SCR 651. This approach was subsequently eschewed for the *Charter* rights: *R v Big M Drug Mart* (1985) 18 DLR (4th) 321 at 358–9.
Like the *Canadian Charter*, the *New Zealand Bill of Rights Act 1990* was also modelled on the *ICCPR*. This is all made very clear by the long title to the Act which says that it is an Act ' (b) to affirm New Zealand's commitment to the *ICCPR*": see Huscroft and Rishworth (eds), above n 76; and Paul Rishworth et al, *The New Zealand Bill of Rights*, Auckland (2003). The Attorney-General at the time placed the *New Zealand Bill of Rights Act 1990* in the context of New Zealand's international obligations under the *ICCPR* in his comment on the topic: Geoffrey Palmer, 'Human Rights and the New Zealand Government's Treaty Obligations' [1999] *Victoria University of Wellington Law Review* 10.The case law on the *New Zealand Bill of Rights Act 1990* provisions have also clearly referred to the *ICCPR* as the model for the New Zealand provisions: see Court of Appeal decisions in *Mendelssohn v Attorney General* [1999] 2 NZLR 268; *Minister of Transport v Noort* [1992] 3 NZLR 260, *Simpson v Attorney General [Baigent's Case]* [1994] 3 NZLR 647. The general view of commentators in New Zealand is that the model there is the same Western liberal "Lockean" view of individual rights and the promotion of individual autonomy: see Ran Hirschl, 'Negative Rights vs Positive Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-liberal Economic Order' (2000) 22(4) *Human Rights Quarterly* 1060; and Rishworth et al, above n 231, at 278–9.

[232] See Bahiyyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Protection* (1996); Steiner and Alston, above n 68, for the history of the *ICCPR* and the religious freedom provisions. For the human rights context of the *ICCPR* generally, see for example Theodoor C van Boven, 'Distinguishing Criteria of Human Rights' in Mark L Berlin and William F Pentney (eds), *Human Rights and Freedoms in Canada* (1987); Steiner and Alston, above n 68.

[233] Notably :
– Article 18 of the *Universal Declaration of Human Rights* of 1948. Article 18 provides: "Everyone has freedom of thought, conscience and religion; this right includes … freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching practice, worship and observance."
– Article 18 of the *ICCPR*. The relevant parts of the text of Article 18 can be found below at 6.2.2.

were not ceded to the state but to be protected by it.[234] These natural rights, including those relating to religion, were seen as not capable of being overridden by the state.[235] Such rights were primarily a negative type of right, that is, the freedom *from* interference by the state and thus were a limit to the power and jurisdiction of the state and so could be framed as such.

Australia is the one country where the purpose of the religious freedom clause in the *Constitution* has not been as consistently viewed as a matter of human rights. Section 116 of the Australian *Constitution*,[236] like the US First Amendment,[237] prohibits the Commonwealth Parliament from making laws establishing a religion or prohibiting the free exercise of religion. There has been a view expressed by various justices in the High Court that s 116 was a fetter on legislative power rather than a guarantee of a human right, though such comments have only been dicta in each case.[238] As in the USA, however, a fetter on the legislative power may in fact be the way freedom is guaranteed or at least protected to some extent.[239] At the same time, there are also dicta that sees s 116 as being about religious freedom and human rights.[240] Other

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[234] Locke, *Second Treatise,* above n 79. Of course, the notion of natural human rights long pre-dated Locke: see, for example, the discussion in O'Neill, Rice and Douglas, above n 68; Imre Szabo, 'Historical Foundations of Human Rights and Subsequent Development' in Mark L Berlin and William F Pentney (eds), *Human Rights and Freedoms in Canada* (1987); Stuart Kaye and Ryszard Piotrowicz, *Human Rights in International and Australian Law* (2000). Locke, however, proved particularly influential. These Lockean views found expression in Jefferson's *Virginia Act for Establishing Religious Freedom of 1786*: see Koch and Peden, above n 9, at xx and 291. In the preamble, the Virginia Act refers to the inappropriateness of attempting to influence the mind, which God had created free. It recounted how the civil magistrate should not intrude into "the field of opinion" or restrain "the profession or propagation of principles" and that the rightful purpose of civil government was to interfere "when principles break out into overt acts against peace and good order". For the influence on Jefferson, see also McConnell, 'Origins'; above n 68; Richards, above n 229.

[235] As outlined above in 2.2.3. It has been said that this comes out of the influence of Puritan covenant theology based on the voluntary compact in which governments contractually limited their powers and thus can be revolted against if they should deny the freedoms of the people: Wald, above n 107. See also Howe, above n 96.

[236] See 5.3.1 below for the text.

[237] There is a notable, albeit slight, difference of wording in the component dealing with establishing a religion: relied on in the *DOGS case* (1981) 146 CLR 559 to distinguish it. The Court did note that the jurisprudence in the US at the time of Federation in Australia was also more limited. The difference in interpretation is best demonstrated in the purposive approach discussed in Chapter 10 below.

[238] For example, Stephen J in the High Court in the *DOGS case* (1981) 146 CLR 559, 605 said that s 116 was not a guarantee of rights of individuals but took the form of an express restriction on Commonwealth legislative power. Wilson J in the same case at 649 took the same view. Mason J in that case did not go as far, saying that it was about religious equality more than religious freedom, at 617. Barwick J in that case, at 580, interpreted s 116 as a fetter on legislative power but did not comment on whether it had another purpose, although it was clear that he thought that its purpose was radically different from that of the Bill of Rights in the US, a point he said he did not need to discuss, at 579. Gaudron J in *Kruger v Commonwealth* (1997) 190 CLR 1 at 124–5 agreed with Stephen J in the *DOGS* case and said it was not a constitutional right to religious freedom.

[239] Indeed, the comments referred to above still leave open an ulterior motive for the fetter on legislative power, for example. Stephen J nevertheless said at 610 of the *DOGS* case, ibid, that s 116 did provide important safeguards for religious freedom by restricting legislative encroachment.

[240] Murphy J in the *DOGS case*, ibid, dissenting at 632, spoke of s116 as being about religious liberty. Gibbs J in that case, at 603, suggested it was as well, by contrasting the establishment part of s 116 which he said did not fetter legislation for the purpose of protecting a fundamental human right, unlike the words which forbid the making of any law prohibiting the free exercise of any religion. Later, Brennan J in the High Court in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 519 said that s 116 was calculated to protect human rights and fundamental freedom along with s 117 and s 92. This has been

elements pointing to the purpose of religious freedom as being a human right can be seen in the similarity to the wording in the US, suggesting that these were drawn with a similar purpose,[241] and it is obvious that many at the Australian constitutional conventions were aware of US case law.[242]

There were, on the other hand, certainly hints of a narrower reading more akin to facially equal treatment between religions and non-discrimination rather than any principle of religious liberty. Many commentators see s 116 as providing only for religious equality for all citizens so far as it prevented the Commonwealth from placing adherents of any form of religion under any disadvantage or restriction in the exercise of their religion, when compared with adherents of other forms of religion.[243] In this way s 116 has been interpreted more as a constraint on the powers of the Commonwealth

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bolstered by various other dicta such as in *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 at 130–2, where Mason ACJ and Brennan J clearly referred to s 116 in the context of protecting religious freedom, referring to s 116 and "its fourfold guarantee of religious freedom" and at 131 referred to the guarantees in s 116 having a character as "a bastion of freedom" and referring at 132 to protection "to preserve the dignity and freedom of each man (sic)". In *ALRM v South Australia* (1995) 64 SASR 551, the applicants had sought a declaration that the setting up of the Hindmarsh Island Royal Commission was in breach of the common law and an impairment of the fundamental freedom to exercise a religious belief. While the Court did not have to decide this issue, Doyle CJ said at 552 that he accepted that freedom of religion is one of the fundamental freedoms which entitles Australians to call our society a free society and that statutes are presumed not to intend to affect this freedom. Debelle J said at 554 that. for the purpose of the action only, he was prepared to assume that freedom of religion is a fundamental freedom in our society and the essence of a free society and at 556 that no civilised society would seek to impose an improper restraint upon that freedom. See also dicta in *Attorney-General (NSW) v Grant* (1976) 135 CLR 587, 600 where Gibbs J said that the law recognised complete freedom of conscience in matters of religion and *Nelan v Downes* (1917) 23 CLR 546, 575 where Powers J said that all religions are free in Australia.

[241] See the views in Monsma and Soper, above n 76. Ely has also suggested that Inglis Clark, who drafted the original 1891 version of the *Constitution*, was an admirer of the US culture and political institutions and had advocated guarantees of freedom: see Richard G Ely, 'Andrew Inglis Clark on the Preamble of the Australian *Constitution*' (2001) 75 *Australian Law Journal* 41; Richard G Ely, 'Andrew Inglis Clark and the Church–State Separation' (1975) 8 *Journal of Religious History* 271.

[242] For instance, the debates during the Constitutional Conventions revealed a good understanding of the US case law of the time relating to the Religion Clauses. Further, the Seventh-day Adventist Church, which lobbied strongly for such a clause in the Australian *Constitution*, was a denomination that originated in the USA, had American leaders and fitted into the dissenting Protestant evangelical mould of churches that lobbied in the US for freedom of religion protections. In the major study of the history of s 116 by Richard G Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891–1906* (1976), he attributes the momentum behind a religious freedom clause to the lobbying by Seventh-day Adventists. They kept Friday sunset to Saturday sunset as their Sabbath on which they did not work, and were afraid of Sunday observance laws being imposed in Australia which would restrict their ability to work then as well. Their fear stemmed from attempts in the USA in the 1880s to impose laws prohibiting people from working on Sunday and these efforts had gained encouragement from recent decisions, such as the Supreme Court decision in the *Church of the Holy Trinity v United States* 143 US 457 (1892), where it was said that USA was a Christian nation. There were particular fears resulting from the reference to God in the preamble of the proposed *Constitution*. Henry Higgins who proposed various provisions in s 116 subsequently took up the cause of the Seventh-day Adventists in the Conventions.

[243] See Stephen McLeish, 'Making Sense of Religion and the *Constitution*: A Fresh Start for Section 116' (1992) 18(2) *Monash University Law Review* 207; *DOGS case* (1981) 146 CLR 559 per Mason J at 615–7; Joshua Puls, 'The Walls of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 (1) *Federal Law Review* 139. This was partly based on Andrew Inglis Clark's comment on the relevant clause in his 1891 draft of the *Constitution* providing that the states could not prohibit the free exercise of religion. He said that that the clause provided for religious equality for all citizens so far as it prevented the states from placing adherents of any form of religion under any disadvantage or restriction in the exercise of it, when compared with adherents of other forms of religion: see Ely, *Unto God and Caesar,* above n 242, at 53.

rather than guaranteeing religious freedom,[244] though this does not necessarily preclude a right of freedom as well.[245] Ultimately, there is nothing that suggests that s 116 could not have been about both religious freedom and equality or that different people involved in enacting it might have had different motivations.

The religious freedom guarantee is clearer in the constitution of Tasmania, the only Australian state that has a constitutional provision dealing with freedom of religion. This speaks of freedom of religious conscience as "guaranteed" to citizens.[246] The recent religious freedom clauses in the bills of rights legislation in the Australian Capital Territory ("ACT") and Victoria[247] are also modelled on the style of the *ICCPR* clause, so are clearly within the human rights model.

4.2.2 Protection of Private Autonomy from Government Interference

As mentioned above, in Lockean philosophy rights were those private aspects which were not ceded to the state. Such views also came to represent one significant understanding of human rights at an international level in the 20th century which gave rise to the Canadian and New Zealand provisions.[248] Within the liberal rights discourse, religious freedom in particular is seen as an area of private autonomy and protected as such.[249] The theory is that people are able to determine for themselves what truth or

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[244] *DOGS case* (1981) 146 CLR 559 especially Stephen J at 605 and Mason J at 616–7, who said it was more about religious equality than liberty. See also quotes at note 238 above.

[245] See n 241 above in which Inglis Clark is also said to have favoured a guarantee of liberty. This suggests that he did not see the ideas as mutually exclusive.

[246] Section 46(1) of the *Constitution Act 1934* (Tas) reads: "*Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen".*

[247] The Australian Capital Territory ("ACT") *Human Rights Act 2004* has a provision dealing with freedom of religion in s 14 as follows:

"(1) Everyone has the right to freedom of thought, conscience and religion. This right includes:

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.

(2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching."

The *Charter of Rights and Responsibilities 2006* (Vic) in s 14 has very similar provisions.

[248] See Steiner and Alston, above n 68; Maleiha Malik, 'Minority Protection and Human Rights' in Tom Campbell, Keith D Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001) discussing the European Convention. Mary Ellen Turpel, 'Aboriginal Peoples and the *Canadian Charter*, Interpretive Monopolies, Cultural Differences' (1989–90) 6 *Canadian Human Rights Year Book* 3 believes that this is the paradigm operating under the *Canadian Charter*. See also van Boven, above n 232, who speaks of the individualistic nature of Western human rights thinking in relation to the *ICCPR* and the *Universal Declaration of Human Rights*.

[249] Evans, writing of the European religious freedom laws, has argued for the purpose of religious freedom as being about creating self-identify and living autonomously: Carolyn Evans, *Freedom of Religion,* above n 16. In *Alberta v Hutterian Brethren of Wilson Colony* [2009] SCC 37, the Canadian Supreme Court recently emphasised that religious freedom revolves around the notion of personal choice and individual autonomy, at [88]. This, however, can encourage a view of religion as belonging in the private sphere: see Gedicks, 'Religious Group Rights', above n 109, whose analysis is that religion is protected under the US First Amendment as "religion" only when it is private, but otherwise tends to be protected as something else, like freedom of speech. Christopher L Eisgruber and Lawrence G Sager, in 'Equal Regard' in Stephen M Feldman (ed), *Law and Religion: A Critical Anthology* (2000), argue that religious activity

"good" is.[250] This is consistent with the Rawlsian style of procedural liberalism which posits a model in which individuals are able to pursue their own concept of the good within their private or "background" sphere, but not impose it on others in the public sphere.[251]

Human rights in the West have so far accordingly been framed as rights of individuals,[252] in line with a view of the protection of private autonomy. Religious freedom has as well,[253] and seen in this context is very much about what individuals may believe or do themselves; in other words, it primarily protects their religious autonomy, causing the limitations outlined in Chapter 6.

In more recent times there have been moves to articulate Indigenous human rights in a way that is aimed at cultural survival, which requires protection of land and sites and not merely private autonomy. These alternatives are examined in Part D. However, as

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should be protected *because* it is private, not because it is religious. Abner S Greene, 'The Incommensurability of Religion' in Stephen M Feldman (ed), *Law and Religion: A Critical Anthology* (2000) argues too that religion should be seen as a ground of private decision-making but not of law, which must be run on the basis of secular justifications. Justice O'Connor, who has pronounced key judgments on religious freedom in the US Supreme Court, has specifically referred to a commitment to preserving a private sphere for individuals and churches to pursue their beliefs free of government intrusion and coercion: Sandra Day O'Connor, 'Religious Freedom: America's Quest for Principles' (1997) 48 *Northern Ireland Law Review Quarterly* 1. See also references to private autonomy in Robert N Bellah, 'Cultural Pluralism and Religious Particularism' in Henry B Clark, *Freedom of Religion in America* (1982); Berman, *Faith and Order,* above n 99; Marie A Failinger, 'Wondering after Babel: Power, Freedom and Ideology in US Supreme Court Interpretations of the Religion Clauses' in Rex J Ahdar (ed), *Law and Religion* (2000); Malcolm Evans, 'The United Nations and Freedom of Religion: The Work of the UN Human Rights Committee' in Rex J Ahdar (ed), *Law and Religion* (2000); Sophie C van Bijsterveld, 'Religion, International Law and Policy in the Wide European Arena: New Dimensions and Developments' in Rex J Ahdar (ed), *Law and Religion* (2000); Monsma and Soper, above n 76; Paul Horwitz, 'The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond' (1996) 54(1) *University of Toronto Faculty of Law Review* 1; Martin Loughlin, 'Rights, Democracy and Law' in Tom Campbell, Keith D Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001).

[250] See Richards, above n 229; Underkuffler-Freund, above n 99; Malik, 'Minority Protection', above n 248; Gaze and Jones, above n 16. Drinan framed it as a person being entitled to embrace their own conception of life without it being imposed by governments: Drinan, above n 16.

[251] See expansion of this in 2.2.2 above.

[252] As late as June 1993, the *Vienna Declaration,* above n 16, declared that all human rights derive from the dignity and worth inherent in the human person and that the human person is the central subject of human rights and fundamental freedoms and consequently should be the principal beneficiary. The majority of the Canadian Supreme Court in *Alberta v Hutterian Brethren of Wilson Colony* [2009] SCC 37 at [31] confirmed this was the case under the *Canadian Charter* provisions relating to freedom of religion. Many other writers also accept that the Western model of human rights is based on individual rights: see Steiner and Alston, above n 68; Glendon, above n 136; Guinn, *Faith on Trial,* above n 16; Gaze and Jones, above n 16; van Boven, above n 232; Turpel, above n 248; Kapashesit and Klippenstein, above n 11; Jackie Hartley, 'Indigenous Rights Under the *Human Rights Act 2004* (ACT) and the *Charter of Rights and Responsibilities Act 2006* (Vic)' (2007) 11(3) *Australian Indigenous Law Reporter* 6; Megan Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 11(3) *Australian Indigenous Law Reporter* 55. See also Stephen D Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995) discussing Locke's image of society composed of self-sufficient individuals.

[253] Bellah, 'Cultural Pluralism', above n 249; Donald A Gianella, 'Religious Liberty, Non-establishment and Doctrinal Development, Part I' (1967) 80 *Harvard Law Review* 1381; Horwitz, above n 249; McConnell, 'Origins', above n 68; Howard J Vogel, 'The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land' (2000–1) 41 *Santa Clara Law Review* 757; Jay A Sigler, *Minority Rights: A Comparative Analysis* (1983); Howard M Friedman, 'Rethinking Free Exercise: Rediscovering Religious Community and Ritual' (1993–4) 24 *Seton Hall Law Review* 1800.

will be seen in this Part, the laws of the four countries have not yet demonstrated this change in philosophy as far as protection of Indigenous sacred places is concerned.

4.2.3 What is Religion and Religious?

Consistent with the notion of religion belonging to the realm of private autonomy that should not be interfered with by the secular state is a view that public institutions, like courts and governments, have no role in determining what is a valid religion or belief. In such a world-view, religion may be a personal idiosyncrasy as people are free to believe whatever they want in their private sphere. This attitude sits alongside the very expansive approach taken by the courts on what qualifies as a religion. Despite earlier narrow definitions,[254] courts in the USA[255] and Australia[256] have now adopted generous indicia to measure whether belief systems are a religion. It is even less of an issue in Canada and New Zealand as their legislation refers not only to religion but "belief" and similar broad approaches have been adopted.[257] On these indicia Indigenous beliefs should not have any difficulty in qualifying as religious. The Australian courts have given some qualified acceptance to Indigenous beliefs being included in the concept of religion.[258] There have been numerous cases in USA and Canada where Indigenous

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[254] In an early US Supreme Court decision, the view of what was religious appeared only to be those religious beliefs the court found acceptable, with other beliefs that seemed more distasteful (such as polygamy or human sacrifice) being described as only "pretending" to be religious: see *Late Corporation of the Church of Latter Day Saints v US* 136 US 1 (1890) at 49–51 where the Supreme Court characterised polygamy by Mormons, along with assassination by Thugs in India, suttee by Hindu widows and human sacrifice in early Britain as "purporting" to be religious beliefs, but were "a pretence" and it was said that thinking they were religious did not make them so.

[255] In USA, the Supreme Court has accepted that religion could include "a sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by the orthodox belief in God" per *US v Seeger* 380 US 163 (1965) at 164, or "deeply held moral, ethical or religious beliefs", as in *Welsh v United States* 398 US 333 (1970) at 342–3.

[256] In Australia, the leading case of *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, (the "*Scientology*" case) did not put forward a single definition of religion but offered approaches ranging from "first, belief in a supernatural Being, Thing or Principle; and, second, the acceptance of canons of conduct in order to give effect to that belief" (Mason and Brennan JJ at 136–141), to indicia such as belief in the supernatural, that reality extends beyond what is capable of perception by the senses, ideas that relate to one's place in the universe and things supernatural; adherents constituting an identifiable group, acceptance of canons of conduct, participation in specific practices that have supernatural significance (per Wilson and Deane JJ at 173–4), to any body which claims to be religious and whose beliefs or practices resemble earlier cults or which believe in a supernatural being or beings or offers to find meaning and purpose in life (per Murphy J at 151). In the earlier leading case of *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, at 123–4, Latham CJ said that one could not devise a definition of religion and that s 116 had to operate in respect of all aspects of religion, irrespective of varying community opinions as to truth or goodness of conduct or propriety. He confirmed too that it protected the right to have no religion and that s 116 was required to protect unpopular minorities.

[257] Similar indicia to Wilson and Deane JJ have been set out in Canada in *Syndicat Northcrest v Amselem* 241 DLR (4th) 1, 22 and in New Zealand in *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673, 693, 697.

[258] In the Australian "Stolen Generations" case of *Kruger v Commonwealth* (1996) 190 CLR 160, the High Court did leave open the issue of whether there was a religion in that case as it did not need to decide that question. In that case, Gaudron J said that she could not decide if the Aboriginal beliefs were religious, at 208–210. Gummow J, however, suggested that Aboriginal religions were included in s 116, at 232–3. In the *Scientology case* Murphy J said that Aboriginal religion had to be included in the category of religions:

religions were said to qualify under the freedom of religion provisions.[259] Consistent with the wide definitions of religion, most of the sacred place cases in all of the countries have found or assumed that the Indigenous beliefs in question did amount to religious beliefs.[260]

The view of religion as personal and idiosyncratic has also meant that the courts have eschewed any role in determining orthodoxy or validity of beliefs, the only test being the sincerity of each believer. There has been a generally accepted view, in USA and Canada in particular, which recognises that it is inappropriate for courts to decide matters of religious controversy or doctrine or to determine religious freedom claims on the grounds of religious orthodoxy.[261] It is likely that such a view will be followed in

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Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120, 151, and this comment was referred to favourably as well by Kirby J in *Western Australia v Ward* (2002) 213 CLR 1 at [586], though he said that the full significance of s 116 had not yet been explored in relation to Aboriginal spirituality. The National Native Title Tribunal in *FMG Pilbara Pty Ltd/Ned Cheedy and Ors on behalf of the Yindjibarndi People/Western Australia* [2009] NNTTA 91 accepted that Aboriginal beliefs could qualify as a religion for s 116 and this was not questoned on appeal in *Cheedy v State of Western Australia* [2010] FCA 690. The inclusion of Aboriginal beliefs as religions was also recommended by the UN Special Rapporteur: Abdelfattah Amor, *Report in Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Addendum: Visit to Australia*, UN Doc E/CN.4/1998/6/Add.1 (1 September 1997).

[259] See US cases such as *Frank v Alaska* 604 P 2d 1068 (Alaska, 1979) (concerning the hunting of moose out of season for an Athabascan potlatch ceremony); *People v Woody* 394 P 2d 813 (Cal, 1964) (concerning the use of peyote in the Native American Church); *Teterud v Gillman* 385 F Supp 153 (SD Iowa, 1974) and *Teterud v Burns* 522 F 2d 357 (8th Cir, 1975) (concerning the requirement to wear one's hair long); *US v Abeyta* 632 F Supp 1301 (DNM, 1986) (concerning eagle feathers); and Canadian cases such as *Bearshirt v The Queen* [1987] 2 CNLR 55 (where depriving a First Nations prisoner of a prayer bundle and objects were found to infirnge religious freedom rights in s 2(a) of the *Charter*); *Thomas v Norris* [1992] 2 CNLR 139 (where religious freedom claims were not raised in a case involving assault and false imprisonment of a Coast Salish person forced to participate in a ritual, but the Court suggested that common law religious freedom rights might have applied). See too comments by Jack Woodward, *Native Law* (1989) at 339.

[260] This was accepted, for example, even in the unsuccessful cases: see US Court of Appeals in *Badoni v Higginson,* 638 F 2d 172 (10th Cir, 1980); at both levels of courts in *Sequoyah v Tennesee Valley Authority,* 480 F Supp 608 (ED Tenn, 1979) and 620 F 2d 1159 (6th Cir, 1980); in *Hopi Indian v Block,* [1981] US Dist Lexis 18421 (DDC, 1981); *Wilson v Block,* 708 F 2d 735 (DC Cir, 1983); *Crow v Gullet,* 541 F Supp 785 (DSD 1982); *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988); *US v Means,* 858 F 2d 404 (8th Cir, 1988); *Manybeads v US,* 730 F Supp 1515 (D Ariz, 1989); *Attakai v United States,* 746 F Supp 1395 (D Ariz, 1990); *Havasupai Tribe v US,* 752 F Supp 1471 (D Ariz, 1990); *McCrady v Ontario* (1993) 61 OAC 286, March 1993; *Cameron v Ministry of Energy and Mines* [1998] CanLII 6834; *New Zealand Underwater Association v Auckland Regional Council and Ports of Auckland Ltd* (Unreported, Planning Tribunal, A131/91, 16 December 1991). It was assumed for the purposes of the argument in the Australian cases, *Aboriginal Legal Rights Movement v South Australia (No 1)* (1995) 64 SASR 551, *Kruger v Commonwealth* (1996) 190 CLR 160 and *Cheedy v State of Western Australia* [2010] FCA 690. Naturally, it was accepted in the few successful religious freedom cases.
This does not, however, mean that it is not still questioned in influential circles. As mentioned in 1.2 above, it is only in relatively recent times that Indigenous beliefs were regarded as religious and beyond mere "heathenish superstition". However, we have also seen questions raised by commentators from time to time about whether such beliefs do in fact qualify: for example, in Max Harris, 'Selling Suckers Sacred Sites', Bulletin Magazine, 16 September 1980, 31–32, Harris argued that Indigenous beliefs were animist and this was not an organised religion.

[261] Such as in *Watson v Jones* 80 US 679 (1872) at 728, where it was said that "the law knows no heresy," and in *Kedroff v St Nicholas Cathedral of Russian Orthodox Church in North America,* 344 US 94 (1952) and *Serbian Eastern Orthodox Diocese v Milivojevich,* 423 US 696 (1976) where the US Supreme Court held that the courts should not be deciding disputes over religious laws or doctrines. Jackson CJ, delivering the opinion of the Court in *West Virginia State Board of Education v Barnette* 319 US 624 (1943) at 642, said "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in … religion or other matters of opinion." In the Canadian case of *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, at 24, the Court said, in relation to a debate between rabbis about the mandatory nature of a succah, that conformity of the belief to official dogma was

Australia as well.[262] This would be logical given the individualistic nature of the concept of rights to religious freedom. In *Fowler v Rhode Island,[263]* the US Supreme Court noted that it is no business of the courts to say that what is a religious practice or activity for one group is not a religion under the protection of the First Amendment. In *Thomas v Review Board,*[264] the US Supreme Court said that resolution of the question of whether a belief was religious was not to turn upon a judicial perception of the particular belief or practice in question and religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection. In Australia, Chief Justice Latham in the leading *Jehovah's Witness* case outlined the difficulties of defining religion and noted that what is a religion to one person is mere superstition to another. He concluded that it was not for court on some a priori basis to disqualify certain beliefs as incapable of being religious in character.[265] These matters are simply beyond judicial expertise or in fact the expertise of anyone outside the religion in question. This approach is also a recognition of the danger that any prescription of orthodoxy inevitably imposes a judge's personal doctrinal view. The result of this conclusion is that one needs to defer to what an individual says is their religious belief as there is no legitimate test as to the validity of its content.[266] These views were all affirmed by the US Supreme Court in rejecting the doctrine of centrality discussed later in Chapter 8. This view of the subjectivity of religious belief is contrasted in Part C with the way the heritage law is treated.[267]

Wide views of what constitutes a religion and the non-justiciability of a religion's validity obviously leave a beneficially wide scope within that sphere of private autonomy. This is a two-edged sword for minority religions. On the one hand, a flexible view of religion may be very helpful for minorities and it may be very appropriate for courts to avoid deciding religious controversies. At the same time, however, there is no recognition of

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irrelevant and the Court was not an arbiter of religious doctrine. It was said that the *Charter* stresses the subjective aspect of the believer's personal sincerity rather than the objective aspect of the conformity of the beliefs with established doctrine, and what must be proven is the sincerity of a belief, not that the belief is valid. In *Multani v Commission Scolaire Margueritte-Bourgeoys* [2006] SCC 6, a Sikh student's freedom of religion was found to be infringed by not allowing him to wear a metal dagger-like kirpan, even though other Sikhs had compromised by wearing non-metal versions. See also comments in Perry, *Religion in Politics,* above n 224. By way of comparison, the courts in the United Kingdom have taken similar views: see the House of Lords decision in *Williamson v Secretary of State* [2005] AC 246 especially at [22]–[23], [57].

[262] See also the High Court in *Nelan v Downes* (1917) 23 CLR 546 which said that all religions were equal and the Court could not say that any doctrines, such as the celebration of masses for the soul of the deceased, were superstitious but that it had to decide the spiritual efficacy and benefit of the action according to the doctrines of the religion, per Barton J at 562, Isaacs J at 568, Powers J at 572–3. In *Christian Family Schools Association v Public Transport Corporation* (1990) EOC 92-300, the Tribunal accepted that what counted was that the complainant had a religious belief that he had to educate his child at home, even though other members of the same religion did not have such views.

[263] 345 US 67 (1953) at 70.

[264] *Thomas v Review Board,* 450 US 707 (1981) at 714–6.

[265] *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 at 123-4.

[266] Underkuffler-Freund, above n 99; Galanter, above n 99.

[267] See Chapter 17.

such religions as legitimate or of particular value in the public interest, especially when compared with “secular” values.[268] A religion is unable to be tested because it is seen as subjective and irrational.[269]

This is demonstrated by the corollary to the philosophy of protecting private subjective autonomy; the argument for religious freedom is seen not to apply where activities are classified as being typically outside the private sphere.[270] When activities can be described as secular activities (for example, commercial or subsistence ones) in which non-religious people engage and which are normally covered by government regulation in the public sphere, it is assumed, arising from the division of spheres, that the secular is thus not religious. The deference to personal opinion and belief about the religious nature of the activity tends to disappear and objective tests are imposed to determine whether something is in fact to be classed as secular. This problem is addressed in Chapter 7 where certain activities may be considered to be secular, thus outside the autonomous private self and outside the protection of religious freedom, even though in the Indigenous world view they may all be religious and related to the sacredness of a place.

4.2.4 Freedom from Coercion of Conscience and Belief

One of the key emphases in the protection of religious freedom was the protection of the individual conscience.[271] A major impetus for religious freedom that came in the 18th century was a response to religious persecution in Europe. This was significant in the founding of the USA[272] and, while it may not have been as significant in the

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[268] See, for instance, Monsma and Soper, above n 76 who refer to the secular ethos being favoured by default in the USA. See also Bradley, above n 83; Carter, *Culture of Disbelief,* above n 22.

[269] See Sherry, above n 83, on faith as that which does not rely on reason and which relies on sources of knowledge inaccessible to others who are not of the same faith. In Gedicks, ‘Hostility to Religion’, above n 22, he concluded that liberalism privileges the secular by naming public life as rational and the private life as irrational and chaotic. A similar criticism was made in Fish, above n 63. See also Machado, above n 76.

[270] Malcolm Evans has described the UN Human Rights Committee approach, for instance, as a broad view of what is a religion but a narrow view of what is a manifestation: Malcolm Evans, above n 249. See also Carolyn Evans, ‘Religious Freedom in European Human Rights Law: The Search for a Guiding Conception’ in Mark W Janis and Carolyn Evans (eds), *Religion and International Law* (1999). This appears to be a similar approach as what will be seen in the four countries. See also Horwitz, above n 249.

[271] See Underkuffler-Freund, above n 99; Failinger, above n 249; James E Wood, ‘The Relationship of Religious Liberty to Civil Liberty and a Democratic State’ (1998) 2 *Brigham Young University Law Review* 479; Sandel, *Democracy’s Discontent,* above n 73; Drinan, above n 16; von Heyking, above n 76; Machado, above n 76.

[272] A significant number of the first European settlers in the US migrated to escape persecution and religious wars in their home countries. This led to the image of a country offering asylum to the persecuted and oppressed. Madison, *Memorial and Remonstrance,* above n 65, referred to this policy as promising “a lustre to our country”. This narrative has found its way into government and parliamentary reports as the motivation for religious freedom in the US, such as in the report by the US Department of the Interior, *AIRFA Report*, above n 8, and in the US Congress, Senate, *Religious Freedom Restoration Act, Sen Report No 103-111*, 103rd Congress (1993), 1993 USCCAN 1892. It was also noted in US Supreme Court in *Everson v Board of Education,* 330 US 1 (1947) and still referred to, for example, by Souter J delivering

founding of the other three countries, they would have had this European understanding of what religious freedom and persecution were.[273] Persecution was based primarily on people's beliefs or formal religious affiliations, though it extended to some direct manifestations of that belief and affiliation, such as the kind of church and worship service people attended.[274] The persecution was designed to compel people to conform to a set of beliefs and devotional practices. It was this compulsion that was believed to be improper. The key argument was put that it was improper because individual *consciences* should not and could not be compelled.

One leading articulation of this aspect of religious freedom came from John Locke in his *Letter concerning Toleration*[275] where he said that "true religion" required the "inward and full persuasion of the mind" and faith was not faith without such belief. His view was that it was not possible to compel anyone to accept a religion and God had not given anyone authority to do so. The emphasis on individual conscience naturally picks up and complements those strands of Western Christianity which emphasise private conscience.[276] James Madison put a different slant on the purpose of the freedom as being to protect the eternal welfare of individuals, as it was believed to be too unfair to put pressure on people to disobey what they believed was a command from a higher power.[277] While this differed somewhat from Locke's emphasis, it was still about not forcing people to act against the dictates of their beliefs and the emphasis was on the conscientious aspect of religion. This idea of religious freedom as primarily a protection from compulsion of the individual conscience has continued to recent times, as demonstrated in a leading Canadian judgment on religious freedom.[278] As

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the opinion of the Supreme Court in *McCreary County v American Civil Liberties Union of Kentucky,* 545 US 844 (2005) at 876.

[273] In *R v Big M Drug Mart* (1985) 18 DLR (4th) 321, at 360–1, for instance, Dickson J in the Supreme Court of Canada placed the freedom of religion in its historical context of the struggles for religious freedom in post-Reformation Europe.

[274] Though these too could be seen as what people themselves chose to do in their private time and in their own or their religious group's private space.

[275] Locke, *Letter Concerning Toleration,* above n 63. As discussed in Chapter 2, this expounded on the separation of the business of the state and religion as a means of ensuring the end to such compulsion.

[276] See Derek Davis, above n 99, who argued for separation of church and state on the basis that religion is, of its nature, a personal private interior matter of individual conscience, having no relevance to the public concerns of the state. See also Chapter 2.

[277] Madison said that the duty owed to God took precedence over the claims of civil society and an abuse of the freedom of religion was an offence against God: Madison, *Memorial and Remonstrance,* above n 65, 66–70. This view was also put by Evangelical Protestant minority groups pushing for a constitutional right to religious freedom for religious reasons and who had an influence on James Madison: see Michael McConnell, 'Taking Religious Freedom Seriously' in Terry Eastland (ed), *Religious Liberty in the Supreme Court* (1993) at 497; McConnell, 'Origins'; above n 68, at 1446, 1477. See also Timothy Hall, above n 68. The rationale of a need to obey a higher law than those imposed by secular governments was also mentioned in Gianella, above n 253, at 1386; Sandoz, above n 229; McConnell, 'Origins'; above n 68.

[278] In the key judgment in the Canadian Supreme Court decision in *R v Big M Drug Mart* (1985) 18 DLR (4th) 321 at 360–1 Dickson J said that from the European experience people came to realise that belief, based on the individual conscience, is not subject to human compulsion. He said that the *UN Charter* was based on the notion of the centrality of individual conscience and the inappropriateness of government intervention to compel and constrain its manifestation. He thought it was easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivated such protection. See critique of this in von Heyking, above n 76.

discussed below, there are grounds for arguing that the international instruments did not have such a narrowly privatised view of religion[279] but the results in Indigenous cases have not departed to any significant extent from that narrow position.

The reason for religious freedom in the four countries has since moved away from the Madison formulation to emphasise not so much freedom to obey a divine law but more secularly-framed notions of freedom of choice.[280] This fits in with the private autonomy notion discussed above. Choice is just as much an internalised private sphere matter as religious belief or conscience, though with the added disadvantage of being identified as a voluntary preference.[281] In this scenario, religion easily becomes an idiosyncrasy[282] to be tolerated, but only as long as it does not impact on the interests of the majority to any significant extent. Such religious values are not likely to hold much weight in any balancing against "secular" interests like the interests of economic development.

When the jurisprudence sees the essence of religious freedom as freedom from coercion of the conscience or choice, this causes difficulties where the damage is only to sacred places and does not manipulate or place pressure on the individual believer's conscientious choices. This problem is highlighted in Chapter 9 in cases where coercion of the conscience was used as a key element to deny protection to Indigenous places.

[279] This argument has been put in general terms by W Cole Durham, 'Perspectives on Religious Liberty: A Comparative Analysis' in Johan D van der Vyver and John Witte Jr (eds), *Religious Human Rights in a Global Perspective: Legal Perspectives* (1996), who discusses the extension of the freedom in international documents to public settings, though he acknowledges the limitations. Others have argued that the international approach still has an emphasis on the internal realm: see for example, Carolyn Evans, 'Religious Freedom in European Human Rights Law' above n 270. This issue is discussed in later chapters.

[280] See Sandel, 'Religious Liberty', above n 91, arguing that the US courts have moved to this position whereas the original arguments of people like Madison did not see religion as a matter of voluntary choice. In the US Department of the Interior, *AIRFA Report*, above n 8, it was reported that the Western tradition of religious freedom is largely based on the principle of individual choice. There is a more detailed analysis of this in Gedicks, 'Hostility to Religion', above n 22. In Canada, von Heyking has argued that the courts have created a secularised version of religious freedom which is as a matter of private and arbitrary choice: von Heyking, above n 76. Similar views are found in Sandel, *Democracy's Discontent,* above n 73; Rex J Ahdar, 'The Inevitability of Law and Religion: An Introduction' in Rex J Ahdar (ed), *Law and Religion* (2000); Failinger, above n 249; Horwitz, above n 249.
The component of personal choice to follow one's religious beliefs and practices was emphasised in the majority decision of the Supreme Court in Canada in *Alberta v Hutterian Brethren of Wilson Colony* [2009] SCC 37 at [88]–[98].

[281] This is suggested too by Failinger, above n 249; Bradley, above n 83; von Heyking, above n 76. Casanova has argued that religion, like moral virtue, has become a matter of taste: Casanova, above n 49.

[282] Various commentators have criticised this characterisation of religion as an arbitrary choice which thus down-plays the social and communal aspects of religion: see, for instance, von Heyking, above n 76; Bradley Miller, '*Brillinger v Brockie*, Case Comment' (2000) 33(3) *University of British Columbia Law Review* 829; Carter, *Culture of Disbelief,* above n 22; Harold Berman, 'Religious Freedom and the Challenge of the Modern State' (1990) 39 *Emory Law Journal* 149; Fish, above n 63. Bradney, above n 103, said that religious belief is commonly regarded in British society as a minor hobby like stamp collecting or playing squash. He notes how courts have treated such views as irrational and obdurate and considered evidence of a failure to live in an acceptable manner. See similar views in Malik, 'Faith and the State of Jurisprudence', above n 80.

4.2.5 Religious Non-discrimination and Neutrality

Apart from the model of religious freedom as a human right, there has always been at least one different version in Australia, towards which the US Supreme Court has swung in more recent times.[283] This model sees the religious freedom provisions as being essentially about non-discrimination and equality or neutrality rather than about a substantive liberty right.[284] It has also been framed in terms of not using religion as a classification for imposing privileges or disadvantages.[285]

The legal result flowing from the rhetoric of non-discrimination and neutrality, however, has been to focus on the purpose and intent of the legislation. The aim of such provisions is to prevent governments from passing legislation which is *aimed at* adversely affecting religion or a particular brand of religion. Neutral laws on public sphere topics are acceptable as long as they do not seek to intrude on the impermissible private area of religion. The examples of this jurisprudence are discussed in Chapter 10.

[283] See Douglas Laycock, 'Free Exercise and the Religious Freedom Restoration Act' (1994) 62 *Fordham Law Review* 883; Greene, above n 249. See also Chapter 10.

[284] See contrasts drawn between non-discrimination and the human right of religious freedom in Laycock, 'Free Exercise and *RFRA*', above n 283; Greene, above n 249; Evans and Gaze, above n 50. For a discussion of one way in which freedom of religion could be equated with non-discrimination, see Eisgruber and Sager, above n 249.

[285] For instance by Kurland, an advocate for this way of understanding the Religion Clauses, in Philip Kurland, 'Of Church and State and the Supreme Court' (1961) 29 *University of Chicago Law Review* 1.

Chapter 5 – Overview of the Relevant Religious Freedom Provisions

5.1 Overview of the Religious Freedom Laws in Each of the Countries and the History of Religious Freedom Laws Specific to Indigenous Sacred Places

This chapter discusses the various general religious freedom laws found in the four countries, and provides an overview of how those laws and any Indigenous-specific legislation based on a religious freedom model have impacted on Indigenous sacred places. This sets the historical and legal context for the discussion of the specific principles that occupies the remaining chapters in this part.

The USA is the country where the concept of religious freedom has been held to most firmly and thus used most in relation to Indigenous sacred places, in both legislation and case law. The extensive religious freedom litigation has produced a confused but developed jurisprudence that has seen many shifts and continues to do so. While most of these have not been helpful in the protection of such places, the expansiveness of the religious freedom jurisprudence and the shifting political contexts have meant that courts have had to wrestle with and develop principles for dealing with the unusual situation of Indigenous sacred places. Such principles are a useful revelation of the legal problems that flow from a notion of religion as a "private sphere" matter.

By contrast, the Australian jurisprudence in relation to its main Commonwealth constitutional provision[286] has always been much narrower, thus has not been used much in litigation to protect Indigenous places, except in a round-about way. The lack of a culture, similar to the USA, of rights relating to religious freedom has also meant that the legislation dealing with Indigenous sacred places has not been set in the religious freedom context but rather in the context of the heritage model discussed in Part C. This may be because religion in Australia has generally had a lower profile.[287] However, the principles developed for religious freedom have still been consistent with one particular privatised view of the place of religious freedom.

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[286] There is little case law on the state and territory religious freedom provisions, mentioned in 5.3 below, and none relating to Indigenous sacred places so no relevant jurisprudence has developed.

[287] Marion Maddox for instance notes that religion has seldom been regarded as an interesting dimension of Australian national life. She also notes that there has only been very modest literature on the High Court cases on protection of religious freedom: see Maddox, *For God and Country,* above n 12. This is evident from the relative lack of cases and legal literature relevant to religious freedom. See also similar conclusions by Coleman and White, 'Negotiating the Sacred', above n 76.

Canada, New Zealand and Victoria and the Australian Capital Territory in Australia have more expansively worded provisions for religious freedom and, on the face of the legislation, have scope to develop a wider application of these for Indigenous places, but so far the cases have revealed similar narrow tendencies to the overall Australian picture. Each country is summarised below in the following sections.

5.2 USA

5.2.1 The General Religious Freedom Provisions

First Amendment

The key Religion Clauses are found in the First Amendment in the Bill of Rights section of the *US Constitution*.[288] The First Amendment[289] reads:

> "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;* or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[emphasis added]

The first part of the Religion Clauses prohibits establishment of religion ("the Establishment Clause")[290] and the second ("the Free Exercise Clause") prohibits restraint on the free exercise of religion.

There have been considerable shifts in US religious freedom jurisprudence. In early cases, religious freedom was narrowly construed as concerning only beliefs rather than actions.[291] A major growth came with the Supreme Court's extension of the protection both to religious activities and to actions of the states in the 1940s[292] and the zenith of

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[288] The US *Constitution* was drafted in 1787 and finally ratified in and effective from 1788. The Bill of Rights was added by way of series of amendments and came into effect in December 1791. For concise summaries of the history of the Bill of Rights see Ariens and Destro, above n 64; Saul K Padover, *The Living US Constitution*, (2nd revised ed by Jacob W. Landynski, 1982); Carl J Friedrich and Robert G McCloskey, *From the Declaration of Independence to the Constitution* (1954).

[289] The Religion Clauses are those in italics. There is also another provision relavant to religious freedom (but not to this thesis) in Art VI (3) of the US Constitution that provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States".

[290] See 5.2.3 below.

[291] Typified by the early Mormon cases where the state was held to be justified in banning polygamy and carrying out consequential penalties against the church: see *Reynolds v United States,* 98 US 145 (1878) and *Davis v Beason,* 133 US 333 (1889).

[292] Typified by cases like *Cantwell v Connecticut,* 310 US 296 (1940), where the court overturned convictions of Jehovah's Witness members for soliciting in public and expanded the protection of religious

an expansive interpretation was reached in the 1960s to 1970s with the development of a "strict scrutiny" standard.[293] Under the strict scrutiny standard, the first test was to ascertain whether there was an infringement or burden on religious exercise.[294] If so, there was then to be "strict scrutiny" to determine whether there was any compelling state interest to justify the infringement or burden and to assess whether the means to achieve that compelling interest was the least burdensome to the religious exercise. The jurisprudence took another turn in the 1980s and 1990s to narrow the applicability of the Free Exercise Clause to situations of coercion[295] and later to laws that targeted or discriminated for or against religion instead of being neutral and generally applicable.[296] These shifts came about in some key Indigenous cases referred to in the next section.

The First Amendment contains no express provisions for limitations or justifications. Any limits to the rights provided for are found in the interpretation of the rights protected and thus in the jurisprudence developed.

The States

In addition to the Religion Clauses in the US *Constitution*, all fifty US states also have their own constitutions, almost all of which have express provisions about free exercise of religion, though some of these differ quite markedly in their wording and may well give rise to different results on religious freedom issues from some of the First Amendment principles.[297] However, as all Indigenous cases relying on the religious

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freedom to actions as well as beliefs as well as expanding protection to state actions by use of the Fourteenth Amendment.

[293] The high point was reached in Supreme Court decisions like *Sherbert v Verner,* 374 US 398 (1963) and *Wisconsin v Yoder,* 405 US 205 (1972) which enunciated the strict scrutiny test. *Sherbert* overruled unemployment benefit laws which denied unemployment benefits to a Seventh-day Adventist who had refused to work on the Sabbath, and in *Yoder,* the Supreme Court overturned the convictions of an Amish couple who would not send their children to school in breach of education regulations. Both cases concerned general laws with no specific religious aims.

[294] This component can also be divided into two separate steps, that is, a threshold step of whether the motivation is religious and then whether there is a burden. See, for example, analyses in Mark S Cohen, 'American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting' (1987) 85 *Michigan Law Review* 771 and James H Woodall, 'Note, American Indians and the First Amendment: Site Specific Religion and Public Land Management' [1987] *Utah Law Review* 673.

[295] In the case of *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988), discussed below and in depth at Chapter 9.

[296] In the case of *Employment Division, Department of Human Resources of Oregon v Smith,* 494 US 872 (1990). See 5.2.2 below and Chapter 10.

[297] Good discussions of some of the various state religion clauses can be found in Nicholas Miller and Nathan Sheers, 'Religious Free Exercise under State Constitutions' (1992) 34 *Journal of Church and State* 303; Angela Carmella, 'State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith* Jurisprudence' [1993] *Brigham Young University Law Review* 275. For a specific New York analysis, see David H E Becker, 'Free Exercise of Religion under the New York *Constitution*' (1999) 84 *Cornell Law Review* 1088.

These state religious freedom clauses are mostly found in the Articles entitled "Declaration" or "Bill" of Rights in the *Constitution*s. Some follow the US *Constitution* in terms of limits on power, eg Alaska Art 1 § 4, District of Columbia D.C. CODE ANN, Art 1 § 101; Florida Art 1 § 3, Hawaii Art 1 § 4, Indiana Art 1 § 3,

freedom model have all been brought under the federal *Constitution*, these state clauses are of limited relevance in this thesis to illustrate how the public–private distinction has played out for Indigenous sacred places.[298]

Effect of Breach

All the constitutional provisions protecting free exercise and those dealing with establishment have the effect of being supreme and overriding law that can invalidate government laws or actions which violate those provisions. There is, therefore, real practicality in relying on such provisions to challenge government permits or actions which may infringe religious freedom.

Other Statutes

In addition to the constitutional provisions outlined above, there have been some religious freedom statutes enacted at a federal level in response to narrow readings of the First Amendment, discussed in 5.2.2 below.[299] Some states have also enacted Religious Freedom Restoration statutes for similar reasons.[300]

5.2.2 Overview of Native American Legislation and Cases

The Early Cases and Legislation

Iowa Art 1 § 3, Louisiana Art 1 § 8, Montana Art 2 § 5, Oregon § 3, South Carolina Art 1 § 2. Some are even more limited in their specificity as to what is prohibited, eg Alabama § 3, Arizona Art 2 §12. Others are negatively worded, not just as limits on legislature but on anyone: eg Delaware Art 1 §1, Kansas Bill of Rights § 7, Kentucky Bill of Rights § 5, Arkansas Art 2 § 24, New Jersey Art 1 § 3, Pennsylvania Art 1 § 3, South Dakota Art 6 § 3, Utah Art 1 § 4, Wisconsin Art 1 § 18. McConnell has noted that some of these speak of freedom of religion in affirmative terms rather than just negative: McConnell, 'Origins'; above n 68. Examples of affirmative provisions, including those which affirm primarily freedom of worship rather than religion generally, are the Arkansas Art 2 §§ 24–25; California Art 1 § 4, Colorado Art 2 § 4, Connecticut Art 1 § 3, Georgia Art 1 § 1(3), Idaho Art 1 § 4, Illinois Art 1 § 3, Indiana Art 1 § 2, Maine Art 1 § 3, Maryland Declaration of Rights Art 36, Massachusetts Pt 1 Arts 2 & 3, Michigan Art 1 § 4, Minnesota Art 1 § 16, Missouri Art 1 § 5, Mississippi Art 3 § 18, Nebraska Art 1 § 4, Nevada Art 1 § 4, New Hampshire Pt 1 Arts 5 & 6, New Mexico Art 2 § 11, New York Art 1 § 3, North Carolina Art 1 § 13, North Dakota Art 1 § 3, Ohio Art 1 § 7, Oregon § 2, Pennsylvania Art 2 § 3, Rhode Island Art 1 § 3, Tennessee Art 1 § 3, Texas Art 1 § 6, Vermont Art 3, Virginia Art 1 § 6, Washington Art 1 § 11, West Virginia Art 3 § 15, Wyoming Art 1 § 18.

[298] One can only speculate as to whether they will follow the Supreme Court's attitude to the Religion Clauses, but space does not permit such speculation in this thesis.

[299] These are the *Religious Freedom Restoration Act 1993* and the *Religious Land Use and Institutionalised Persons Act 2000*. Some of the history of these is set out below at n 322 in section 5.2.2.

[300] These include Florida's *Religious Freedom Restoration Act of 1998*, FLA STAT §§ 761.01 to 761.05 (2009); Illinois' *Religious Freedom Restoration Act of 1998,* 775 ILL COMP STAT §§ 35-1 to 35-30 (2009); Rhode Island's *Religious Freedom Restoration Act,* RI GEN LAWS § 42-80.1 (2009); Texas' chapter on religious freedom enacted in 1999, TEX CIV PRAC & REM CODE §§ 110.001 to 110.012 (2010); Virginia's 2007-enacted section preserving religious freedom, VA CODE ANN § 57-2.02 (2008).

As outlined in Chapter 1, despite the First Amendment, there was a distinct lack of freedom to engage in Indigenous religious practices in the USA until changes came with the rise in Native American activism in the 1960s and 1970s.[301] This also saw the rise in lobbying to prevent damage to sacred places and the disruption of privacy and access to such places for religious ceremonies.[302] The result of the lobbying was the return of some sacred areas to Indigenous control.[303] In 1976, the Californian legislature took the lead on specific legislation to protect sacred sites in enacting the 1976 *Native American Historical, Cultural and Sacred Sites Act*.[304] This legislation prohibited public agencies and parties using or occupying public property or operating under a public licence and the like from interfering with the free expression or exercise of Native American religion as provided for in the US *Constitution* and the Californian *Constitution*.[305]

This new mood coincided with the most expansive period of the strict scrutiny test in religious freedom jurisprudence in the US Supreme Court referred to above.

The *American Indian Religious Freedom Act* and Task Force Report

All these moves to protect Native American religious freedom culminated in August 1978, when the US Congress enacted the *American Indian Religious Freedom Act* (*AIRFA*')[306] with virtually no opposition.[307] The *AIRFA* is a very short enactment, with a

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[301] See references in 1.2 above.

[302] See Ellen M W Sewell, 'The *American Indian Religious Freedom Act*' (1983) 25 *Arizona Law Review* 429, 431; Rex P Craven, 'The *American Indian Religious Freedom Act*: An Answer to the Indian's Prayer?' (1983) 29 *South Dakota Law Review* 131, 135.

[303] One of the most notable was the 1970 *Taos Blue Lake Act*, Pub L 91-550, 84 Stat 1437 (1970) [more properly called 'An Act to Amend Section 4 of the Act of May 31 1933 (48 Stat 108)'] to return the sacred Blue Lake area to the Pueblo de Taos tribe in New Mexico. The Senate report, US Congress, Senate, Committee on Interior and Insular Affairs, *Taos Indian Land Act, Sen Report 91-1345,* 91st Congress (1970), said the statute was motivated by the significance of the Blue Lake as the most sacred of shrines for the Pueblo de Taos.

[304] Codified as CAL PUBLIC RESOURCES CODE §§ 5097.9-991.

[305] While this aspect may have just been restating the constitutional law, the Act was more ground-breaking in the USA in its specific prohibitions on damages to sacred places, which is mentioned in Part C at 13.3.1.

[306] Senate Joint Resolution 102, Pub L 95-341. It has been codified in the US Code as 42 USC § 1996.

[307] This may well have been because of the perceived harmlessness of the statute. It was characterised at the time of its enactment by its sponsor in the House of Representatives, Rep Morris Udall, as merely a statement of policy "with no teeth". When President Carter signed it into law in August 1978, he too repeated that it was not to affect other laws nor override existing law but was only designed to prevent government actions that would violate the constitutional provisions of the First Amendment: Letter of 12 August 1978, included in the US Department of the Interior, *AIRFA Report*, above n 8. Summaries on the passage of the bill can be found in US Department of the Interior, *AIRFA Report*, above n 8; History of SJ Res 102, found at Library of Congress, *Congressional History Summary of Senate Joint Resolution 102* (*American Indian Religious Freedom Act*), Thomas <http://thomas.loc.gov>; Sewell, above n 302; Howard Stambor, 'Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni and the Drowned Gods' (1982) 10 *American Indian Law Review* 59; Sharon O'Brien, 'A Legal Analysis of the *American Indian Religious Freedom Act*' in Christopher Vecsey (ed), *Handbook of American Indian Religious Freedom* (1995), at 27; Barsh, 'Illusion' above n 9; Kristen L Boyles, 'Note, Saving Sacred Sites: The 1989 Proposed Amendment to the *American Indian Religious Freedom Act*' (1991) 76 *Cornell Law Review* 1117.

long preamble that acknowledged past infringements of freedom for Native American religions but identified this as being due to the lack of "a clear comprehensive and consistent federal policy" and to "lack of knowledge or the insensitive and inflexible enforcement of federal policies and regulations".[308] Amongst the infringements acknowledged was the denial of access to sacred sites required in Native American religions, including cemeteries, and interference with and even banning of their ceremonies.[309] The *AIRFA* declared that it was to be henceforth the policy of the United States to 'protect and preserve for American Indians their inherent right to freedom to believe, express and exercise their traditional religions', "*including, but not limited to, access to sites, use and possession of sacred objects and freedom to worship through ceremonials and traditional rites*" [emphasis added].[310]

Pursuant to the *AIRFA*, the Federal Agencies Task Force reported in August 1979.[311] The report outlined numerous instances of concerns about infringements on religious practices at sacred areas. Like the legislators, however, the Task Force thought that the problem was primarily one of ignorance of Native American beliefs, particularly due to the differences between Western and Native Americans religions. The major remedy proposed was for officers to be better informed.[312] The view seemed to be that the First Amendment was the only substantive law really needed.[313]

The First Set of Sacred Place Cases

In light of the encouraging signs from expanded Free Exercise jurisprudence in the 1970s and of the *AIRFA* and political mood of the 1970s, the first pieces of litigation concerning protection of Indigenous sacred places were launched in the late 1970s and early 1980s.[314] These cases concerned developments or management actions by

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[308] US Department of the Interior, *AIRFA Report*, above n 8.
[309] Ibid.
[310] At § 1. It required federal agencies to consult with Native American religious leaders, to evaluate their policies and practices to determine changes required and the President was to report back to Congress within the year on his evaluations and recommendations for legislation: § 2.
[311] US Department of the Interior, *AIRFA Report*, above n 8.
[312] The conclusion was that these problems were not due to any major theological barriers but a failure to appreciate the theoretical gulf between the different world views. The report has been criticised as oversimplifying and overdrawing the distinctions: see Michaelsen, 'Significance of the *AIRFA*', above n 152, at 106
[313] While the report indicated (at Executive Summary and at 59–66) that recommendations for legislative action had been developed for federal land use designations for Native American sacred sites, Native American religious use of site-specific lands, protection of sites against vandalism and non-tribally controlled excavations, no legislative amendments were forthcoming. The Task Force Report's optimistic view that the matter could be dealt with under existing laws has been accused of contributing to the burying of any hope of real legislative change: see Steven C Moore, 'Sacred Sites and Public Lands' in Christopher Vecsey (ed), *Handbook of American Indian Religious Freedom* (1995), at 88.
[314] These were:
Badoni v Higgnson, 455 F Supp 641 (D Utah, 1977) and, on appeal, at 638 F 2d 172 (10th Cir, 1980), concerning the Glen Canyon Dam built near the Rainbow Bridge in Utah that flooded the area, preventing ceremonies and "drowning gods" of the Navajo people;

federal authorities and were argued on the basis of the strict scrutiny principles and also on the basis of the *AIRFA*. The plaintiffs were to face a rude shock in the District and Circuit courts, which rejected the first sets of claims for a variety of reasons. In all the cases, the sincerity of the plaintiffs was not in issue nor was the fact that they had beliefs that qualified as religions. Instead, lines were drawn based on a whole gamut of differing thresholds to exclude the finding of a burden on religion, most of which are the subjects of Chapters 6 to 8[315] where it is argued that most of these are limitations drawn from a privatised view of religion.

Following this string of unsuccessful cases came a twist in the form of some successes for Native American plaintiffs.[316] Both sets of successful cases later went on appeal and were ultimately overturned in the leading Supreme Court judgment in ***Lyng v Northwest Indian Cemetery Protective Association****,* 485 US 439 (1988) ("*Lyng*"), in April 1988. This case posed a test in which there was no burden on religious practices without any coercion on people to act contrary to their religious beliefs, a test that this thesis argues to also be reflective of a privatised view of religion.[317] *Lyng* was then binding on and warmly embraced by most lower courts between 1988 and 1990 to deny relief in the various cases concerning Indigenous sacred places.[318]

The attempts in Indigenous sacred place cases to narrow the Free Exercise law ran alongside a Supreme Court trend in other minority religious situations as the 1980s

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Sequoyah v Tennessee Valley Authority, 480 F Supp 608 (ED Tenn,1979) and, on appeal, at 620 F 2d 1159 (6th Cir, 1980), also concerning a dam, the Tellico Dam, which flooded an area of the Little Tennessee River Valley, sacred to the Cherokee people;

Hopi Indian v Block [1981] US Dist Lexis 18421 (DDC, 1981) and, on appeal, *Wilson v Block,* 708 F.2d 735 (DC Cir, 1983), challenging the expansion of the Arizona Snow Bowl skiing facilities in the sacred San Francisco Peaks in the Coconino National Forest in Arizona;

Inupiat Community of Arctic Slope v United States, 548 F Supp 182 (D Alaska, 1982), brought by the Inupiat people to stop a lease and sale of an offshore area in the Beaufort Sea near Alaska;

Fools Crow v Gullet, 541 F Supp 785 (DSD, 1982) and on appeal 706 F 2d 856 (8th Cir, 1983), brought by representatives of the Lakota and Tsistsistas Nations to stop construction works in the sacred area of Bear Butte in the Black Hills in South Dakota;

Dedman v Board of Land and Natural Resources, 740 P 2d 28 (1987), brought in the Supreme Court of Hawaii by believers in the goddess Pele to stop a geothermal energy permit.

[315] These are through limiting protection to freedom to believe and act only (as set out in Chapter 6), narrow readings of what is religious (see Chapter 7) and through the development of doctrines like centrality and indispensability (see Chapters 6 and 8).

[316] These were:

Northwest Indian Cemetery Protective Association v Peterson, unsuccessful preliminary injunction decision 552 F Supp 951 (ND Cal, 1982), successful District Court decision at 565 F Supp 586 (ND Cal, 1983) and on appeal at 764 F 2d 581 (9th Cir, 1985) and a further decision in 1986 after a re-hearing 795 F 2d 688 (9th Cir, 1986). These related to an action by the Yurok, Karok and Tolowa peoples to stop the building of a road and a timber permit in the sacred High Country in the Siskiyou Mountains in California. They culminated in the first Supreme Court decision on the matter in *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988); and

US v Means, 627 F Supp 247 (DSD, 1985), concerning an attempt by some Lakota people and the Lakota Nation to obtain a special use permit from the Forest Service to set up a religious, cultural and educational community and camp, called the Yellow Thunder Camp, in the Black Hills National Forest.

[317] An issue to be taken up in Chapter 9, along with the critique expressed by the strong dissenting judgment of Brennan J.

[318] These are discussed in Chapter 9.

progressed. This was particularly the case in the Court under the leadership of Chief Justice Rehnquist commencing in 1986, though with signs of change even before then.[319]

Cases and Legislation Post-*Lyng*

Lyng, and the enthusiastic support for this decision that seems to have been given by lower courts since then, made it virtually impossible for cases concerning sacred places to succeed under the Free Exercise Clause. Damage to Indigenous sacred places usually affects the land directly and rarely involves coercion requiring Indigenous people to act against their beliefs or penalises them for their religious activities. However, if *Lyng* dealt a near-fatal blow to the claims for protection of sacred sites under the Free Exercise Clause, the 1990 Supreme Court decision of ***Employment Division v Smith,*** 494 US 872 (1990) ("*Smith*"), concerning the sacramental use of peyote,[320] hammered the final nails in the coffin. *Smith* held that the Free Exercise Clause would not be infringed by neutral generally applicable laws. The implication of *Smith* would exclude most sacred place claims, as laws affecting sacred places are usually neutral and generally applicable rather than having a purpose of restricting religious freedom.

These cases all showed that, despite the desire in the US Congress to include the Native American sacred places in the notion of religious freedom, the *AIRFA* was found

[319] The 1980s, for example, saw certain prisons and the military removed from the strict scrutiny analysis in favour of a deferential standard. The leading examples in this regard were *Goldman v Weinberger,* 475 US 503 (1986), where the Supreme Court rejected a Free Exercise claim by an Orthodox Jewish rabbi in the Air Force who sought to wear a yarmulke despite the policy on uniforms, and *O'Lone v Estate of Shabazz,* 482 US 342 (1987), where the Supreme Court overrode a claim by Muslim inmates of a prison who were required to work outside the prison on weekdays including Fridays which prevented them from attending the Jumu'ah services held at the main prison facility.
There was also an example of watering down the compelling interest criterion in favour of a simple balancing in *US v Lee,* 455 US 252 (1982). This case concerned an Old Amish employer who refused to pay social security tax for his employees due to religious beliefs. The Supreme Court found that this was an interference with his free exercise rights, but that the social security laws were justified as there was a compelling interest in having a comprehensive social security system without a myriad of exemptions. This was probably not a controversial conclusion but there was a comment from Chief Justice Burger for the Court to the effect that when followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of faith are not to be superimposed on statutory schemes binding on others. This could be interpreted as suggesting that there was little scope for religious exemptions in relation to generally applicable laws, as pointed out by Stevens J who concurred in the result but thought the reasoning of the majority went too far against religious exemptions.
The key decision influencing later Indigenous sacred place cases was *Bowen v Roy,* 476 US 693 (1986) rejecting a claim to prevent a child from receiving a social security number. This case contained dicta to the effect that the Free Exercise Clause was not to apply to internal affairs of government. The Supreme Court was also divided on the Free Exercise test to be applied, with only a narrow majority preferring the traditional strict scrutiny test. The case is discussed further at Chapter 9.
[320] *Smith* did not concern a sacred place but the use of the sacred drug peyote which was ingested for sacramental purposes as part of the religious ceremonies of the Native American Church. The case is discussed at Chapter 10 as it is significant to the distinction drawn by the court between the general and neutral public sphere and private individualised sphere.

by the courts to be nothing more than a procedural statute and policy statement that played no part in the jurisprudence.[321]

The cases after *Lyng* and *Smith* were few and far between. There was little attempt to litigate any cases under the Free Exercise model after the *Smith* case. The outcry created by *Smith* led to general legislative changes, notably in the ***Religious Freedom Restoration Act 1993*** **('*RFRA'*)** and the ***Religious Land Use and Institutionalised Persons Act 2000*** **('*RLUIPA'*)** but these were not designed to provide a remedy for Indigenous sacred places. [322] This was confirmed by largely unsuccessful litigation to protect Indigenous sacred places from federal agency action.[323] The UN Special

[321] The *AIRFA* was held to be a procedural statute only, which required consideration of religious freedom issues for Indigenous people in the USA, but did not require their concerns to prevail or be given much weight: *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988) at 455 and 471; *Hopi Indian v Block,* [1981] US Dist Lexis 18421 (DDC, 1981) at 23–24 ; *Wilson v Block,* 708 F 2d 735 (DC Cir, 1983) at 745–7, *Fools Crow v Gullet,* 541 F Supp 785 (DSD, 1982) at 793–4, *Northwest Indian Cemetery Protective Ass v Peterson,* 552 F Supp 951 (ND Cal, 1982) at 954; *Northwest Indian Cemetery Protective Association v Peterson,* 565 F Supp 586 (ND Cal, 1983) at 597; *Northern Lights Inc*, 27 Federal Energy Regulation Commisison Reports (CCH) 63 024 (1984).
An exception may be where the *AIRFA* had been used to obtain an injunction when such procedures had not been complied with and thus has "bought" a bit of time to seek protection, as in the case of *New Mexico Ranchers v Interstate Commerce Commission,* 702 F 2d 227 (DC Cir,1983) at 230–3. The Circuit Court held that the failure by the Commission to consider allegations of misconduct and bad faith on the part of companies seeking to build a railroad which was likely to damage sites of significance was in breach of its duties under, inter alia, the *AIRFA*. It was held that the authority should not have been granted before the Department of the Interior examined and decided on the allegations. In 1988, the matter came back before the Circuit Court in *New Mexico Navajo Ranchers v Interstate Commerce Commission,* 850 F 2d 729 (DC Cir, 1988) which held that the *AIRFA* had eventually been complied with.
[322] In November 1993, the *RFRA* was enacted to overturn *Smith* and to return to the strict scrutiny test: see, for instance, comments in the House report, US Congress, House of Representatives, *Religious Freedom Restoration Act, HR Report No 103-88*, 103rd Congress (1993), and the Senate report, above n 272. The *RFRA* is codified as 42 USC § 2000bb. However, the congressional speeches and reports also made it clear that the *RFRA* would not overturn *Lyng* or the previous cases but simply turn the clock back to just before *Smith* and this would not change the law of what amounted to a burden: see Chapter 9. In June 1997, the *RFRA* was held by the Supreme Court to be unconstitutional as far as it applied to the states, in *City of Boerne v Flores,* 521 US 607 (1997), on the basis that the power of Congress to bind the states using the Fourteenth Amendment only went as far as protecting the provisions of the First Amendment and could not alter and extend the meaning of the Free Exercise Clause. It survived, however, as a statute applying to federal agencies and actions: see, for example, *Gonzales v O Centro Espirita Beneficente Uniao Do Vegetal,* 546 US 418 (2006); *EEOC v Catholic University,* 83 F 3d 455 (DC Cir, 1996); *Christians v Crystal Evangelical Free Church (In re Young),* 141 F 3d 854 (8th Cir, 1998*); O'Bryan v Bureau of Prisons,* 349 F 3d 399 (7th Cir, 2003); *Guam v Guerrero,* 290 F 3d 1210 (9th Cir, 2002); *Kikimura v Hurley,* 242 F 3d 950 (10th Cir, 2001*)*. On this basis, the *RFRA* was later used to challenge federal action restricting religious freedom at Indigenous sacred places as discussed in n 323 below. The state *RFRA*s referred to above in n 300 would also still apply.
Following the finding of invalidity of *RFRA* in its application to the states, there were further attempts by the US Congress to extend the strict scrutiny requirement to the states through legislation. The most relevant of these was the enactment of the *RLUIPA,* Pub L106-274 in September 2000, codified at 42 USC § 2000cc. This statute was partly designed to protect religious liberty in land use situations, especially locating and using places of worship. However, it only applied to situations where the plaintiffs had a property interest. In this way, the law, designed to insist on strict scrutiny for places of worship of most mainstream religions, was going to exclude places of worship for Indigenous people. The opinion of the 9th Circuit Court of Appeals in ***Navajo Nation v US Forest Service,*** 535 F 3d 1058 (9th Cir, 2008) at 1077 confirmed that the *RLUIPA* applied only to private land and not to the "government's use of its own land". The comment has been made that the *RFRA* and *RLUIPA* continue the legal privileging of property rights over religious freedom: Kirsten A Carpenter, 'Old Ground and New Directions at Sacred Sites on the Western Landscape' (2005–6) 83 *Denver University Law Review* 981.
[323]The following cases in the US District Court at Arizona rejected claims using the *RFRA* and held that *Lyng* was still applicable:
Benally v Kaye [2005] US Dist Lexis 39751 (D Ariz, 2005), concerning the restrictions on Navajo wishing to perform the Sundance on Hopi tribal land;

Rapporteur in a 1998 report[324] noted in the light of *Lyng* and *Smith* that the jurisprudence of the Supreme Court showed a lack of understanding of Native American values and a double standard, because native practices are not protected in the same way as others. He called for recognition of Native American values in the legal sphere, including, inter alia, the inalienability of sacred sites.

There were also attempts from the mid -1980s at the federal level to pass further legislation to provide some form of protection to Indigenous sacred places. Some of these described the protection in terms of the Free Exercise model and the strict scrutiny principles developed for religious freedom. They were first introduced in Congress in the period from just prior to *Lyng*. Many more attempts were made through to the 1990s[325] and into the 21st century.[326] None of them were enacted but the relevant parts of these will be referred to in the thematic chapters below.

Due to the failures in Congress to pass legislation, President Clinton responded on 24 May 1996 with **Executive Order 13007** entitled "Indian Sacred Sites".[327] This imposed

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Navajo Nation v US Forest Service and Ors, 408 F Supp 2d 866 (D Ariz, 2006) and on appeal in ***Navajo Nation v US Forest Service,*** 535 F 3d 1058 (9th Cir, 2008), a further attempt to stop the Arizona Snow Bowl expansion. [There had been one successful appeal to a three-judge panel in the 9th Circuit Court of Appeals in *Navajo Nation v US Forest Service,* 479 F 3d 1024 (9th Cir, 2007) but this decision was subsequently vacated by the majority of judges in the 9th Circuit Court of Appeals and the en banc court subsequently affirmed the District Court's rejection of the *RFRA* claim in the 2008 decision referred to above.]

Snoqualmie Indian Tribe v Federal Energy Regulatory Commission, 545 F 3d 1207 (9th Cir, 2008), in which the 9th Circuit Court of Appeals followed its earlier *Navajo Nation* decision in rejecting an *RFRA* challenge to a decision of the Commission approving a hydroelectric project at the sacred Snoqualmie Falls for the lack of a substantial burden on religious exercise.

There was, however, a notable exception in the line of Comanche Nation cases where the District Court in the Western District of Oklahoma declined to follow the 9th Circuit decisions and found that the construction of a military training centre, which would infringe on the privacy and "viewscape" required for ceremonies at the sacred Medicine Bluffs, would substantially burden religious exercise: ***Comanche Nation v US*** [2008] US Lexis73283 (DWD Okla, 2008) and the earlier interlocutory decision, ***Comanche Nation v US*** [2008] US Lexis 627773 (DWD Okla, 2008).

There have not been any successful Indigenous sacred place cases brought under the state *RFRA*s so far. Florida's *RFRA* gave rise to an unusual Indigenous sacred place case: in ***Wilson v Moore,*** 270 F Supp 2d 1328 (D Fla, 2003), a Native American prison inmate unsuccessfully argued, that denial of a designated Holy Ground at the prison was a violation of his free exercise of religion rights.

324 Abdelfattah Amor, Special Rapporteur, *Report on Civil and Political Rights: Including Freedom of Expression, Addendum 1: Visit to the USA,* UN Doc E/CN.4/1999/58/Add.1 (9 December 1998), in Section IIC: Situation of Native Americans.

325 These bills were **S 2250**, An Act to Amend the American Indian Religious Freedom Act*,* 100th Congress (1988) before the *Lyng* case; **HR 1546**, An Act to Amend the American Indian Religious Freedom Act, 101st Congress (1989); **S 1124**, An Act to Amend the American Indian Religious Freedom Act, 101st Congress (1989); **S 1979**, Native American Religious Freedom Act*,* 101st Congress (1989); **S 110**, Native American Religious Freedom Act, 102nd Congress (1991); **S 1021** Native American Free Exercise of Religion Act, 103rd Congress (1993); **S 2269**, Native American Cultural Protection and Free Exercise of Religion Act, 103rd Congress (1994); **HR 4155**, An Act to Amend the American Indian Religious Freedom Act*,* 103rd Congress (1994).

326 In June 2002, there were oversight hearings on protection of Native American sacred places that were under threat: NCAI News, May 2002. The bills then introduced were *Native American Sacred Lands Act*, **HR 5155**, An Act to Protect Sacred Native American Federal Lands from Significant Damage, 107th Congress (2002), with an emphasis on direct protection of sacred places rather than religious freedom and, in June 2003, the similar bill **HR 2419**, the Native American Sacred Lands Act, 108th Congress (2003).

327 61 FR 26771 (1976).

obligations on federal agencies to accommodate access and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sites. The wording of the Executive Order was heavily qualified and deferential to agency functions.[328]

While no comprehensive legislation was able to be enacted to protect Native American sacred places, there were nevertheless some site-specific Acts passed in the post-*Lyng* period which required federal agencies managing the relevant land to temporarily close areas to general public use in order to provide privacy for religious activities by Native American peoples.[329]

5.2.3 The Establishment Clause Challenges to Indigenous Sacred Place Accommodations

Attempts have been made to enact legislation or regulations to protect Indigenous sacred places but these have encountered problems caused by the Establishment Clause. In the 1980s, the prevailing Establishment jurisprudence was summarised in the case of *Lemon v Kurtzman,*[330] that is, to avoid violation of the Establishment Clause three steps had to be satisfied, namely: (1) the purpose of the law was secular; (2) the primary effect of the law was not to advance nor inhibit religion; and (3) there was no excessive entanglement between the government and religion. This test has turned

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[328] The order requires federal agencies, to the extent that it was practicable, permitted by law and where not clearly inconsistent with essential agency functions, to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sites and, where appropriate, to maintain confidentiality of such sites (§ 1). Agencies were to promptly implement procedures and to report (§ 2).

[329] Examples of such legislation included:

- *El Mapais National Park Act of 1987*, 16 USC §§ 460uu-1 to 460uu-47 (2006), enacted as an amendment to the *El Mapais Act* (Pub L 100-225, 101 Stat 1539). This has been described in Hooker, above n 152, and in Shawna Lee, 'Government Managed Shrines: Protection of Native American Sacred Site Worship' (2000–1) 35 *Valparaiso University Law Review* 265.
- The 1994 *Defense Appropriations Act,* Pub L 103-139 in Title X §§10 001–10 007, involved the return to Hawaii of the island of Kaho'olawe, an area of great cultural and religious significance to native Hawaiians. A reserve was set up under Hawaiian laws to be used exclusively for preservation of rights traditionally exercised for cultural subsistence and religious purposes: HAW REV STAT §§ 1-1-6K-1 to 1-1-6K-10. This is discussed in Spriggs, above n 11.
- The *Traditional Native American Uses of National Forest Scenic Areas Act 1984,* 16 USC § 543f (2006), allowing access to Scenic Areas in National Forests for traditional cultural and religious purposes.
- The *Grand Canyon National Park Enlargement Act of 1975*, 16 USC § 228i (2006), enacted in 1975 regarding the Havasupai Indian Reservation, also provided that the lands could be used for traditional (including religious) purposes and nothing in the sections dealing with the management of the Grand Canyon National Park were to be construed to prohibit access by any members of the tribe to any sacred or religious places or burial grounds.
- In *An Act to Return the Nanih Waiya State Park and Mound to the Mississippi Band of Choctaw Indians of 2007,* 2007 Miss. Gen Laws 310 (approved by the Governor on 12 March 2007), the site of a mound sacred to the Choctaw Indians was returned to them.

[330] 403 US 602 (1971). A similar test was enunciated in *Committee for Public Education v Nyquist,* 413 US 756 (1973) at 772–3 and followed in many lower court decisions since then.

very much on the distinction between the religious and the secular, with culture and history being classified as part of the latter. The cases illustrate how these distinctions reflect the public–private dichotomy.

The Establishment Clause jurisprudence began to be questioned from the 1980s with strong criticisms of *Lemon*[331] and more relaxed tests have been suggested by various judges.[332] None of these has yet emerged as a definitive replacement test and the fact that some cases have continued to strike down legislation designed to accommodate religious concerns[333] has meant that Establishment concerns have still dogged attempts to provide a political remedy for the protection of Indigenous sacred places.[334]

In the mid 1990s, probably coinciding with President Clinton's efforts in regard to the protection of sites (especially Executive Order 13007), various government agencies introduced management plans which were more sympathetic to Indigenous concerns. These were then met by a new type of "Indigenous sacred place" case, challenging such programmes on the basis of the Establishment Clause. Such cases commenced in the mid 1990s and continued into the 21st century. One such argument was upheld at an interlocutory stage in the *Bear Lodge* case in relation to mandatory rules to prevent interference with religious practices.[335] When the guidelines were later changed to voluntary requests only, these were held to pass muster.[336]

[331] Justice Scalia colourfully compared *Lemon* to a ghoul in a horror movie which repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried: *Lamb's Chapel v Center Moriches Union Free School District,* 508 US 384 (1993) at 398. It was not applied at all by the majority of the Supreme Court in a number of cases, eg *Van Orden v Perry,* 545 US 677 (2005).

[332] Such as whether there was a perception of "endorsement", a test championed by O'Connor J in cases such as *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v Amos,* 483 US 327 (1987); *Wallace v Jaffree,* 472 US 38 (1985); *Lynch v Donnelly,* 465 US 668 (1984); *County of Allegheny v American Civil Liberties Union,* 492 US 573 (1989); *Capital Square Review and Advisory Board v Pinette,* 515 US 753 (1995) at 778–80. Another was whether there was "coercion", a test used by Kennedy J in cases such as *Lee v Weisman,* 505 US 577 (1992) and *County of Allegheny v American Civil Liberties Union,* 492 US 573 (1989), by Scalia J in *McCreary County v American Civil Liberties Union of Kentucky,* 545 US 844 (2005) and by Thomas J in *Van Orden v Perry,* 545 US 677 (2005). There was also a suggestion that the test to be applied should depend on the circumstances: see by O'Connor J in *Board of Education of Kiryas Joel Village School District v Grumet,* 512 US 687 (1994) at 718–721; *Capital Square Review and Advisory Board v Pinette,* 515 US 753 (1995) at 778.

[333] Such as in *Larkin v Grendel's Den Inc,* 459 US 116 (1982) where the court struck down a Massachusetts statute that in effect gave religious institutions a right of veto over liquor licences being issued within 500 feet of their place of worship. Such a result could prevent vetoes over sacred places by Indigenous groups too. Also, in *Board of Education of Kiryas Joel Village School District v Grumet,* 512 US 687 (1994), the Court found that the carving out of a school district around a Satmar village, in order to provide for the needs of the handicapped children of the Satmar Hasidim, was a violation of the Establishment Clause. In *McCreary County v American Civil Liberties Union of Kentucky,* 545 US 844 (2005), the US Supreme Court found that the Ten Commandments in the court houses did give a religious message and was in breach of the Establishment Clause.

[334] See 7.4 below.

[335] In ***Bear Lodge Multiple Use Association v Babbitt*** (D Wyo, No 96-CV-063-D, 8 June 1998). The National Park Service in 1995 prepared a management plan which initially included a closure of the Devil's Tower or Bear Lodge monument for commercial climbing during the month of June, a culturally significant time for Native American religious practices there. A coalition of groups including commercial rock climbers challenged the plan on the basis that this violated the Establishment Clause. Judge Downes in the District Court in 1996 agreed because the purpose of the ban was to advance religion. There is a detailed discussion of the 1996 case in Raymond Cross and Elizabeth Brenneman, 'Devils Tower at the

In the late 1990s and early 21st century, other Establishment Clause challenges to government plans and actions designed to protect Indigenous sacred places were dismissed on the grounds of a lack of standing.[337] In each of these cases, the plaintiffs were found to have lacked standing because the "bans" were voluntary and thus were found not to cause any injury to them. The fact that these cases turned on the *voluntary* nature of the request to refrain from damaging sites did not hold out much hope of legal protection.

Other sacred place cases where the government actions have survived Establishment Clause challenges have been those where the courts have been prepared to classify the motives as the protection of culture and history (that is, for secular purposes) rather than religion.[338] These cases are discussed later in relation to the artificial division created between what is regarded as religious as opposed to cultural.[339]

Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century' (1997) 18 *Public Land and Resources Law Review* 5, 37.

[336] The Service revised its plan following the first Judge Downes decision and merely requested people to voluntarily refrain from climbing during June out of respect. Judge Downes in *Bear Lodge Multiple Use Association v Babbitt,* 2 F Supp 2d 1448 (D Wyo, 1998) did not depart from his earlier reasoning but found that the government itself was not advancing religion as it was not coercing anyone to do anything, at 1455.

[337] These were:

The appeal in the *Bear Lodge* case: 10th Circuit Court of Appeals in ***Bear Lodge Multiple Use Association v Babbitt,*** 175 F 3d 814 (10th Cir, 1999). An application to the Supreme Court for a certiorari was denied: *Bear Lodge Multiple Use Association v Babbitt,* cert denied 529 US 1037 (2000).

Natural Arch and Bridge Society v Alston, 209 F Supp 2d 1207 (D Utah, 2002) and also on appeal to the 10th Circuit Court of Appeals in ***Natural Arch Bridge Society v Alston*** [2004] US App Lexis 5446 (10th Cir, 2004). These concerned a management plan issued by the National Park Service in relation to the Rainbow Bridge. It sought to discourage visitor access to areas of the Bridge out of respect for sacred nature of this area to Native American groups.

Wyoming Sawmills Inc v US Forest Service, 179 F Supp 2d 1279 (D Wyo, 2001) and on appeal, in ***Wyoming Sawmills Inc v US Forest Service,*** 383 F 3d 1241 (10th Cir, 2004) concerning challenges by a logging company to a Historic Preservation Plan adopted by the US Forest Service for the Medicine Wheel National Historic Landmark. The plan sought, inter alia, to protect the historic property by continuing the traditional cultural use and by the Forest Service withdrawing an area from timber sales.

Rocky Mountain Oil and Gas Association v US Forest Service, 157 F Supp 2d 1142 (D Mont, 2000) concerning a challenge by oil and gas companies to a decision by the US Forest Service not to issue any oil and gas leases, which was challenged on the basis that the decision was based on the Native American religious practices in the area. The decision was upheld in ***Rocky Mountain Oil and Gas Association v US Forest Service*** (2001)12 Fed Appx 498 (9th Cir, 2001) at 500–1, but on the further grounds that the 9th Circuit Court held that the primary purpose and effect of the decision not to issue oil and gas leases was for a range of environmental and other such reasons.

[338] See the *Cholla v Ready Mix* line of cases concerning the Arizona government's prevention of mining at Woodruff Butte in Arizona in which the courts held that the Establishment Clause did not apply to or prevent the protection of sites of *historical and cultural* importance, even if they also had religious significance to Native American tribes: ***Cholla Ready Mix v Civish*** 382 F 3d 969 (9th Cir, 2004); ***Cholla Ready Mix v Mendez*** (D Ariz, DC No CV-02-01185, 21 January 2003). See also the cases concerning the closure of Cave Rock near Lake Tahoe in Nevada in which the courts reached a similar conclusion: ***Access Fund v US Department of Agriculture*** 499 F 3d 1036 (9th Cir, 2007) and ***Access Fund v Veneman*** (D Nev, No CV-N-03-687-HDM, 28 January 2005).

[339] See 7.4 below. The issue is also discussed at 14.4 below.

Establishment Clause challenges have also been made to sections of the Californian legislation in which sacred places are protected, though these cases were able to be resolved without deciding the Establishment Clause issue.[340]

5.3 Australia

5.3.1 The General Religious Freedom Provisions

Commonwealth – s 116

The key provision for many years was in s 116 of the Commonwealth *Constitution* which applies to the Commonwealth only. This reads:

> "The Commonwealth shall not make any law for establishing any religion or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

Like the USA, this covers laws relating to both the prohibition of free exercise of religion and the establishment of any religion.

The High Court, in the leading freedom of religion case of *Adelaide Company of Jehovah's Witnesses v Commonwealth,*[341] recognised that prohibiting the free exercise of religion included prohibitions on actions as well as belief. "Free", however, did not

[340] In *People v Van Horn* 218 Cal App 3d 1378 (1990), the action concerned the uncovering of an ancient grave by an archaeological company which wanted to retain the artefacts taken from the grave. However, as the action in question dealt with burial site excavation provisions introduced in 1982 amendments, the Court of Appeal was able to focus only on those and said that the 1982 amendments were legislation to prevent skeletal remains from being vandalised and to give Native Americans an opportunity to be involved in the disposition of the remains and there was no reference to religion in those 1982 amendments.

The Establishment Clause was used in *Native American Heritage Commission v Board of Trustees of the Californian State University* 51 Cal App 4th 675 (1996) to challenge the development by the University at a significant sacred site of the Chinigchinich religion. In that case the Establishment Clause had been raised as a defence. The Court of Appeal overturned the summary dismissal of the case by the trial judge on Establishment grounds. The relevant ground for dismissal was the lack of standing of a state agency to raise the Establishment Clause which could only be brought by people claiming infringements on their personal constitutional rights. It was also dismissed, obiter, on characterising the statute as only requiring a consideration of mitigation and balancing that against public interest requirements and not a statute that dedicated land for Native American religious worship.

A Californian Court did adopt a narrow view of the Establishment Clause in a non-Indigenous case where it upheld an exemption from historic landmark legislation for religious organisations: *East Bay Asian Local Development v California* 13 P 3d 1122 (Cal, 2000).

[341] (1943) 67 CLR 116, a decision arising from challenge based on s 116 to a Commonwealth war-time law which declared the Jehovah's Witnesses to be an organisation prejudicial to the defence of the Commonwealth and which allowed an officer to take possession of their premises. The Court found that the law did not infringe s 116. The reasoning as to precisely why this was so seemed muddled, but there was no suggestion that this was because there was no interference with or even prohibition of free exercise of religion. Instead, most of the reasoning suggested that the interference or prohibition was permissible: see especially the judgment of Latham CJ at 124–5.

mean “absolute”. Unfortuately, the various justices did not formulate any clear test as to how to identify or measure the limits to religious freedom.[342] Unlike in the USA, no strict scrutiny test has emerged and there is no suggestion that religious exercise is to be given any particular weight in the balancing process.

The test that developed of whether a law is for prohibiting free exercise of religion turned on what the **purpose of the law** was, as ascertained primarily from the legislation in question. Section 116 refers to not making a law “for” prohibiting free exercise of religion.[343]

There was no need to develop doctrines of centrality or coercion to narrow religious freedom protection as in the USA. The narrowness of the purpose test, the lack of a strict scrutiny in Australia and its non-application to the states has meant that s 116 has never been used to overturn any laws or executive actions and has in general been treated so narrowly as to raise serious doubts as to whether it could ever be of assistance.[344] The Human Rights and Equal Opportunity Commission has recommended that a Religious Freedom Act should be enacted to rectify the limitations.[345] However, as the failed Constitutional referendum of 1988 and the lack of any movement towards a specific Religious Freedom Act show,[346] there has not been a groundswell of public lobbying for legislative or constitutional change as there has been in the US.

There is an Establishment Clause but this has been interpreted far more narrowly than in the US. In the leading case of *Attorney-General (Vic) ex rel Black v Commonwealth,*[347] the High Court majority suggested that establishing a religion was something akin to constituting a religion as an official state religion. Due to this

[342] With comments ranging from the fact that religion was not always superior to the law of the land: *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 at 125–6 and 129 per Latham CJ, to s 116 being subject to the powers of the government to protect peace and good government and order of the Commonwealth: at 148–9, 155 per Rich and Starke JJ, to allowing a reasonable interference with free exercise of religion: per Latham CJ at 131, Williams J at 159–160, to Starke J's views that s 116 did not protect subversive actions: at 155.

[343] This is one of the slight textual but important differences between the US First Amendment and s 116. Instead of saying that there should be no law prohibiting free exercise of religion as in the First Amendment, s 116 says the law must be “for” prohibiting this. There is a discussion of the purpose test in Australia in Chapter 10.

[344] Note that Murphy J, usually in dissent, appears to have been a lone voice arguing for a more expansive view of religious freedom and of Establishment. In *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, he argued that a Commonwealth Commissioner could not impose a requirement for an oath as that would be a religious observance infringing on free exercise of religion. In the *DOGS* case he argued for an expansive view of Establishment similar to the US interpretations.

[345] Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief Report* (1998). The government has so far rejected any such legislation: see Joint Standing Committee, *Conviction with Compassion,* above n 9.

[346] There has recently been another consultation conducted by the Human Rights Commission into the question of Freedom of Religion in Australia: see Australian Human Rights Commission, *Freedom of Religion and Belief in the 21st Century: Discussion Paper* (2008).

[347] (1981) 146 CLR 559.

interpretation, Australia has not had the same constitutional problems as the USA in enacting legislation to protect Indigenous sacred places of the kind discussed in Part C.

As a constitutional provision, a breach of s 116 results in invalidity of the legislative action.

States and Territories

Section 116 is a provision dealing only with the Commonwealth. [348] There is no equivalent to the US Fourteenth Amendment which would give s 116 any extension as far as the states are concerned. There are authorities supporting a view that it does extend to cover the territories,[349] though these are not conclusive. Referenda in 1944 and 1988 that involved an attempt to extend s 116 to the states failed.[350]

The only state that has a constitutional provision dealing with freedom of religion is Tasmania.[351] In recent times, religious freedom clauses have been enacted in various non-constitutional human rights legislation in the ACT and Victoria. [352] Both the ACT and Victorian legislation also have provisions dealing with minority religious rights.[353]

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[348] Despite its incongruous appearance in a part of the *Constitution* entitled "The States". The original intention of drafter Andrew Inglis Clark was to provide that the states could not prohibit the free exercise of religion: see Ely, *Unto God and Caesar, a*bove n 242 at 53. Henry Higgins then proposed clauses which were initially aimed at preventing both the states and the Commonwealth from prohibiting free exercise of religion, but failed. The reference to the states was finally dropped in deference to the supporters of state rights and the reference to the Commonwealth reinserted: Ely, *Unto God and Caesar, a*bove n 242, at 86 and103; John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 951.

[349] See assorted comments in *Kruger v Commonwealth* (1997) 190 CLR 1 per Toohey J at 85–86, Gaudron J at 123, Gummow J at 166 (but Dawson or McHugh JJ had different views); the *DOGS case* (1981) 146 CLR 559 per Wilson J at 649, Murphy J at 621 (but not Gibbs J at 593–4); *Teori Tau v Commonwealth* (1969) 119 CLR 564, 570; *Lamshed v Lake* (1958) 99 CLR 132, 143 per Dixon CJ. A similar attitude (though not about s 116) can be found in *Wurridjal v Commonwealth* [2009] HCA 2. There were other suggestions that s 116 applied to all Commonwealth laws: Latham CJ in *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 123 and Barwick CJ in the *DOGS case* (1981) 146 CLR 559, 576.

[350] Joint Standing Committee, *Conviction with Compassion,* above n 9, at 4.26.

[351] Section 46(1) of the *Constitution Act 1934* (Tas) reads: "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."

[352] The *Human Rights Act 2004* (ACT) has a provision dealing with freedom of religion in s 14 as follows:

"(1) Everyone has the right to freedom of thought, conscience and religion. This right includes:
  (a) the freedom to have or to adopt a religion or belief of his or her choice; and
  (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.

(2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching."

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("Victorian *Charter*") in s.14 has very similar provisions.

[353] The ACT s 27 provides: "Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language". The Victorian *Charter* s 19(1) entitled "Cultural Rights" is very similar. Both are modelled on Article 27 of the *ICCPR* set out in 6.2.2 below. The Victorian *Charter* has an additional clause which relevantly provides:

"(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community:

Unlike s 116 of the Commonwealth *Constitution*, the Tasmanian *Constitution*, ACT *Human Rights Act* and the Victorian *Charter* are only ordinary statutes and the relevant freedoms are able to be overridden. The ACT and Victorian legislation do not purport to invalidate any other legislative provisions in breach of human rights and this is made clear by the limited effect of a declaration of incompatibility by a court.[354] The ACT and Victorian provisions are more similar in form to the Canadian and New Zealand provisions outlined below and the jurisprudence is expected to follow those, but it is too early to tell whether the courts will develop a narrower jurisprudence like that of s 116.

Although there have been suggestions of a concept of freedom of religion as part of the common law,[355] there are clear cases which have taken the contrary position[356] and it is unlikely that such a common law right would be recognised.

5.3.2 Overview of the Indigenous Religious Freedom Cases

Unlike in the USA, until recently, there were no reported decisions of religious freedom claims made to protect sacred places, Indigenous or non-Indigenous. The most obvious reason is that the impetus to protect sacred places of Aboriginal or Torres Strait Islander people has resulted in legislative energy being directed since the 1970s to the development of Indigenous heritage legislation[357] and litigation has relied on those heritage provisions instead of religious freedom principles. Consequently, there has not been legislation specifically based on religious freedom for Indigenous peoples. The one "sacred place" case relying on s 116 has failed so far and so have all the other cases where issues of Indigenous religious freedom have been raised [358] Comments in these cases are discussed later where relevant.[359]

(a) to enjoy their identity and culture and; ...
(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs."

This is also discussed at 6.2.2.

[354] See *Human Rights Act* (ACT) s 32 and Victorian *Charter* s 36.

[355] In *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 at 130, Mason ACJ and Brennan J said that freedom of religion is the essence of a free society. In *ALRM v South Australia* (1995) 64 SASR 551, the applicants had sought a declaration that the setting up of the Hindmarsh Island Royal Commission was in breach of the common law and an impairment of the fundamental freedom to exercise a religious belief. While the Court did not have to decide this issue, Doyle CJ said, at 552, that he accepted that freedom of religion is one of the fundamental freedoms which entitles Australians to call our society a free society and that statutes are presumed not to intend to affect this freedom. Debelle J said, at 554, that for the purpose of the action only he was prepared to assume that freedom of religion is a fundamental freedom in our society and the essence of a free society and, at 556, that no civilised society would seek to impose an improper restraint upon that freedom.

[356] In *Grace Bible Church Inc v Reedman* (1984) 54 ALR 517, the Full Court of the Supreme Court of South Australia, after a detailed analysis of the history and authorities, held that the common law has never contained a fundamental guarantee of the right of religious freedom and no such right had ever been created in South Australia.

[357] Discussed in Part C.

[358] The use of s 116 to protect sacred places was raised in ***FMG Pilbara Pty Ltd/Ned Cheedy and Ors on behalf of the Yindjibarndi People/Western Australia*** [2009] NNTTA 91 and, on appeal, in ***Cheedy v***

Concerns have been expressed about the adequacy of Australian laws to protect the freedom to exercise Indigenous religions in the context of protection of sacred places.[360] The UN Special Rapporteur has noted Australia's record on Indigenous sacred places as not adequately protecting the religious freedom of its Indigenous peoples.[361]

Despite the scarcity of case law in Australia, religious freedom has been cited by commentators in Australia as a reason for the need to protect of Indigenous sacred places.[362] The lack from the start of any expansive views of religious freedom (or any rights rhetoric at all) is probably a reason behind the absence of an outcry of the kind seen in the US about the abandonment of protections for minority religions. However, as addressed in the thematic chapters below, as far as Indigenous sacred places are concerned, there may be little practical difference between the end results in the Australian and US cases, except that they have been couched in different language and legal elements.

5.4 Canada

5.4.1 The General Religious Freedom Provisions

Charter

State of Western Australia [2010] FCA 690. The native title party argued that s 116 meant that a mining tenement which would interfere with religious practices at the sacred places could not be granted. It was held on appeal that the purpose of the provisions allowing future acts to be granted did not infringe s 116 as that was not the intent or purpose of the sections or a decision to allow the grant. This case is under appeal.

Other religious freedom cases are:

- The Stolen Generations case, ***Kruger v Commonwealth*** (1996) 190 CLR 1, raising issues of whether removal of children from their communities and their traditional sacred sites prevented them from engaging in religious practices and this breached their freedom of religion;
- ***Aboriginal Legal Rights Movement ("ALRM") v South Australia*** *(No 1)* (1995) 64 SASR 551. This involved a challenge to the establishment of a royal commission into whether beliefs about "women's business" in relation to Hindmarsh Island were fabricated. This was not based on s 116 but on a principle of religious freedom claimed to exist at common law. Doyle CJ, with whom Bollen J agreed, was prepared to accept this as being one of the fundamental freedoms in Australia so that statutes are presumed not to intend to affect this freedom.

[359] The *Kruger* and *Cheedy* cases are discussed in most depth in Chapter 10 in relation to the "purpose" test and the *ALRM* case is discussed in subsequent thematic chapters, especially Chapters 6 and 9, in relation to what is a restriction on religious freedom and on the issue of coercion.

[360] See, for instance, HREOC, *Article 18 Report*, above n 345; Caroline Woo, 'The Hindmarsh Island Bridge Controversy: Your Secret is Safe with Me' in Gary D Meyers and Anita Field (eds), *Identity Land and Culture in the Era of Native Title* (1998).

[361] Amor, *Australian Addendum*, above n 258. These general concerns about religious freedom underlie the critique of the Aboriginal heritage laws and processes rather than s 116. Details are discussed in Part C.

[362] For example, in New South Wales Parliament Legislative Assembly Select Committee Upon Aborigines, *Aboriginal Land Rights and Sacred and Significant Sites: First Report* (1980) [14.9].

The key religious freedom provisions in Canada today are ss 2(a) and (b)[363] of the *Canadian Charter of Rights and Freedoms*, part of the *Canadian Constitution* of 1982. The relevant parts of the *Charter* are:

> s 2 "Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication …"

The *Charter* provisions are entrenched and infringement of the fundamental freedom provisions will result in inconsistent provisions being of no force and effect.[364] Unlike the US and Australian constitutional provisions, s 2 proclaims freedoms that everyone has, rather than being framed as limitations on the power of parliaments. However, the *Charter* only applies to actions of federal and provincial governments[365] and does not guarantee religious freedom in all circumstances. It covers more than religion but also "conscience" and "thought, belief, opinion and expression".

The leading early *Charter* case outlining the principles of religious freedom embodied in the *Charter* is the Supreme Court decision *R v Big M Drug Mart.*[366] Dickson J for the majority spelt out in wide and generous terms the scope of the freedom. To be valid, the majority in *Big M Drug Mart* held that neither the legislative **purpose** nor its **effects** could infringe the freedom of religion.[367] The interpretation of the *Charter* was to be generous rather than legalistic, aimed at securing for individuals the full benefit of the *Charter*'s protection.[368] These principles, along with an an acceptance that infringement could occur by legislative effects, avoided any narrow purposive requirement of the kind in Australia or in the US after *Smith.* In these ways, the *Canadian Charter*

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[363] Section 2(a) has been used as the main freedom of religion provision, with s 2(b) being mainly used for free expression issues.
[364] Provided for in s 52 of the *Charter*.
[365] See s 32 of the *Charter*.
[366] (1985) 18 DLR (4th) 321. In this case the Supreme Court upheld a challenge by some business proprietors (not religious groups) to the *Lord's Day Act* which made it illegal to sell goods on a Sunday. Dickson J saw religious freedom as being based on a truly free society being able to accommodate a wide variety of beliefs, tastes, pursuits, customs and codes of conduct, founded on respect for the inherent dignity and the inviolable rights of the human person, at 353. In that case, the legislation failed for having a purpose of compelling conformity with a Christian tenet, a coercive purpose of using the force of the state to bind non-believers and infringe their freedom. There was no need to consider the effects of the legislation as the improper purpose already invalidated it.
[367] Ibid, at 350. There is also a very detailed discussion of how unintended effects of religious freedom can be a violation of the *Charter* by Tarnopolsky JA in *R v Videoflicks* (1984) 48 OR (2d) 395, 412–9, another "Sunday closing" case that was eventually dealt with in the Supreme Court in *R v Edwards Books And Art Ltd* (1986) 2 SCR 713. As far as the *burden* is concerned, Dickson J in the *Big M Drug Mart* case was not interested in any distinctions between direct and indirect burdens or between action and belief, intentional or not, foreseeable or not: *R v Big M Drug Mart* (1985) 18 DLR (4th) 321 at 362 and by implication, especially at 352, where the suggestion was that religious freedom could be infringed by a law with a valid purpose which impacts on rights and freedoms.
[368] Ibid, at 360.

provisions seem to be the most expansive of the four countries and doctrines such as the requirements for centrality and coercion have not developed as in the USA.

The s 2 freedoms however are not absolute. There is a general limitation (or justification) provision found in s 1.[369] The leading authority on the s 1 limitations to the *Charter* freedoms, *R v Oakes*, has suggested that the onus for establishing justification for overriding the freedom is on the party seeking to prove it and the standard is stringent.[370] In addition, the *Charter* enables the Parliaments to override its provisions in relation to particular statutes.[371]

Bill of Rights Act

Prior to the enactment of the *Charter*, religious freedom was provided for in the federal *Canadian Bill of Rights 1960* in s 1 which listed fundamental freedoms, including freedom of religion.[372] The *Canadian Bill of Rights* only had a limited application, being restricted to federal legislation.[373] It was further limited by the Supreme Court's view that it only applied to rights and freedoms as they existed in Canada immediately before the statute was enacted.[374]

Common Law

Prior even to the *Bill of Rights Act*, there were assorted sections in various limited constitutional-style statutes that recognised legal equality of religions. These were interpreted expansively by the Supreme Court in cases such as *Saumur v City of Quebec*[375] and *Chaput v Romain*[376] pointing to a constitutional freedom of religion,

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[369] This provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*".*

[370] *R v Oakes* [1986] 1 SCR 103, at 136–7. The *Oakes* test has recently been affirmed by the Supreme Court of Canada in *Alberta v Hutterian Brethren of Wilson Colony* [2009] SCC 37. The Supreme Court in the *Hutterian Brethren* case did say that there needs to be a degree of deference to the governments' attempts to deal with social problems (at [37]).

[371] Through s 33 which allows them to declare that legislation operates notwithstanding various provisions of the *Charter*, such as s 2, although this is obviously politically undesirable.

[372] Section 1 said: "It is hereby recognised and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely: ... (c) freedom of religion."
Section 2 provided: "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge, or infringe or to authorise the abrogation, abridgement or infringement of any of the rights or freedoms herein recognised and declared."
The *Canadian Bill of Rights* was developed after the *Universal Declaration of Human Rights* and during the time when the *ICCPR* was being drafted.

[373] "Laws of Canada" were defined in s 5(2) as applying only to Acts of Parliament of Canada.

[374] *Robertson and Rosetanni v Queen* [1963] SCR 651.

[375] In *Saumur v City of Quebec* (1953) 4 DLR 641, at 668, Rand J was able to say that, from 1760, the present religious freedom had been recognised in the Canadian legal system as a "principle of fundamental character" and that "the untrammelled affirmation of religious belief and its propagation,

despite the lack of a written constitution. While the *Canadian Bill of Rights* is still technically in force, this and the concepts of religious freedom recognised in the *Saumur* and *Chaput* cases are not likely to play much of a role given the more generally applicable and clearer provisions of the *Canadian Charter*.[377]

Provincial Legislation

In addition, there are religious freedom provisions in various provincial statutes in quite similar form[378] and some may extend to the private context as well.[379] These provincial provisions have not been raised in any of the reported Indigenous sacred place cases.

Treaties

Religious freedom provisions have appeared in some treaties with First Nations and are discussed below where relevant.[380]

Establishment

There are no constitutional clauses prohibiting the establishment of religion.[381] However, some types of situations that are dealt with under the US Establishment

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personal or institutional, remains as of the greatest constitutional significance throughout the Dominion". He went on the describe freedoms such as freedoms of religion and speech as "original freedoms" which were "the necessary attributes and modes of self-expression of human beings" and the "primary conditions of their community life within a legal order". The decision concerned a Quebec law which prohibited distribution of material without a permit. Members of the Jehovah's Witnesses were convicted of breaching this by distributing tracts. The majority of the Supreme Court overturned the convictions on the basis that the Quebec provisions were legislating against religious freedom which was beyond the powers of the provinces. However there was dicta from various judges about the importance of freedom of religion as a fundamental principle and right, see for instance (1953) 4 DLR 641 at 667–670, 681–2, 689, 702, 711–2.

[376] Similarly in *Chaput v Romain* [1955] SCR 834 at 840, the majority said that "All religions are on an equal footing, and Catholics, as well as Protestants, Jews and other adherents to various religious denominations, enjoy the most complete liberty of thought". (The judgment of Taschereau J for the majority is in French but an English translation is found in the judgment of Ritchie J in *Robertson and Rosetanni v Queen* [1963] SCR 651 at 655.) This was a case concerning police breaking up a religious meeting of Jehovah's Witnesses and seizing religious books. Such action was held to be a violation of the criminal law and the police were ordered to pay damages.

[377] The Supreme Court of Canada has said that the jurisprudence that had developed under the *Canadian Bill of Rights* is appropriate to a constitutional guarantee of human rights and fundamental freedoms as found in the *Charter*: *R v Big M Drug Mart* (1985) 18 DLR (4th) 321, 359. However, the common law principles might be able to be applied in litigation not involving government action, as suggested by Gerald A Beaudoin and Ed Ratushney (eds), *The Canadian Charter of Rights and Freedoms* (2nd ed, 1989) at 69.

[378] See, for example, the *Alberta Bill of Rights*, RSA 2000, c A-14, s 1(c); *Saskatchewan Human Rights Code,* SS 1979, c S-24.1, s 4; Quebec *Charter of Human Rights and Freedoms,* RSQ, c C-12, s 3; Yukon Territories *Human Rights Act,* RSY 2002, c 116, s 3. See also Beaudoin and Ratushney (eds), above n 377, at 2, which refers to provisions in Alberta, Saskatchewan and Quebec.

[379] For example, the Quebec *Charter* provision was used in a private context in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1.

[380] The case of *R v Sioui* [1990] 1 SCR 1025 concerned rights to free exercise of religion provided for expressly in a provision in an 18th century treaty between the British and the Huron people. The modern-day treaty process may also give rise to provisions dealing with Indigenous religions, but most of these would be specific to the groups and places and tend to fall into the context covered in Part C rather than general religious freedom models.

Clause could be handled as religious freedom issues under s 2(a) of the *Charter*.[382] So far there are no Indigenous cases that have failed for establishment reasons.

5.4.2 Overview of the First Nations Sacred Place Cases and Legislation

There are only a few Canadian cases where freedom of religion has been raised as an issue relating to protection of sacred places or practices there. With the possible exception of *R v Sioui,*[383] the arguments have been unsuccessful. The main emphasis in Canada has been to seek to protect Indigenous sacred places through arguments and litigation based on Aboriginal rights.[384] There are also a limited number of claims brought in relation to the general heritage legislation which is discussed in Part C. Specific legislation dealing with Indigenous religious freedom is missing, although there are powers in some statutes to give access to areas for ceremonial and cultural purposes.[385]

All the relevant decisions on First Nations' sacred places or religious practices in relation to particular locations date from the 1990s so they all came after the *Lyng* case in the USA. Despite the expansive expressions of religious freedom by Supreme Court decisions such as *R v Big M Drug Mart,* the few decided matters do not make this evident.[386]

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[381] A comment was made in a public education context by Lacourciere JA in *Zylberberg v Sudbury Board of Education* (1988) 65 OR (2d) 641, 675 that there is no firm wall of separation between church and state. This has been cited by Beaudoin and Ratushney (eds), above n 377 at 184. Lacourciere JA was dissenting in the particular case and the majority found religious observances in public schools to be in breach of the *Charter* for imposing them on non-Christians.

[382] This is evident in the Sunday trading cases such as *R v Big M Drug Mart (*1985) 18 DLR (4th) 321 which struck down a law forbidding trading on a Sunday as infringing religious freedom by coercing religious adherence and the *Zylberberg* case in the previous note.

[383] The case of *R v Sioui* [1990] 1 SCR 1025 was not a case under the *Charter* or other religious freedom legislation, but concerned only rights to free exercise of religion for the Huron provided for expressly in a clause in an 18th century treaty. The Court agreed with the overturning of the conviction of some members of a Huron band for activities within a conservation park which the Huron said were religious. There was no mention of sacred places in the *Sioui* case and it may be drawing a long bow to include it in this section. However, it has been suggested that the fact the Huron traditionally carried out religious rites at the park may have been because the place in question was sacred: see the speculation that this was a sacred place by Ross, above n 24 at 5. While it was not decided under the *Charter* and was a matter of treaty interpretation, it may be relevant as a comparison and an indicator of the post-*Lyng* jurisprudence in Canada. It is discussed in Chapters 8, 9 and 11.

[384] See the analysis of Ross, at above n 24, and at 1.4 above.

[385] For example, in s 4.2 of British Columbia's *Park Act*, RSBC 1996, c 344.

[386] There have been a series of unsuccessful cases relating to sacred places in which religious freedom claims under the *Charter* were raised as follows:

***McCrady v Ontario* cases** in the 1990s which came out of a series of injunction applications by the Poplar Point Ojibway Nation to stop a hydro-electric dam project at the sacred High Falls area over the Namewaminikan River in Ontario. A claim for religious freedom failed when directed to actions of the Registrar of Cemeteries under specific cemeteries legislation. Due to the limited nature of the issues, the cases are not of great relevance. The relevant cases are *McCrady v Ontario* 1991 ACWSJ Lexis 34584 and *McCrady v Ontario* (1993) 61 OAC 286.

Nanoose Indian Band v Intrawest [1994] CanLII 1806. This was part of a series of challenges relating to the discovery of human skeletal remains on Vancouver Island during a sewer extension. The permits were overturned on procedural fairness grounds but not on religious freedom grounds. It is

None of the sacred place cases reached the Supreme Court on the question of religious freedom[387] so it is not clear whether that Court would have developed similar tests like in the USA to limit the application or would have used a more expansive view of religious freedom. While the general principles stated for religious freedom under the *Charter* appear wider than the way the jurisprudence has ended up in the USA and Australia, the few cases directly related to sacred places so far have not fared any better, though it is arguable that they have not been tested enough.

5.5 New Zealand

5.5.1 The *New Zealand Bill of Rights Act*

The first statutory freedom of religion provisions in New Zealand were enacted as part of the *New Zealand Bill of Rights Act* ("*NZBOR*") in 1990.[388]

Unlike the *Canadian Charter*, the general religious freedom provision in the *NZBOR* picks up the distinction drawn in Article 18 of the *ICCPR*[389] which separates the "belief" component from the "manifestation" component of religion. The relevant provisions, s 13 and s 15 of the *NZBOR*, are in the following form:

> s 13 "Everyone has the right to freedom of thought, conscience, religion and belief, including the right to adopt and to hold opinions without interference."

> s 15 "Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or private."[390]

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speculative as to whether this case fits into one of the threshold grounds that are discussed in subsequent chapters.

Cameron v Minister for Energy [1998] CanLII 6834. This was part of a set of cases by the Saulteau and Kelly Lake Cree Nations relating to a sacred area near mountain peaks known as the Twin Sisters and Mount Monteith to stop oil-drilling and timber-cutting activities. This case failed but on a variety of alternate grounds ranging from the lack of infringement of activities to lack of centrality of the places to be drilled, to the lack of coercion.

[387] With the possible exception of *R v Sioui* as mentioned above in n 383.

[388] For a summary of the history of the *NZBOR*, see Huscroft and Rishworth (eds), above n 76. This Bill was driven largely by the Labour Attorney-General of the time, Geoffrey Palmer, and there appears to have been no great public groundswell for such a Bill of Rights.

[389] For the contents of this, see 6.2.2 below.

[390] Note that s 15 only allows manifestation of "religion and belief" not also "thought and conscience" as referred to in s 13. The distinction between the terms, however, is not relevant for the purposes of this thesis.

In addition, there is a specific provision mentioning the profession and practice of religion for members of minority groups, like in Article 27 of the *ICCPR*[391]. This is found in s 20 of the *NZBOR*, which reads as follows:

> "A person who belongs to an ethnic, religious or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority".

Like Canada, there is no express prohibition on establishing a religion. There is no suggestion that the courts will use the general religious freedom provisions to create rules against establishment.[392] The government specifically decided not to include a clause prohibiting establishment of religion because of the interpretations given to that in the US such as restricting prayers and aid to religious schools.[393]

The *NZBOR* applies at all levels of government to bodies or people performing public duties or functions conferred on them pursuant to law.[394] This applies throughout the nation as New Zealand does not have a federal system.

There have so far been very few cases on freedom of religion in New Zealand. For the general principles that would be applied, one needs to look to the principles emerging from the other provisions of the *NZBOR* and also to the *Canadian Charter* jurisprudence. The Court of Appeal has indicated that such rights should be interpreted generously, to keep pace with civilisation.[395] The result should be similar to the approach that looks both to the purpose and effect of the action in question. However, despite the earlier rhetoric, the Court of Appeal has also taken a narrow view of what was religious and did not appear to give much weight to what the group said its beliefs were and what would be an infringement of those beliefs.[396] One wonders if this is because there is a greater reluctance to apply a generous view to religious freedom cases compared with other rights situations or whether this is part of a retreat from the

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[391] See 6.2.2 below for the text of Article 27.

[392] *Mendelssohn v Attorney-General* [1999] 2 NZLR 268, 275 suggested that the government had the power to take positive steps to protect or assist religions if it wished.

[393] New Zealand, *White Paper,* above n 100, also referred to in Elkind and Shaw, above n 100, at 51.

[394] Section 3.

[395] *Simpson v Attorney General* [1994] 3 NZLR 667, eg at 676, 691, 702; *Ministry of Transport v Noort* [1992] 3 NZLR 260, 268–271, 277.

[396] For instance in *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88 where it held that the appointment of the Public Trustee as an interim caretaker of the property of a religious group had nothing to do with freedom of religion as it did not affect the ability of persons to conduct themselves in religious activities as they saw fit. The evidence was said to amount only to evidence that the group would be uncomfortable with a non-believer involved in the trust's affairs. It had been alleged that one of the beliefs was that all decisions should be made by consensus but this was said to be contradicted on the evidence.

earlier expansive approach to rights generally. There have not, however, been any doctrines of centrality or coercion articulated nor have courts espoused the narrow purpose tests in Australia or in the USA after *Smith*.

Commentators have followed Australian authorities[397] in saying that there is no common law principle of religious freedom in New Zealand.[398]

Effect of Breach

The *Canadian Charter* format is followed by having a general limitations clause applicable to the various rights such as those mentioned above. This is in s 5.[399] Unlike the constitutional provisions in USA, Australia and Canada, the *NZBOR* is not entrenched and is only an ordinary statute. Furthermore, the rights listed do not override or invalidate any other statutory provisions, even if s 5 is not satisfied.[400] As a result, the effectiveness of the *NZBOR* is highly limited in the face of other legislative power. Its main effects are in relation to administrative action and also in the requirement found in s 6 for there to be a preference for interpreting laws in a manner consistent with the *NZBOR* where possible and the requirement in s 7 for reports to Parliament on incompatibility.[401] It has been suggested though that although the *NZBOR* is an ordinary statute, the importance of the rights set out therein may well mean that they will not be interpreted any differently from similar rights in a constitutional document.[402]

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[397] See 5.3.1 above.

[398] Huscroft and Rishworth (eds), above n 76, at 226.

[399] Section 5 provides "Subject to section 4 of this *Bill of Rights*, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[400] This is by virtue of s 4 which says:

> "No court shall in relation to any enactment (whether passed or made before or after commencement of this *Bill of Rights Act:*
>
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective, or
>
> (b) decline to apply any provision of the enactment by reason only that the provision is inconsistent with any provision of this *Bill of Rights*."

[401] Under s 7, the Attorney-General has to report to Parliament when new legislation being introduced is incompatible with *NZBOR*.

[402] The Court of Appeal, particularly its President Cooke, has made comments to the effect that bills of right need a generous interpretation to give individuals the full measure of the fundamental rights and freedoms referred to: *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440, citing Lord Wilberforce in a Bermuda constitutional case, *Minister of Home Affairs v Fisher* [1980] AC 319, 328–-9. This was repeated in *Minister of Transport v Noort* [1992] 3 NZLR 260, 268. In *Simpson v Attorney General* [1994] 3 NZLR 667, Hardie Boys J in the Court of Appeal said that the *NZBOR* is a commitment by the Crown that those who exercise power in the three branches of government will observe the rights the Bill affirms. This commitment was not only to observe them in their own duties but to be able to grant effective remedies when rights have been infringed. The enjoyment of basic human rights were said to be the entitlement of every citizen and their protection was the obligation of every civilized state. The rights were said to be inherent and essential to the structure of society and do not depend on the constitutional form in which they are declared, at 702; see also Casey J at 691. The *NZBOR* was also said to be a living instrument which may be interpreted afresh from time to time: *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439; *Simpson v Attorney General* [1994] 3 NZLR 667, 676.

In relation to limitations, the *Oakes* test as set out in Canada, or a slightly modified version thereof, has been applied in New Zealand.[403] Despite this, some lower courts have given s 5 a very low threshold for freedom of religion cases.[404]

5.5.2 Overview of the Maori Sacred Place Cases

There are only limited references to the religious freedom provisions of the *NZBOR* in decided cases concerning Maori sacred places. This is likely to be because of the ability to raise issues of damage to sacred places in the planning and development legislation that will be discussed in Part C. It is also likely because the lack of effectiveness of the *NZBOR* to invalidate or prevent actions, exacerbated by the courts showing no interest in such arguments in relation to such sacred places when they have been raised. The few relevant cases have all failed on the religious freedom grounds.[405] There are no statutes specifically dealing with religion freedom for the Maori peoples.

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[403] See Rishworth et al, above n 231, at 174, 182–3; *Minister of Transport v Noort* [1992] 3 NZLR 260; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, at [18]–[19]. See also 11.4 below.

[404] One example is the case of *Feau v Department of Social Welfare* (1995) 2 HRNZ 528, concerning a Seventh-day Adventist convicted and sentenced, inter alia, to attend an induction programme on a Saturday morning. He challenged this as a manifestly excessive sentence as attending such a programme on a Saturday was contrary to his religious beliefs about the observance of the Sabbath and that this was in violation of his rights under s 15 of the *NZBOR*. Elias J in the High Court in Auckland accepted that the appellant's belief was sincere and that this belief would be infringed by the requirement to attend on Saturday. His response, however, was that a one-off attendance that did not involve actual work was the price he had to pay for his offence. It did not appear that any weight was given to the religious belief infringed or to whether there was a means of offering the programme on another day of the week to avoid the inconsistency with the religious requirements.

[405] These are:

New Zealand Underwater Association v Auckland Regional Council (Unreported, Planning Tribunal, A131/91, 16 December 1991). The application was opposed by a number of parties on various grounds, including environmental ones. Religious freedom arguments under the s 20 minority religion clause was relied on by various Maori groups to challenge an application to discharge dredgings from the Port of Auckland into the waters of the Hauraki Gulf, said to be a sacred treasure. The case failed because the religious interests did not outweigh other factors favouring the grant. In the course of the decision, there were dicta that reflected on issues such as the relationship between the *NZBOR* provisions and protection of sacred places, centrality and the property rights discussed in subsequent chapters.

Beadle and Wihongi v Minister for Corrections (Unreported, Environment Court, A74/02, 8 April 2002). This concerned the development of a regional prison at Ngawha which was opposed by some Maori people on the grounds of disturbance of the taniwha, an ancestral creature, in the area.

Ngati Hokopu ki Hokowhitu v Whakatane District Council, (Unreported, Environment Court, C168/2002, 13 December 2002), a dispute between different Maori groups over a marae complex development close to a famous urupa [burial area].

The latter two cases in effect turned on the courts making a finding of fact that the developments would not desecrate a sacred place and they are more relevant for the analysis in Part C. However some dicta are discussed in the thematic chapters in this Part.

So far all signs point to New Zealand courts treating Indigenous sacred places no more sympathetically than in Canada and the US cases as far as freedom of religion jurisprudence is concerned.[406] This Part explores one major reason for this.

[406] There is very little by way of commentary on the freedom of religion in New Zealand in the context of Indigenous sacred places or any sacred places. In the 2003 text, Rishworth et al, above n 231, Paul Rishworth made reference to the US sacred place cases and the fact that packaging claims about such places was not likely to give better results than the specific provisions of the *Resource Management Act* dealing with waahi tapu. The *Resource Management Act* cases on waahi tapu sacred places point are discussed in Part C. There is also reference to the *NZBOR*'s application to protect sacred sites in Richard Collins, above n 23, at 244–7. He refers to the lack of cases and does not show any optimism for such cases succeeding, suggesting that religious equality arguments may fare better.

Chapter 6 – Protection of Activities Rather Than Place

6.1 Introduction

This chapter examines the problems of formulating religious freedom as the protection of the individual's right to carry out or refrain from activities[407] rather than the protection of sacred places themselves. The rationales concentrating on individual autonomy often suit religious freedom claims in the typical cases coming before the courts from Christian or similar types of religions which are based on the plaintiff's freedom to carry out or refrain from activities on religious grounds. In the case of Indigenous sacred places, however, what needs to be protected is of a different kind, that is, of the place itself, not primarily the individual ability to hold beliefs or carry out actions. The problem is that within the typical Western human rights model the concept of place, especially a place that is not privately owned by the religious group, is usually not contemplated as being within the sphere of individual autonomy but falls in the realm of relationships with the wider society, matters that are typically governed by the state in the public sphere. This does not mean that the traditional model has to be set in stone and cannot be expanded, but, because of the potential impact on third party or government property development rights, it has suited the courts not to do so.

This chapter starts in 6.2 with the legislation and cases that have couched religious freedom as non-interference with individual "beliefs and actions" rather than protection of the object of the beliefs or actions. The next section 6.3 discusses the general religious freedom cases in relation to locating and damaging places of worship and proselytising, where, despite the fact that these cases have related to specific locations, the decisions and arguments have in the main still used the traditional formulation of the right to carry out activities (such as worship and teaching) at those places.

The contrasts will be made with the Indigenous sacred place cases in 6.4 where there may be no protection, even where sacred places could be destroyed but where the individual believer is not restrained from holding or carrying out any particular beliefs or actions. While most of these Indigenous sacred place cases have been argued and decided on the basis of the protection of the right to carry out activities there, the cases

[407] Including the "internal activity" of believing.

reveal the problems with such an approach when it is not the main object of protection. Finally 6.5 discusses the appropriateness of such an approach and alternatives.

6.2 The Discourse of Individual Rights as Rights to Believe and Carry out Religious Practices and Non-interference With Those Rights

6.2.1 The Formulation of Religious Freedom as the Freedom to Believe and Act

Introductory Chapter 4 discussed how the human rights model, including religious freedom, is substantially about personal autonomy and what people can believe or do without government interference. The analysis of the jurisprudence in the four countries indicates that religious freedom has tended to be similarly defined. This was summed up in *Cantwell v Connecticut,*[408] where the US Supreme Court said that the First Amendment encompasses "*freedom to believe and freedom to act*". Such a formulation is not surprising given that in all the four countries, apart from Indigenous sacred place cases, almost all the religious freedom cases brought before the courts related to restrictions on the right to express belief or carry out or refrain from activities resulting from such beliefs.[409] This was also the case for various religious freedom cases concerning Indigenous ceremonies.[410] The terminology of the First Amendment Free

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[408] 310 US 296 (1940).

[409] Many cases concerned refusals to work on the Sabbath: see *Sherbert v Verner* 374 US 398 (1963) (USA) and *Feau v Department of Social Welfare* (1995) 2 HRNZ 528 (NZ). Other examples of "activity based" cases included:

- proselytising: see *Cantwell v Connecticut* 310 US 296 (1940); *Murdock v Pennsylvania* 319 US 105 (1943) (US);
- the refusal to salute flags: see *West Virginia State Board of Education v Barnette* 319 US 624 (1943) (US);
- the refusal to attend public schools or applications for exemptions from this: *Wisconsin v Yoder* 405 US 205 (1972) (US); *R v Jones* (1986) 31 DLR (4th) 569 (Canada);
- the freedom of Sikhs to carry a kirpan: *Multani v Commission Scolaire Margueritte-Bourgeoys* [2006] SCC 6 (Canada);
- anti-abortion protests: *Ontario (Attorney General) v Dieleman* (1994) 20 OR (3d) 229 (Canada);
- abstentions from military drills: *Kryger v Williams* (1912) 15 CLR 366 (Australia);
- the disruption of worship services from the deportation of an imam: *Minister for Immigration v Lebanese Moslem Association* (1987) 71 ALR 578 (Australia);
- the use of a name by a religious organisation: *Catholic Church of the Diocese of Darwin Property Trust v Monterio* (1987) FLR 427 (Australia); or
- subversive activities: *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 (Australia – in this case, while the impugned legislation was one directed at the organisation and its property, a major consideration was the extent to which subversive activities could be curtailed under s 116).

[410] In *Frank v Alaska* 604 P 2d 1068 (Alaska, 1979) where the Supreme Court of Alaska found that the hunting regulations preventing the killing of moose for an Athabascan funeral potlatch ceremony interfered with the free exercise of that religion and exemptions would be granted.
In Canada, the case of *R v Jack* [1985] 2 SCR 332 was about hunting deer out of season but reached a different result from *Frank*.

Exercise Clause used in the USA and Australia's s 116 of the *Constitution* reflects the conception of the right in such terms by the use of the language of "free *exercise* of religion" (emphasis added). Despite the more general expression in Canada and New Zealand referring to freedom of conscience and religion and the like, the cases have so far not departed from the usual description of the freedom to believe and act.[411]

An Australian example of an emphasis on protecting the right to carry out or refrain from activities rather than protection of the beliefs themselves is found in *Aboriginal Legal Rights Movement v South Australia (No 1),*[412] on the challenge to the Hindmarsh Island Royal Commission set up to determine, inter alia, whether religious claims were fabricated. Debelle J[413] said that the fundamental freedom of religion protected the *exercise of Aboriginal religious beliefs* and members of the Ngarrindjeri were still entitled to freely exercise those beliefs.[414] He acknowledged that it may be a grave insult to require a person who professes a particular belief to attend and answer questions in respect of that belief but distress and concern about such an inquiry fell short of an impairment to the free exercise of religion.[415] The emphasis in Debelle J's reasoning was only on the protection of activities, including the activity of believing, but impacts short of that, even declaring beliefs to be fabricated, would not be regarded as impairing the free exercise of religion.

In *People v Woody* 394 P 2d 813 (Cal, 1964), the Supreme Court of California overturned a conviction for using the prohibited substance peyote when used for sacramental purposes in a ceremony of the Native American Church.

In the Stolen Generations case in Australia, *Kruger v Commonwealth* (1996) 190 CLR 160, the argument of the plaintiffs was that the removal of children from their communities and traditional sacred sites prevented them from engaging in *religious practices*.

In the native title cases of *Cheedy v State of Western Australia* [2010] FCA 690 and the earlier *FMG Pilbara Pty Ltd/Ned Cheedy and Ors on behalf of the Yindjibarndi People/Western Australia* [2009] NNTTA 91, although the case concerned sacred areas, the infringements alleged were about carrying out religious obligations like managing and controlling the area, collecting ochre and stones, singing the songs and protecting the site.

[411] For example, in the New Zealand case of *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88, the Court of Appeal held that the appointment of the Public Trustee as an interim caretaker of the property of a religious group had nothing to do with freedom of religion as it did not affect the ability of persons to *conduct themselves in religious activities* as they saw fit. The *ICCPR* model that they have borrowed from is discussed in the next section.

[412] (1995) 64 SASR 551, a decision of the Full Court of the Supreme Court of South Australia.

[413] His was the most detailed of the judgments on the religious is issue.

[414] (1995) 64 SASR 551, at 555. Debelle J said that, even if the report of the Commission said that their beliefs were fabricated, the Ngarrindjeri could continue to profess them, ibid.

[415] Ibid. This is criticised in Joanna Bourke, 'Women's Business: Sex Secrets and the Hindmarsh Island Affair' (1997) 20(2) *University of New South Wales Law Journal* 333, 345 as indicating a lack of understanding and trivialisation of Aboriginal beliefs.

6.2.2 The International Instruments and Case Law

The extent to which a different approach may have emerged at an international level is relevant to the religious freedom provisions[416] modelled on the *ICCPR*.[417]

The relevant parts[418] of Article 18 of the *ICCPR* for these purposes are:

> "(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

These expressions of the freedom of religion are in classic Western form, framed as individual human rights[419] and follow the form of freedom to have and adopt a belief and the freedom to manifest that belief, by way of "worship, observance, practice and teaching".[420] While these provisions speak of "religious freedom" rather than just "free exercise" of religion, the formulation has not gone beyond belief and action.

Krishnaswami, the UN Special Rapporteur,[421] spoke of the concept of religious freedom as being intended to embrace all possible manifestations of religion and belief.[422] He included examples of the use and maintenance of buildings for worship, public processions and the right to go on pilgrimages to sacred places, all notably framed in the language of activities in relation to places. Similarly, Article 6(a) of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion*

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[416] Namely the *Canadian Charter*, the New Zealand *NZBOR* and the ACT and Victorian provisions in Australia, all covered in Chapter 5.
[417] Above n 231. The *ICCPR* has been ratified by all four countries in question, namely Canada in 1976, New Zealand in 1979, Australia in 1980 and USA in 1992. See earlier mention of this in Chapters 4 and 5.
[418] For Article 18(3), see Chapter 11.
[419] See Chapter 4.
[420] These words also appear in the 1948 *Universal Declaration of Human Rights*, Article 18
[421] In a 1960 report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities dealing with Freedom of Religion and Belief in relation to Article 18 of the *Universal Declaration of Human Rights*: Arcot Krishnaswami, Special Rapporteur, *Study of Discrimination in the Matter of Religious Rights and Practice*, UN Doc E/CN.4/Sub.2/200/Rev.1 (1960). Krishnaswami himself was from India and would be expected to have some familiarity with religions having sacred places.
[422] See also United Nations Human Rights Committee, *General Comment No 22 (48) (Art. 18): The Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (23 July 1993) about the intent of the Article not to be limited to traditional religions or beliefs analogous to them.

or Belief[423] includes mention of the right to worship and assemble and to *maintain* places for these purposes as an example of manifestation of religion.[424]

UN documents in the context of religious freedom have made references, unfortunately with no conceptual analyses, to the need to protect sacred places from desecration,[425] thus hinting that a concept of religious freedom "ought" to cover such protection of the places themselves.[426] Gregory Mose has argued for protection of places of worship as part of the recognition of the human right of freedom of religion.[427] However, this was mainly on the basis of churches or mosques being required for the purposes of manifestation of religion, assembling for worship and teaching of religion, that is, for religious practices,[428] not on the basis that these places were sacred in themselves.

The *ICCPR* also has a provision dealing with minority religions and cultures in Article 27 which provides as follows:

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[423]GA Res 36/55, UN GAOR, 36th sess, 73rd plen mtg, UN Doc A/RES/36/55 (25 November 1981) ('*Religion Declaration*'). This Declaration expanded on Article 18 of the *ICCPR*.

[424] Though it has been pointed out that the list in the *Religion Declaration* was not intended to be exhaustive: Tahzib, above n 232, at 183 and 322.

[425] On its face, desecration does not in itself necessarily involve any restriction of actions or beliefs.

[426] For example, Krishnaswami, above n 421, mentioned the need to protect burial places and cemeteries from desecration, though that discussion was in the context of the need for equal treatment, due to many official cemeteries being protected and not others, rather than as a statement that protection of such places was part of the human right of religious freedom.
The UN Human Rights Committee has expressed views in reports on various countries to the effect that places of worship and "holy places" should not be closed, confiscated or destroyed by the state. These have been listed in Tahzib, above n 232, at 269, referring to various Human Rights Committee reports. For instance, in the October 1993 Annual Report of the Human Rights Committee, United Nations Human Rights Committee, *Annual Report 1993 to UN General Assembly*, UN Doc A/48/40 (Part 1) (7 October 1993) at [233], further details were requested about the destruction of holy places and cemeteries of Baha'is in Iran. Such destruction had been referred to in 1993 reports by the Special Representative of the UN Commission on Human Rights, Reynaldo Galindo Pohl, *Final Report on the Situation of Human Rights in the Islamic Republic of Iran*, UN Doc E/CN.4/1993/41 (28 January 1993) at [239], and by the UN Human Rights Committee, United Nations Human Rights Committee, *Concluding Observations: Iran*, UN Doc CCPR/C/79/Add.25 (3 August 1993), at [16]. Such destructions were (amongst other actions) said to be in clear contradiction of the provisions of Art 18 of the *ICCPR*. It may be, though, that this could fit into the paradigm of a religious activity of gathering at or maintaining such places of worship or else targeted attacks based on their beliefs.
The UN Special Rapporteur, in 1998 in reports on violations of intolerance and discrimination based on religion and belief, listed damage to Indigenous sacred places in USA and Australia as examples of infringements of the Declaration, albeit without any specific discussion about the issue of protection of "place" as opposed to individual exercise of rights: Amor, *Australian Addendum*, above n 258, and Amor, *Religious Intolerance in the US*, above n 324.
The *Vienna Declaration,* above n 16*,* called upon all governments to take all appropriate measures in compliance with international obligations to counter intolerance and related violence based on religion and belief, including "the desecration of religious sites, recognising that every individual has the right to freedom of thought, conscience, expression and religion": see paragraph 22 of Part B. The *Vienna Declaration* was adopted by consensus amongst the 171 States represented at the World Conference and endorsed by the General Assembly of the United Nations.

[427] Gregory M Mose, 'The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking A Rights-Based Approach to the Protection of Religious Cultural Property' (1996) 3 *Buffalo Journal of International Law* 180, in an article dealing with the destruction of places of religious worship. It was also clear from the context of the destruction of such places during the Bosnian conflict that the attacks were intended as an attack on the religious faith of the communities whose places they were and intended to prevent them from practising their religion.

[428] Although he also addressed the importance of such places as part of the heritage of the local communities as well, a matter relevant to Part C.

> "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

The wording too, refers to *professing and practising* the religion and *enjoying* culture and its application has usually concentrated on rights to engage in cultural activities. An illustration of this can be found in the case before the UN Human Rights Committee of *Lansmann v Finland,*[429] concerning a complaint by Sami reindeer herdsmen about a quarry on a mountain that was regarded as sacred. The complaint was only discussed by the Committee as being about the disruption to reindeer activities by the quarry works. Apart from mentioning that the quarrying was at a sacred place, there was no discussion of whether the impact on the place itself could be a breach of Article 27.[430]

The Human Rights Committee has, however, assumed a breach of the Article 27 in the case of a failure to protect Indigenous sacred places in Australia.[431] Similarly in the case of *Hopu and Bessert v France,*[432] some members thought that a hotel development over burial sites in Tahiti could have been a denial of the right to practise religion and cultural values protected under Article 27, which at least raised important questions under that Article.[433] These opinions are hints of a wider view emerging but not well articulated at the international level.[434]

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429 Human Rights Committee, *Views: Communication No 511/1992*, 52nd sess, UN Doc CCPR/C/52/D/511/1992 (8 November 1994).

430 It may be that the sacredness of the mountain was the reason why it was vital that reindeer herding activities should take place there, though the Committee opinion did not even discuss this.

431 Such as in the Concluding Comment in 2000 on Australia where the lack of protection for an Indigenous sacred place, the Boobera Lagoon, was referred to. The concern was expressed that protection of sites of religious or cultural significance for minorities *that must be protected under Article 27* are not always a major factor in determining land use: United Nations Human Rights Committee, *Concluding Observations: Australia*, 69th sess, UN Doc A/55/40 (2000), at [498]–[528].

432 Human Rights Committee, *Views: Communications No 549/1993*, 60th sess, UN Doc CCPR/C/60/D/549/1993/Rev.1 (29 July 1997). The majority finding was that the development on the burial sites was in breach of rights to privacy and family, but that Article 27 could not be relied on because France had reserved its ratification to exclude that article.

433 Committee members Kretzmer, Buergenthal, Ando and Colville said that the failure to protect an ancestral burial ground could raise the issue of denial of the right of religious or ethnic minorities to enjoy their own culture or to practise their own religion. They regretted that the Committee was prevented from applying Article 27 to these cultural values in that case. See also comment by Thornberry, above n 34 at 165–175 on Article 27 suggesting that it should cover the protection of sacred places.

434 Under the *International Convention on the Elimination of All Forms of Racial Discrimination*, open for signature 7 March 1966, 660 UNTS 195, (entered into force 4 January 1969), the Committee for the Elimination of Racial Discrimination ("CERD") had issued a General Recommendation 23 which related to the usual style of rights of Indigenous peoples to practise cultural traditions and to control and use traditional lands: United Nations CERD, *General Recommendation No. 23: Indigenous Peoples*, UN Doc CERD/C/51/Misc.12/Rev.4 (18 August 1997) at [4]–[5]. The CERD however later expressed concern about government-approved activities on areas of spiritual and cultural significance of Western Shoshone peoples in USA as an infringement on cultural rights: United Nations CERD, *Decision 1(68): United States of America*, UN Doc CERD/C/USA/DEC/1 (11 April 2006), at [7]–[8].
Another key provision is the International Labour Organization, Convention 169, *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, ("Indigenous and Tribal Populations Convention, 1989"), adopted by the General Conference of the International Labour Organization at its 76th session on

The issue of direct protection of religious and cultural sites was raised in an earlier text of the *Draft Declaration on the Rights of Indigenous Peoples*.[435] The 1993 text contained provisions placing a positive requirement on states to protect sacred places.[436] Subsequent compromises in re-drafted texts of the Declaration however removed specific mention of sacred places and the requirements on states to ensure that such places are protected.[437]

While there are arguments about whether the Declaration recognises collective or group rights in addition to purely individual ones,[438] this may still be interpreted as rights of groups of people to do things and does not itself challenge the old human rights paradigm of protecting the autonomy of the individual or private group sphere.[439] All that can be gleaned at the moment is a sense at the international level that sacred places ought to be protected as part of the logic of religious freedom but no analysis of the potential conceptual shortfalls in the models has been made.

6.2.3 Cultural Rights in Victoria

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27 June 1989, (entered into force on 5 September 1991), especially Article 13 which speaks of recognition of spiritual values of Indigenous peoples to the land.

[435] The draft was prepared over many years by the Working Group on Indigenous Peoples under the auspices of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, whose work fell within the principles of Article 27 of the *ICCPR*. The 1993 text was approved by the Sub-Commission and referred to the Commission on Human Rights in 1994. The history of the draft Declaration is described in Sarah Pritchard, *An Analysis of the UN Draft Declaration on the Rights of Indigenous Peoples* (2001); Megan Davis, 'The United Nations Draft Declaration 2002, (2002) 5(16), *Indigenous Law Bulletin* 6; Battiste and Henderson, above n 31, in the preface; Thornberry, above n 34. The UN General Assembly has voted to support the Declaration on 2 October 2007 but the four countries in this thesis voted against it initially. Subsequently, Australia in 2009 and New Zealand in 2010, have decided to support it. Canada has also indicated in 2010 that it will take steps to endorse the Declaration.

[436] Though this too was framed as being in order to protect the activities there. The text said:

"13(1) Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies**, the right to maintain, protect and have access in privacy to their religious and cultural sites**; the right to use and control of ceremonial objects; and the right to the repatriation of human remains.

(2) **States shall take effective measures, in conjunction with Indigenous peoples concerned, to ensure that Indigenous sacred places, including burial sites, be preserved respected and protected**." [emphasis added]

Sub-clause (1) though was still framed as a rights to do things in relation to sites, that is to "maintain, protect and have access to" them, but sub-clause (2) went further in protecting sites themselves.

[437] The new Article 12(2) says instead: "States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned." This version was in the Declaration adopted by the General Assembly of the UN on 2 October 2007: *United Nations Declaration on Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007). This version was also that adopted in 29 June 2006 by the Human Rights Council of the United Nations and recommended to the General Assembly for resolution: Human Rights Council Resolution 2006/2 dated 29 June 2006. (Canada is the only one of the four countries represented on the Human Rights Council and it voted against the resolution).

[438] See Part D in 18.2 below, especially under n 1592.

[439] See for example Turpel, above n 248; Beaman, above n 29. The question of new paradigms is taken up in Part D.

In addition to provisions adopting parts of Article 18 and 27 of the *ICCPR*, the Victorian *Charter* has a further s 19(2) that includes a reference to Aboriginal people holding distinct cultural rights and that they must not be denied the right:

> "to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs*".* [s 19(2)(d).]

Though dealing with land and waters, this is still worded as the right of Aboriginal persons to carry out an activity, namely to maintain a relationship. However, at least maintenance of a relationship is not dependent upon physical activities. It also clearly recognises the importance of particular places to spirituality and culture that goes beyond the protection of the mere ability to perform activities. There are no cases yet on the interpretation of this sub-section.

6.3 The Non-Indigenous Religious Freedom Cases and Legislation Concerning Land Use

There have been many non-Indigenous cases concerning land-use issues, especially the right to use particular locations for places of worship. These too have been framed in the traditional model of freedom to carry out religious activities, even when the places of worship may be consecrated and thus, in a sense, sacred. In the days before *Smith,*[440] there were cases brought on the basis of rights to carry out various activities such as:

– to gather and build places of worship contrary to zoning and building laws,[441]

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[440] *Employment Division of Oregon v Smith* 494 US 872 (1990). See mention of this in 5.2 above and analysis in Chapter 10. These religious freedom arguments have continued to be used in the USA in situations when the *Smith* case has been able to be distinguished.

[441] Examples of cases where rights to free exercise of religion in locating and building places of worship overcame town planning requirements in the USA include *Board of Zoning Appeals of Decatur v Decatur, Indiana Company of Jehovah's Witnesses,* 117 NE 2d 115 (Ind, 1954); *Community Synagogue v Bates*, 136 NE 2d 488 (NY, 1956); *Columbus Park Congregation of Jehovah's Witnesses v Board of Appeals of the City of Chicago*, 182 NE 2d 722 (Ill, 1962); *Westchester Reform Temple v Brown*, 239 NE 2d 891(NY, 1968); *Jewish Reconstructionist Synagogue of the North Shore Inc v Incorporated Village of Roslyn Harbor*, 342 NE 2d 534 (NY, 1975); *Lubavitch Chabad House of Illinois v City of Evanston*, 445 NE 2d 343 (Ill, App Ct, 1982); *Islamic Society of Westchester and Rockland v Foley*, 96 AD 2d 536 (NY Sup CT, 1983); *Islamic Center of Mississippi Inc v City of Starkville*, 876 F 2d 465 (5th Cir, 1989). There do not appear to be similar established lines of cases in Canada, Australia or New Zealand on zoning issues, but in one of the leading Canadian cases of *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, the Supreme Court found that not allowing an Orthodox Jewish family to build a succah on their own balcony, even if it was contrary to the rules of the condominium syndicate and even though there was an offer to allow them to build a succah in another place on the common property, was nevertheless a breach of the right to freedom of religion. This then raised similar principles to the zoning cases.

– to make building alterations contrary to historic preservation restrictions in order to facilitate worship, teaching and religious expression,[442]

– to control and use church buildings and create authority structures to determine disputes,[443] and

– to have quietness and seclusion necessary for training priests in a seminary.[444]

A different line of land-use cases in USA and Canada have related to the right to carry out religious activities (for example, worship or proselytising) in public places despite non-compliance with laws requiring permits for such activities.[445]

Even though they concerned land use and places of worship, all of the above cases claimed only restrictions on the freedom to carry out activities. Some, however, included restrictions on conditions necessary for carrying out the activities properly, such as the type of space and setting needed for activities, rather than restrictions that would prevent the activities themselves. For instance, in the *Yonkers* case, the priestly formation activities were not curtailed, but only the quietness required for such activities

[442] For example, the case of *Society of Jesus v Boston Landmarks Commission*, 564 NE 2d 571 (Mass, 1990) concerned alterations of the interior of a church subject to a landmark designation which would have required approval from the Landmarks Commission. The modifications proposed creating space for pastoral counselling rooms and office space and moving the altar to enable this. The Supreme Court of Massachusetts upheld the challenge to the landmark designation on the basis that the configuration of the church interior had to be considered part and parcel of the Jesuits' religious worship. In this way, restrictions on church design and renovation were considered as infringements on religious activities. See also *First Covenant Church of Seattle v City of Seattle*, 840 P 2d 174 (Wash, 1992), followed in *First United Methodist Church of Seattle v Seattle Landmark Preservation Board*, 916 P 2d 374 (Wash, 1996) and also *Keeler v Mayor of Cumberland*, 940 F Supp 879 (D Md, 1996), which all upheld challenges to historic preservation laws restricting alterations to church buildings. Various commentators have characterised historic preservation listing as a restriction on religious expression: see Angela Carmella, 'Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review' (1991) 36 *Villanova Law Review* 401; Robert L Crewsdon, 'Ministry and Mortar: Historic Preservation and the First Amendment after Barwick' (1988) 33 *Washington University Journal of Urban & Contemporary Law* 137, 157–8; Thomas Pak, 'Free Exercise, Free Expression and Landmark Preservation' (1991) 91 *Columbia Law Review* 1813.

[443] Such as cases dealing with adjudication of property rights between factions within religious organisations, for example, *Watson v Jones,* 80 US 679 (1872) and *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 US 94 (1952)

[444] Such as the challenge to a compulsory acquisition of part of the land of a religious seminary in USA, in *Yonkers Racing Corporation and St Joseph's Seminary v City of Yonkers*, 858 F 2d 855 (2nd Cir, 1988). The seminary had claimed that this breached their freedom of religion because the two acres of seminary grounds designated for public housing formed an "apron of quietude" surrounding the seminary and this quietness was essential to the academic, spiritual, psychological and pastoral preparation of the trainees for the priesthood. This was remanded by an appeal court to require consideration of whether the taking of that amount of land would substantially affect religious freedom by affecting the training requirements.

[445] For instance, in *Cantwell v Connecticut*, 310 US 296 (1940); *Kunz v New York*, 340 US 290 (1951). In *O'Hair v Andrus*, 613 F 2d 931 (DC Cir, 1979) it was said that to refuse a permit to use the National Mall for an open air mass by the Pope would run counter to First Amendment principles of freedom of communication and religious freedom. This has been extended to private property such as the sidewalk of a company-owned town in *Marsh v Alabama*, 326 US 501 (1946) where free exercise of religion and free speech principles were upheld in relation to distribution of religious literature. Similar approaches have been taken in Canada in *Ontario (Attorney General) v Dieleman* (1994) 20 OR (3d) 229 and the earlier common law case of *Saumur v City of Quebec* (1953) 4 DLR 641.

to be effective.[446] The issue of extension of the freedom to conditions necessary for its exercise is discussed further in the following sections.

The *RFRA* and the *RLUIPA* in the USA were both still in the form of prohibiting burdens on "*religious exercise*" and were thus still directed at activities.[447] The fact that the legislation did not extend beyond the protection of religious exercise did not appear as a point of concern in Congressional debates.[448]

There have been cases of courts overturning government actions involving sacred places on grounds of religious freedom but the sacredness of the place was not the basis of the decision.[449]

The main non-Indigenous case concerning the significance of the place of worship, rather than the activities carried out there, was the case concerning the Pillar of Fire Church whose Memorial Hall in Denver was to be condemned.[450] The members claimed that the Hall was revered for its historical and symbolic meaning related to the birth of the church.[451] On appeal, the Supreme Court of Colorado in *Pillar of Fire v Denver Urban Renewal Authority*[452] said that, if the building was sui generis and had unique religious significance, its destruction would then be far more than an incidental burden on religion. The Court noted that the case presented an issue which had rarely, if ever, been raised before, given the scarcity of cases dealing with the condemnation

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[446] In the example of set-back and parking requirements, it is less clear whether the building and the parking were seen in themselves as religious activities or whether these were part of the conditions necessary for the effective operation of the churches in question. That level of analysis was not carried out in the cases referred to above in n 441.

[447] See 5.2.2 above for the references to these Acts. For example, the *RLUIPA* prohibited governments from imposing or implementing a land use regulation in a manner that imposes a substantial burden on the *religious exercise* of a person, unless the government passes the compelling interest strict scrutiny test. The definition of religious exercise in s 2000c-5(7) was to include "any exercise of religion, whether or not compelled by or central to a system of religious belief". This may, of course, have been because the Congress was reluctant to stray from the wording of the First Amendment.

[448] Probably because it has not caused a problem for mainstream religions.

[449] For example, in *Kotohira Kinsha v McGrath* 90 F Supp 892 (D Haw,1950), a World War Two seizure under the *Trading with the Enemy* legislation of a Japanese Shinto shrine in Hawaii, said to be where three Shinto gods were enshrined, was found by the District Court of Hawaii to be an infringement of the Free Exercise clause. The seizure was invalidated by the government's particular motives in targeting the Shinto religious belief. Although the description of the gods in the shrine would suggest a sacred nature, there was no need for the court to question whether the shrine was considered sacred or whether ceremonies had to be performed there. It fitted the traditional categories of people having a right not to be persecuted *because* of their beliefs and the protection was not for the shrine itself. This case falls into the similar category of those examples cited by Gregory Mose in Bosnia-Herzegovina where churches and mosques were destroyed for the purpose of destroying the religion or intimidating the believers: Mose, above n 427.

[450] That is, compulsorily acquired for demolition, not because of its dilapidated condition.

[451] The building was at the time of the action used for church purposes but not for regular Sunday worship services.

[452] 509 P 2d 1250 (Colo, 1973).The Appeal Court set aside that decision allowing condemnation and remanded the case for further hearing.

of religious property.[453] It also said that the First Amendment protects religious freedom which "has its roots in the hearts and souls of congregations" not in "inanimate bricks and mortar", but noted that religious faith and tradition could invest certain structures and land sites with significance deserving First Amendment protection. The matter was remanded to have the facts determined.[454] The *Pillar of Fire* case did not even require that the building should have particular sacred qualities or that it would be a breach of the tenets of the religion to destroy it. There was reference to the building being "sui generis" but that appeared more to be a way of distinguishing it from other "run of the mill" church buildings of the denomination rather than any doctrinal significance or necessity to have that particular church. It was clear that the building was not said to be important for the purposes of the religious activities carried out there. Unfortunately, because of the ultimate factual findings, the issue of the extent to which destruction of significant places could be burdens on free exercise of religion was not discussed in any depth beyond accepting the possibility.

There do not appear to have been any freedom of religion cases in Australia, Canada or New Zealand addressing the taking or demolition of non-Indigenous places of religious significance. Cumbrae-Stewart in Australia in what may be an overly-optimistic early article,[455] suggested that it could be a breach of s 116 for the Commonwealth government to convert freehold land to leasehold where a consecrated Anglican church was situated on the freehold land.[456] The reason he gave was that the *act* of consecration was one which was to be permanent and thus required freehold tenure rather than leasehold, as it could not be used for purposes for which it was not consecrated. His speculation, despite relating to land being made sacred (through consecration), was framed in terms of religious activities, with the act of consecration being the religious exercise that needed to be protected.[457]

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[453] A point also noted in *Yonkers Racing Corporation and St Joseph's Seminary v City of Yonkers*, 858 F 2d 855 (2nd Cir, 1988), discussed above n 444, where the court said it was not aware of any other taking of church property being challenged in a federal court and that the *Pillar of Fire* case was the only other case of this sort.

[454] On remand, however, the trial court held that the Hall was not sui generis and had no unique religious significance. It found that the church was not the founding church of the organisation and that the church owned at least five other worship centres nearby. It also held that there had been attempts in the past to sell the building but there were no willing buyers so it was used mainly as a rooming house. The matter went back to the Supreme Court of Colorado on appeal in *Denver Urban Renewal Authority v Pillar of Fire*, 552 P 2d 23 (Colo, 1976) which dismissed the appeal given the factual findings.

[455] Francis Denys Cumbrae-Stewart, 'Section 116 of the *Constitution*' (1946) 20 *Australian Law Journal* 192. This was written before the "purpose of the impugned law" principle became clearly enunciated by the High Court.

[456] Ibid, at 210.

[457] This presupposes that keeping some place sacred was the ongoing exercise that would be impaired; somewhat tortuous reasoning when the real importance of a consecrated place is the status of the place rather than any ongoing activity that keeps it consecrated. This, however, may be reading too much into it as it was not Cumbrae-Stewart's purpose to tease out the distinction between place and activity.

In almost all of the above situations the needs of the religions were addressed by characterising religious freedom as a right of an individual or group to carry out activities. There is a clear contrast seen in the next section with the Indigenous sacred places where the traditional formulation just does not work.

6.4 The Indigenous Sacred Places Cases and Legislation

6.4.1 Introduction

All the Indigenous sacred place cases relying on freedom of religion arguments appear to have been analysed by the courts on the traditional model of whether rights to perform religiously motivated activities were infringed. Some cases have not required any protection for sacred places themselves as what was sought to be protected was only the ability to carry out religious activities.[458] There is no doubt that the ability to perform activities at sacred places may be of great importance in Indigenous religions,[459] perhaps as a way of keeping the place sacred[460] or maintaining the state of the land,[461] but when the real issue is the protection of the place itself, the traditional model has proved quite inadequate.

There have been cases which have, to different degrees, also involved questions about activities and these have been analysed by the courts in that same way, but the major

[458] Examples are the issues about disclosure of restricted information to a Royal Commission in *Aboriginal Legal Rights Movement v South Australia (No 1)* (1995) 64 SASR 551, or rights to set up a religious camp as in *US v Means*, 627 F Supp 247 (DSD, 1985) and on appeal, 858 F 2d 404 (8th Cir, 1988), or removal from a place preventing regular rituals there as in *Manybeads v US*, 730 F Supp 1515 (D Ariz, 1989) and the right to carry out religious ritual in a conservation park as in *R v Sioui* [1990] 1 SCR 1025. While this was not what was ultimately sought, the argument put in Stolen Generations case about the removal of children from communities and sacred places was framed as depriving them of the ability to be taught about and to practise their religion: *Kruger v Commonwealth* (1996) 190 CLR 160.

[459] The holistic nature of most Indigenous religions means that it is difficult to separate "place" from "activity" at or in relation to a place: see examples from 3.2 above. Rituals may need to take place there because they are places which are sacred and where one can tap into that sacredness or where the sacredness is essential for the ritual to be effective. However, to be effective these had to be performed at the original geographic sites used by the original creative beings, so ritual could not be divorced from the particular place: as suggested for example by Theodor G H Strehlow, 'Geography and the Totemic Landscape in Central Australia: A Functional Study' in Ronald M Berndt, (ed), *Australian Aboriginal Anthropology* (1970).

[460] For instance, as the Berndts described it once, the mythical beings continue to exist as long as the people continue to obey the instructions laid down in the beginning: Ronald and Catherine Berndt, *World of the First Australians,* above n 146. Swan has also said that the performance of ritual heals the people and the place by cleansing and creating harmonies at the places and enabling clearer communication between the place and the people: Swan, *Sacred Places,* above n 9. See also Kelley and Harris, above n 40. Another example is that of re-touching the Wanjina paintings as a necessary ritual, referred to in the earlier section, 3.2 above.

[461] In the USA, Vine Deloria also spoke of rituals being practised in an effort to bring "harmony and coordination to the present physical universe" and that the "dominant purpose of these rituals is to bring order out of a chaotic situation": Deloria and Stoffle, above n 183, ch 3. It has also been said that rituals continue the process of creation: Suagee, 'Mother Earth's Caretakers', above n 36. Kolig has described this as a duty to transform spiritual potential into actual life forms as part of a mutual responsibility between humans and the land: Kolig, *Noonkanbah Story,* above n 30. See also Bonvillain, above n 156, and Canada, Royal Commission on Aboriginal Peoples, above n 8.

concern in all those cases was to protect the sacred places themselves. Nevertheless, the courts only analysed the claims on the basis of restraint on the activities of the plaintiffs. The best illustrations of these problems are discussed below in 6.4.2 in relation to a line of US cases. Despite the recognition of sacred places needing to be protected as part of freedom of religion under the *ICCPR* provisions,[462] the limited religious freedom cases in Canada and New Zealand have not shown much willingness to expand the concept beyond belief and activities, nor has the one set of sacred place cases in Australia that raise s 116.

In the absence of actual rituals being prevented at the sacred places sought to be protected, Indigenous groups in Canada and Australia have, in at least two cases, framed their activities in the more passive forms of "stewardship" or "management" of the sacred places. Allowing damage to such places could be considered infringement on these activities. However, as discussed below, these formulations have been rare and have not proven successful so far.

6.4.2 The US Cases

In a series of US cases to prevent damage to sacred places, the courts were clearly only interested in activities said to be infringed and not in the sacredness of the places themselves. This is illustrated in the discussion of the cases below.

Sequoyah v Tennesee Valley Authority

In *Sequoyah v Tennesee Valley Authority,*[463] the Cherokee plaintiffs sought injunctive relief to prevent the completion and flooding of the Tellico Dam and Reservoir. There were arguments based on the inability to visit the area for religious pilgrimages and to collect medicines, but a key issue for the Cherokee was that the dam and reservoir would disturb the sacredness of the river valley and the very essence and existence of the Cherokee religion and culture. The activities such as pilgrimages and the collection of medicines at that Valley were of significance because of the sacredness of the place itself.

Judge Robert Taylor at first instance in the US District Court in 1979 assumed that the land to be flooded was considered sacred to the Cherokee religion.[464] However, he

[462] See 6.2.2 above.
[463] The US District Court for the Eastern District of Tennessee decision is at 480 F Supp 608 (ED Tenn, 1979) and the Circuit Court decision on appeal at 620 F 2d 1159 (6th Cir, 1980).
[464] 480 F Supp 608 (ED Tenn, 1979) at 611.

referred to the essential element to a claim under the Free Exercise Clause as being some form of government coercion of *actions,* such as pressuring or forcing individuals not to participate in religious practices.[465] He said that other than preventing access to certain land, however, the impoundment of the reservoir had no coercive effect on the plaintiff's religious *beliefs or practices.*[466] This was despite the claims and evidence that the effect of the government action was to destroy sacred places and inflict spiritual harm on the Cherokee people. Ultimately, the judge disposed of the case on a different basis.[467]

From the above analysis, it is clear that, although the concerns were about the sacredness of the valley being damaged, the judge only analysed effects on the activities of the plaintiffs. The same approach was used on appeal by the Circuit Court,[468] which also dismissed it on grounds related to the religious exercises at the particular valley. The grounds relied on by the Circuit Court related to the lack of centrality of *the practices* at the Valley.[469] Judge Lively pointed out that medicines collected from the Valley area to be flooded could be obtained elsewhere and concluded that the centrality of the Valley to the practices of the traditional Cherokee religion was therefore missing. The religious significance of the area was not sufficient to make it or the practices there central to the religion. The Court said that "at most" the evidence established a feeling by the individuals that the general location of the dam and impoundment had a religious significance which would be destroyed by the flooding.[470] The dismissive tone suggested that the religious significance of the place and its destruction was irrelevant to what the court needed to consider in relation to the prevention of religious activities.

Hopi Indian v Block

Hopi Indian v Block [471] related to the expansion of the Arizona Snow Bowl in the San Francisco Peaks. Both the Hopi and Navajo plaintiffs spoke of the sacredness of the Peaks themselves and as the one sacred reality rather than divided into different sites.

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[465] Ibid.
[466] Ibid. The requirement for coercion is discussed in Chapter 9.
[467] Relating to the lack of any claim to a legal property interest in the land: see Chapter 11.
[468] The majority decision was handed down by Circuit Judge Lively in 1980 in *Sequoyah v Tennessee Valley Authority*, 620 F 2d 1159 (6th Cir, 1980).
[469] This issue of centrality is discussed in Chapter 8 in a different context. While Judge Merritt dissented, this was just on the basis that the case should be remanded to give the plaintiffs an opportunity to lead evidence on the centrality of the religious exercise.
[470] 620 F 2d 1159 (6th Cir, 1980) at 1164.
[471] (DDC, 1981) 1981 US Dist Lexis 18421.

Judge Richey of the District Court of the District of Columbia ruled against the plaintiffs on whether there was a burden on free exercise of religion. He echoed earlier District Court comments that there needed to be a "coercive effect of the enactment as it operates against the *practice* of religion" (emphasis added).[472] His conclusion was that the government had not forced the plaintiffs to embrace any religious belief or to say or believe anything in conflict with their religious tenets and neither their religious ceremonies nor collection of traditional material was being prevented. The judge said that the plaintiffs were instead making "an unusual claim" based on the indirect effects of the desecration of the Peaks on their religion.[473] As in *Sequoyah*, the Court gave no weight or relevance to the claims of sacredness and desecration but dismissed the claims because of the lack of sufficient effect on the activities.

The appeal was dismissed in a decision in 1983 in *Wilson v Block*.[474] The Circuit Court recognised that the San Francisco Peaks[475] were essential for ceremonies and gathering of religious objects and that the religious ceremonies were therefore site-specific. However, Senior Circuit Judge Lumbard, who gave the opinion of the Court, repeated that there had been no direct or indirect burdens on religious *beliefs or practices*.[476] The plaintiffs argued that to desecrate the spiritual character of a religion's most sacred shrine would force modification of doctrines to conform to changed circumstances and would create Free Exercise burdens. The Court concluded that the construction of the Snow Bowl facilities would cause the plaintiffs spiritual disquiet, but such consequences did not amount to a Free Exercise claim.[477] It found that, as the plaintiffs had not demonstrated that the government land in issue was indispensable *to some religious practice*, they had not justified a First Amendment claim.[478] The Snow Bowl had also not prevented the practices so far.[479]

The Court did have to deal however with the *Pillar of Fire* case[480] which was not argued on the basis of activities carried out, but on the significance of the place itself. That case was simply distinguished on the basis that it involved a privately owned religious

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[472] Ibid, at 13 of the opinion.
[473] Ibid at 17.
[474] *Wilson v Block,* 708 F 2d 735 (DC Cir, 1983).
[475] These Peaks were said to be the home of the Kachinas who were spiritual beings sent as emissaries to the Hopis by the creator and who travelled to the Hopi villages to participate in the various religious ceremonies and rituals referred to as the Kachina Cycle.
[476] *Wilson v Block,* 708 F 2d 735 (DC Cir, 1983) at 741
[477] Ibid at 741–2.
[478] Ibid at 743–4. The indispensability test is also discussed with the centrality test in Chapter 8. For this chapter, one can note that these tests only related to the infringement on activities. The Court found that the Peaks were indispensable to the practices of the religion but the small portion where the Snow Bowl was located was not, because ceremonies could be conducted and materials collected elsewhere in the Peaks, at 744.
[479] Ibid at 744.
[480] Referred to in 6.3 above.

property.[481] There was no satisfactory answer by the Court to the question of why the Free Exercise Clause could not extend to the protection of religiously significant places, nor was there any attempt to deal with the *Pillar of Fire* reasoning.

Fools Crow v Gullet

In 1982, the District Court at South Dakota decided the Bear Butte construction work case of *Fools Crow v Gullet.*[482] The Lakota and Tsistsistas Nations sought injunctions relating to the religious activities at the Butte but also sought to stop constructions of roads and parking areas at the ceremonial area at the foot of Bear Butte and of wooden tourist viewing platforms on the Butte. The Butte was described as a church which had to be free from destruction and desecration and the works were said to be desecrating acts.[483]

Judge Bogue in the District Court held that the plaintiffs failed to show that the construction projects had burdened any rights protected by the Free Exercise Clause, as they had not established that any particular religious *practices* were damaged by the construction. The Free Exercise Clause was said to place a duty on the state to keep from prohibiting religious *acts*, not to provide the means or the environment for carrying them out.[484] There was no discussion by the Court of the effect of construction works on the Butte itself or the effect that this desecration would cause to the religious ceremonies. The appeal court did not find any error in this.[485]

Dedman v Board of Land and Natural Resources

In 1987, the lesser known case of *Dedman v Board of Land and Natural Resources*[486] was decided by the Supreme Court of Hawaii.[487] This concerned an appeal from a decision of the Board granting a permit for a geothermal project on the island of Hawaii. The appellants claimed breaches of the Free Exercise Clause, the equivalent clause in

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[481] *Wilson v Block*, 708 F 2d 735 (DC Cir, 1983) at 742. The issue of private ownership is discussed in more detail in Chapter 11.

[482] 541 F Supp 785 (DSD, 1982).

[483] See the reference to the submissions in Brian Edward Brown, *Religion, Law and the Land: Native Americans and the Judicial Interpretation of Sacred Land* (1999) at 102.

[484] 541 F Supp 785 (DSD, 1982) at 791.

[485] *Fools Crow v Gullet,* 706 F 2d 856 (8th Cir, 1983) at 859.

[486] 740 P 2d 28 (Haw, 1987). The opinion of the Court was delivered by Lum CJ. This case seems to have escaped the notice of most commentators. The application for a certiorari to the Supreme Court failed: *Dedman v Board of Land and Natural Resources*, 485 US 1020 (1988). This application to the Supreme Court, however, coincided with the *Lyng* decision referred to below.

[487] A state rather than federal court like the others.

the Hawaiian *Constitution*[488] and a failure to give adequate consideration to religious claims in weighing the criteria for establishing a geothermal resource sub-zone.[489]

The Court and other parties accepted that the appellants believed the goddess Pele was present in the relevant project area around the Kilauea Volcano and that it was essential to them that Pele not be violated or degraded. The appellants' witnesses testified that the project would desecrate the body of Pele and destroy her by robbing her of vital heat.[490] However the appellants probably felt that they had to frame their arguments on the basis of an infringement to their freedom to engage in religious practices and thus claimed that the desecration would disable them from training young Hawaiians in traditional beliefs and practices and would interfere with ritual practices.[491] The Court pointed to the lack of evidence of any religious ceremonies being conducted on the land[492] and concluded that approval of the project would not burden their religious beliefs, inhibit religious speech, compel them to refrain from religiously motivated conduct or compel them to engage in conduct that they might find objectionable on religious grounds.[493]

There was no doubt about the sacredness of the area, but this appeared irrelevant as the Court concentrated only on the religious practices that would be inhibited.[494]

Lyng and Northwest Indian Cemetery Protective Association v Peterson

The series of cases which culminated in the *Lyng* decision[495] concerned decisions relating to carry out constructions and to permit harvesting of timber in the sacred High Country. The area was used for religious rites and it was argued that the logging and increased traffic would disrupt the rituals which required quiet, solitude and that the land remain in its natural pristine state. The claim was thus targeted to protection of religious practices that would be interfered with.

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[488] Article 1 section 4 of the Hawaiian *Constitution*, which was in similar terms to the First Amendment.
[489] Under the relevant Hawaiian legislation dealing with geothermal energy. This did not mention religious exercise grounds.
[490] 740 P 2d 28 (1987) at 32.
[491] Ibid.
[492] There was reference to one witness who worshipped Pele in her home: Ibid at 31.
[493] Ibid, at 32–33.
[494] There was a further finding by the Board at first instance that tapping the geothermal energy would not affect the eruptions of the volcano. This issue of the use of an objective test is discussed further in Part C at 17.5.2. However, it is clear from the Court's analysis on the test of a burden on religious practices that even if there had been an acceptance of the desecration, this would not have made any difference to the result.
[495] *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439 (1988). See Chapter 9 for a more detailed discussion of coercion test spelt out in that case.

Judge Weigel for the Northern District of California accepted that the area was so sacred that the performance of ritual activities there made them central to the religion.[496] Nevertheless, the key factor in his decision was the finding that ritual activities would be interfered with.

The 9th Circuit Court of Appeals[497] confirmed that the fact that the plaintiffs used the area and considered it sacred was not enough to characterise it as a burden on religious exercise. They had to show the area was indispensable and central *to their religious practices and beliefs* and that the actions would severely interfere with those practices.[498] The sacredness of the area was only relevant to the Circuit Court's analysis of the importance of religious practices there.[499] Judge Beezer disagreed with the finding of a burden.[500] His view was that road construction and forest activities in themselves did not pose a serious threat to the practice of religion as the evidence did not show why the quests needed to be carried out near the road where the practitioners would be visible and disturbed by the noise.[501] His dissent on this issue thus also turned on the extent to which there was a hindrance to the activities.

In April 1988, in the US Supreme Court decision in *Lyng,*[502] Justice O'Connor for the majority concluded that what was needed was for the programmes to coerce individuals into acting contrary to their religious beliefs.[503] Justice Brennan delivered the strong dissenting judgment, though this too was about the right to carry out religious activities. Brennan J summarised the dissenting position as one in which the constitutional guarantee of free exercise of religion did not draw such fine distinctions between types of restraints on religious exercise but rather was directed against any

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[496] He accepted that for the plaintiffs the High Country was the centre of the spiritual world and the use of the area for rituals and ceremonies was central and indispensable to their religion: 565 F Supp 586 (ND, Cal 1983) at 594. The intrusions on the area were recognised as potentially destructive of the very core of the religious beliefs and practices, at 595.

[497] In two decisions, one in 1985 in *Northwest Indian Cemetery Protective Association v Peterson*, 764 F 2d 581 (9th Cir, 1985) and a further decision in 1986 after a re-hearing in *Northwest Indian Cemetery Protective Association v Peterson*, 795 F 2d 688 (9th Cir, 1986). The only major difference in relation to the First Amendment issue is the dissent of Judge Beezer in the second decision in 1986.

[498] *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986) at 692, and *Northwest Indian Cemetery Protective Association v Peterson,* 764 F 2d 581 (9th Cir, 1985) at 585. The Circuit Court, however, found that the area *was* central and indispensable to the religious practices and that the road would seriously damage the salient visual, aural and environmental qualities of the High Country required for the religious practices: *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986) at 692–3, *Northwest Indian Cemetery Protective Association v Peterson,* 764 F 2d 581 (9th Cir, 1985) at 586.

[499] The Circuit Court agreed that the area was central and indispensable to the religious practices, to a large extent because the government actions would interfere with the religious exercises in the *only* place where they could be performed: *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986) at 693; *Northwest Indian Cemetery Protective Association v Peterson,* 764 F 2d 581 (9th Cir, 1985) at 586.

[500] He thought the matter should be sent back to the District Court to re-evaluate it.

[501] *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986), at 792–3.

[502] 485 US 439 (1988).

[503] Ibid, at 450. The requirement of coercion is discussed in Chapter 9.

form of government action that *frustrates or inhibits religious practice*. He recognised that the refusal of the Court to accept their claims left Native Americans with absolutely no constitutional protection against what was possibly the gravest threat *to their religious practices*.[504] Brennan J took a purposive view of the constitutional protection of religious freedom and pointed out that this was threatened just as much by government action that made *the practice* of one's chosen belief impossible as by actions that pressured one to engage *in conduct* inconsistent with religious beliefs. The harm to the practitioners was the same regardless of how the government restraint was applied.[505]

Brennan J did discuss the evidence about the importance of the sacred High Country to the Karok, Yurok and Tolowa Peoples. He pointed to the differences between Western religions and the site-specific nature of Native American religions.[506] He referred to the stress point in the longstanding conflict between two disparate cultures: the dominant Western culture which viewed land in terms of ownership and use and that of Native Americans in which concepts of private property were not only alien but contrary to a belief system that holds land sacred.[507] Despite this recognition, it still did not seem to be enough to assert that the land was sacred. The test as articulated by Brennan J was whether there was a "substantial threat of frustrating religious *practices*".[508]

The result from the majority in *Lyng* was to focus entirely on coercion on individuals to act contrary to their beliefs. This left virtually no room for arguments based on burdening religion through damaging the sacred place itself. The dissent gave a lot more weight to the sacredness of the place, but only insofar as this meant that activities at the place needed protection. They still expressed it in the form of the traditional model.

Cases after *Lyng*

In ***Attakai v United States,***[509] the Navajo people sought injunctions to stop the construction which would destroy sites and objects of religious, historical and archaeological significance. In relation to the claim based on the First Amendment, the plaintiffs said that sacredness attached to places and that destruction of the sites

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[504] Ibid, at 459.
[505] Ibid, at 468–9.
[506] Ibid, at 459–61.
[507] Ibid, at 473.
[508] Ibid, at 475.
[509] 746 F Supp 1395 (D Ariz, 1990).

through fencing works prevented the plaintiffs from fulfilling their caretaking responsibilities in performing rituals there.[510] The plaintiffs obviously felt the need to transform the protection of place into the language of activity, namely caretaking. The case was able to be disposed of by Judge Carroll who ruled that the *Lyng* case was binding.

In April 1990, the District Court of Arizona again dismissed a free exercise claim designed to protect sacred places in ***Havasupai Tribe v US***,[511] a case concerning an attempt by the Havasupai Tribe to stop mining in an area in the Kaibab National Forest. Judge Strand found that *Lyng* was applicable. He reiterated that plaintiffs were not being prevented from practising their religion. He also added, in a footnote, that the tribe did not have to be at the site to practise their religion and that it was a state of mind and a religious and spiritual journey. Physical presence at the sites was not always required and one could pray from a distance.[512] He did not address the issue of whether the prayer or journey had any meaning if the sacredness of the places had been destroyed. This comment clearly suggested that the act of prayer was all that mattered and, as long as one could continue to carry out that physical act, it did not matter if there was no longer anything to pray to.

A similar fate befell a variety of other cases in the USA concerning sacred places after *Lyng*[513] without any discussion about the protection of the places themselves.

In the 2006 another Arizona Snow Bowl case was brought relying on the *RFRA.*[514] In ***Navajo Nation v US Forest Service***, [515] in spite of the findings that the government was permitting activity that would be regarded by many tribes as desecrating a most sacred of mountains, Judge Rosenblatt in the District Court at Arizona based his dismissal of the case on there being no burden as the plaintiffs failed to show that they were pressured to commit an act forbidden by the religion or prevented from engaging in conduct or having a religious experience which the faith mandated. This was affirmed by the appeal court in 2008.[516]

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[510] *Attakai v United States*, 746 F Supp 1395 (D Ariz, 1990) at 1402–3
[511] 752 F Supp 1471 (D Ariz, 1990).
[512] *Havasupai v US*, 752 F Supp 1471 (D Ariz, 1990) at 1485.
[513] Such as *Lockhart v Kenops*, 927 F 2d 1028 (8th Cir, 1991); *Pit River Tribe v Bureau of Land Management*, 306 F Supp 2d 929 (ED Cal, 2004) and *Benally v Kaye* [2005] US Dist Lexis 39751.
[514] For the *RFRA*, see 5.2.2 above.
[515] 408 F Supp 2d 866 (D Ariz, 2006).
[516] In ***Navajo Nation v US Forest Service***, 535 F 3d 1058 (9th Cir, 2008). The judgments are further expanded on below. This was followed in ***Snoqualmie Indian Tribe v Federal Energy Regulatory Commission***, 545 F 3d 1207 (9th Cir, 2008).

A different view of the burden required under the *RFRA* was taken in the case of ***Comanche Nation v US***[517] but a burden was found in that case because the development on the sacred place infringed on the religious practices there which required an unobstructed "viewscape". Eighteen years after the *Lyng* decision, there was still no discussion of the need to protect sacred places as opposed to the activities related to those places.

6.4.3 The US Legislation, Bills and Executive Orders

Most of the remedial US legislation aimed at protecting free exercise of religion of Native Americans also concentrated on activities rather than protection of places.

A potential exception was the first piece of legislation dealing generally with sacred sites in the USA, the **1976 Californian *Native American Historical, Cultural and Sacred Sites Act*.**[518] Section 5097.9 had two aspects: it said that no public agencies and private parties using or occupying public property or operating under a public licence, permit or the like shall:

- interfere with the free expression or exercise of Native American religion as provided for in the US *Constitution* and the Californian *Constitution*, nor
- cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site or sacred shrine located on any public property, except on a clear and convincing showing that the public interest and necessity so require.

Here free exercise of religion and non-damage to sacred places are mentioned in the same section. However, the references are found in two different phrases which might be construed as drawing a distinction between damage to sites on the one hand and interfering with the exercise of religion on the other.[519]

Even though there was ample reference to sacred sites in *AIRFA*,[520] the emphasis was clearly on *access* to such sites and activities at the sites. This can be seen in the list of

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[517] [2008] US Lexis 73283 (D WD Okla, 2008) and the earlier interlocutory decision, ***Comanche Nation v US*** [2008] US Lexis 627773 (D WD Okla, 2008). The cases concerned the construction of a military training centre which would infringe on the privacy and "viewscape" required for ceremonies at the sacred Medicine Bluffs.
[518] Codified as CAL PUBLIC RESOURCES CODE §§ 5097.9-991(2009).
[519] The aspect dealing with the second "non-damage" aspect is dealt with in Part C.
[520] 42 USC § 1996. See 5.2.2 above.

past infringements of religious freedom in the preamble,[521] the statement of policy to protect access to sites[522] and the analogies drawn in the Parliamentary reports on the bills which became the *AIRFA*.[523] Although Representative Udall of Arizona, when arguing for consent to the *AIRFA* in the House, may have indicated a recognition that sites could be sacred in themselves when he spoke of the land being filled with physical sites of religious and sacred significance to Indians,[524] the *AIRFA* did not expressly take up this issue.

The Federal Agencies Task Force Report of 1979[525] did address the protection of sites themselves. It outlined numerous instances of concerns about infringements on religious practices and on sacred areas. In discussing the issue of sacred places, the Report acknowledged that the issue was not only access to perform rituals or gather materials at particular places but that the physical integrity of the place was also essential and that changes to that would damage the spiritual nature of the land. It did emphasise though that such damage to the spiritual nature of the land could also damage the efficaciousness of the ceremonies and the wellbeing of the religious practitioners.[526] The Task Force Report thus recognised that religious freedom for Native Americans included protection of the integrity of sacred places and that desecration of such places, as well as interference with ceremonies and rituals carried out there, would be an infringement of such a religious freedom.

Many of the bills attempting to deal with problems faced in the Native American sacred place cases were aimed only at protecting exercise and practices at sacred places

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[521] The list of past infringements of religious freedom for American Indians included "the denial of access to sacred sites required in Native American religions, including cemeteries and interference with and intrusion and even banning of their ceremonies".

[522] The *AIRFA* declared that it was to be henceforth the policy of the United States to "protect and preserve for American Indians their inherent right to freedom to believe, express and exercise their traditional religions", "including, but not limited to, *access* to sites … and freedom to worship through ceremonials and traditional rites": at s 1, 42 USC § 1996. It is arguable that because the policy "included" such activities it did not exclude direct protection of the places.

[523] The reports of the House and Senate in relation to the bills leading to the *AIRFA* drew analogies with denying *access* to one's church or temple: US Congress, Senate, Select Committee on Indian Affairs, *American Indian Religious Freedom Act, Sen Report 95-709*, 95th Congress (1978), at 2, and US Congress, House of Representatives, Committee on Interior and Insular Affairs, *American Indian Religious Freedom Act, HR Report No 95-1308,* 95th Congress (1978) at 2. The reports also described the Californian statute of 1976 referred to above as taking giant strides in "overcoming the problems of *access*" ignoring the fact that the Californian statute also dealt with a prohibition on causing damage to sites. There was a comment in the reports when discussing denials of access that: "[t]he issue is not ownership or protection of the lands involved. Rather, it is a straightforward question of access in order to worship and perform the necessary rites": Senate Report 95-709 above at 3, House Report 95-1308 above at 2.

[524] He also said that Indian religions had their "Calvarys, Jerusalems, Vaticans, Meccas, Bethlehems and Nazareths" and that bloody wars had been fought elsewhere in the world because of these religious sites, cited in US Department of the Interior, *AIRFA Report*, above n 8, at Appendix A.

[525] US Department of the Interior, *AIRFA Report*, above n 8. This report was made pursuant to the *AIRFA*: see reference to background of this in 5.2.2 above.

[526] US Department of the Interior, *AIRFA Report*, above n 8, at 52–54.

rather than the places themselves.[527] However, there were others, which did not progress, which did seek to address issues of protection of places along with protection of religious exercise. There were attempts to include requirements for notice and consultation when federal actions could disturb the integrity of a Native American sacred place,[528] and to make it an offence to damage such a place.[529] Speeches in support of some of these made it clear that direct protection for sacred places from desecration was intended.[530] There are other pieces of US legislation discussed in Part C concerning cultural and archaeological sites protected under the heritage model of legislation which have been enacted, but these particular bills based on religious freedom and sacredness of the place did not become law.

Due to the failure of some of the previous bills, President Clinton's **Executive Order 13007** of 24 May 1996 entitled "Indian Sacred Sites"[531] required federal agencies not only to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, but also to avoid adversely "affecting the physical integrity of

[527] Senate Bill **S 2250** (1988) sought to ensure federal lands were not managed in a manner that would seriously impair or interfere with the exercise or practice of such traditional American Indian religions, in § 3(a). **HR 1546** (1989) was similar in style to S 2250, but referred to "a substantial and realistic threat to undermine and frustrate" a traditional Native American religious practice: in § 3(a). **S 1124** (1989) was similar in style to HR 1546 and S 2250 but more restrictive. It repeated the "substantial and realistic threat of undermining and frustrating such religion or religious practice", in the definition of the burden: s 3(a). **HR 4155** (1994) was in a similar form to S 1124. (See n 325 above for detailed references to these bills and those in the next notes.)

[528] **S 1979** (1989) and **S 110** (1991) provided requirements for notice and consultation with Native American traditional and government leaders when, inter alia, federal actions may *"alter or disturb the integrity of Native American religious places"* (§§ 5 and 6). The threshold burden of an adverse affect on the religion was, inter alia, set at when the actions altered or disturbed "the integrity of Native American religious places or the sanctity thereof (§ 6). These were the first federal bills which sought to provide direct protection to Native American religious places (defined at § 2).

[529] **S 1021** (1993), in the section dealing with protection of sacred sites had a set of findings in § 101 saying, inter alia, that many Native American religions considered certain sites to be sacred and that the physical environment associated with those sites had to be protected *in order for those sites to be in a condition appropriate for religious use*. Section 109 made it an offence for any person to knowingly damage or deface a known Native American religious site on federal land. This would provide protection for religious sites themselves, although, as set out in the findings, the purpose of such protection may have been to ensure that the sites are suitable for religious use, that is, the sites are protected in order to protect the practices.

S 2269 (1994) was a later refinement of S 1021. There were detailed provisions for notice, consultation and negotiation in relation to federal activities that may have an adverse impact on Native American sacred sites (§§ 103–104). A right of action was given to an aggrieved party with the onus of proving an adverse impact on a sacred site (§ 401).

The final attempts at bills which did address protection of Indigenous places were **HR 5155** (2002) and **HR 2419** (2003). Under these, federal departments and agencies, inter alia, were to avoid significant damage to Indian sacred lands (§ 2).

[530] Senator Inouye, on introducing **S 1021**, said that the Task Force report emphasised the need to protect sites from damage and that 44 sites were at the time threatened by tourism, development and resource exploitation: US Congress, Senate, *S 1021: Native American Free Exercise of Religion Act*, Introduction by Sen Daniel Inouye, Senate, 103rd Congress (1993), 139 Congressional Record S6456–7 (25 May 1993) at S6456–7. Senator Wellstone also addressed the issue of protecting sacred places, from a Jewish point of view. He made comparisons to the importance of Jerusalem and said he did not find it strange that people should mark their history and spirituality in "real concrete places": ibid, at S6463.

Rep Nick Rahall, in introducing **HR 5155** and **HR 2419**, referred to desecration across the country and pointed out that most Americans understood reverence for the Sistine Chapel or US Capitol but non-Indians had difficulty giving the same reverence to mountains or valleys: US Congress, House of Representatives, *HR 5155, An Act to Protect Sacred Native American Federal Lands from Significant Damage*, Introduction by Rep Nick Rahall, 107th Congress (2002), 148 Congressional Record E1293.

[531] 61 Fed Reg 26771–2 (1996). See 5.2.2 above.

such sites" (s 1). It gave no enforceable cause of action, but at least did address and confirm a policy of protecting sites themselves.

6.4.4 The Cases in the Other Countries

Australia

FMG – Cheedy

Section 116 constitutional arguments were used recently in the *FMG – Cheedy* native title cases.[532] At issue was the grant of mining leases over areas containing places sacred to the Yindjibarndi people. However, the National Native Title Tribunal and Federal Court, on appeal, described the arguments in relation to s 116 as being about the leases preventing the performance of religious obligations and activities. Such activities included the requirement to manage and control their country in accordance with religious beliefs, to speak for the land, protect sites, collect stones and ochre for ceremonies, teaching and initiation and the like.[533] The decision on s 116 turned on the purpose of the legislation[534] and there was no analysis of s 116 in terms of direct protection of the sacredness of the places.

The need to fit the protection of sacred places into the language of religious activity saw the Yindjibarndi people framing their argument about the infringement of religious exercise in terms of the religious obligation to "manage" and "control" the land. Such management or control could then prevent the destruction of the sacred places. The Tribunal and Court were prepared to assume that such management and control were religious activities, but, through use of the purpose test, were able to avoid consideration of whether such management and control would be an "exercise" of religion or would be infringed by allowing mining activities which could in turn destroy sacred places.

Canada

Nanoose Indian Band – Intrawest Case

[532] *FMG Pilbara Pty Ltd/Ned Cheedy and Ors on behalf of the Yindjibarndi People/Western Australia* [2009] NNTTA 91, and on appeal, *Cheedy v State of Western Australia* [2010] FCA 690. The argument was that the National Native Title Tribunal should exercise its powers to allow the grant of mining tenements under the future act scheme in a manner so as to avoid infringing s 116. This has been appealed to the Full Court of the Federal Court with no decision yet.

[533] *FMG Pilbara Pty Ltd/Ned Cheedy and Ors on behalf of the Yindjibarndi People/Western Australia* [2009] NNTTA 91 at [9], [38]; *Cheedy v State of Western Australia* [2010] FCA 690 at [54], [56], [69].

[534] Discussed at Chapter 10.

In one of the 1994 challenges by the Nanoose Band to the sewer extensions that could damage skeletal remains and ancient middens on Vancouver Island, *Nanoose Indian Band v The Queen and Intrawest Corporation,*[535] Justice Hutchinson in the Supreme Court of British Columbia dismissed the religious freedom claim with little discussion. While the judge accepted the sincerity of the Band's concern about the removal of their ancestors from the original place of interment, he said that allowing it to be done does not interfere with freedom of religion. The short conclusions do not explain why allowing disturbance of the burial areas is not an interference with freedom of religion. However, the fact that the judge thought it unnecessary to deal with whether the burial sites were sacred places or what role they played in the religion suggests that his decision was based simply on the fact that no religious activities were said to have been interfered with.

McCrady v Ontario

The *McCrady* cases were brought in the early 1990s to stop the hydroelectric dam project at the High Falls area in Ontario. These involved actions aimed at protecting place rather than activities. The judge, Kurisko J, accepted the area was believed to be sacred and inhabited by deceased ancestors.[536] The construction of the High Falls dam and the consequent flooding of the river were claimed to be a serious desecration. Despite this, the Ontario General Division Divisional Court in March 1993 managed to avoid dealing with the plaintiffs' religious freedom claims which were directed at actions under the Cemeteries legislation.[537] It would have been more enlightening if the religious freedom challenge had been made to the grant of the permits for construction and operation of the dam.

Cameron v Ministry of Energy

In October 1988, Taylor J of the British Columbia Supreme Court handed down a decision in *Cameron v Ministry of Energy and Mines*[538] concerning the development of a gas well and timber cutting in the sacred area near the Twin Sisters and Mount Monteith. There was no dispute about the spiritual significance of the area, which was

[535] [1994] CanLII 1806.
[536] *McCrady v Ontario* [1992] Ontario Sup CJ Lexis 1646, October 1992, at 16–19.
[537] *McCrady v Ontario* (1993) 61 OAC 286, at 308. The Registrar had made a declaration under that legislation of an area nearby being an unapproved Aboriginal people's cemetery but this did not include the area sought to be protected because of the lack of evidence of human remains there. The action and religious freedom claims were directed to challenging the Registrar's definition of the burial area and the case turned instead on the correctness of that definition. See 5.2.2 above.
[538] [1998] CanLII 6834.

particularly based on its theological significance rather than ceremonial or other activities there. There was also a general agreement amongst the First Nations in question that gas exploration activities in the area would be spiritually damaging. The Court was prepared to accept for the purposes of argument that there were religious *practices* that involved the Twin Sisters mountains, even through there was no current or recent history of the area being used for such purposes.[539] The Court concluded that for there to be a breach of s 2(a) of the *Charter* there had to be coercion or constraint of a right to exercise religious beliefs or a denial of the ability to worship or practise those beliefs. He found that there was no contemplated activity that would coerce or constrain the right to exercise religious beliefs or practices on an *actual usage basis*.[540]

The *Cameron* case, however, turned not on usage but on an argument of stewardship of the area. The plaintiffs argued that the gas well would defile an image of sanctuary that the First Nations were entrusted to preserve. Taylor J decided that the protection of religious freedom in s 2(a) of the *Charter* does *not* protect a concept of stewardship of a place of worship, but, even if it did, in this case there would only be minimal interference with the exercise of religion in terms of the sanctity of the area.[541] Taylor J also said that the intellectual *concept* of stewardship was not impugned by the drilling, which did not deny the principle of such stewardship. The fact that there was a protected area provided a basis for continued intellectual stewardship as an aspect of the area's spirituality.[542] The claim for religious freedom was thus denied.

Unlike the US cases, there was a consideration of stewardship itself as being a religious activity, though it was ultimately not accepted. As in the US cases, however, Taylor J and the plaintiffs still felt the need for the facts to fit into the language of activities that were impaired. The relevant concern for the plaintiffs was the preservation of the sacredness of the place and every part of it. The fact that the plaintiffs were forced to characterise the protection in the form of a religious activity, namely stewardship, shows how inapt the religious freedom jurisprudence adopted was.

New Zealand

New Zealand Underwater Association Inc v Auckland Regional Council

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[539] Ibid, at [192], [197]. Taylor J said however that there were only vague references to dances being performed over fifty years ago and no one could say that they had visited the area on a consistent basis as one would a shrine or a temple or church.
[540] Ibid, at [191]–[192]. This is discussed further at Chapter 9 on the issue of coercion.
[541] Ibid, at [195]–[196].
[542] Ibid at [251].

In *New Zealand Underwater Association Inc and Maruia Soc Inc v Auckland Regional Council and Ports of Auckland Ltd*,[543] there was a discussion of religious freedom issues raised by the minority rights provision, s 20 of the *NZBOR*. The Tribunal accepted that that there were genuine spiritual concerns that the discharge of dredgings into the waters of the sacred Hauraki Gulf would be offensive to the spiritual values of the Gulf. It accepted that the Gulf was sacred and deserved to be protected, but ultimately concluded that under the planning legislation, no special weight was to be given to Maori spiritual concerns.[544]

As far as the specific *NZBOR* arguments were concerned, the Tribunal noted that the Maori groups failed to establish that the grant sought would deny their enjoyment of their culture or the practice of their religion. It acknowledged that the people or some of them may feel profoundly affronted by the discharge, but the Tribunal noted that the Gulf was said to still be available as a resource to the Maori.[545]

The decision did not suggest that there were any religious practices that would be physically interfered with by the discharge. It could be argued in effect that legislation dealing with the grant of the application overrode s 20 of the *NZBOR*, and that was all that was decided. However, the dicta goes further by reference to the ability to continue to use the Gulf "as a resource" and to the finding that there was no denial of the enjoyment of their culture nor the practice of their religion. It was noted, by contrast, that people were only being "profoundly affronted" due to their sense of responsibility. Reading between the lines, the Tribunal concluded that there was thus no infringement of rights to believe or manifest religion because activities of resource gathering or other activities were not being physically interfered with.

6.4.5 Summary

It can be seen from the above analysis that, in relation to those religious freedom decisions, even where the concerns were to protect sacred places, the courts still reverted to an analysis of the protection of the plaintiffs' activities and failed to see how the damage to religious significance of the places could be a breach of religious

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[543] Unreported, Planning Tribunal, A131/91, 16 December 1991.
[544] Ibid, at 30, 47–50.
[545] Ibid, at 53. The Tribunal also noted that the whole of the gulf area was of spiritual significance to the Maori tribes and that their attitude would be the same to a discharge anywhere else in the gulf.

freedom. When the US courts imposed a test requiring centrality or indispensability,[546] this was judged not by the sacredness of the place or even the centrality or indispensability of the place within the religious beliefs, but by the extent to which the place was central or indispensible for religious activities.

The restriction of religious freedom analysis to activities is not a conceptual limitation unique to judicial reasoning. For instance, Robert Michaelsen, who has written extensively and sympathetically on Native American religious rights, once identified the central issue for the courts in dealing with the Free Exercise claims involving sacred sites as being "the *nature and extent of access* required to protect the Indians' religious rights."[547] He failed to include the destruction of sacred areas.

In this jurisprudence, sacredness of place is irrelevant and the law appears to treat sacred places as nothing more than locations for religious activities.

6.5 The Commentary and Analysis

6.5.1 Introduction

As is obvious from the above cases, Indigenous religions involving sacred places raise different needs from the majority of cases involving Judeo-Christian religions and those modelled on them. The result is that a human rights approach premised on protection of the private sphere of individual autonomy has failed to protect an important element of Indigenous religions which are not so limited. This is despite the fact that the destruction of sacred places could be just as, if not more, destructive to the religion and inherent dignity of the people concerned as curtailment of activities.

There has been extensive criticism of the decisions referred to above for their inability to protect Indigenous sacred places. However, many of the critics have still felt it necessary to use the traditional "activities" analysis, albeit extending it to include the protection of the conditions necessary for the practices to have meaning. This approach still seeks to prevent government interference with the realm of private autonomy, but views it in a more realistic light as to what really gives rise to the interference. A second and probably the most direct way would be to simply extend protection to places believed to be sacred as part of a wider concept of religious freedom. This would require the model going beyond the private sphere of individual

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[546] Such as in *Sequoyah, Wilson v Block* and the lower courts in the *Lyng* decision, all referred to above in 6.4.2.

[547] See Robert S Michaelsen, 'Civil Rights, Indian Rites' (May–June 1984) *Society* 42, 45

religious action to recognise that the protection of religion does squarely involve policy decisions in the public sphere as well.

6.5.2 Conditions Necessary for Practices to Have Meaning

Brian Edward Brown has argued for the first approach in his book[548] dealing with the Indigenous sacred place cases in the USA. He has highlighted the lack of recognition and protection of the land area "as a sacred being in itself" and the problems arising from what he described as the courts seeing religion as "only consisting of certain beliefs to which adherents give their credence and a corresponding set of ceremonies, rituals and prayers mandated or inspired by those beliefs".[549] Brown criticised the courts for "not appreciating the sense of the sacred that animates the religious faith, which in turn *gives meaning to the practices* under consideration."[550] In Brown's words, the problem is that the court has "severed the vital connection between the central religious phenomenon and the responses addressed to it" and the "utterly secular perspective" which has fixed land not as the "primordial subject of a religious experience" but only as "a site where religious behaviour is performed."[551] His solution was that it is necessary to "reassert the *integrity of the religious practices* and the experience of the sacred that *gives meaning to them*" and "to expose the incongruity that accommodates the religious observances while ignoring the destruction of the holy reality."[552]

Similarly, Martin Loesch has suggested that an infringement of the right should also be found whenever there is an adverse effect on the ability to practise a religion, including when the physical conditions required for a customary ritual have been so altered that performance is prevented.[553] Deward Walker also, when proposing "an integrity" standard,[554] spoke of sacred places and geography as being fundamental ingredients of ritual, which, if altered, could affect the essential practices of religion.[555] Analogies may also be drawn to general religious freedom cases like *Yonkers*[556] where the land around the seminary was argued to be necessary to provide the conditions for the reflection needed for the activity of priestly formation.

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[548] Brian Brown, above n 483.
[549] Ibid, at 174.
[550] Ibid.
[551] Ibid, at 175.
[552] Ibid.
[553] Martin C Loesch, 'The First Americans and the Free Exercise of Religion' (1993) 18 *American Indian Law Review* 313, at 366.
[554] In the context of a replacement for the centrality standard, mentioned in 6.4.5 above.
[555] Deward Walker, above n 169, at 113–4.
[556] *Yonkers Racing Corporation and St Joseph's Seminary v City of Yonkers*, 858 F 2d 855 (2nd Cir, 1988). See 6.3 above.

While these proposals are stated in classic "exercise" terms, they do extend to protect the conditions required for such an exercise. Any such principle needs to cover not only situations where the performance is physically restricted, but also situations where the result of the government action is that there is no longer any religious point in the performance.

This is also in effect the argument put by Brennan J in his dissenting judgment in *Lyng*. He recognised that the destruction of the sacred place made the practice of religion impossible for the plaintiffs.[557] Similarly Fletcher J, dissenting in *Navajo Nation v US Forest Service*, noted that religious exercise was substantially burdened when the exercise required the purity of the sacred place and this had been contaminated.[558] Such views looked beyond restraint on physical actions to the conditions that make the practices spiritually effective.[559]

There is much logic to this view if the aim is to protect a freedom to exercise a *religion*, because that must imply that the religious nature of the exercise is what is important. It is nonsensical to say there is no interference with religious exercise because someone can still go through the physical motions of praying or making pilgrimages when that to which one is praying or visiting is being destroyed and there is no longer any religious purpose for going through those motions. As Celia Byler also put it, once spiritual value is destroyed, one cannot *exercise* a religion. Referring to the *Havusupai* case,[560] she said that this was not about relationship to places – the places *are* the religion. If the place is no longer in existence, or no longer sacred, all aspects of the religion relating to that place are gone and the prayers cannot be sent there if there is no place or no one to receive them; the spiritual power cannot be attained if the source is destroyed.[561]

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[557] *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439 (1988) at 459, 468–9

[558] *Navajo Nation v US Forest Service*, 535 F 3d 1058 (9th Cir, 2008) at 1103–6. Evidence was led that the use of recycled sewage effluent to make artificial snow at the Snow Bowl on the sacred San Francisco Peaks would contaminate the purity of the peaks and cause the loss of the spiritual purity required for the ceremonies, thus destroying the religious value of the ceremonies.

[559] This attitude is hinted at in the non-Indigenous context in dicta of Tarnoplosky J in the Court of Appeal in Ontario in *R v Videoflicks* (1984) 48 OR (2d) 395, a case concerning laws prohibiting retail sales on Sunday and its effects on Saturday Sabbath observers. Tarnopolsky J said that a law which makes a religion more costly and difficult to practise infringes freedom of religion. His comments still related to the *practisce* of religion, but for him to address "preservation" of culture and the matters that make it more difficult to practise a religion does reflect a view that freedom of religion may also involve protection of key elements of the religion itself, or at least the conditions necessary for the religious activities to have meaning. The comments were made in a discussion of Article 27 of the *ICCPR*, even though there was no equivalent in Canada.

[560] *Havasupai v US*, 752 F Supp 1471 (D Ariz, 1990). See 6.4.2 above.

[561] Celia Byler, 'Free Access or Free Exercise? A Choice between Mineral Development and American Indian Sacred Site Preservation on Public Lands' (1990) 22 *Connecticut Law Review* 397, at 426. This was referring to the suggestion by Judge Strand that the damage to the sacred place did not prevent people from praying to it from a distance. The Hopi Chief referring to the *Wilson v Block* case also made the point that the Snow Bowl would make it impossible to teach that the area is a sacred place and would

The dissenting judgment of Brennan J in *Lyng* puts the argument that the actions that destroy a religion are at least as coercive and as much a burden on religious beliefs and practices as are the typical penalties accepted as burdens on religion in other cases.[562] To regard indirect burdens on practices as sufficient to pass that "burden" threshold and not regard the destruction of the whole religious purpose of the practice as a burden on religious practice is to miss the point.

In many cases there may be no physical activities to be protected or interfered with. This has forced some plaintiffs to resort to arguing about interference with conditions necessary for more "passive" activities, such as in the *Cameron* case in Canada, *Cheedy* in Australia or the *New Zealand Underwater Association* case where the religious exercises relied on were not specific rituals or visitation but characterised as more general practices of *"stewardship", "guardianship*" or "*management*". This may also be the case of the "*maintaining a relationship*" with land or waters as mentioned in the *Charter* in Victoria.[563] Such exercises would clearly be interfered with and burdened by the damage to the place for which people have stewardship or guardianship as the destruction overrides the acts of stewardship and guardianship. There is nothing particularly unusual about religious freedom protecting a physically passive activity; after all, the original intent was concerned with persecution on the grounds of belief, opinions and affiliations, regardless of what positive activities one engaged in.

Such expansions to the concept of religious exercise require a consideration of interferences which lead to unwanted changes in the way one exercises individual autonomy. The above arguments, however, all seem to be a contorted means of achieving the plaintiffs' main aims of protecting the object of the belief, discussed below.

6.5.3 Protection of what is Believed to be Sacred

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in time become a mere fairy-tale: a quote from Hopi chief Abbott Sekaquaptewa, reproduced at Brian Brown, above n 483, at 64.

[562] *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439 (1988) at 459, 468–9. The majority also accepted that the effect would be the destruction of the religion, at 447, 451–2. The same argument was used by Fletcher J dissenting in *Navajo Nation v US Forest Service*, 535 F 3d 1058 (9th Cir, 2008) at 1090–1, 1106.

[563] See 6.2.3 above.

The more direct approach to protect Indigenous sacred places would be to simply widen the concept of religious freedom beyond practices to include protection of those places which are believed to be sacred.[564]

The texts of some of the existing provisions will cause difficulties as they stand. In the USA and Australia at the federal level, the language is of "*free exercise*", a phrase suggesting that it is about what individuals do. The language of the international human rights instruments, the *Canadian Charter*, *NZBOR* and others modelled on the *ICCPR* speak of the right of religious freedom which is wider than "*exercise*", but narrower than a word like "respect", and could also be in danger of being read down to only a *freedom* to believe and act. It could be argued, however, that one notion of freedom of religion is the right to have one's religious beliefs respected and protected. All of this might require a re-wording of the right or a new statutory formulation to clarify the meaning.

Some commentators have argued against an extension beyond the individual freedom to act and believe on principle because such an extension would require protection of what merely causes offence to individuals. For example, Donald Falk, while being critical of the *Lyng* decision and highly supportive of the protection of Indigenous sacred places, has disagreed with the approach outlined above. He justified the protection of such places on the basis that there is perceptible harm to religious conduct as a physical expression and not merely a harm to what is believed about the place. He said that burdens have to cause an adverse effect on the belief and practices, as opposed to merely offending or conflicting with the belief or believers.[565] Falk's view was that free exercise of the plaintiffs in *Lyng* was interfered with, not because of the impairment to the "spiritual purity" of the area but because of the impeding of religious practices. He argued that interference with physical practices was of a different order to an interference with subjective beliefs and the former was easier to prevent and judge through objective processes.[566] Falk suggested the threshold test should be to show that the threatened site was essential to a religious practice. For similar reasons, Scott Hardt also suggested that development should not be prohibited merely because it violates the sacred earth or that religious sensibilities would be

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[564] The broader conceptual changes necessary are discussed in Part D, but the precise debate about protection of the object of the belief under the existing model is discussed here.

[565] Donald Falk, '*Lyng v Northwest Indian Cemetery Protective Association*: Bulldozing First Amendment Protection of Indian Sacred Lands' (1989) 16 *Ecology Law Quarterly* 515 at 548–-553, 557–559.

[566] A similar argument has been put in the Note, 'Burdens on the Free Exercise of Religion: A Subjective Alternative' (1989)102 *Harvard Law Review* 1258 at 1272–3 where the writer argues that relief should only be granted when the exercise of religious rights are infringed but not where there is a mere contradiction of religious teachings where individual can still continue with their beliefs and practices.

offended. He thought it was necessary to assert that the religious practices would be impeded.[567]

The distinction between damage to sacred places (where there are no clear physical activities) only causing offence but not infringing religious freedom appears to have influenced various courts in the Indigenous sacred place cases referred to above. For instance, in *New Zealand Underwater Association Inc and Maruia Soc Inc v Auckland Regional Council and Ports of Auckland Ltd*,[568] the Tribunal recognised the general spiritual concerns about the area but granted no relief. Paul Rishworth, commenting on that case,[569] said the underlying merits of the case were weak, relying as it did on the claimed right not to be offended. In *Aboriginal Legal Rights Movement v South Australia (No 1),*[570] Debelle J spoke of grave insults and spiritual distress caused by the Hindmarsh inquiry but said this was not an impairment of free exercise of religion. In *Sequoyah v Tennesee Valley Authority,*[571] the Court discounted the “feelings” of the significance of the area and in *Wilson v Block*, the construction of the Snow Bowl facilities were said to be inconsistent with plaintiffs’ beliefs and would cause them spiritual disquiet, but such consequences did not amount to a Free Exercise claim.[572] The issue was probably put most strongly by the majority of the 9th Circuit Court of Appeals in *Navajo Nation v US Forest Service* who said that the desecration of a sacred mountain would only affect the plaintiffs’ subjective spiritual experiences but this was not a burden on religious exercise as their ability to access the mountain and perform ceremonies was unaffected. If it were otherwise, the Court said that each citizen would hold an individual veto to prohibit government action solely because it offended his religious beliefs, sensibilities or tastes or failed to satisfy his religious desires.[573] The concern is about the intrusion of what are seen as “private sensibilities” onto the public sphere.

Obvious concerns of allowing religious freedom to extend beyond the protection of private autonomy to protection of what is held to be sacred are the wide and uncertain extent of the latter and the potential impact on the wider public. The question is whether a line can be drawn between protecting sacred places and protecting people against being merely offended or insulted or against activities which contradict religious

[567] Scott Hardt, ‘The Sacred Public Lands: Improper Line Drawing in the Supreme Court’s Free Exercise Analysis’ (1989) 60 *University of Colorado Law Review* 601.
[568] Unreported, Planning Tribunal, A131/91, 16 December 1991.
[569] In Rishworth et al, above n 231, at 306–7
[570] (1995) 64 SASR 551 at 555.
[571] 620 F 2d 1159 (6th Cir, 1980).
[572] *Wilson v Block,* 708 F.2d 735 (DC Cir, 1983) at 741–2.
[573] *Navajo Nation v US Forest Service,* 535 F 3d 1058 (9th Cir, 2008) at 1063–4. The decision was followed in the subsequent 9th Circuit decision of ***Snoqualmie Indian Tribe v Federal Energy Regulatory Commission***, 545 F 3d 1207 (9th Cir, 2008) referred to in 5.2.2 above.

beliefs.[574] Such a distinction should not simply turn on whether something belongs to imagined public or private spheres. A line could be drawn at preventing the destruction of a religion but excluding situations where the destruction of a sacred place may not destroy the entire religion. However, such an extreme consequence has not been required in any of the "religious activity" cases and is too onerous.[575] Sarah Gordon has offered another distinction. Having highlighted that the problem encountered in the US cases was one of a narrow reading of the Free Exercise Clause, which is limited to concepts drawn from Judeo-Christian religions that have not adapted to cover site-specific religions, she argued for the need for freedom of religion to recognise the religious interest at stake and to assess the degree of harm to it. Concluding that there is no freedom of religion if one destroys the object of the belief, she suggested a threshold requirement of whether the action infringes, inter alia, "a deity."[576] This would not expand the concept so far as to cover anything that might cause offence, but it may still be too narrow as it would not cover the full range of Indigenous sacred places, for instance, burial sites. One possibility may be to expand the concept of religious freedom to include not damaging the objects of worship or things which have sacred significance in themselves,[577] perhaps in a similar way to some heritage legislation referred to in Part C. This approach would not include actions which simply contradicted religious teachings or offended people. The rationale may be that believers can only be free to exercise their religion if, at the least, those things held sacred are not damaged or destroyed.

There is, of course, the risk that individuals or groups may take wide or unusual views of what is significant and what is damaging, as for example in the case of *Bowen v Roy*,[578] where using a social security number was believed to damage a child's spirit. This raises fears of opening the floodgates of religious freedom claims. However, if decisions to draw the line at what is to be protected are made because of the fear of the effects on the "public interest", then this should be a decision made at a policy level through balancing competing public policy concerns and should occur in a transparent and accountable way. It should not be achieved through treating such destruction of

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[574] The aim being to avoid situations where the freedom may require others to act in conformity with tenets of a religion or to create something akin to a de facto blasphemy law.

[575] It has been said a test that requires a virtual extinction of the religion is too harsh for Indigenous cases: see Cynthia Thorley Andreason, 'Indian Worship v Government Development: A New Breed of Religion Cases' (1984) *Utah Law Review* 313; Falk, above n 565. Such a test if applied to the non-Indigenous cases would disqualify almost all of them. For example, in the *Sherbert* case, the burden was missing out on unemployment benefits and in *Yoder* it was either prosecution of moving to another state. Neither case involved the extinction of the religion nor did it jeopardise the survival of the faith.

[576] Gordon, above n 133.

[577] Ching, discussing the *Dedman* case referred to above at 6.4.2, for example, has referred to the need to account for what he calls "intrinsic significance": Glenn Ching, '*Dedman v Board of Land and Natural Resources*: Native Hawaiian Sacred Site Claims' (1988) 10 *University of Hawaii Law Review* 365.

[578] 476 US 693 (1986), a decision of the US Supreme Court relied on in *Lyng*. This case is described further at 9.2.1 below.

sacred places as incapable of being a burden on religious freedom at all. If zoning restrictions or heritage listings can be considered burdens on religious practices at particular places, it seems inconsistent to exclude damage to places that give meaning to the whole belief system. Similarly, when looking at the *Lyng* case, it seems illogical in the wider scheme of protecting religious freedom that restrictions on access to a site could be a burden on the freedom but complete destruction of the site would not.[579] If religious freedom is to be applied in a fair and equal manner to all religions, including Indigenous ones, then there has to be an expanded view as to what amounts to an infringement on the freedom and an acceptance that this can extend beyond the protection of a private sphere of individual action.

[579] This was in effect recognised by the majority in *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439 (1988) at 451–2 and by Brennan J dissenting at 458–9.

Chapter 7 – Classification as a "Religious" Activity or Matter

7.1 Introduction

This and the following chapters examine threshold tests that courts have drawn to limit Indigenous attempts to protect sacred places, even when the claims are formulated as activities. One such limitation discussed in this chapter is the exclusion of activities classified as "secular" rather than "religious" from the protection given by religious freedom. Such an exclusion presumes a dualistic separation of the private religious and the public secular.

This chapter examines the cases concerning Indigenous sacred places where the courts have dealt with the perceived need to draw such distinctions between what is religious and what is not. There are two main ways in which these have operated against protection of Indigenous sacred places and activities conducted there. One is the way religious freedom jurisprudence has confined the concept of the religious to the privatised Western images discussed in 2.2.1 above in a way that has excluded some Indigenous expressions, especially where activities are seen as mundane and not particularly devout, despite the sacredness of the place giving them a special meaning that could otherwise be described as religious.[580] The second is the flip side of the division, that is, the way in which the Establishment jurisprudence in the USA prevents government actions motivated by religious purposes.[581] In these cases, purposes that could be described as "religious" need to be secularised to be permitted. These contrasting Establishment instances reflect the required characteristics of public sphere activities, matters that are returned to for further exploration in Part C.

As outlined previously,[582] in recent years the courts have moved to a wide definition of "religion" in which Indigenous beliefs have generally qualified. However, this has often not been extended to the classification of activities seen as secular. The next section deals with how this limitation has been a substantial problem for non-Indigenous religions in religious freedom cases.[583]

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[580] Discussed in 7.2 and 7.3.
[581] Discussed in 7.4.
[582] In 4.2.3 above.
[583] Examples are found in the next section.

So far this has not been a significant difficulty in most Indigenous sacred place cases as those have largely concerned only ceremonial or ritual (and thus "obviously religious") activities. However, there have been a few Indigenous cases concerning sacred places where, despite the acceptance that the plaintiffs had "religious" beliefs, the particular activities have been classified as being not religious because they looked more like everyday subsistence or economic acts or were "merely cultural". This is based on assumptions fed by a privatised view of what is religious which excludes from that classification matters that occur in the public sphere. This has also been seen in the occasional comments of politicians in Australia to the effect that concerns about sacred sites are about cultural matters rather than religious,[584] and perhaps a reason why they are treated there as belonging to a secular public heritage system.[585]

On the other hand, the requirement to divide the religious and the secular also emerges in some of the Establishment Clause challenges to US government action to protect Indigenous sacred places, where it is alleged that such actions advance religion or have a religious purpose. The result here is different. Where the government actions are classified as religious, such actions have been seen as an impermissible intrusion of public institutions into the private religious sphere. To be protected in the public sphere, it has been necessary for government actions to be free of the religious classification.

Both types of examples reveal the difficulties faced by Indigenous sacred places when it comes to sharp divisions of religious and secular, private and public.

7.2 Non-Indigenous Examples of Classification Problems

Following on from the internalised concepts of religion discussed earlier,[586] some of the early religious freedom jurisprudence also confined the concept of religious freedom to such private matters as spiritual beliefs and rituals. For example, reflecting what Locke thought to be the heart of religion,[587] the early US cases suggested that freedom of religion primarily protected only the right of belief and even excluded external actions from this concept.[588]

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[584] Alexander Downer, the then Australian Minister for Foreign Affairs, was quoted by Marion Maddox as suggesting that it was "a long bow" to consider sacred sites as being religious rather than cultural. She also quotes Liberal parliamentarian Tony Abbott who spoke of protecting sacred places for cultural rather than religious reasons: see Maddox, *For God and Country,* above n 12, at 273–4; Maddox, *God under Howard* above n 73, at 133–4.
[585] See Part C.
[586] In 2.2.1 above.
[587] See 2.2.1 above.
[588] This was used by the US Supreme Court in *Reynolds v United States*, (1878) 98 US 145. The Court drew on Jefferson, *Danbury Baptist*, above n 64. Jefferson in that Letter said that "the legislative powers of

This attitude is reflected, particularly in early cases dealing with religious freedom, in some of the other countries examined as well. For example, in an early decision from the Australian High Court, a refusal to undertake a military drill was not accepted as possibly being religious.[589] The early commentary by Quick and Garran made a point of emphasising that s 116 of the Australian *Constitution* was concerned with the "realm of purely spiritual worship".[590] There is also an example under the old *Canadian Bill of Rights*, *Walter v Attorney-General of Alberta,* concerning legislation to prevent large holdings of communal property which affected Hutterite communities who held property in common.[591] In the course of the decision, Martland J for the Court said[592] that "religion" in the *Bill of Rights Act* meant religion in the sense that was generally understood in Canada, that is, involving matters of faith and worship, and that freedom of religion involves freedom in connection with the profession and dissemination of religious faith and exercise of religious worship, but not freedom from compliance with provincial laws relating to matters of property holding.[593]

Since then the courts have become more sophisticated and have expanded the scope of religion to include external actions. Courts have also from time to time looked to the source and nature of the stated motivation for an action. More enlightened views of what qualifies as "religious" exercise can be seen in cases such as *Wisconsin v Yoder*[594] where the US Supreme Court accepted that the issues concerning public

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government reach actions only and not opinions". Jefferson's *Virginia Act for Establishing Religious Freedom* also used that model of protecting only belief and profession of belief. In its preamble it referred to the inappropriateness of attempting to influence *the mind*, which God had created free. The Virginia statute provided that no one was to be compelled to frequent or support any religious worship, place or ministry and no one was to suffer on account of *religious opinions or belief*. All were to be free to profess and maintain by argument their opinions in matters of religion. The distinction between belief and action was later dropped by the court, though some would argue it has always remained in some ways: see Marci Hamilton, above n 73; Angela Carmella, 'A Theological Critique of Free Exercise Jurisprudence' (1992) 60 *George Washington Law Review* 782.

[589] In *Kryger v Williams* (1912) 15 CLR 366, even though the plaintiff relied on religious reasons for a refusal to undergo the military drill, Griffiths CJ at 369 implied that military training had nothing at all to do with religion. Barton J also expressed the view that it was absurd to say that the appellant could not exercise his religion freely if he did the necessary drill, at 372–3. *Kryger* was cited with approval in the more recent case of *Halliday v Commonwealth of Australia* [2000] FCA 950 at [18] and [21], where the Federal Court drew analogies between military service and paying taxes.

[590] Quick and Garran, above n 348, at 953. They went on to say that, as soon as religion seeks to regulate relations between two or more individuals, it becomes subject to the powers of the government and the supremacy of law and the individual then has no constitutional immunity against government interference.

[591] [1969] SCR 383. Legislation was passed in Alberta to prevent large communal holdings of property. The legislation appeared to be specifically aimed at the Hutterite religious communities who believed that it was a tenet of their religion to hold property in common. The Court held, however, that the legislation was valid as it was properly characterised as dealing with and aimed at "property holding practices" and not religious freedom, even if the property practices stemmed from religious belief.

[592] At [1969] SCR 383, 393.

[593] It has been pointed out, though, that the *Walter* case was concerned mainly with division of powers between federal and provincial governments and is not applicable to definitions of religion for the concept of religious freedom under the *Charter* and was only obiter anyway: see Dale Gibson, *The Law of the Charter: Equality Rights* (1990) at 194–5. However, it does reveal an earlier attitude on the limited meaning of "religion" under the *Bill of Rights Act*.

[594] 405 US 205 (1972).

schooling were religious because they fell within an Amish way of life that was religious.[595] There are other US Supreme Court examples of religious freedom arguments being upheld in cases of religious motivations affecting activities that in themselves could otherwise look like typical secular pursuits.[596]

In Australia too Latham CJ in *Adelaide Company of Jehovah's Witnesses v The Commonwealth* expressed a view that religious exercise included acts and not just beliefs and that these could be political as well as religious.[597] In Canada, in *R v Videoflicks,*[598] Tarnoplosky JA of the Ontario Court of Appeal took a similar attitude and said that, in determining what the essential practices of a religion are, the analysis must proceed not from the majority's perspective of the concept of religion but in terms of the role of practices and beliefs in the religion of the individual or group concerned. The judge gave examples of what may appear to be secular activities like eating, cutting one's hair, what clothes one wears, but could nevertheless be activities with major religious significance to adherents. Here is another rejection of the view that there are activities which of themselves can be classified as either religious or not.

Nevertheless, the issues and tensions have remained and courts, especially in the USA,[599] have continued to struggle, particularly when faced with religious groups engaging in activities that secular groups also engage in. In some instances, religiously motivated activities (such as social welfare or commercial fundraising or establishing schools and sporting facilities) have been classified as "secular" even when they have

[595] The test drawn in *Yoder* was based instead on whether the *worldview* was deeply rooted in religion or was either merely philosophical or a personal preference. This distinction was drawn between the beliefs of someone like Thoreau who rejected materialistic values but whose choices were said to be philosophical and personal rather than religious. What made the belief about a removal of a child from school religious rather than philosophical appeared to relate to the source and nature of the motivation for the removal of a child from schooling, not the objective nature of the action. The finding was that for the Amish their whole way of life was inseparable and interdependent with their religion, described by the court as a deep religious conviction shared by an organised group and intimately related to daily living, so that keeping children at school beyond the Eighth grade was a religious issue not merely philosophical: *Wisconsin v Yoder*, 405 US 205 (1972) at 214–-7. The comment has been made that the Court was trying simply to distinguish the religiousness of this case from various counter-cultural movements that might also not approve of the public schooling system: Pepper, 'Reynolds–Yoder', above n 68.

[596] For example, *Thomas v Review Board*, 450 US 707 (1981) concerning the abstaining from working in armaments manufacture (on religious conscientious objection grounds) and *Sherbert v Verner*, 374 US 398 (1963) concerning not working on Saturdays (being the Sabbath).

[597] *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 at 124–125. The other justices did not express any views contrary to this point. The concern of the government in that case was about subversive political activities.

[598] (1984) 48 OR (2d) 395, at 420.

[599] Again, this may be mainly because most of the cases come from the USA. The lack of such cases from other jurisdictions has not been because they take a different view but because they have not been tested as much. The *Mendelssohn* case mentioned below in n 601 comes from New Zealand but the issues were not put as clearly as in the US. However, even though they acknowledge the difficulties of such a classification, Evans and Gaze have recently argued in Australia that a distinction in protection needs to be drawn between in core religious activities which have a greater claim to religious freedom, as opposed to public sphere activities like education, employment and training: see Evans and Gaze, above n 50, at 47–8. Their comments were directed more to the balancing process but reveal an attitude in which such distinctions are still very relevant. The quotes from the Australian politicians in n 584 above also indicate that similar issues may well arise.

arisen from religious beliefs.[600] Courts have also continued to be uncomfortable with issues concerning property ownership being seen as religious.[601] The courts have usually been more willing to characterise something as religious when it has concerned activities in typical places of worship and described as religious worship or teaching.[602] Maybe it is because such activities within traditional places of worship are regarded by the courts as quintessentially religious.[603]

In instances where courts have rejected a religious classification for the activity, they have made a judgment based on the nature of the activity rather than the motive for the activity. Activities common in familiar religions like Christianity have been more likely to be found to be religious simply because those religions have tended to inform what is defined as religious. These are often activities typical of the private sphere.[604]

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[600] This has been the case even though such activities themselves may be part of the process of proselytising or living out the religious principles of welfare and justice. A range of these with differing results are discussed in Crewsdon, above n 442, and Scott David Godshall, 'Land Use Regulation and the Free Exercise Clause' (1984) 84 *Columbia Law Review* 1562. There have also been cases where churches have engaged in fundraising to support religious activities but these have been held to be secular despite religious motivations, such as in *Tony and Susan Alamo Foundation v Secretary of Labor*, 471 US 290 (1985). This view has also been seen in cases where churches have sought to demolish heritage listed buildings in order to build commercial buildings to maximise financial return for the property: see *Society of Ethical Culture v Spatt* 415 NE 2d 922 (NY, 1980) and *Church of St Paul and St Andrew v Barwick* 496 NE 2d 183 (NY, 1986), though the latter case was ultimately disposed of on the issue of ripeness.
Even the building of a church has been regarded as a secular and not religious activity, though this could be an extreme case: *Lakewood Ohio Congregation of Jehovah's Witnesses v City of Lakewood* 699 F 2d 303 (6th Cir, 1982).

[601] In *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88 the Court of Appeal of New Zealand held that the appointment of the Public Trustee as interim caretaker of the property of a religious group had nothing to do with freedom of religion as it did not affect the ability of persons to conduct themselves in religious activities as they saw fit. This was despite a belief, asserted to be religious, that all decisions should be made by consensus of the religious adherents rather than by a caretaker trustee. The evidence was said to amount only to evidence that the group would be uncomfortable with a non-believer involved in the trust's affairs. The Court noted that the belief about consensus was contradicted by the terms of the trust deed itself under which the property of the group was held, which did not provide for a requirement of consensual decision-making. Whether the decision was correct on the evidence or not, in considering caretaking of property as nothing to do with religion, the Court seemed to take a narrow view of what could be religious and did not appear to give much weight to what the group said its religious beliefs were and what it said would be an infringement of those beliefs.

[602] For instance, courts have found that historic preservation orders do hinder religion when the renovations sought relate to the parts of church buildings more central to the typical worship rituals such as changes to location of an altar: *Society of Jesus v Boston Landmarks Commission*, 564 NE 2d 571, 573 (Mass,1990); or where it was successfully argued that the design of a church was an expression of theological doctrine: *First Covenant Church of Seattle v City of Seattle*, 840 P 2d 174 (Wash, 1992); or where the renovations were to build a larger facility for religious mission, as in *Keeler v Mayor of Cumberland*, 940 F Supp 879 (D Md, 1996) where the District Court in Maryland found the restriction on the church demolishing a monastery and chapel in a historic district as a violation of both the First Amendment and the *Maryland Declaration of Rights*. The church members had filed affidavits about their religious motivations for the new expanded facilities and how they had discerned that this was part of their religious mission.

[603] It has been argued that a heritage listing that affects the interior configuration of churches is religious and cannot be separated from worship itself, but that designations that affect only the exterior of churches are not religious and should not be protected under the First Amendment: see Alan Weinstein, 'The Myth of Ministry v Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions' (1992) 65 *Temple Law Review* 91. This seems like a blatant assumption that interior or private worship and expression is religious but external buildings are not.

[604] These include such things as belief in God and whatever one classifies as proper doctrine, moral behaviour as defined in various religious codes, worship (commonly manifested in regular services in buildings like churches and temples) as well as private prayer and scripture reading, which are easily classified as private sphere activities. With the missionary component of Christianity, however, come

The ACT and Victorian religious freedom provisions extend beyond religion to "conscience" and "thought", and the Canadian and New Zealand religious freedom provisions include these as well as "belief". There has not been a clear line of authority to show how much wider these concepts may be than the term "religion".[605] In Canada it has been said that "conscience" referred to moral views of right and wrong, regardless of whether they emerge from a religious base.[606] However, it is not clear if it includes all that has been classified as "secular" or "cultural" as it is likely that there is still a distinction between what is motivated by conscience or belief and what is motivated by cultural heritage or even economic necessity.

7.3 The Indigenous Sacred Place Cases: Secular Activities Considered Not Religious

While most of the Indigenous cases discussed earlier[607] were dismissed on other grounds, some contained obiter comments to the effect that the activities said to be impeded did not qualify for Free Exercise Clause protection because they were not religious but cultural or economic and thus "secular".

Cultural and Historical Activities – *Sequoyah v Tennessee Valley Authority*

In the decision of the 6th Circuit Court of Appeals in *Sequoyah v Tennessee Valley Authority,*[608] Judge Lively for the majority drew the distinction between activities that were cultural rather than religious. Despite accepting the sincerity about religious significance of the places and the fact that the Cherokees had a religion,[609] Judge Lively commented that the overwhelming concern of the plaintiffs appeared to be related to the historical beginnings of the Cherokees and their cultural development

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activities like evangelising and attempts to teach and convert, which still seem to be accepted as religious, where they take traditionally common forms. It is seen later in Chapter 10 that even these came to be regarded as relating to freedom of speech in the public sphere and governed by different principles from private sphere issues like religious freedom.

605 These are likely to include the examples of views like those of Thoreau (see n 595 above) which were excluded in the *Yoder* case from the concept of what is a religion as opposed to a secular philosophy.

606 *Roach v Canada* (1992) 88 DLR (4th) 225.

607 In 6.4 above.

608 620 F 2d 1159 (6th Cir, 1980).

609 Judge Lively recounted that the places where the plaintiffs' ancestors lived, gathered medicines, died and were buried had cultural and religious significance and that particular geographic locations figured more prominently in Indian religion and culture than in those of most other people. The Court said it had no trouble accepting that Cherokees had a religion and said that there was no need for a religion to have written creeds or man-made houses of worship or to pass any organisational or doctrinal test. Orthodoxy was not an issue and neither was the sincerity of the plaintiffs' adherence to the religion. See *Sequoyah v Tennessee Valley Authority* 620 F 2d 1159 (6th Cir, 1980) at 1163. The court used overtly religious language to describe the beliefs about the sacredness of the place. Judge Lively noted that the land was described as sacred and holy to the Cherokee and that anthropologists had confirmed that such particular places were important in Cherokee tradition and religion, ibid at 1162.

and it was the damage to the tribal and family folklore and tradition, more than particular religious observances, which was at stake.[610] Lively J went on to say that although cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise clause of the First Amendment.[611] The inference was that the cultural and historical motivations were not religious.

The reasons for finding that the interests were historical and cultural and not religious are not clear. The most common interpretation of Judge Lively's reasoning is that he thought what was cultural and historical was *therefore* not religious.[612] This suggests that the Court assumed a clear separation between two mutually exclusive concepts and that something could not be both cultural/historical and religious.

Another reading could be that, although the issue concerned the Cherokee religion, the plaintiffs' true motivations were found as a fact not to be religious at all but cultural and historical only, despite the sincere religious ceremonial language in which they were couched.[613] However, this too raises a similar problem of classification. It presupposes that there are such things as "religious reasons" or sufficient levels of devotion or conviction that may be absent when a person is merely participating in the religious ceremonies or visitations for cultural reasons.[614] This strongly suggests an association of religion with the element of internalised belief or devotion rather than with external community action, which may not be legitimate in religions where culture and religion are one and the same (or even where faith is manifested primarily in works) and everything is a way of being.[615]

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[610] Ibid, at 1163–4. The court found that the evidence showed that only a few Cherokees made expeditions to the area prompted for the most part by an understandable desire to learn more about their cultural heritage.

[611] Ibid, at 1164–5.

[612] Such as Laurie Ensworth, 'Native American Free Exercise Rights to the Use of Public Lands' (1983) 63 *Boston University Law Review* 141; Woodall, above n 294; Stephen L Pepper, 'Conundrum of the Free Exercise Clause: Some Reflections on Recent Cases' (1982) 9 *North Kentucky Law Review* 265; Erica Rosenberg, 'Native American's Access to Religious Sites: Unprotected under the Free Exercise Clause?' (1985) 26 *Boston College Law Review* 463; Michaelsen, 'Promise and Perils', above n 144; Pemberton, above n 29; Loesch, above n 553.

[613] This may have been hinted at by the Court when it referred to the objections of the Cherokee to the Tellico Dam in the 1960s, being based primarily on a fear that their cultural heritage rather than their religious rights would be affected by the flooding of the Little Tennessee Valley, and that it was only with the filing of the present complaint in October 1979, less than a month before impoundment was to begin, that any Cherokee made an explicit claim based on the Free Exercise Clause: *Sequoyah v Tennessee Valley Authority*, 620 F 2d 1159 (6th Cir, 1980) at 1162. It can also be seen in the reference to their expeditions to the place being prompted by the desire to learn more about their cultural heritage, ibid at 1163.

[614] Perhaps an analogy for such a finding is someone who participates in Christian services like christenings or marriages or on Christmas Day primarily because they like the traditions, not because they have particular religious feelings. See the discussion in 7.5 below.

[615] The issue of a narrowness in defining belief as mere interior assents to propositions in the context of Indigenous beliefs in the Hindmarsh Island case in Australia has been criticised in James Weiner, 'Religion, Belief and Action: the Case of the Ngarrindjeri Women's Business on Hindmarsh Island, South Australia 1994–1996' (2002) 13(1) *The Australian Journal of Anthropology* 51 and Marion Maddox, 'What is a "Fabrication"?: The Political Status of Religious Belief' (1998) 11(1) *Australian Religion Studies Review* 5.

Subsistence Activities

Inupiat Community of Arctic Slope v United States

There is a hint of a similar approach in the case of *Inupiat Community of Arctic Slope v US,*[616] the action brought by the Inupiat people to stop an oil exploration lease in the Beaufort Sea. Judge Fitzgerald of the District Court of Alaska, in a very brief discussion of the religious claim, found that the lease of land offshore did not create any serious obstacle to the exercise of religion. He found that there was no explanation of the religious significance of the sacred sites or of how the activities may interfere with their free exercise of religion. The judge noted that the claim was that the religious beliefs were inextricably intertwined with a hunting and gathering lifestyle and that all exploratory activities which interfered with such subsistence activities should be interdicted on free exercise grounds. He held that such a claim based on non-specific grounds could not succeed.[617]

As expressed by the Court, this could simply be a situation where insufficient evidence was presented or the case was not sufficiently articulated.[618] However, commentators have noted that the evidence presented made it clear that a strong connection was made between the Inupiat religious beliefs and practices and their hunting and gathering lifestyle, so that such activities *were* religious and areas furnishing such subsistence were sacred and indispensable to religious observances.[619]

Regardless of the correctness of the factual finding, reading between the lines, there was certainly an attitude in the brief judgment that suggested that hunting, gathering and subsistence activities were not by their nature religious, but economic or cultural. That was why the judge wanted more detail as to what specific "religious" activities were interfered with and as to what the "religiousness" of the activities or the sites were, as the Court seemed to consider that this additional element was missing. Here too we see the assumption of a sharp distinction between the religious and the secular.

[616] 548 F Supp 182 (D Alaska, 1982).
[617] 548 F Supp 182 (D Alaska, 1982) at 188–189.
[618] It is not possible to tell from the face of the reasoning that this was incorrect.
[619] Rosenberg, above n 612, said that the evidence presented to the court stressed the sanctity of sites on sea-ice as well as land because of the presence of spirits. See also a similar view on *Inupiat* in Loesch, above n 553.
In a slightly different context, see reference to the study by Asen Balikci concluding that the hunting and fishing places of Netsilick Eskimo were sacred and required taboos to preserve those places and their sacredness, in the introduction by Paul Oliver in Paul Oliver (ed), *Shelter, Sign & Symbol* (1975).

Northwest Indian Cemetery Protective Association

This analysis of the *Inupiat* judgment has similarities with the dissenting judgment in the Circuit Court of Appeals in *Northwest Indian Cemetery Protective Association v Peterson*[620] where Beezer J said that the use of the land had to be religious and that the anthropologist[621] had applied an inappropriate definition of religion. The anthropologist had said that to divide activities into religious and secular would force Indian concepts into non-Indian categories and distort the original conceptualisation in the process. The report had suggested that hunting and fishing *were* religious activities for Indians. Beezer J said this may be correct in an anthropological sense but the federal *Constitution* did not recognise such a broad concept of religion.

The view expressed by Beezer J and hinted at by the *Inupiat* Court was that such things as hunting and gathering, receiving the gifts of sacred places and caring for and celebrating them could not in themselves be "religious" for the purposes of the religious freedom provisions. Perhaps what those judges felt were missing were such things as religious devotion and belief, or liturgical ritual, such as that offered by the religions more familiar to the courts. This again assumes an internalised view of what is religious.

Failure to Look Like Typical Religious Rituals: *Badoni v Higginson*

For completeness, there is one unusual case that even found ritual and ceremonial activities to be not sufficiently religious for the purposes of the Free Exercise Clause. This was the case of *Badoni v Higginson*[622] which concerned the flooding of the area of the Rainbow Bridge National Monument. The District Court ruled against the plaintiffs for reasons discussed elsewhere,[623] but the judge[624] found that there was really no "religious" interest. He reached this conclusion by findings that the performance of the ceremonies had been infrequent, that they were not attended by large numbers and that they were not tribally organised.[625] This was despite the Navajo evidence that their ceremonies were not regular or periodic but to be carried out as and when required.[626] The decision seemed to turn on the fact that the Navajo religion was not sufficiently like

[620] (1986) 795 F 2d 688 (9th Cir, 1986) at 701.
[621] Namely, Dr Theodoratus, who had written the main anthropological report in that case.
[622] 455 F Supp 641 (D Utah,1977).
[623] See Chapters 9 and 11.
[624] In the course of a discussion of balancing religious interests against competing public interests.
[625] 455 F Supp 641 (D Utah,1977) at 646. The judge said that these beliefs did not constitute "deep religious convictions shared by an organised group and intimately related to daily living". The medicine men were also found to be not recognised by the Navajo Nation as such, presumably meaning the formal tribal structures.
[626] Ibid, at 645.

mainstream religions, with organisational structures, hierarchies and regular worship services, to qualify as a religion protected by the First Amendment. This was a crude ethnocentric viewpoint that was rejected on appeal.[627]

The classification of something as cultural/historical and thus not religious has also troubled the courts in other Indigenous cases in USA, not related to sacred places, with differing results. For example, there have been contrasting decisions by Circuit Courts on the wearing of long hair by Native Americans, with at least one deciding that it was about pride in heritage and not religious and at least one deciding that wearing long hair was a religious tenet.[628]

The above cases illustrate that some courts have difficulty accepting at face value the assertions of Indigenous groups that activities are religious. While it may be easier to accept ceremonial activities as religious, this acceptance may not extend to rituals at sacred places which involve more mundane activities, such as "caring for country"[629] or hunting and gathering. The logic behind drawing a distinction between ceremonial or prayer activities and more mundane daily rituals is not apparent, apart from the assumption of a privatised view of what is religious and that this is distinct from the rest of life which occurs in the public sphere.

The Indigenous examples above are all from the USA. However, in the light of the non-Indigenous cases and commentary discussed in the previous section,[630] similar issues are likely to arise in other jurisdictions as to whether public sphere activities are covered by religious freedom.

7.4 The Establishment Clause: The Paradox of Needing to Secularise the Religious

Issues of classifying something as religious or not have also come up in cases in the USA concerning the Establishment Clause under the *Lemon v Kurtzman* test which

[627] In the appeal in *Badoni*, the Circuit Court seemed to accept the religious nature of the activities and even suggested that protection of these might have infringed the clause against establishment of religion: *Badoni v Higginson* 638 F 2d 172 (10th Cir, 1980) at 178–9
[628] In *New Rider v Board of Education*, 480 F 2d 693 (10th Cir, 1973), the Court held that the desire of Pawnee students to wear their hair long in breach of school regulations was no higher than a desire to express pride in their heritage and did not qualify as religious. A contrasting decision was arrived at by another Circuit Court in *Teterud v Burns*, 522 F 2d 357 (8th Cir, 1975), where the Court accepted that prisoners wearing their hair long was a tenet of the Indian religion rather than just a secular consideration of racial pride and personal preference.
[629] For example, by cleaning around and maintaining the pristine condition of sacred places.
[630] See 7.2 above.

requires the government action or legislation, inter alia, to have a secular purpose.[631] Here the religious nature of sacred places has been used to defeat government attempts to protect them, as such attempts are seen to be intruding outside the legitimate secular role of governments.

This is illustrated in the main Establishment Clause case which limited the scope of government intervention to protect sacred places, *Bear Lodge Multiple Use Association v Babbitt.*[632] Judge Downes in the US District Court for Wyoming found that the Establishment Clause could apply to strike down the Final Climbing Management Plan for the Devils Tower National Monument because it asked for respect for the reverence that many American Indians have for Devils Tower as a sacred site and asked rock climbers to refrain from climbing the Tower during the culturally significant month of June. The Forest Service had argued that the measures related to Indigenous culture rather than religious practices and could not amount to establishing a religion. The Court said[633] it was not persuaded that a legitimate distinction could be drawn between religious and cultural practices of those American Indians who consider Devils Tower a sacred site. This decision expanded the earlier Indigenous sacred place cases where courts in various dicta have suggested that the religious nature of the remedy sought under the Free Exercise Clause is in breach of Establishment Clause principles.[634] So, where the concerns about activities at sacred places were accepted as driven by the intent to protect religion, this was used to deny relief.

Contrary to *Bear Lodge*, however, arguments to protect sacred sites on the grounds of the sites' culture and history succeeded in other cases, notably the *Cholla Ready Mix* line of cases concerning Woodruff Butte[635] and the *Access Fund* cases concerning

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[631] See 5.2.3 above.

[632] *Bear Lodge Multiple Use Association v Babbitt*, 2 F Supp 2d 1448 (D Wyo, 1998).

[633] Ibid, at 1450. The judge did not analyse whether there could have been secular motives of the government even if solely aimed at protecting religious freedom, nor whether such motives may have been sufficient to pass the test.

[634] Some of these turned on the religious purpose behind the relief sought and the effect of advancing religion. In *Badoni v Higginson*, 638 F 2d 172 (10th Cir, 1980) at 178–9, the Circuit Court of Appeals thought the religious nature of what was sought to be protected would violate the Establishment Clause. A similar view was taken by Judge Richey of the District Court in *Hopi Indian v Block* (DDC, 1981) [1981] US Dist Lexis 18 421 at 18–19, where he outlined the usual three-part *Lemon* test and, drawing support from the 10th Circuit comments in *Badoni*, said that the purpose of any restriction on development was religious, not secular, and it had the primary effect of advancing the Hopi and Navajo religions. He referred to the result sought as being that of a government-managed "religious shrine", ibid, at 21–22, and said that one had to accommodate one's "idiosyncracies", both religious and secular, to compromises necessary in community life, at 20. In the case of *Inupiat Community of Arctic Slope v US*, the District Court referred to Establishment Clause problems and repeated the statement and same authorities from the District Court in *Badoni: Inupiat Community of Arctic Slope v US,* 548 F Supp 182 (D Alaska, 1982) at 189.
There were also warnings of excessive entanglement of the government with religion: *Fools Crow v Gullet*, 541 F Supp 785 (DSD, 1982) at 794.

[635] In this line of cases, the courts found that the Establishment Clause did not apply to or prevent the protection of sites of *historical and cultural* importance, which was a secular purpose, even if they also had religious significance to Native American tribes. The *Cholla v Ready Mix* line of cases concerned the

Cave Rock[636] because the purpose of the protection of the sacred places for their historical or cultural significance was found to be a sufficient secular purpose. Analogies can be drawn with those other Establishment cases which passed muster by secularising the religious significance of the place and making the purpose suitable for the public sphere, in a similar manner to the "civil religion" examples discussed previously.[637] These may be illustrations of the tendency to regard what is religious as being about personal conscience and beliefs rather than cultural or habitual behaviour common in civil religion in the governmental arena. There are also reflections of the view that what is commonly accepted in the public sphere is assumed to be somehow secular.

Some of the Indigenous sacred place cases which survived Establishment Clause arguments did so on the basis that actions compelled by the Free Exercise Clause were in themselves legitimate *secular* (for example, constitutionally required) purposes and achieved such effects and thus did not infringe the Establishment Clause.[638] These arguments may have been influenced by the view that a secular motive of complying with legal requirements is not a religious purpose even if directed at religion.

Establishment Clause arguments have, however, continued to trouble attempts to protect Indigenous sacred places and were used to defeat some of the bills designed to provide such protection.[639] This was not entirely new as Establishment concerns had even been raised back in the days of the *AIRFA*.[640] The struggles with the Establishment Clause have caused promoters of bills for protecting Indigenous sacred

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prevention of mining at Woodruff Butte in Arizona: *Cholla Ready Mix v Civish*, 382 F 3d 969 (9th Cir, 2004); *Cholla Ready Mix v Mendez* (D Ariz, DC No CV-02-01185, 21 January 2003).

[636] In the cases concerning the closure of Cave Rock near Lake Tahoe in Nevada, the Courts followed the decisions in *Cholla Ready Mix* and found that the Cave Rock was being protected for secular reasons, namely the cultural and historical importance of the sites. See *Access Fund v US Department of Agriculture*, 499 F 3d 1036 (9th Cir, 2007) and *Access Fund v Veneman* D Nev, No CV-N-03-687-HDM, 28 January 2005). In the *Cholla* and *Access Fund* cases, the fact that the cultural and historical significance may be related to the religious significance to the Native American tribes has not mattered The *Bear Lodge* and *Natural Arch* cases were distinguished by the 9th Circuit Court of Appeals on the grounds that those cases concerned protection of places exclusively for religious reasons: see *Access Fund v US Department of Agriculture*, 499 F 3d 1036 (9th Cir, 2007) at 1046.

[637] See discussion above at 2.2.4.

[638] *US v Means,* 627 F Supp 247 (DSD, 1985) at 264; *Northwest Indian Cemetery Protective Association v Peterson,* 565 F Supp 586 (ND Cal, 1983) at 597; *Northwest Indian Cemetery Protective Association v Peterson,* 764 F 2d 581 (9th Cir, 1985) at 586; *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986) at 693–4, though Beezer J warned that creating large expanses of protected areas though could be a violation of the Clause: 795 F 2d 688 (9th Cir, 1986) at 794.

[639] See the bills mentioned in 5.2.3 above. For instance, in criticism from mining and other interests and the Justice department in relation to S 1124 (1989), S 2250(1988), S 110 (1991): see discussions of the various bills in Boyles, above n 307; Michael J Simpson, 'Accommodating Indian Religions: The Proposed 1993 Amendment to the *American Indian Religious Freedom Act*' (1993) 54 *Montana Law Review* 19; comments by Senator McCain in relation to S 1021 at US Congress, Senate, *S1021: Native American Free Exercise of Religion Act*, 103rd Congress (1993), 139 Congressional Record S6464; Hooker, above n 152; Loesch, above n 553.

[640] In Statement by Larry Simms, Attorney/Advisor of Office of Legal Counsel for the Justice Department at 10–11 of the *Senate Report 95-709*, above n 525. He expressed concern about the potential for it to be seen as giving preferential treatment to American Indian religions.

places in the US to characterise the laws as cultural and as fulfilling a secular purpose, such as a trust responsibility towards Native American tribes, rather than as religious, although these have not satisfied doubts about validity.[641]

As a result of this flip side of the legal dualism, the protection of sacred places can fail if they are seen as religious rather than secular, just as activities at sacred places can be denied religious freedom protection if seen as secular rather than religious. The Indigenous religions run the risk of losing either way.

7.5 The Problems of the Secular–Religious and Public–Private Distinctions in the Context of Indigenous Sacred Places

7.5.1 The Tendency to Encourage Narrow and Ethnocentric Views of What is Religious

The above cases show the dangers of ethnocentric interpretations of what is religious. Ranging from extreme cases like *Badoni* to more subtle cases concerning activities such as hunting and gathering, courts have tended to define what is religious according to what is similar to activities within religions familiar to them.[642] This has corresponded with a privatised view of what is "religious", which has excluded from its ambit the cultural and economic activities typical of the public sphere. If we are to be serious about protecting rights of minorities and treating all people with equal respect, then all such religions should be protected without distinctions based on whether they conform to features of majority religions. Similarly, they should be protected whether or not they are restricted to the private sphere.

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[641] As in S 2269 (1994), see US Congress, Senate, *S 2269: Act to Protect Native American Cultures and to Guarantee the Free Exercise of Religion by Native Americans*, Introduced by Sen Daniel Inouye, 103rd Congress (1994), 140 Congressional Record S8390. *Senate Report 103-411*, above n 145, however, attached views of the Department of the Interior and of the Assistant Attorney-General for the Justice Department, which still considered that the Bill ran into Establishment Clause problems. In the earlier S 1021 Bill (1993), attempts had been made to deal with some of the Establishment problems of the earlier bills by not leaving it up to the Native American practitioners to define a violation: see Loesch, above n 553; Rayanne Griffin, 'Sacred Site Protection against a Backdrop of Religious Intolerance' (1995) 31 *Tulsa Law Journal* 395.

[642] This has been recognised by various commentators, such as Rosenberg, above n 612, who said that the *Inupiat* court's rejection of such religious arguments about the environment for whaling on the grounds of vagueness was really a rejection on the grounds of unconventionality. See also Zellmer, above n 653.
The comment has been made that such an approach may result in anything countercultural being found to be secular rather than religious: Carmella, 'Theological Critique', above n 588.
As Pepper put it in the context of discussing the centrality issue in *Sequoyah* (see 8.7 below), the religion is not protected because "it's not like our religion": Pepper, 'Conundrum', above n 612.

Many commentators have recognised that a distinction between the religious and the secular/cultural is particularly inappropriate for Indigenous religions because of the lack of such a distinction in the Indigenous religions themselves, with their belief in the interconnection between all aspects of life.[643] This characteristic is highlighted by the lack of a word for "religion" and the fact that many Indigenous people may describe it all as "culture".[644] The distinction is particularly unhelpful where religious practices and beliefs require activities and preservation of sacred places on public or third-party property.[645] These comments would apply a fortiori when dealing with cultural and subsistence activities carried out at sacred places, where the activity is hallowed (thus made religious) by the sacredness of the place.

Perhaps some test needs to be imposed for a definition of what is religious for statutory interpretation of the concept of *religious* freedom. The courts have avoided some ethnocentric dangers by adopting a concept of "religion" that is sufficiently wide enough to encompass most religions throughout the world, including Indigenous religions.[646] Once a particular world view is objectively classified as religious, then activities motivated by that belief system should be considered as religious as well, otherwise a narrow definition is imposed by indirect means, such as by referring to motives as "cultural" or "secular".

On this approach, there may be nothing that is inherently non-religious. What makes an activity religious is the motivation that drives it. For example, if a person believes that they are required by their religion (as defined widely) to carry out an activity, that should be sufficient to make it religious and its exercise a matter of religious freedom.

Neither should the test for religious motivation be based on the intensity of personal belief or devotion, especially when talking of a communal activity. If there is substantial

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643 See 3.1.1 on the holistic nature of Indigenous thought. Commentators noting the inadequacies of the religious–secular distinctions in Indigenous cases include Michaelsen, 'Promise and Perils', above n 144; Rhodes, above n 7; Dussais, above n 7; Diane Brazen Gould, 'The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion' (1986) 71 *Iowa Law Review* 869; Stambor, above n 307; Vecsey, 'Prologue', above n 145; Pepper, 'Conundrum', above n 612. Michaelsen has suggested that the lawyers and the way the cases were run were also at fault for adopting the legal distinctions between the cultural and religious: see Michaelsen, 'Significance of the *AIRFA*', above n 152.

644 See Michaelsen, 'Promise and Perils', above n 144; Joel Brady, 'Land is Itself a Sacred, Living Being: Native American Sacred Site Protection on Federal Public Lands Amidst the Shadow of Bear Lodge' (1999–2000) 24 *American Indian Law Review* 153. One is reminded of the famous comment attributed to Chief John Snow that "[o]ur life was not a fragmented one with a compartment for religion. Rather, our life was one in which religion (and reverence for nature, which revealed religious truth) was woven through all parts of the social structure and observed in conjunction with every activity": Snow, above n 160.

645 A point noted in Marci Hamilton, above n 73, at 787.

646 See 4.2.3 above. It is beyond the scope of this thesis to argue about the difficulties in any precise definition of religion. The debates have been canvassed in many articles including Jesse Choper 'Defining "Religion" in the First Amendment' (1982) *University of Illinois Law Review* 579; Wojciech Sadurski, 'On Legal Definitions of Religion' (1989) 63 *Australian Law Journal* 834; Underkuffler-Freund, above n 99; Timothy Hall, above n 68.

religious motivation within the community's belief system, the fact that some individuals may not share it or have extraneous purposes should not impact negatively on the carrying out of communal activities or the protection of the place. What counts may be that the ritual is carried out by a few for the benefit of the group, or even the world, and the individual motivation of the others is irrelevant. In some instances, what matters may not be what individuals believe or experience but that the religious tradition is accorded respect.[647]

Defining "religious" simply as that which is religiously motivated, whether at an individual or community level, does leave a wide scope for activities of all kinds to amount to religious exercise.[648] The alternative however is to limit religious freedom only to certain types of religious activities and to exclude activities at the heart of other religions, particularly those less familiar to the courts. Such a discriminatory approach against minority religions strikes at the heart of what religious freedom is intended to achieve.

7.5.2 Inappropriateness of Mutually Exclusive Categories, Especially in the Effects on Indigenous Religions

A related concern, emerging especially in the *Sequoyah* case, is the attitude that the categories of "religious" and "cultural/secular" are not only separate but also mutually exclusive, an attitude which perhaps reflects a division of spheres. However, the jurisprudence has generally not gone this far. Part C refers to how cultural or social significance in the heritage law incorporates religious heritage which is a key component of a society's "culture".[649]

There is no reason why the religious and secular have to be separated. For religious freedom purposes, all that should be required is that the relevant belief or activity can be said to be religious.[650] There have been cases such as *Callahan v Woods*[651] where the courts have accepted that the coincidence of religious and secular beliefs did not disqualify a First Amendment claim as that was not limited to claims which are "purely

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[647] See examples and comments by Deloria, 'Sacred Lands and Religious Freedom', above n 165 at 206; Deloria, 'The Concept of History' in Barbara Deloria, Kristen Foehner and Sam Scinta (eds), *Spirit and Reason: the Vine Deloria Jr Reader* (1999).
[648] The issue of any limits is discussed below in 7.5.3.
[649] See also Article 27 of the *ICCPR* which links "ethnic, religious or linguistic minorities" and speaks in the one breath of their rights to "enjoy their own culture, to profess and practice their own religion, or to use their own language", in 6.2.2 above.
[650] A point also made by others such as Stambor, above n 307; Woodall, above n 294.
[651] 658 F 2d 679 (9th Cir, 1981).

religious".[652] One line of argument on the Establishment Clause is that, as long as there is a purpose and matter that is cultural or secular, this should be permissible and it is irrelevant if it might also be classified as religious.[653] There is no need for a strict separation of spheres to be imported into the religious freedom jurisprudence.

7.5.3 Limits to what is Religious

Critics[654] have questioned why activities common to religious and non-religious bodies should be given protection only when engaged in by religious bodies or persons for religious motives but not otherwise. Arguments state that, once religiously motivated activities enter into the "public" or "commercial" sphere, they should be treated on equal terms to other players. This problem is lessened in Canada and New Zealand where secular philosophies may be protected as well, but the expansion of what is religious does not address the issue as to why such beliefs should be protected compared with activities unrelated to any underlying philosophy.

The removal of a narrow view of what is religious does expand the potential scope of the religious demands beyond its "private" box, opening "floodgates" to all kinds of claims. There is no doubt that a religion could be all-pervasive and make demands on all of life, as it does in Indigenous religions. If that is the case, is there any limit to what is religious?

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[652] In that case the 9th Circuit Court of Appeals held that as long as the plaintiff's beliefs were religious, the fact that the person might also have had long-term secular philosophical beliefs along the same lines did not prevent the claim and the overlap was said to be protected. Examples given by the Court included Seventh-day Adventists enjoying Saturday leisure and Orthodox Jews and Muslims not liking the taste of pork as being irrelevant if there was also a sincere religious motivation for the behaviour. The Court recognised, at 687, that lives are not so compartmentalised that one can readily keep secular and religious concerns separate.

[653] There is confusion in the Establishment jurisprudence as to whether merely having a secular purpose is sufficient to avoid problems or whether the secular purpose has to predominate. For example, the US Supreme Court displayed differing views in one of the Ten Commandments cases, *McCreary County v American Civil Liberties Union of Kentucky,* 545 US 844 (2005). Souter J delivering the majority opinion said that, to survive the Establishment Clause challenge, the secular purpose could not be merely secondary to the religious purpose: at 864–5. However, dissenting justices either rejected the *Lemon* test altogether or said that merely having a secular purpose was sufficient: see Scalia J at 901. There was a different majority in the case of *Van Orden v Perry*, 545 US 677 (2005), with the swinging judge Breyer J deciding that there was a predominant secular purpose on the facts of that case, at 702–3.

Many commentators have argued in relation to the Establishment Clause challenges to the protection of Indigenous sacred places, in a similar manner to the decisions the in *Cholla Ready Mix* and *Access Fund* cases above, that having a secular purpose is sufficient and it does not matter if it is religious as well: see Erik B Bluemel, 'Prioritizing Multiple Uses on Public Lands after Bear Lodge' (2005) 32 *Boston College Environmental Affairs Law Review* 365; Cross and Brenneman, above n 335; Joel Brady, above n 644.; Sandra B Zellmer, 'Sustaining Geographies of Hope: Cultural Resources on Public Lands' (2002) 73 *University of Colorado Law Review* 413.

[654] For example, by Eisgruber and Sager, above n 249, who have argued against a principle of religious liberty and in favour of non-discrimination. This is probably also implied by Kurland's arguments that the governing principle behind the US First Amendment should be one of neutrality and to confer a benefit or impose a burden on the grounds of religion should be prohibited: see Kurland, above n 285.

This goes back to the purpose of the religious freedom model, being the human rights imperative to care for and respect the inherent dignity of believers, whose beliefs and feelings also must be respected. The concern is to protect believers (or a religious community) against adverse impacts that a restriction on religious freedom may arguably bring about. This purpose emphasises the subjective viewpoint of the religious community and thus the tests imposed should be ones that assess matters from their perspective.

If there are concerns about the width of activities which could be included in the concept of religious freedom, such that anything that a religious person does may be arguably be done from a sincere religious motivation, then, as mentioned in the previous chapter, limits should be drawn in accordance with an exercise of balancing this right against other countervailing interests, rather than by artificially narrowing the concept of what is religious.

Chapter 8 – The Tests of Centrality and Indispensability and the Problem of Doctrinal Analysis

8.1 Introduction

The tests of centrality and indispensability in the USA were touched on in the context of religious freedom's focus on activities.[655] This chapter deals with how those tests, which probed into beliefs, were ultimately rejected in favour of the prevailing orthodoxy[656] that such approaches were inappropriate intrusions into the private sphere.

Centrality and indispensability were two tests developed in the USA in order to exclude protection for peripheral or non-essential activities. The centrality principle holds that, for a burden on religious exercise to be prohibited, it must affect an activity that is *central* to the tenets of the religion; and the indispensability principle requires the activity affected to be *indispensable* to the religion. Under these tests, it is insufficient for activities to be merely religious to be protected, but they must also be central or even indispensable. The centrality test appears to have emerged primarily in the 1980s[657] in the USA and was applied in non-Indigenous land use cases where places of worship were sought to be established on particular locations in breach of the relevant zoning requirements. Some of these religious freedom cases were rejected because the building of such a place of worship was not held to be sufficiently central to the particular faith.[658] In reaching these findings, the courts seemed to make their

[655] See 6.4.2 and 6.4.5 above.

[656] Outlined previously in 4.2.3.

[657] There were many cases prior to the 1980s in which no such tests were applied, even though there was nothing sacred or special about the location chosen. For example, the courts had struck down prohibitions on preaching or worship or dissemination of religious materials in public places where they would otherwise need permitseg: *Cantwell v Connecticut*, 310 US 296 (1940); *Saumur v City of Quebec* (1953) 4 DLR 641. Similarly, there had been a long line of US cases upholding claims by groups seeking to establish a place of worship within a district or zone where the town planning laws did not permit such uses but there was nothing doctrinally special about the locations, eg: *Board of Zoning Appeals of Decatur v Decatur, Indiana Company of Jehovah's Witnesses*, 117 NE 2d 115 (Ind, 1954); *Community Synagogue v Bates*, 136 NE 2d 488 (NY, 1956); *Columbus Park Congregation of Jehovah's Witnesses v Board of Appeals of the City of Chicago*, 182 NE 2d 722 at 725 (Ill, 1962); *Westchester Reform Temple v Brown*, 239 NE 2d 891 (NY, 1968); *Islamic Society of Westchester and Rockland v Foley*, 96 AD 2d 536 (NY Sup Ct, 1983).

[658] In both *Lakewood Ohio Congregation of Jehovah's Witnesses v City of Lakewood*, 699 F 2d 303 (6th Cir, 1982) and *Messiah Baptist Church v County of Jefferson*, 859 F 2d 820 (10th Cir, 1988), the building of a church by Jehovah's Witnesses and Baptists respectively was found to be not a "fundamental tenet" or "cardinal principle of faith" but only a "desirable accessory of worship". Similarly, in *Christian Gospel Church Inc v City and County of San Francisco*, 896 F 2d 1221 (9th Cir, 1990), a claim to allow worship in a house in a residential zone was rejected both because home worship was not a fundamental tenet of the religion (that is, not a central practice) and also because there was no evidence showing that it was necessary to worship at the particular home in the particular zone and they could worship in another building somewhere else (that is, the particular zone was not indispensable). The same attitude was shown in *Seward Chapel Inc v City of Seward*, 655 P 2d 1293 (Alaska, 1982) where an application to build

own judgment on what was central to the doctrines. It appears that external activities, like building a place of worship, were sometimes more easily considered optional accessories and not central to the faith. Perhaps this reflected the internalised view of what was central to religion.[659]

As outlined in the next section, the test of centrality and the further similar test of indispensability were extended to Indigenous sacred places but applied even more narrowly. Their application in these Indigenous cases has been heavily criticised for departing from the precedents,[660] for their ethnocentricity and for the unfairness of imposing such tests on Indigenous religions.[661]

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a parochial school next to a church was refused because there had been no showing of a religious belief that required the school to be located in the zone (ie they failed to show that a school building there was indispensable to the religion).

In a contrasting case, concerning the establishment of a mosque, the Court accepted the centrality of the practice of gathering for worship: *Islamic Center of Mississippi Inc v City of Starkville*, 876 F 2d 465 (5th Cir, 1989). The case concerned Muslim students at the University of Mississippi who wanted to set up a mosque in a residential area. The City claimed that the students could drive to other areas outside the city. The Court, however, described gathering for worship as "an integral part of most religious faiths" and preventing people from gathering was a burden on religious exercise. Also in *Grosz v City of Miami Beach*, 721 F 2d 729 (11th Cir, 1983) a burden on religion was found, albeit a minor one which was ultimately outweighed by other interests. This case concerned an Orthodox Jewish rabbi who used his house in a residential area as a small synagogue where the zoning laws prohibited places of worship. Places of worship were permitted four blocks away and the court held that the government burden outweighed the burden on religion in having to travel four blocks.

[659] See 2.2.1 discussing privatised religious concepts.

[660] Numerous commentators have argued that there was no such thing as a centrality principle in the precedents: eg, Andreason, above n 575, Brian Brown, above n 483; Cohen, above n 294; Sheri L Grouhoud et al, 'Comment, *Northwest Indian Cemetery Protective Association v Peterson*: Indian Religious Sites Prevail over Public Land Development' (1986) 62 *Notre Dame Law Review* 125; Hardt, above n 567; Loesch, above n 553; Stephen McAndrew, '*Lyng v Northwest*: Closing the Door in Indian Religious Sites' (1988-9) 18 *South Western University Law Review* 603; Pemberton, above n 29; Pepper, 'Conundrum', above n 612; Rhodes, above n 7; Richard Schneebeck, 'Religious Freedom and Public Land Use: *Wilson v Block* (1985) 20 *Land and Water Law Review* 109; Sewell, above n 302; Stambor, above n 307; Winslowe, above n 144.

Commentators have also noted that the centrality test would result in failing to protect many important practices that have historically been given First Amendment protection: see Steven Seeger, 'Restoring Rights to Rites: the Religious Motivation Test and the *Religious Freedom Restoration Act*' (1997) 95 *Michigan Law Review* 1472. See also the Note, 'Burdens on the Free Exercise of Religion' above n 566; Lupu, above n 25; Galanter, above n 99. It was also discussed in *Coronel v Paul,* 316 F Supp 2d 868 (D Ariz, 2004).

In Canada too, Horwitz, above n 249 advocates for an approach based not on whether certain practices are essential but on whether they are related to spiritual tenets or beliefs due to the difficulty of determining what is essential.

Similar criticisms have been made of the novelty of the indispensability test, such as by Hardt, above n 567; Samuel D Brooks, 'Note, Native American Indians Fruitless Search for First Amendment Protection of Their Sacred Religious Sites' (1990) 24 *Valparaiso University Law Review* 521; McAndrew, this note above; Pemberton, above n 29; Schneebeck, this note above.

In *Frank v Alaska*, 604 P.2d 1068 (Alaska, 1979) at 1072–3 the court had specifically rejected the argument that fresh moose meat was desirable but not essential to the potlatch, saying that there was no such requirement that it be essential, as long as the practice of using moose meat was deeply rooted in religious belief. It was only Connor J, the dissenting judge, who would have rejected the claim because moose meat was not central or necessary. The leading Supreme Court cases such as *Wisconsin v Yoder*, 405 US 205 (1972) also did not discuss the indispensability of the removal of children from high school.

[661] Commentators have suggested that centrality concepts are easier to impose when religions have a Bible or a creed: see Pepper, 'Conundrum', above n 612. See also Seeger, 'Restoring Rights to Rites', above n 660, who has suggested that Quakers or New Age groups may have difficulty proving some beliefs or practices are central. Many observed that there is usually no hierarchy amongst Indigenous sacred places and no creed or canon defining this, leading to the extensive criticism of a centrality test in the specific context of Indigenous religions: see Gordon, above n 133; Grouhoud et al, above n 660; Richard Herz, 'Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights' (1993) 79

The point of the discussion of the centrality/indispensability cases in this thesis is that they were, in a sense, a temporary aberration from the normal treatment of the "private religious sphere". The tests imposed were objective, in which the courts decided what was central or indispensable to the religion despite what was asserted by the adherents.[662] Such tests have been heavily criticised by commentators and ultimately overruled by the US Supreme Court which affirmed that religious beliefs should not be tested on an objective basis and should be treated as subjective matters for the believers.

As discussed in Chapter 4, this attitude in itself is appropriate and helpful for the religious adherents, but it demonstrates the contrasting approach used for the religious freedom model, grounded in a philosophy of non-intrusion into the private subjective religious sphere, from the objective approach of the heritage system demonstrated in Part C. [663] By painting religious beliefs as unable to be tested or limited, even by issues of relative importance, the courts were able to justify the imposition of even more stringent tests of coercion and purpose[664] which may have left the religious sphere "untouchable," but also substantially narrowed its scope.

The centrality/indispensability tests did not appear in the other three countries, probably because protection has been excluded by other elements of their religious freedom jurisprudence.[665]

8.2 Centrality and Indispensability in the Indigenous Sacred Place Cases

8.2.1 The US Cases which Failed the Tests

In the first series of sacred place cases in the USA, outlined below, the cases failed because the courts took the view that the practices there were not sufficiently central

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Virginia Law Review 691; Michaelsen, 'We Also Have a Religion', above n 62; Michaelsen, 'Civil Rights', above n 547; Patrick Noonan, above n 33; Pepper, 'Conundrum', above n 612; Rhodes, above n 7; Gould, above n 643; Note, 'Developments in the Law', above n 107.

[662] See 2.2.2 and 4.2.3 above for a discussion of the association of objectivity with the secular public sphere and of the impropriety of courts testing or judging subjective religious beliefs by their own standards.

[663] In Chapter 17.

[664] The subjects of Chapters 9 and 10.

[665] Though, as discussed later in 8.2.3, there are some vague hints that the tests might have been applied if necessary.

nor were they indispensable to the religion. The courts in effect imposed their own views of what was central within those religions.

Sequoyah v Tennessee Valley Authority and the Centrality Test

The 6th Circuit Court of Appeals used the centrality test to deny the challenge to the flooding of the Little Tennessee River for the Tellico dam in the case of *Sequoyah v Tennessee Valley Authority.* Judge Lively delivered the majority decision setting out this requirement.[666] He said that there was no claim of centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances that was disclosed in the affidavits and concluded that the centrality of the valley to the practices of the traditional Cherokee religion was missing.

The Court did not clearly articulate the precise reasons why the valley was not central, but there were references to the practices at that particular place being infrequent and irregular, thus not being of central importance to daily life,[667] to the practices at the valley being only personal preferences of the plaintiffs rather than convictions shared by the group,[668] and to the fact that the plants were available elsewhere.[669] The assessment of the place not being of central religious importance assumed a value judgment based on what could be called ethnocentric notions of centrality, that is, that centrality is marked by regularity and frequency of practices there, by shared notions of the need to carry out practices there and by the unavailability of alternative places to carry out the practices.[670] In this judgment, the Court intruded impermissibly into the realm of beliefs by imposing its own values.

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[666] *Sequoyah v Tennessee Valley Authority,* 620 F 2d 1159 (6th Cir, 1980) at 1163–5. Judge Merritt in his dissent supported the centrality test and the general reasoning of the Court's opinion but believed that the case should have been remanded to the District Court to allow the plaintiffs to lead evidence as to centrality. He said this was due to plaintiffs not being prepared for such an approach being taken by the court in what he acknowledged was a confusing and essentially uncharted area of law, at 1615.

[667] *Sequoyah v Tennessee Valley Authority,* 620 F 2d 1159 (6th Cir, 1980) at 1164, referring to the language of *Yoder* discussed above. Perhaps the contrast that the court had in mind was to regular (weekly or more frequent) gathering for congregational worship in the life of a typical Christian, Jewish or Muslim religion that marked the centrality of such a gathering in the religious life.

[668] This was suggested by the *Sequoyah* Court's comment that the concerns were merely a personal preference of the plaintiffs, not convictions shared by an organised group: *Sequoyah v Tennessee Valley Authority,* 620 F 2d 1159 (6th Cir, 1980) at 1164.

[669] Ibid, at 1164.

[670] For example Stambor has argued that the area was clearly more central to the Cherokee than the removal of students from school was in the Amish religion that qualified in the US Supreme Court decision in *Wisconsin v Yoder*, 405 US 205 (1972), described in n 293 at 5.2.1; Stambor, above n 307.

***Wilson v Block* and the Indispensability Test**

The indispensability test was the Circuit Court of Appeals' preferred barrier to the finding of a burden on religion in the case of *Wilson v Block,*[671] one of the cases concerning the expansion of the Arizona Snow Bowl. The plaintiffs had argued that the *Sequoyah* test was inappropriate as courts are not competent to rule on centrality and all religious practices should be protected. Senior Circuit Judge Lumbard, delivering the opinion of the Circuit Court, agreed that the First Amendment protection should not turn on the theological importance of the disputed activity.[672] However, he did limit the protection to situations where the government's proposed land use would impair a religious practice that could *not* be performed at any other site. It was held that if the plaintiffs had not demonstrated that the government land in issue was *indispensable* to some religious practice, *whether or not central to their religion*, they had not justified a First Amendment claim.[673] In the case in question, the Court found that the Peaks were indispensable to the practices of the religion but the small portion where the Snow Bowl was located was not, because ceremonies could be conducted and materials collected elsewhere in the Peaks.[674]

The Court claimed the "indispensability" test avoided engaging in theological analyses of what practices are doctrinally central within the religion. Its method of doing so was by simply assessing where practices had historically been carried out, purportedly as a mechanistic consideration of observable practices rather than theological analysis. However, in doing so the Court fell into the same trap as the centrality test by imposing its own conception of what was indispensable. In other words, it still came up with its own judgment of religious importance, in this case by making past practices the benchmark.[675]

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[671] 708 F 2d 735 (DC Cir, 1983).

[672] 708 F 2d 735 (DC Cir, 1983) at 743. Richey J at first instance in *Hopi Indian v Block* [1981] US Dist Lexis 18 421 at 17 had noted that the plaintiffs had not claimed that the relevant area was central or indispensable to their religion.

[673] 708 F 2d 735 (DC Cir, 1983) at 743–4. This indispensability requirement was arguably a much harder test than that of centrality as it required the place not only to be one of a few central places for the practices but the *only* place. In this case the Kachina cycle of practices were clearly found to be indispensable, and in addition, the Peaks were in fact the indispensable location for those practices. In order to avoid granting relief, the relevant "place" for assessment had to be narrowed even further to the particular affected spot within the sacred area.

[674] Ibid, at 744. It was noted that the existing Snow Bowl had not prevented ceremonies so far.

[675] Glenn Ching has also made a similar criticism in relation to ranking values in a manner akin to the centrality and indispensability tests when analysing the Hawaiian case of *Dedman v Board of Land and Natural Resources*, 740 P 2d 28 (Haw, 1987), a case discussed in Chapter 6 where relief was denied, inter alia, because there was no proof that religious activities had been carried out in the area to be affected by the geothermal energy: Ching, above n 577. Ching criticised the court for measuring the *relative* religious value of a site by the rituals performed there, as such an inquiry enabled a court to give preferences to those religious values and tenets which resembled ones that they were familiar with and to rank objectively manifested interferences ahead of interference to subjective beliefs.

***Fools Crow v Gullet* – District Court and Indispensability**

In 1982 the District Court at South Dakota in *Fools Crow v Gullet*[676] rejected attempts to stop construction work at Bear Butte in the Black Hills. The indispensability test was used only in relation to one of the complaints, a restriction during construction on the road on parking near the ceremonial ground which would prohibit worshippers from camping overnight at a place where they normally camped, forcing them to camp further away from the area. The Court found that the plaintiffs had failed to establish that overnight camping at the ceremonial area was *an indispensable* part of the religious practices.[677]

8.2.2 The US Cases which Passed the Tests

A short time after the Circuit Court decision in *Fools Crow*, the tide finally turned. Two series of sacred place cases in the USA were, at first instance, found to satisfy the centrality and indispensability tests. These decisions still based the tests on importance, but in a way that took into account the perceived importance to the Indigenous groups. In this way, although the tests imposed still required intrusive analysis of the relative importance of practices and tenets of the religion, the assessments were based more on the subjective beliefs of the practitioners rather than the courts' own views and thus avoided problems of the ethnocentricity of the cases described above.

Northwest Indian Cemetery Protective Association v Peterson

Federal District Court Judge Weigel in 1983 in *Northwest Indian Cemetery Protective Association v Peterson* found that the Free Exercise Clause applied to prevent road construction and timber harvesting in the High Country. He accepted that, for the plaintiffs, the High Country was the centre of the spiritual world and that the use of the area for rituals and ceremonies was central and indispensable to their religion.[678] The intrusions on the area were therefore recognised as potentially destructive of the very core of the religious beliefs and practices.[679] The earlier decisions such as *Sequoyah*

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[676] 541 F Supp 785 (DSD, 1982).

[677] *Fools Crow v Gullet,* 541 F Supp 785 (DSD, 1982) at 792. It does not appear to have been argued that there was any special requirement about *camping* at that particular location or that the location had any religious significance other than convenience to the Bear Butte where ceremonies were required. However, the court still thought it appropriate to impose an indispensability test.
On appeal the 8th Circuit Court of Appeals dismissed the appeal quite simply by saying that the District Court was neither clearly erroneous as to factual determinations nor mistaken as to the law as it was applied to the facts: *Fools Crow v Gullet,* 706 F 2d 856 (8th Cir, 1983) at 859.

[678] 565 F Supp 586 (ND Cal, 1983) at 594.

[679] Ibid, at 595.

and *Hopi Indian* and *Crow* were not questioned but distinguished on the basis that the concerns in those cases had not been found to be central or indispensable.[680].

In the two decisions on appeal in the 9th Circuit Court of Appeals,[681] a similar conclusion was reached. The Circuit Court repeated the requirements of centrality for any burden to be found,[682] but accepted the evidence that the government actions would interfere with the religious exercises in the *only place* where they could be performed.[683] The dissenting Judge Beezer disagreed with the finding of a burden on religious freedom because of the lack of factual evidence about the indispensability of the practices at that location.[684]

The case went on appeal to the Supreme Court in *Lyng*[685] which rejected the centrality and indispensability tests and replaced them with something that enabled the Court to reject the free exercise claim. The Supreme Court critique of the centrality tests in that case are discussed below in 8.3.

US v Means – District Court

The 1985 District Court of South Dakota decision in *US v Means*[686] also upheld claims of centrality in setting aside the rejection of the plaintiffs' special permit to establish the Yellow Thunder Camp in the sacred Black Hills. The particular site sought for the camp was chosen by elders as a place that was conducive to religious practices and they believed that it was a place to which they were spiritually guided. The defendants had argued that the ceremonies could be practised elsewhere in the Black Hills so the location was not central or indispensable. The Court said that while, in one sense, the religious practices did not have to be conducted in a particular place in the Black Hills,

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[680] Ibid.
[681] *Northwest Indian Cemetery Protective Association v Peterson,* 764 F 2d 581 (9th Cir, 1985). and *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986). There were two decisions because the Circuit Court allowed the matter to be re-opened and then made another very similar decision.
[682] *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986) at 692, *Northwest Indian Cemetery Protective Association v Peterson,* 764 F 2d 581 (9th Cir, 1985) at 586.
[683] *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986), at 693, *Northwest Indian Cemetery Protective Association v Peterson,* 764 F 2d 581 (9th Cir, 1985) at 586. The Circuit Court agreed though that the general area *was* central and indispensable to the religious practices and that the road would seriously damage the salient visual, aural and environmental qualities of the high country required for the religious practices, so *Wilson v Block* was able to be distinguished.
[684] *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986) at 792–3. His view was that road construction and forest activities in themselves did not pose a serious threat to the practice of religion as the evidence did not show why the quests needed to be carried out near the road where the practitioners would be visible and disturbed by the noise. He thought the matter should be sent back to the District Court to re-evaluate it.
[685] 485 US 439 (1988).
[686] 627 F Supp 247 (DSD, 1985).

this view did not take into account the subjective factors as to why a particular site was chosen, such as spiritual guidance to that particular site.[687]

The Forest Service argued that the practice of permanent occupancy was not an essential aspect of Lakota religion and the maintenance of a camp site was not an essential practice for the religion. The Court however pointed out that the Forest Service did not ask the relevant questions, that is, was the belief that the Black Hills were sacred a sincerely held religious belief and, if so, was *that* belief in its sacredness central or indispensable and, if so, was the camp site central or indispensable to that belief.[688] The Court concluded that the area was central and indispensable and the burden on the exercise of religion was established.[689]

The Court in *US v Means* was clearly prepared to consider the significance and centrality of the place from the viewpoint of the Indigenous practitioners and chided the Forest Service for failing to do so. However, *US v Means* also went on appeal to the Circuit Court[690] which was decided after, and thus bound by, the Supreme Court change of tack in *Lyng*.

Due to the rejection of the tests in *Lyng*[691] later cases no longer applied them.[692]

8.2.3 Cases outside the USA

None of the other three countries have shown any sign of adopting these centrality/indispensability tests,[693] although there have been some vague hints that a

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[687] There were also other practical restrictions on location, as sometimes part of the ceremony had to take place at a distance from people and may involve walking barefoot for a long distance or taking rocks from one place to another. The restrictions of the Forest Service on use of that location thus interfered with the manner in which the ceremony was being conducted. Further, it was said that while there may have been private land blocks in the Black Hills that could be used, this did not mean that they were for sale or that the group could afford to buy such land or that the places conformed to what was needed or had religious significance or was spiritually acceptable, ibid at 254.

[688] Ibid, at 258–262.

[689] Ibid.

[690] 485 US 439 (1988).

[691] To be discussed below in 9.2.

[692] With the possible exception of the case of *Wilson v Moore,* 270 F Supp 2d 1328 (D Fla, 2003), a very different sort of case. This concerned the argument by a Native American prison inmate, inter alia, that denial of a designated Holy Ground for ceremonies and prayers at the prison was a violation of his free exercise of religion rights. The Court held there was no evidence that the plaintiff could not engage in other religious practices and express his faith without Holy Ground or that Holy Ground was so essential to the practice of his faith that its absence would be a substantial burden on the exercise of his religion. This then seemed to apply a kind of indispensability requirement.

[693] The Canadian Supreme Court in a case under the *Quebec Charter*, *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, drew on principles that were said to apply equally to the *Canadian Charter*. The case concerned Orthodox Jews wanting to build a succah booth on their balconies which contravened the condominium rules. The majority of the Supreme Court said that both the obligatory as well as voluntary expression of faith should be protected under the *Quebec* and *Canadian Charters* and that it was the

similar threshold could have been used had it been necessary.[694] The tests may well have been relevant in those countries in a balancing process if the assessments of religious freedom claims reached that stage.[695]

However, there are certainly indications that a lesser test based on relative religious importance has been used. For example, a distinction between serious and trivial impacts seems to be the preferred test used in Canada.[696] A similar test was hinted at

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religious or spiritual essence of an action that was relevant, not any mandatory or perceived mandatory nature of its observance, at 25–6. On this reasoning, the indispensability of the practices was not a requirement.
They have not been used in Indigenous religion cases in the other three countries.
In Australia, the assorted dicta in *Kruger v Commonwealth* (1996) 190 CLR 160 did not suggest any such test. This was the case concerning a Northern Territory law allowing the removal of Aboriginal children from their parents and communities. One argument was that the removal of such children from their traditional lands and communities would deprive them of their freedom to exercise their religion. Justice Gaudron suggested that if Aboriginal people had religious practices and beliefs, and if, as would seem likely, those practices were carried out in association with other members of the Aboriginal community to which they belonged or at sacred sites or other places on their traditional lands, removal of those people from their communities and traditional lands would necessarily have prevented the free exercise of religion, at 210. Gummow J also said that the withdrawal of infants may no doubt have had the effect as a practical matter of denying their instruction in the religious beliefs of their community, at 233.
In *R v Sioui* [1990] 1 SCR 1025, the Canadian Supreme Court did not imply any centrality requirement into the interpretation of the rights to free exercise of religion provided for in an 18th century treaty between the British and the Huron when considering religious rites of cutting down trees and making fires in a prohibited area contrary to regulations under the *Parks Act*. This was not a case under the *Bill of Rights Act* or the *Charter* nor any general religious freedom principles, however, it is an illustration that there is nothing in the concept of free exercise of religion that carries with it such limits.
As an aside, in the area of Aboriginal rights, the Supreme Court in Canada did articulate a kind of centrality requirement in *R v Van Der Peet* (1996) 137 DLR (4th) 289, where Aboriginal rights recognised at common law and under s 35 of the *Canadian Constitution* had to be practices, traditions and customs "central and significant" to the Aboriginal societies that existed pre-contact. These had to be "integral to the distinctive culture" of the Aboriginal group rather than a practice that was simply marginal or incidental. See also *Mitchell v MNR* [2001] 1 SCR 911. The legal context of this is quite different from the religious freedom issue but may be a slight hint of a fondness for a concept like centrality. For one examination of that legal context, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (2008).

[694] In the British Columbia Supreme Court case of *Cameron v Ministry of Energy and Mines* [1998] CanLII 6834, which dismissed the religious freedom claim on other grounds, Taylor J looked at an alternative religious freedom argument based on intellectual stewardship of the area. He found that there could still be absolute intellectual stewardship "activities" in a protected area within the sacred Twin Sisters mountains, with a lesser form of stewardship in the other areas that were to be the subject of drilling for a gas well. There was no discussion of centrality or indispensability as such, but the implication was that the area to be drilled was not considered by Taylor J to be indispensable to the practice of stewardship as such because stewardship could continue in the protected area and to a lesser extent in other areas. One could speculate that Taylor J thought that the area to be drilled was not a sufficiently central area either. However, the case did not turn on these issues and not much can be drawn from it.
The New Zealand Planning Tribunal case of *New Zealand Underwater Association Inc and Maruia Soc Inc v Auckland Regional Council and Ports of Auckland Ltd* (Unreported, Planning Tribunal, A131/91, 16 December 1991) concerned a discharge into the sacred Hauraki Gulf. There was a reference, however, to whole of the gulf being of significance to the relevant Maori peoples and the fact that the gulf was still available as a resource to the Maori, at 53. This hinted at a finding that the particular area which was the subject of the discharge was not indispensable but the decision does not take the exploration any further.

[695] Evans and Gaze in Australia have spoken of the need to assess whether a practice is central to a religion in the process of balancing of interests: Evans and Gaze, above n 50, at 47–8.

[696] In the Canadian case of *R v Jones* (1986) 31 DLR (4th) 569, a requirement for a pastor who wanted to educate his children at home to make application for an exemption was found to be only a trivial and insubstantial burden and such trivial burdens were not a breach of the freedom of religion and belief. The minority (Dickson CJ, La Forest and Lamer JJ), however, thought that it should have been considered as a burden on religious freedom and found to be a reasonable justification under s 1 of the *Charter*. Similarly, in the case of *Residents for Sustainable Development in Guelph v 6 & 7 Developments Ltd* [2005] ON.C. Lexis 4467, a decision of the Ontario Superior Court of Justice Divisional Court, the Court held having Wal-mart and other commercial stores next to a 600-acre spiritual retreat centre was either not a burden or was only a trivial and insubstantial one. The Jesuit Centre had argued that the retreatants would be offended by the consumerism of the development.

in Australia.[697] While these do not go as far as centrality or indispensability, they still assume that courts can assess relative religious importance of certain activities within the tenets of the religion.

8.3 The Rejection of Doctrinal Analysis as an Unacceptable Intrusion into the Private Sphere

Insofar as the centrality and indispensability tests imposed the courts' views of what activities and locations were central to the religions in question, these infringed the general principles eschewing doctrinal analysis in religious freedom cases. As noted,[698] there has been a long history of courts taking the view that it is inappropriate for courts to decide on questions of religious orthodoxy. The argument has been that to do so allows the courts to impose their own version of what is theologically correct which would impinge on individual religious freedom. The courts have accepted that, while sincerity can be tested, sincere beliefs cannot be questioned. No issue is taken in this thesis with this principle and it is contended that any tests based on what the courts believe to be correct or orthodox is inappropriate for religious beliefs.[699]

The common critique of the centrality and indispensability tests has, however, extended this principle to the inappropriateness of making decisions involving any analysis of religious tenets. The Circuit Court in *Wilson v Block* rejected the "centrality of practices" test on the basis that this involved an inquiry into theological importance.[700] Such concerns were also used by O'Connor J to reject the centrality test when delivering the majority decision in *Lyng*.[701] O'Connor J said[702] that the centrality

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The Court in *R v Jack* [1985] 2 SCR 332 spoke of exclusion of minor interferences. It gave an example of a priest not being able to challenge liquor licensing laws on the grounds that they restrict the ability to buy communion wine because such purchases could easily have occurred during trading hours.
The requirement that the interference be more than trivial or insubstantial has been recently affirmed in Canada by the Supreme Court in *Alberta v Hutterian Brethren of Wilson Colony* [2009] SCC 37.
This may have been the analysis applied in the case of *Cameron v Ministry of Energy and Mines* [1998] CanLII 6834, where Taylor J said that the existence of drilling would only be minimal interference with the exercise of religion in terms of the sanctity of the area, at [195]–[196]. He said that while this stewardship may be geographically constricted, it was not eliminated, at [251].

[697] The distinction between serious and less major impacts has been used to exclude protection in some general religious freedom cases. One example is the case of *Minister for Immigration v Lebanese Moslem Association* (1987) 71 ALR 578 in Australia where a distinction was drawn between a temporary disruption and a long-term deprivation of services of an imam. The deportation of an imam for the views he expressed was upheld, but on the basis that it was not a *prohibition* of free religious exercise which could continue. It was, however, noted that it may amount to prohibition if there were repeated refusals to allow imams to enter Australia, at 593.

[698] At 4.2.3 above.

[699] A similar critique is applied in Part C in relation to the assessment of sacredness in Chapter 17.

[700] Even though it then applied an "indispensability of place to a practice" test, failing to recognise that this too involves an implied assumption as to what was indispensable: see 8.2.1 above. See also a similar comment by Loesch, above n 553.

[701] *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988).

[702] Ibid, at 457–8.

test would require the courts to weigh the value of every religious belief and practice threatened and offered the prospect of holding that some sincerely held religious beliefs and practices are not central to certain religions, despite protestations to the contrary from religious objectors. This would require judges to rule that some religious adherents misunderstand their own religious beliefs. She concluded that such an approach could not be squared with the *Constitution* or the precedents and would cast the judiciary in a role that they were never meant to play.[703]

Similarly in *Smith,*[704] Scalia J expressed concern about the centrality test being as inappropriate as determining the importance of ideas in a free speech context and was like evaluating the merits of differing religious claims.[705]

The US Supreme Court has not specifically addressed the equally problematic test of whether a sacred place is indispensable to its religion, but the same logic applies.

The objection in the political arena to the use of the centrality test in the non-Indigenous land use cases in the USA eventually crystallised in the form of the *RLUIPA* of September 2000[706] which expressly removed any centrality requirement,[707] at least for situations when claimants had a property interest in the land.[708]

The above comments by the Supreme Court and legislators encapsulate a common criticism of the objective centrality or indispensability tests in the Indigenous sacred place cases,[709] that is, that courts should not be assessing religious tenets.

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[703] Despite this, O'Connor J in *Lyng* did appear to have an indirect swipe at the plaintiffs on the grounds of their lack of orthodoxy of belief when she said at 485 US 439 (1988) at 451 that the Indians themselves were far from unanimous in opposing the road and it seemed less than certain that the construction would be so disruptive that it would doom their religion.

[704] 494 US 872 (1990).

[705] Unlike O'Connor J, Scalia J pointed out that if one subjects general laws to religious practices, there would then have to be a way of distinguishing between important practices and those which were not and that this would have to involve some kind of centrality analysis, ibid at 887. The Court instead avoided this by excluding general neutral laws from religious freedom, an issue explored in Chapter 10.

[706] *Religious Land Use and Institutionalised Persons Act,* 42 USC §§ 2000cc–2000cc-5, see 5.2.2 above. In introductory speeches in July 2000, Senators Orrin Hatch and Edward Kennedy listed a series of examples where religious liberty had been restricted in land use situations. These included limits on congregation sizes, limits on operating hours which prevented overnight retreats, rejection of special permits for religious gatherings in homes, refusing rezoning of commercial areas to allow new churches: US Congress, Senate, *S 2869*: *Religious Liberty and Institutionalized Persons Act 2000,* Extension of Remarks and Statements by Sens Orrin Hatch and Edward Kennedy, 106th Congress (2000) 146 Congressional Record S6687–90, per Sen Hatch at S6687-8 and Sen Kennedy at S6688–90.

[707] In § 2000c-5(7) where "religious exercise" was said to include "any exercise of religion, whether or not compelled by *or central* to a system of religious belief". There have been decisions recognising that this was designed to overcome some of the problems that earlier cases faced with findings that the building of a church was not central: for example, *Midrash Sephardi Inc v Town of Surfside,* 366 F 3d 1214 (11th Cir, 2004) at 1226 and *Civil Liberties for Urban Believers v City of Chicago,* 342 F 3d 752 (7th Cir, 2003) at 760.

[708] That is, not most Indigenous situations: see § 2000cc-5 (5).

[709] See eg, Cohen, above n 294; Gordon, above n 133; Grouhoud et al, above n 660; Loesch, above n 553; Michaelsen, 'Promise and Perils', above n 144; Winslowe, above n 144.

As outlined in Chapter 4, this fits with the notion that it is not the role of the state or its institutions, like courts, to intrude into the private sphere of religious doctrines at all. Beliefs in the private religious sphere are not seen as able to be tested by any objective means as they are by nature subjective and potentially irrational, in contrast to the values of the public sphere. [710]

As set out in 8.2.2 above, some judges applied a less intrusive form of the centrality and indispensability test, basing the tests on what the religious practitioners sincerely believed said were central and important.[711] These judges opted for a wider scope for public manifestation of religious freedom, allowing it to stop state activity on state land, but felt that some test of religious importance was necessary to draw limits to what was protected by the freedom. Tests based on religious importance can at least exclude protection for practices that even the believers acknowledge are relatively unimportant.

This was also the approach that was taken by the dissenting judges in *Lyng*, in a judgment delivered by Brennan J. He avoided concerns of the court making theological decisions by saying that Native Americans would be the arbiters of which practices are central, subject only to the normal requirements of whether their claims are genuine and sincere.[712]

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[710] See 4.2.3 above.

[711] Such subjective tests of religious importance have also been applied in non-Indigenous contexts. In Canada Tarnopolsky J, in *R v Videoflicks* (1984) 48 OR (2d) 395 at 420, said that freedom of religion also includes the right to observe the essential practices demanded by the tenets of one's religion, but in determining what those essential practices are in any given case, the analysis must not proceed from the majority's perspective but in terms of the role that practices and beliefs assume in the religion of the individual or group concerned.
Brennan J's approach based on the acceptance of the sincere assertions of the plaintiffs as to the centrality and indispensability has found support amongst many commentators: see Cohen, above n 294; Keith Haroldson, 'Note, Federal Land Use Decision that is not an Outright Prohibition, Coercion or Penalty on the Practice of a Religion Does Not Burden the Faith in a Manner that Violates the Free Exercise Clause: *Lyng v Northwest Indian Cemetery Protective Association* (1990) 39 *Drake Law Review* 563; Alan Ray, '*Lyng v Northwest Indian Cemetery Protection Association:* Government Property Rights and the Free Exercise Clause' (1988–9) 16 *Hastings Constitutional Law Quarterly* 483; Robin Rannow, 'Religion: The First Amendment and the *American Indian Religious Freedom Act*' (1982) 10 *American Indian Law Review* 151; Mary H Smith, '*Wilson v Block'* (1986) 26 *Natural Resources Journal* 169.
On the other hand, some like Richard Carson have suggested that it is too subjective to be of any value: Carson, above n 23. He has promoted something akin to an extinction test, by arguing for a test whereby the government action would be permissible if it merely frustrates some religious practice but not if it jeopardises the survival of the faith. Carson's reference to being of "value" presumably refers to value as a limiting factor, but it is suggested that any limiting factor should be one which does not unfairly disadvantage Indigenous religions, especially as an extinction test is certainly not required in the general religious freedom principles.
A good discussion of this issue in the general religious freedom context is in the Note, 'Burdens on the Free Exercise of Religion', above n 566. Support for a subjective assessment also appears in relation to the European Convention's religious freedom provisions in Carolyn Evans, *Freedom of Religion,* above n 16.

[712] *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988) at 474–5.

Brennan J seemed to equate centrality only with "substantiality", which was his preferred formulation,[713] with such substantiality being judged on the basis of the stated sincere beliefs. This test could ameliorate some of the problems of intrusive analysis of religious tenets. The other similar tests used in other countries, based on the distinction between serious and trivial impacts,[714] could do so as well if they are judged on the basis of subjective importance.

The US Supreme Court, however, preferred to reject even less intrusive or ethnocentric options in favour of a complete avoidance of doctrinal analysis. It has firmly upheld the impregnable private sphere of religious autonomy and opposed any analysis of religious importance. Such an approach, however, has not been designed to make it easier for Indigenous religions to protect their sacred places or to advance their religious freedom. The Court chose instead to severely limit that sphere of religious autonomy in more drastic ways outlined in the next two chapters.

[713] At *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988) at 474–5, Brennan J spoke of having to amount to a "**substantial** threat of frustrating religious practices". A similar test was posed by Falk as "substantial and realistic threat of undermining or frustrating their religious practice": Falk, above n 565. The same sentiments were adopted in the 1993 US *RFRA (*42 USC § 2000bb) and the 2000 US *RLUIPA* (42 USC §§ 2000cc–2000cc-5) which used the terminology of a "substantial burden" on religious exercise.
[714] See 8.2.3 above.

Chapter 9 – Coercion to Act Against Beliefs

9.1 Introduction

In the major US Supreme Court decision of *Lyng*,[715] the Court relied on a test whereby religious freedom was held not to be infringed upon if there was no coercion on religious adherents to act against their religious beliefs. This test replaced the centrality and indispensability tests in the USA. It was a test that assumed a highly privatised view of what religious freedom was for, namely that which did not cause individuals to sin. The result was something that was even harder for the Indigenous sacred place cases to satisfy. Again, it is a test that appears primarily in the USA though there are certainly hints that it could be followed in Canada. Australian cases have not resorted to this test due to the even narrower jurisprudence.

9.2 Coercion in the US Indigenous Sacred Place Cases: The Coercion of Individual Choice

In the early Indigenous sacred places cases[716] in the USA, assorted dicta framed the appropriate test for infringement of religious freedom as requiring a coercive effect or government coercion resulting in a penalisation of religious beliefs and practices. In all of those cases, however, there was no discussion of what the meaning of such

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[715] 485 US 439 (1988).

[716] See the following:

Badoni v Higginson, 638 F 2d 172 (10th Cir, 1980) at 176. Circuit Judge Logan commented that there needed to be a *coercive effect* of an enactment operating against practices of a religion.

Sequoyah v Tennessee Valley Authority, 480 F Supp 608 (ED Tenn, 1979) at 611. Judge Robert Taylor also referred to the essential element to a claim under the Free Exercise Clause as being some form of government coercion of actions which are contrary to religious belief. The governmental coercion could take the form of pressuring or forcing individuals not to participate in religious practices.

Fools Crow v Gullett, 541 F Supp 785 (DSD, 1982) at 790. The Court repeated the comments of the other District Court judges in *Badon*i and *Sequoyah* in requiring the plaintiffs to show the coercive effect of the restriction as it operates against the practice of their religion. The court also said that the requirement to register and obtain permits did not require any violation of any tenet of religion, at 793. This case was affirmed on appeal at 706 F 2d 856 (8th Cir,1983).

Hopi Indian v Block [1981] US Dist Lexis 18421 at 13 of the opinion. Judge Richey also denied religious freedom claims and repeated earlier District Court comments that there needed to be a "coercive effect of the enactment as it operates against the practice of religion". On appeal in *Wilson v Block,* 708 F 2d 735 (DC Cir, 1983) at 741, the Circuit Court reiterated the coercion test in pointing out that, unlike cases of indirect burdens like *Sherbert v Verner* and *Thomas v Review Board,* there were no government benefits conditional upon violating beliefs, nor any pressure to modify their beliefs.

Dedman v Board of Land and Natural Resources, 740 P 2d 28 (Haw, 1987) at 32. Lum CJ for the Supreme Court of Hawaii said it was necessary for the plaintiff in a free exercise case to show coercive effect of the law as it operates against him in the practice of his religion. He relied on cases such as *School District of Abingdon v Schempp,* 638 F 2d 172 (10th Cir, 1980).

coercion was. In most,[717] the plaintiffs were, against their will, prevented in some way, from carrying out religious activities at sites in question and could be said to have been coerced to cease such practices there. In at least the Snow Bowl or Bear Butte cases,[718] they could be penalised or sued if they insisted on carrying out religious practices in the middle of the other development activities. In all cases, failure to carry out such practices was said to be a violation of religious beliefs. The facts of these cases suggest that the coercion that the courts did not find was government pressure on individuals that coerced them to *choose* to refrain from such practices. Judge Richey in *Hopi Indian v Block* concluded that the government had not forced the plaintiffs to embrace any religious belief or to say or believe anything in conflict with their religious tenets, nor had it forced the plaintiffs to choose between religious beliefs and public benefits.[719] On appeal, the Court rejected the argument that there was coercion, through the plaintiffs being prevented from exercising their beliefs, because it held that there was no pressure on them to modify their beliefs.[720] Mere forced inability to follow beliefs was not enough.

The coercion issue did not form any part of the earlier ***Northwest Indian Cemetery Protective Association*** decisions until the case reached the Supreme Court in *Lyng*. The Circuit Court of Appeals in two decisions accepted that, to be a burden, it was not necessary that the government actually penalise religious beliefs or practices but the test was simply whether free exercise was more difficult or impeded.[721]

On appeal, however, in the crucial decision of ***Lyng***, the Supreme Court raised the bar and established the principle that there was no breach of the Free Exercise Clause where there was no coercion of the individual plaintiffs to violate their religious beliefs and that, without this, impairment of central and indispensable practices or even destruction of the religion was insufficient to breach the Clause.

Justice Sandra Day O'Connor delivered the opinion of the majority.[722] She acknowledged that the Government's proposed actions would have severe adverse effects on the practice of their religion,[723] so it was accepted that there would be a severe impairment of the religious exercise. However Justice O'Connor went on to

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[717] An exception was the *Dedman* case where there was no evidence of any practices being carried out in the sacred area in question.
[718] Namely, *Hopi v Block*, *Wilson v Block* (Snow Bowl) and *Badoni* (Bear Butte).
[719] [1981] US Dist Lexis 18 421 at 13 of the opinion. A similar formulation was used by the Supreme Court of Hawaii in *Dedman v Board of Land and Natural Resources,* 740 P 2d 28 (1987) at 32–33.
[720] *Wilson v Block,* 708 F 2d 735 (DC Cir, 1983) at 741.
[721] *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986), at 693. *Northwest Indian Cemetery Protective Association v Peterson,* 764 F 2d 581 (9th Cir, 1985) at 586.
[722] Joined by Rehnquist CJ and White, Stevens and Scalia JJ.
[723] *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988) at 447.

apply the decision in *Bowen v Roy,*[724] a decision in which the Supreme Court had rejected a challenge to the use of social security numbers by the government which the plaintiffs believed would stifle their daughter's spiritual development and rob her of her spirit, contrary to their Native American religious beliefs.[725] O'Connor J said that in both cases the government was interfering with a party's attempt to obtain spiritual fulfilment in accordance with their own beliefs, but, in both cases, the government was not coercing individuals into violating their beliefs nor penalising them for their religious activities by denying them an equal share of rights, benefits and privileges enjoyed by other citizens.[726]

The Court in *Lyng* concluded that it was not sufficient for there to be incidental effects of government programmes which make it more difficult to practise certain religions: programmes have to *coerce* individuals into acting contrary to their religious beliefs.[727] This was the case even if the effect was to virtually destroy the ability to practise one's religion.[728] The crucial word of the constitutional text was "prohibit",[729] which was regarded as meaning actions which were coercive. O'Connor J distinguished it from acts which merely frustrated or inhibited religious practices.[730] O'Connor' J's coercion

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[724] 476 US 693 (1986).

[725] Roy and Miller had applied for social security benefits under programmes which required social security numbers to be supplied as a condition of receiving such benefits. They said that getting a social security number for their two year old daughter, Little Bird of the Snow, would violate their religious beliefs. The benefits were then terminated and food stamps reduced and Roy challenged this. The objection to the use of a social security number to process welfare benefits for their daughter was the belief that such a number would rob their daughter of her spirit and prevent her from attaining greater spiritual power. On discovering that his daughter already had a social security number assigned to her, Roy said his concern was as to the use of the number and believed no damage had occurred yet. The ruling was that there was no breach of the plaintiffs' Free Exercise rights. The consensus view of the Court was that the Free Exercise Clause did not require the government itself to behave in ways the individual believed would further his or her spiritual development or that of the family. The clause could not be interpreted to require the government to conduct "its own internal affairs in ways that comport with the religious beliefs of particular citizens" and the clause was written "in terms of what the government could not do, not in terms of what the individual could extract from the government". The judges equated the objection to the government's use of the social security number to an objection to the size or colour of the government's filing cabinets. See *Bowen v Roy* 476 US 693 (1986) at 699–700.

The Supreme Court in *Roy,* however, divided on the test to be applied. Rehnquist and Powell JJ agreed with Burger CJ that a distinction was to be drawn between the denial of benefits by a uniformly applicable neutral statute that might cause indirect burdens, on the one hand, and affirmative compulsion or prohibition by threat of penal sanctions for conduct that has religious implications on the other. For the former, Burger CJ said that a "reasonableness" test (ie that the action was a reasonable means of promoting a legitimate public interest) was sufficient and the *Sherbert* and *Yoder* test was inappropriate. Social security numbers were a reasonable means of achieving the legitimate goal of preventing fraud (at 706–11). O'Connor, Blackmum, Brennan and Marshall JJ objected to the new standard that was being proposed by Burger CJ but were of the view that the social security numbers were constitutional on the basis of the traditional strict scrutiny test, ie there was a compelling interest of preventing fraud. Stevens J did not address this issue and White J dissented, following the decision in *Thomas v Review Board,* 450 US 707 (1981) at 715–6.

There has been extensive criticism of applying *Roy* to the facts in *Lyng*, particularly in the failure to draw the distinction between internal procedures of government and external action: see Falk, above n 565, at 550; Ariens and Destro, above n 64, at 231, Hardt, above n 567.

[726] 485 US 439 (1988) at 449.

[727] Ibid, at 450.

[728] Ibid, at 451–2.

[729] Ibid, at 451.

[730] Ibid, at 456.

test excluded even burdens on central and important activities if there was no coercion involved. The minority rejected the coercion test and preferred to rely on tests which measured infringements on the freedom by the impact on the exercise.[731]

O'Connor J's outline of the policy basis of her decision is discussed at Chapter 11. She said that the Free Exercise Clause is written in terms of what the government cannot do, not what the individual can extract from the government.[732] Her reasoning was based on the Free Exercise Clause not limiting the government's rights to use its own land and not giving rise to de facto beneficial ownership of land, rather than on the nature of coercion and religious freedom.

Apart from the effects of *Smith* in 1990, discussed in the next chapter, the *Lyng* case remains a good authority in the US, as it was not affected by later legislation such as the *RFRA*.[733]

The Indigenous sacred place cases since *Lyng* have all dutifully followed the Supreme Court authority,[734] even where they did not have to. *Lyng* was also found to be binding

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[731] Brennan J, joined by Marshall and Blackmum JJ in the minority, said the constitutional guarantee of free exercise of religion did not draw such fine distinctions between types of restraints on religious exercise but rather was directed against any form of government action that frustrates or inhibits religious practice: ibid, at 459. He noted that the purpose of religious freedom was threatened just as much by government action that made the practice of one's chosen belief impossible as by actions that pressured one to engage in conduct inconsistent with religious beliefs. The harm to the practitioners was the same regardless of how the government restraint was applied, at 468–9.

[732] 485 US 439 (1988) at 451.

[733] *Religious Freedom Restoration Act of 1993*, 42 USC § 2000bb. The *RFRA* was aimed at correcting the effects of *Smith* and turning the clock back to the situation immediately prior to *Smith* and not assist Indigenous sacred place cases: see *Senate Report 103-111*, above n 272, dealing with the Senate *RFRA* Bill (S 578). The Senate Committee specifically cited *Bowen v Roy* and *Lyng* as examples of cases where no such burdens were found and said that the *RFRA* was only a restoration of the legal standard that applied in those cases and that the *RFRA* should not be construed more stringently or leniently than prior to *Smith*. This was repeated in Senate debates, such as by Senator Hatch on October 27th 1993, at US Congress, Senate, *Religious Freedom Restoration Act,* 103rd Congress (1993), 139 Congressional Record S14469-70. Senator Inouye in the same debate also accepted that this was the case and gave that as a reason for moving further legislation to deal with the problems of sacred sites, at S14470. This is also the view of many commentators, such as Loesch, above n 553; Hooker, above n 152; Monica Marquez and Elizabeth Fishman, 'Developments in Policy: Federal Indian Law' (1996) 14 *Yale Law and Policy Review* 353; John W Ragsdale, 'Individual Aboriginal Rights' (2003–4) 9 *Michigan Journal of Race and Law* 323; Griffin, above n 641; Barbara S Falcone, 'Legal Protections (or the Lack Thereof) of American Indian Sacred Religious Sites' (1994) 41 *Federal Bar News and Journal* 568.

[734] Key examples include the following:

- 8th Circuit Court in ***US v Means***, 858 F 2d 404 (8th Cir, 1988) upheld the refusal of the government to grant a special use permit for the Lakota Yellow Thunder camp in the Black Hills on the basis that there was no coercion by threat of sanctions to refrain from religious conduct or to engage in religiously objectionable conduct, at 406–7.
- ***Manybeads v US***, 730 F Supp 1515 (D Ariz, 1989) concerned the removal of the Navajo tribes from the Hopi Indian reservation pursuant to the *Navajo–Hopi Land Settlement Act 1974*. The Act had been passed to resolve the long-standing land dispute between the Hopi and the Navajo over rights to land and did this through partitioning of land between the tribes and required the relocation of Navajo people from the land that was allocated to the Hopi tribe. The action was brought by Navajo plaintiffs for an injunction to stop the forced relocation. The plaintiffs argued that this was coercive on their choices to stay in order to comply with their duties to perform daily prayers and offerings at those lands and that they would be in breach of the removal laws if they stayed to practise their religion properly. See the account of the plaintiffs' arguments in Charles

in most of the cases brought under the *RFRA*,[735] though there was an exception to the trend in the District Court decisions in the *Comanche Nation* cases where the *Lyng* interpretation was departed from in a wider construction of a burden under the *RFRA*.[736]

In none of the above cases following *Lyng* was there any discussion of what coercion meant and why it was an appropriate test.[737] As in the earlier cases, access was legally prevented and removal from the area could be enforced and people could be penalised if they insisted on proceeding with their practices.

The above cases show that the coercive effect has to be directed at the believers themselves, rather than at the religious practices or the religious meaning. However, coercion is not based merely on what the individuals can or cannot do. The *Badoni* and *Sequoyah* cases make clear that the District Courts did not consider even complete

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Miller, 'The *Navajo–Hopi Relocation Act* and the First Amendment Free Exercise Clause' (1988) 23 *University of San Francisco Law Review* 97. Judge Carroll of the District Court of Arizona, however, simply followed the *Lyng* decision which was described as a "direct and dispositive answer" to the refusal of relief: *Manybeads,* 730 F Supp 1515 (D Ariz, 1989) at 1517.

- ***Attakai v United States***, 746 F Supp 1395 (D Ariz, 1990). This concerned works at the Hopi Indian Reservation and was an action brought on behalf of the Navajo people to stop the construction of fences and livestock watering activities which would destroy sites. The plaintiffs said that, under their religion, there were rituals and ceremonies which had to be conducted at the sites in order to fulfil their caretaking obligations as entrusted by the creators. Judge Carroll again followed *Lyng*.
- ***Lockhart v Kenops***, 927 F 2d 1028 (8th Cir, 1991) concerning a land exchange involving sacred places in the Black Hills. The Circuit Court followed *Lyng* and *Means*.
- ***Benally v Kaye*** [2005] US Dist. Lexis 39751 (D Ariz, 2005), involving prevention of a Navajo Sundance on Hopi Land. Judge Wake followed *Lyng* and *Attakai*.
- ***Havasupai Tribe v US***, 752 F Supp 1471 (D Ariz, 1990). The case concerned the Canyon uranium mine in the Kaibab National Forest near the Grand Canyon National Park. The Havasupai Tribe sought injunctions to stop the development of the mine which was expected to deny access to sacred sites, said to be the essence of the religious and cultural systems. The application was dismissed. *Lyng* was sought to be distinguished by the argument that, unlike in *Lyng*, the mine involved exclusive possession and would deny the Havasupai access to practise religious activities. Judge Strand found that *Lyng* was applicable and reiterated that there was no government coercion and the plaintiffs were not being penalised for their beliefs nor were they prevented from practising their religion, at 1485.

[735] ***Navajo Nation v US Forest Service and Ors***, 408 F Supp 2d 866 (D Ariz, 2006), was another case relating to the Arizona Snow Bowl. Judge Rosenblatt in the District Court at Arizona followed the line of cases from *Lyng* such as *Havasupai* and *Means* to say that the plaintiffs had to show that a person is pressured to commit an act forbidden by the religion or prevented from engaging in conduct or having a religious experience which the faith mandates. It was said that it was necessary to show that the government decision coerced someone into violating religious beliefs or penalised religious activity, at 903–4. This was endorsed by the 9th Circuit Court of Appeals in ***Navajo Nation v US Forest Service***, 535 F 3d 1058 (9th Cir, 2008). *Navajo Nation* was in turn followed by a later 9th Circuit Court decision on the *RFRA* of ***Snoqualmie Indian Tribe v Federal Energy Regulatory Commission***, 545 F 3d 1207 (9th Cir, 2008). The *Snoqualmie* decision seemed to limit the finding of a substantial burden to a situation where a religious adherent is forced to choose between following tenets of the religion and receiving government benefits, or is coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions, at 1214–5. In this way the language seemed to limit the concept of coercion even further to particular types of coercion, ie, by sanctions or loss of a benefit.

[736] ***Comanche Nation v US*** [2008] US Lexis73283 (D WD Okla, 2008) and the earlier interlocutory decision, ***Comanche Nation v US*** [2008] US Lexis 627773 (D WD Okla, 2008). These cases were able to turn on the wider and more general wording of the *RFRA* but without any real analysis of the concept of coercion.

[737] In is arguable that the courts after *Lyng* failed to distinguish between the coercion element and the property elements discussed in Chapter 11.

blockage of access to perform religious ceremonies at the sacred places as "coercion", even though individuals were physically prevented from performing their religious activities at those places.[738] Such situations have been treated as having an impact on the activities but not coercing the believer. This would apply *a fortiori* when the activities can still take place but are restricted as to precise location or when the activities have lost their meaning. What is the difference between being forced by circumstances to abandon religious practices and being forced through threat of penalty to do so? It appears that the major difference is that, in cases where the sacred place is destroyed or access is blocked, there is no longer any *choice* as the action is no longer physically possible. The type of coercion required to pass the test was that which directly forced the individual to *choose* what to do. Mere prevention of religious activities was not enough if the individual had no choice to violate the religion. The coercion required had to operate on the individual conscience or beliefs.[739] The critique of this approach is set out at 9.4 below.

9.3 Coercion in the Other Countries: Some Hints but No Clear Principle

9.3.1 Australia

The Australian Indigenous cases do not reveal any clear coercion test and their failure could equally be justified by a non-impairment argument instead. Both arguments may be academic due to the narrower "purpose-based" test discussed in the next chapter, though it could be relevant as to whether the required purpose must be simply to impair religious practices or whether it must be to coerce individuals into violating their religious beliefs.

There were elements of coercion at issue in *Aboriginal Legal Rights Movement v South Australia (No 1),*[740] concerning a challenge to the Hindmarsh Island Royal Commission. One fear was the threat of being required to disclose details of beliefs against the dictates of the religion. Doyle CJ, with whom Bollen J agreed, assumed that the inquiry would intrude on the freedom of certain Ngarrindjeri people to hold and practise their religion because of the practical compulsion to submit to scrutiny the substance of their beliefs and disclose matters regarded as secret,[741] but he decided that there was

[738] This point has been made by Nancy Akins, 'New Direction in Sacred Lands Claims: *Lyng v Northwest Indian Cemetery Protective Association*' (1989) 29 *Natural Resources Journal* 593; Andreason, above n 575.
[739] A similar analysis has been made by Patrick Noonan, above n 33.
[740] (1995) 64 SASR 551.
[741] (1995) 64 SASR 551 at 553.

nothing in the evidence to indicate that the actual conduct of the inquiry would infringe the freedom of religion in a manner which is unlawful at common law or beyond the power of the Royal Commissioner. A requirement to violate beliefs by disclosing restricted information was accepted by Doyle CJ and Bollen J as clearly coercive, but nothing was said about the need for such a requirement. Debelle J, on the other hand, came to the same conclusion that there was no evidence of breach and said that secret aspects of Aboriginal law and tradition deserved proper respect and care had to be taken to ensure that there was no unlawful impairment of the freedom to practise their religion,[742] but he did not discuss whether being forced to disclose information contrary to religion would be a breach or why. The facts suggested there was a potential coercion of people to act against their beliefs, but there was no clear articulation of this as being a necessary element.

There is no clear coercion test revealed in the general religious freedom cases in Australia as the decisions did not turn on the existence or otherwise of coercive effects on individuals to violate beliefs.[743]

The National Native Title Tribunal in 2009 in *FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia*[744] showed hints of a similar attitude as that in *Lyng* and *Bowen v Roy* without referring to those cases. The Tribunal suggested that religious freedom did not involve a compulsion on a non-believer to comply with religious tenets of a believer as such a compulsion could itself offend s 116.[745] It also noted that there may be deep offence caused to religious feelings, but by implication, this was not a prohibition of the free exercise of religion.[746] Unfortunately, the Tribunal did not spell out what the missing element was in that case.

It is worthwhile noting that the ACT and Victorian religious freedom provisions,[747] modelled on one of the limbs of religious freedom in the *ICCPR* Article 18(2), expand on the general statement of the right of religious freedom by adding a specific statement that a person is not to be **coerced** in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching. There have not been cases which have analysed the meaning of coercion in

[742] Ibid, at 556–7.
[743] In *Minister for Immigration v Lebanese Moslem Association* (1987) 71 ALR 578, the Full Court suggested that there may be a *prohibition* of free religious exercise if there were repeated refusals to allow imams to enter Australia, at 593. This would not appear to coerce any individuals to act against their beliefs but is a point that emphasises the practical effect on exercise of religion.
[744] [2009] NNTTA 91, a decision of Member O'Dea. This decision was upheld in *Cheedy v State of Western Australia* [2010] FCA 690, but more on the ground of the purpose test as discussed in Chapter 10.
[745] At [21].
[746] At [23]–[24].
[747] *Human Rights Act* (ACT) s 14(2) and *Victorian Charter* s 14(2). See 5.3.1 above.

these contexts but there may be hints that, in the human rights model, coercion of conscience plays a key role.

9.3.2 Canada and New Zealand

Most of the Canadian cases do not specifically mention a similar coercion test. The case of *R v Sioui* [748] concerned coercion in the sense that the Huron people faced convictions for carrying out religious activities in a certain area, although the coercive nature of the penalty played no part in the consideration in that case.

In *Cameron v Ministry of Energy and Mines*[749] a coercion test was suggested, but not as a necessary element. Taylor J cited the words of *Big M Drug Mart*[750] that religious freedom could be characterised as the absence of coercion or constraint and, if a person is compelled to a course of action or inaction which he would otherwise not have chosen, he is not acting of his own volition and cannot be said to be truly free. On this basis, the Court concluded that for there to be a breach of s 2(a) of the *Charter* there had to be either coercion or constraint of a right to exercise religious beliefs *or* a denial of the ability to worship or practise those beliefs.[751] Under Taylor J's formulation, coercion was a sufficient condition but not a necessary one as freedom of religion could also be breached by the denial of the ability to worship or practise, which seems to look to practical effects. Taylor J found that there was no coercion from the oil drilling in a sacred area.[752]

The passage cited by Taylor J in the *Cameron* decision was from the leading case outlining the principles of religious freedom embodied in the *Charter*, that is, *R v Big M Drug Mart,*[753] where Dickson J described the aim of religious freedom in terms that exalted the primacy of the individual conscience.[754] He outlined the nature of coercion as including not only blatant commands to act or refrain from acting on pain of a sanction, but also indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense was said to embrace *both* the absence of coercion and constraint *and* the right to manifest beliefs and practices, so that no one is forced to act in a way contrary to his or her beliefs or conscience.[755] He

[748] [1990] 1 SCR 1025.
[749] See summary of relevant facts of this case in 6.4.4 above.
[750] See discussion below.
[751] [1998] CanLII 6834 at [191]–[192].
[752] Ibid, at [251].
[753] This was a decision concerning laws preventing Sunday trading which were thus coercive in preventing people who were not Sunday observers from working on that day and forced them to observe a religious day of rest.
[754] (1985) 18 DLR (4th) 321 at 354.
[755] Ibid.

spoke too of the interconnection between freedom of religion and freedom of conscience and that similar provisions in human rights documents were united in the notion of the centrality of the individual conscience and the inappropriateness of government intention to compel and constrain its manifestation.[756] The comments emphasised coercion of the conscience, but not in a way that excluded other potential breaches of the freedom of religion.

The language of coercion was also used by Dickson CJ in other cases, such as *R v Edwards Books and Art Ltd,*[757] where he described the impugned laws in the *Big M Drug Mart* case as a "command on pain of sanction" to conform to a particular religious precept. He also used the language of individual conscience when speaking of the purpose of s 2(a), as being to ensure that society does not interfere with "profoundly personal beliefs" that govern one's perception of oneself, humankind, and a higher or different order of being.[758] However in *R v Videoflicks,*[759] the Court, in exempting Jewish people from the operation of laws restricting Sunday trading, did also deal with the effects of the secular legislation and the financial pain of having to close for two days each week. While this financial loss could be said to be compulsive in the sense in which US courts have regarded the *Sherbert* and *Thomas* cases, the decision did not turn on the coercive effect on the choices made but on the fact that the law made it more costly and more difficult to practise the religion.

In summary, it is not clear whether Canada will follow the US lead or not. There are strong hints of the use of terms like "coercion" as being at the heart of the prohibition on religious freedom, but it has not been applied or articulated in the same way as in *Lyng* to exclude relief. In the *Cameron* case it was only articulated as an alternative ground to an "impairment of exercise" test.

Coercion does not seem to have played a role in the New Zealand sacred place cases under the religious freedom model or under the general religious freedom cases. This may be due to the limited cases on the topic, although one would expect that the New Zealand jurisprudence would tend to follow the Canadian.

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[756] Ibid at 361.
[757] [1986] 2 SCR 713, 758–9. These passages were relied on in *Schachtschneider v Canada* [1994] 1 FC 40, 50, where the Court of Appeal of the Federal Court found that the unavailability of a tax benefit for a married couple, who said that marriage rather than co-habitation was part of their religion, was not an infringement of s 2(a) because it did not coerce anyone and was not a form of control that limited anyone's religious conduct or practices or imposed a sanction on anyone. Linden J in *Schachtschneider v Canada* [1994] 1 FC 40 at 65 suggested that a coercive burden on an individual's practice meant that the law had some influence on their religious practice.
[758] Ibid.
[759] (1984) 48 OR (2d) 395.

9.4 Coercion as Protection Only of Freedom from Personal Sin

There are many problems with a coercion requirement as formulated in the *Lyng* case. The most obvious one is that it gives no protection, even from the destruction of a religion.[760] The plight of the Indigenous sacred places has been contrasted with other cases which have protected even small pressures on individuals to infringe their beliefs.[761] The trivialisation of the seriousness of the effects in *Lyng* was heavily criticised by Brennan J dissenting in *Lyng*[762]and by many commentators.[763] There has also been criticism about *Lyng*'s departure from the precedents.[764]

For this thesis, however, the key issue is that the coercion test draws the line at a very narrow type of infringement on religious freedom, reflecting an extremely private view of what religion is about.

As set out previously,[765] religious freedom was often limited by the idea of freedom from compulsion of the conscience, an internalised understanding of what needed to be protected. While the law was extended to external actions,[766] the harm of these

[760] A point noted in Byler, above n 561; Patrick Noonan, above n 33.
[761] For instance, while there may have been a major impact in *Yoder* and *Sherbert* and other cases, this did not amount to a destruction of the religion and Yoder could have paid the fine or moved to another state or Sherbert could have gone without the unemployment benefit. For many of the land use and public place cases discussed in previous chapters, people could have distributed their religious literature or worshipped elsewhere. As commented in the Note, 'Burdens on the Free Exercise of Religion' above n 566, a $5 fine for violating a compulsory education statute is a burden on religion but the destruction of a religion is not. This position has been said to be incongruous: in Akins, above n 738; Brian Brown, above n 483; Ellen Adair Page, 'Note, The Scope of the Free Exercise Clause: *Lyng v Northwest Indian Cemetery Protective Association*' (1990) 68 *North Carolina Law Review* 410; Moore, above n 313; Bill Peters, 'Of Courts, Clauses and Native American Culture: *Lyng v Northwest Indian Cemetery Protection Association*' (1988–9) 9 *North Illinois University Law Review* 419. It has even been called an "act of violence" in Adam Grieser, Peter Jacques and Richard Witmer, 'Reconsidering Religion Policy as Violence: *Lyng v Northwest Indian Cemetery Protective Association*' (2007–8) 10 *Scholar* 373.
[762] See n 731 above.
[763] Such as in Patrick Noonan, above n 33; McAndrew, above n 660; Michele L Seger, 'Unjustified Interference of American Indian Religious Rights: *Lyng v Northwest Indian Cemetery Protection Association*' (1988–9) 22 *Creighton Law Review* 313 (1988–89); Moore, above n 313; Falk, above n 565; Peggy Healy, 'Note, *Lyng v Northwest Indian Cemetery Protective Association*: A Form-over-effect Standard for the Free Exercise Clause' (1988) 20 *Loyola University of Chicago Law Journal* 171; J Brett Pritchard, 'Note, Conduct and Belief in the Free Exercise Clause; Developments and Deviations in *Lyng v Northwest Indian Cemetery Protective Association*' (1990) 76 *Cornell Law Review* 268 (1990); Vogel, above n 253. The disproportionate effect on Indigenous religions has been noted in Brian Brown, above n 483; Hardt, above n 567; Haroldson, above n 711; Robert Ward, above n 152.
[764] See Andreason, above n 575; Healy, above n 763; Ray, above n 711; Robert J Miller, 'Correcting Supreme Court Errors: American Indian Response to *Lyng v Northwest Indian Cemetery Protection Association*' (1990) 20 *Environmental Law* 1037. There are many cases, such as the land use zoning cases, where there has been no individual penalty and the real concern is the impairment of the exercise. Similarly, the concern of the Supreme Court in *Yoder* was on the damaging impact on the Amish way of life rather than on the particular coercive effect on the individual through the small fine.
[765] See 4.2.3 above.
[766] The law also still drew a clear line between protection of the internal conscience, which was absolute and sacrosanct, and protection of actions, which could be regulated, though the precise rules as to what degree and type of regulation has varied considerably. The distinctions between belief and action, internal and external spheres, freedom of speech (which is external and open to regulation) and freedom of

actions was still said to be that of putting pressure on individuals to choose to act against their conscience and beliefs.[767] This fits in with the original compartmentalised thinking that lay behind the human rights notions.[768] What the government could not demand from the individual related to what belonged in the private sphere and what the individual could not extract from the government was what lay in the public or state sphere.[769] In *Shebert*, Douglas J in his concurring judgment said that the harm was in the interference with the individual's *scruples or conscience*, an important area of privacy which the First Amendment fences off from government interference.[770] In other words, it is not freedom of religious expression and practice but the individual's conscience that is really being protected from government pressure, as that is the private sphere into which the government cannot intrude.

The coercion test seems to be directed at the extent to which the government's actions directly force or encourage individuals to act against their consciences or to sin. This therefore reflects the very narrow Western religious view of what religious freedom is about. David and Susan Williams have produced an article on the relationship between "Volitionalism" and religious freedom which provides a useful analysis of these issues.[771] Their view is that, overwhelmingly, Americans believe that individuals should suffer consequences only for actions that they individually and freely choose to undertake and could choose not to undertake. This is reflected in a constitution protecting only such a volitional view of religion, whereas members of non-volitional religions are treated, as in *Lyng*, as second-class citizens. It is freedom of choice that is protected from coercion, with the religious requirements seen making the right religious choices which tend to have metaphysical consequences. The assumption is that one will only suffer eternal or spiritual consequences if one has free will and chooses wrongly.[772] In religious traditions that believe in free will to choose good or evil, and where one is rewarded for one's choices to believe or do the right thing, religious

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religion (which is seen as internal and protected absolutely) have been criticised in, inter alia, Tipton, above n 73; Gedicks, 'Hostility to Religion', above n 22.

[767] Examples such as proselytising, conscientious objection, not working on religious rest days or wearing specific clothing and the like harmed people who were forced to act against their consciences.

[768] Discussed previously in Chapter 4.

[769] This was a comment made by Douglas J in *Sherbert v Verner,* 374 US 398 (1963) at 412, which was in turn used by O'Connor J in *Lyng* as outlined in 9.2 above.

[770] Ibid.

[771] David and Susan Williams, above n 149. The volitionalist view is tied up with free will. If the attainment of eternal salvation is a major aim of religious life, then what is important to the religion and the believer in traditions which emphasise free will is what is required to attain this salvation. Correct belief, correct action and correct choices (whether personally or by proxy) gain prominence.

[772] This is sometimes seen as what is the essence of religion, reflected in an attempt at a definition of religion for the US First Amendment by Jesse Choper as requiring a criterion of "extra-temporal consequences" which focuses on the repercussions of violation for the believer, in Choper, 'Defining Religion', above n 646.

freedom is about not being constrained from making that right choice and acting on it.[773] One cannot be held responsible for things that one did not choose to do.

Some Indigenous practices like ceremony and access to sites may have volitional components, for instance people could choose whether to access the site or perform ceremonies. In *Sequoyah* or *Badoni,* however, the places were flooded and practices could no longer take place there, but the conscience was not coerced into choosing not to perform the religious acts. In cases like *Lyng* and *Bowen v Roy* and in many of the sacred place cases, the practices were not directly prevented and one could still carry out the actions. The problem was that the meaning had been lost, through no fault or choice of the adherent. In such cases, there was no protection where there is no element of choice to carry out or not carry out the practices. The Indigenous plaintiffs were denied their claims because the government actions, rather than compelling their choices, had left them with no choice.

As seen from the Chapter 2 analysis, the concept of sin and eternal consequences plays an important role in the privatised aspects of Western religions and certainly in the understanding of religious liberty in the minds of the influential thinkers. The emphasis is on eternal consequences and, in this view, what matters in religion, is what makes a difference to those consequences, that is, whether one has chosen correctly according to the religion's tenets. This all harks back to the Lockean views of religion being about the acquisition of eternal life, achieved through "inward persuasion of the mind".[774] It is this freedom of the conscience that was treated as sacrosanct by Dickson J in *R v Big M Drug Mart*.

A modern extension is the change in emphasis from the language of freedom to obey a higher law to freedom of individual choice.[775] This is consistent with the existential perspectives of 20th century Western thought, both religious and secular, in which the emphasis is on private decision-making and where the pursuit of meaning is seen as the primary task for the human endeavour.[776]

As outlined in Chapter 3, the issues of personal choices, personal sin and eternal life do not play as significant a role in many Indigenous religions where the duties and

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[773] Not all Judeo-Christian religious traditions are volitional, for instance, Calvinism with its doctrine of pre-destination does not turn on free will and salvation through choices made. There is nevertheless a strong volitional strand as outlined in David and Susan Williams, above n 149.

[774] Locke, *Letter Concerning Toleration,* above n 63. See discussion in above in 2.2.1 and 4.2.3. Marci Hamilton has criticised the emphasis on the coercive effect on the mind and beliefs rather than effect on actions in *Lyng* and *Bowen v Roy* as a harking back to the old belief–action dichotomy that characterised the early US jurisprudence, in Marci Hamilton, above n 73.

[775] See discussion in 4.2.4 above.

[776] As described in Brueggemann, above n 48, in relation to Christian post-World War 2 thought.

responsibilities are to the maintenance of all creation. The consequences are not based on individual consciences or about the afterlife but for the community and the world. They do not depend on whether an individual has chosen rightly or not, but whether they have carried out the necessary activities, including the protection and maintenance of the sacred places. As Vine Deloria identified, the emphasis on individual conscience and commitment is a Western concept that can be contrasted with the Native American idea of an ancient communal tradition that is an operative principle in life and behaviour.[777] He criticised the *Lyng* decision for its insistence of analysing tribal religions within the same Western conceptual framework as Western organised religions and said that religion has been reduced to a group of humans examining their own beliefs rather than continuing to fulfil a role in the great process of nature.[778] This gets to the heart of what the *Lyng* coercion requirement has created, that is, an emphasis on the internal conscience rather than on the corporate action.

There seems little logic in drawing a line between the direct effect on individual choice and the practical effect on what the individual can or cannot do. As Sarah Gordon has suggested, there is no reason to protect only individual conscience and not the whole of religion, such as acts of faith and objects of faith.[779] The distinction has logic only if religion is viewed as being only about eternal consequences of choosing to sin and as a choice for good or evil.

As with previous attempts to draw the line, the concern may be the impact on government freedom to act. Ira Lupu, in analysing the problem of burdens, has regarded Brennan J's impacts-based approach in *Lyng*[780] as being of uncertain scope and able to undermine any government policy which might inadvertently have an adverse effect on unusual minority religions.[781] Vine Deloria has attributed O'Connor J's willingness to search for a new threshold test to a fear that the Free Exercise Clause could be expanded to cover any individual belief or personal preference, similar to the fear expressed by the District Court in the *Badoni* case that someone might believe that the Lincoln Memorial is sacred and visitors should be kept out.[782] On the other hand, as set out in relation to issues in earlier chapters, comparative effects can

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[777] Deloria, 'Sacred Lands and Religious Freedoms', above n 165, at 205.
[778] Ibid and Deloria, 'Sacred Places and Moral Responsibility', above n 148, at 325.
[779] Gordon, above n 133.
[780] See above n 736.
[781] Lupu, above n 25.
[782] Referring to *Badoni v Higginson,* 455 F Supp 641 (D Utah, 1977) at 645. The Deloria reference is Vine Deloria, 'Trouble in High Places: Erosion of American Indian Rights to Religious Freedom in the United States' in John R Wunder (ed), *Native American Cultural and Religious Freedoms* (1999), at 369. A similar analysis of O'Connor J's concerns is found in Lupu, above n 25 and Underkuffler-Freund, above n 99.

be weighed through a balancing test rather than by using unfair privatised gatekeeper doctrines.[783]

[783] See the Note, 'Burdens on the Free Exercise of Religion', above n 566.

Chapter 10 – The Purpose or Intent of the Government Action

10.1 Introduction

In 1990, the US Supreme Court in the peyote case, ***Smith***,[784] eventually adopted a test which excluded most neutral generally applicable laws from religious freedom protection. Such a test had the practical effect of insulating government action from most religious freedom concerns unless such action was specifically directed at religion or had such a purpose. In this way the US Courts came to adopt a narrower form of jurisprudence similar to that which had been arrived at in Australia. Given that most laws which affect Indigenous sacred places are neutral and generally applicable, in the sense that they are aimed at facilitating development in an area rather than at damaging sacred places or religious activities there, the effect is to prevent relief in most of these situations.

The distinction drawn between the neutral generally applicable laws and laws which aim at affecting religion in effect corresponds with the distinction between what is perceived to be a secular public sphere and a private religious one. The result is that religious freedom claims cannot interfere with the public sphere actions and such actions are only invalidated if they are aimed at intruding into the forbidden religious sphere. Given the expansion of government involvement in most areas, the space remaining under this model for a private religious sphere untouched by such general and neutral involvement remains ever-diminishing.

This chapter explores the use of such a test in the US First Amendment[785] and s 116 in Australia and the lack of such a requirement so far in the Canadian or New Zealand jurisprudence. It then discusses the connection between such a test and the assumptions of separate spheres and the practical problems of such a conceptual approach.

[784] 494 US 872 (1990).The case concerned a criminal prosecution for use of peyote which was made illegal by a generally applicable and neutral law. The sacramental and thus religious use did not overcome such a law. See 5.2.2 above for the historical context.

[785] It is unclear as to the extent to which the various US States, with their differently worded provisions, will follow *Smith*. See the discussion in 5.2.1 above, especially Carmella, *State Constitutional Protection,* above n 297.

10.2 The Purpose and Intent Test in the USA: *Smith* and its Effect

The criticisms of the previous chapters, that tests like centrality, indispensability or coercion involved the courts imposing their own religious orthodoxy, were accepted by the Supreme Court in the decision in *Smith*. The *Smith* Court instead replaced these by a test based on whether a law in question was neutral and generally applicable, albeit with some limited exceptions.[786]

The aim of the *Smith* decision was to achieve an equality of treatment for all religions, but this was achieved by making the Free Exercise Clause largely inapplicable for all of them when faced with general laws of the land which did not have the purpose of targeting religion. The logic of Scalia J who wrote the main opinion for the majority[787] was that that the Free Exercise Clause should not exempt religiously motivated actions from general and neutral laws like criminal laws. If such actions were exempt, this would make the professed doctrines of religious beliefs superior to the law of the land and in effect to permit every citizen to become "a law unto himself". It would be "courting anarchy", a luxury society could not afford.[788] Scalia J accepted that accommodations for religious beliefs and practices could be made but left these to the political process.[789]

The public reaction in the US to the *Smith* case was swift, resulting in various religious liberty bills to overturn it, culminating in the enactment of the *RFRAs* and then the *RLUIPA*.[790] These provided some relief for land use cases where the plaintiffs held a property interest in the land but would not assist in most of the Indigenous sacred place cases.

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[786] One exception was where the case involved "hybrid" claims where other rights such as freedom of speech or rights of parents were also implicated. This was used to explain proselytising cases like *Cantwell v Cannecticut,* 310 US 296 (1940) or rights of parents cases like *Wisconsin v Yoder,* 406 US 205 (1972): see *Employment Division v Smith,* 494 US 872 (1990) at 881–2.The second exception was where the cases were not "generally applicable" as they involved individualised assessments. This was the basis for distinguishing cases like *Sherbert v Verner* and *Thomas v Review Board* which involved individual considerations of unemployment issues: see *Smith* at 883–4. These exceptions appeared to be designed merely to distinguish the earlier US Supreme Court jurisprudence which did not fit the *Smith* Court's preferred model.

[787] His was the opinion of the Court. O'Connor J concurred but on different grounds. Blackmun, Brennan, Marshall JJ dissented.

[788] *Employment Division v Smith,* 494 US 872 (1990) at 877–9, 885 and 888–9.

[789] Ibid at 890.

[790] See 5.2.2 above.

There is a dearth of Indigenous sacred place cases that have relied on or discussed the *Smith* decision, largely because hardly any such cases had been brought in the light of that new approach.[791]

10.3 The Purpose and Intent Principle in Australia

The change in jurisprudence in the USA in *Smith* that created such an uproar merely brought it more into line with the Australian jurisprudence in relation to s 116. It is arguable that the s 116 test is even more stringent as it turns on the purpose of the legislation, without allowing exceptions based on individual assessments or hybrid claims. Australian courts have long looked to the purpose of the government legislation or action as a key test and this had become more deeply cemented in the later cases from the 1980s. This partly flows from the terms of s 116 which, unlike the US provision,[792] forbids making a law *"for"* prohibiting free exercise of religion. In the *Jehovah's Witnesses* case, Latham CJ said that the word meant that the purpose could be taken into account and the question was whether the purpose of the law is to protect the existence of the community or whether it is a law for prohibiting religion.[793] While Latham CJ did not say it was the only thing that could be taken into account, later in the 1981 Establishment decision, *AttorneyGeneral for Victoria ex rel Black v Commonwealth,* the majority of the Court favoured a similar purposive interpretation of the word "for" in relation to whether the law was "for" the establishment of any religion. That majority suggested that the only question raised by s 116 was whether the

[791] The *Smith* decision was applied to deny relief in a case concerning disinterment of the body of a deceased member of a tribe in violation of their religious beliefs in the case of ***Kickapoo Traditional Tribe v Chacon***, 46 F Supp 2d 644 (WD Tex, 1999). The Court in that case relied on *Smith* to uphold the application of neutral autopsy and disinterment laws.
The *Smith* case was not applied to summarily dismiss a claim in a Circuit Court of Appeals decision of ***Western Mohegan Tribe v New York***, 246 F 3d 230 (2nd Cir, 2001) [overturning the first instance decision of the Northern District of New York in 2000 in *Western Mohegan Tribe of New York v New York,* 100 F Supp 2d 122 (NDNY, 2000)]. However, that was due to reluctance to do so without any findings of facts. The case related to the development of a State Park at Schodack Island which the tribe alleged was inhabited by their ancestors and was a site of religious and cultural significance where they performed religious ceremonies from time to time. The State of New York proposed to construct a bridge to the island from the mainland and to charge vehicle fees and require an entry permit for groups of 25 or more. The tribe claimed that this would restrict their free exercise of religion by restricting their freedom to perform religious ceremonies. Despite the state raising the *Smith* decision, the Circuit Court remanded the matter to the District Court to make findings of fact. The subsequent history does not appear in any published cases, and it is unlikely there was any departure from the *Smith* reasoning.
[792] The US First Amendment just says there should be no law prohibiting free exercise of religion. This relates to the effect of the law rather than insisting that the purpose of the law be "for" prohibiting religion.
[793] *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, at 132.

purpose of the law was to establish religion.[794] These principles have been followed in Australian cases since then.[795]

The dicta in the 1996 Stolen Generations case of ***Kruger v Commonwealth***[796] also favoured the purpose test. The claim was brought by Aboriginal plaintiffs who had been removed from their communities and sacred sites and institutionalised pursuant to a Northern Territory Ordinance, which was alleged to have prevented them from engaging in religious practices in breach of s 116.[797] The Commonwealth claimed that the purpose of the Ordinance was to protect Aboriginal people, not prevent religious freedom. The judges who discussed the issue held that there was no evidence before the Court to suggest that the purpose of the Ordinance was to prohibit the free exercise of religion.[798] Gummow J specifically referred to the *Smith case* as a reference for this.[799]

Of the judges, Gaudron J was prepared to take the most flexible view as to what was a law "prohibiting free exercise of religion", by extending it to laws which operated to prevent the free exercise of religion, not just those which banned such exercises on their terms.[800] She also thought it extended to provisions which authorise acts which prevent the free exercise of religion, not merely provisions which operate of their own force to prevent that exercise.[801] However, she felt that even if the removal of people from their communities and traditional lands did prevent the free exercise of religion, the question was still whether the Ordinance was a law "for" prohibiting the free

[794] *DOGS case* (1981) 146 CLR 559, per Barwick CJ at 579, 583–4, Gibbs J at 598, 604, Mason J at 615–6, Wilson J at 653. (Aickin J agreed with Gibbs and Mason JJ.) Mortensen has suggested that this marked a shift from the position of Latham CJ in the *Jehovah's Witness* case, in Reid Mortensen, 'Judicial (In)activism in Australia's Secular Commonwealth' in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (2005).
[795] The Full Federal Court in *Minister for Immigration v Lebanese Moslem Association* (1987) 71 ALR 578 upheld the deportation of an imam for the views he expressed. Even in those circumstances, s 116 was said not to be breached because the purpose of the deportation was not to prohibit the free exercise of religion. There was dicta in *Church of the New Faith v Commissioner of Payroll Tax* (*Scientology* case) (1983) 154 CLR 120, 136 that general laws to preserve and protect society are not defeated by a religious obligation to breach them. In *Halliday v Commonwealth* [2000] FCA 950 at [21], the Court rejected a s 116 challenge to GST laws because they were not designed to prohibit free exercise of religion.
[796] (1996) 190 CLR 1.
[797] See discussion by Toohey J and Gaudron J in *Kruger v Commonwealth* (1996) 190 CLR 1, at 86, 132–133. The factual issues in the case were not tried so there was limited information before the High Court. The argument in relation to s 116 was based on the removal of children from their communities and traditional sacred sites which prevented them from engaging in religious practices. It was said that the reason for the removal and thus the purpose of the Ordinance was to prevent children from assimilating the "customs and superstitions" of "full-blooded" Aboriginal people. However, the Court held that the evidence for such a purpose was not before the court and it could not be discerned in the Ordinance itself. It was further submitted by the Commonwealth that it had not been pleaded that the plaintiffs held a religion or that taking them into custody and care deprived them of their ability to exercise that religion.
[798] Only Toohey, Gaudron and Gummow JJ addressed the specific arguments about removal of children and prohibition of free exercise, at *Kruger v Commonwealth* (1996) 190 CLR 1 per Toohey J at 86; Gummow J at 161. For Gaudron J, see the discussion below.
[799] *Kruger v Commonwealth* (1996) 190 CLR 1, at 160.
[800] Ibid, at 131.
[801] Ibid, at 132.

exercise of any religion.[802] Gaudron J took the view that this question was directed to the purpose of the law and s 116 would invalidate a law that had a proscribed purpose even if it had other constitutionally acceptable purposes.[803] The fact that the Ordinance may have the broader purpose of Aboriginal welfare did not in itself answer the challenge under s 116. However, Gaudron J thought that even though the law might have in fact prohibited the free exercise of religion or operated directly with that consequence, this was not sufficient to amount to a breach if it was necessary to attain some public purpose or to satisfy some social need, or if it was for another unconnected purpose and only incidentally affected that freedom.[804] So, while Gaudron J took a more flexible view of what amounted to "prohibiting" free exercise, which could involve consideration of the operation and effects of the law, she still joined rank with the other justices on s 116 requiring at least that a purpose of the law be to prohibit free exercise of religion in order for there to be a violation.[805]

The comments in *Kruger* were dicta but if applied could be even more limited than the *Smith* principle because the laws in question were not and did not have to be generally applicable to avoid s 116.

In *Cheedy v State of Western Australia*[806], McKerracher J in the Federal Court in 2010 dealt directly with s 116 in relation to the protection of sacred places. He held that s 116 directed attention primarily to the purpose of the impugned law, not its effect or result.[807] He said that the effect might sometimes assist in construing the purpose of the law, but that was not the starting point. The case involved an argument by the Yindjibarndi people that s 116 would be breached by the National Native Title Tribunal allowing a mining lease to be granted which would prevent or hinder them from carrying out religious rituals at sacred areas, including religious obligations to manage and control the lands. The Court held that this was not the purpose of the provisions of

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[802] Ibid.
[803] Ibid, at 133.
[804] Ibid, at 133–4.
[805] Some commentators have taken a wider reading of Her Honour's comments: see Helen Grutzner, 'Invalidating the Provisions of the Native Title Act on Religious Grounds: Section 116 of the Commonwealth Constitution and the Freedom to Exercise Indigenous Spiritual Beliefs' in Christopher Boge (ed), *Justice for all? Native Title in the Australian Legal System* (2001); Nicole Watson, Nicole, 'A Denial of Religious Freedoms: Section 190C(3) of the Native Title Act' (2001) 5(7) *Indigenous Law Bulletin* 4.
[806] [2010] FCA 690. This case dismissed an appeal against a decision of the National Native Title Tribunal in *FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia* [2009] NNTTA 91, a decision of Member O'Dea. The Tribunal had analysed the reasoning in *Kruger* and found that to breach s 116, there had to be an "intent, design, purpose *or effect*" of preventing the free exercise of religion – at [19], [21], [24]. There appeared to be no distinction drawn in that decision between the *purpose* and the *effect* and the decision did not appear to turn on the lack of purpose or intent to infringe religious freedom. It had been argued on appeal that the *effect* was to prevent the Yindjibarndi from carrying out their religious obligations.
[807] At [71]-[82], but especially at [73].

the *Native Title Act* which allowed the Tribunal to permit such mining tenements to be granted and that those provisions did not prohibit anything.[808]

In another case touching on freedom of religion in the context of Aboriginal sacred places, *Aboriginal Legal Rights Movement v South Australia (No 1),*[809] there was no specific discussion of the purpose-based test but this seems to have been assumed. The express purpose of the legislation in that case was to establish a Royal Commission inquiry into whether beliefs were fabricated and it was that purpose which was challenged. It too was not a case of a generally applicable neutral law. As this concerned a South Australian law, s 116 was not relied on, but there was a claim based on such a freedom existing at common law. Doyle CJ, with whom Bollen J agreed, said that statutes are presumed not to *intend* to affect the fundamental freedom of religion, although at the end the question was one of Parliamentary *intent*.[810]

As yet there are no reported cases dealing with these issues under the ACT or Victorian religious freedom provisions. One would normally expect that they would tend to achieve similar results to the cases in Canada and New Zealand set out below which do not use a "purpose requirement", but there is always a chance that Australian courts may nevertheless prefer the narrow approach under s 116.[811] Furthermore, there is some authority from the similarly worded religious freedom clause in the *European Convention on Human Rights* that may give support to a test that excludes neutral generally applicable laws from the concept of infringing the freedom of religion.[812]

10.4 Purpose and Intent in Canada and New Zealand

10.4.1 Canada

The pre-*Charter* authorities did suggest that there was a narrow purpose-based test for religious freedom in operation in Canada.[813] However, under the terms of the Canadian

[808] At [85]. It was said that if anything prohibited the religious activities, it was the grant of the mining lease under a state law that was then not covered by s 116.
[809] (1995) 64 SASR 551.
[810] *Aboriginal Legal Rights Movement v South Australia* (1995) SASR 551, at 552.
[811] Even though the s 116 cases rely on the distinctive use of word "for" as outlined above.
[812] See for instance the discussion in Carolyn Evans, *Freedom of Religion,* above n 16, chapter 8 where it has been noted that the law on these issues is somewhat confused, with some authorities supporting the exclusion of neutral generally applicable laws from the operation of Article 9 of the Convention dealing with freedom of religion, but others finding that the public purposes of such laws justify any infringement.
[813] One example is *R v Jack* (1983) 139 DLR (3d) 25 where the majority of the Court of Appeal in British Columbia dismissed an appeal against a conviction of a Coast Salish person for hunting deer out of season in breach of the *Wildlife Act*. The Coast Salish beliefs were that meat needed to be burnt and offered to the ancestral spirits. The Court accepted a common law principle of religious freedom but said

Charter, the courts have clearly referred to alternative tests of *either* an invalid purpose to restrict religious freedom *or* an adverse effect on religious freedom, thus making the purpose of the legislation to impair religious freedom a sufficient but not necessary condition for a prima facie violation. In *R v Big M Drug Mart*, it was held that, to be valid, neither the legislative **purpose** nor its **effects** could infringe the freedom of religion.[814] Dickson J said he was not interested in any distinctions between burdens, intentional or not, or foreseeable or not, as all of these could infringe the guarantee of religious freedom.[815] Recent authorities have also applied religious freedom principles to generally applicable laws.[816]

Consistent with this approach, none of the Indigenous sacred place cases in Canada discussed previously have turned on the issue of the laws not having a religious purpose.

10.4.2 New Zealand

There is little evidence in New Zealand to support a purpose-based requirement. Given the common reliance on Canadian jurisprudence, one would expect that a similar line would be taken. However, this issue may rarely be raised because of the effect of s 4[817] which means that an infringement of religious freedom will not be effective to overcome generally applicable neutral laws anyway.

The few cases that exist do not indicate any analysis based on the purpose of the legislation.[818] Paul Rishworth[819] has expressed the view that the position under the

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that the *Wildlife Act* was an Act of general application and not aimed at preventing Coast Salish people from exercising religious practices. Taggart and Craig JJA both in effect held that freedom of religion had to be exercised in the limits permitted by validly enacted legislation. It was held that the defendants had to prove that the policy of the legislation was to impair the capacity of the First Nations people to practise their religion. The appeal to the Supreme Court in [1985] 2 SCR 332 was dismissed, with the Court citing the passages from the Court of Appeal framing religious freedom in a purposive way without any disapproval.

[814] *R v Big M Drug Mart* (1985) 18 DLR (4th) 321, at 350. The case turned on an impermissible purpose. There is also a very detailed discussion of how unintended effects of religious freedom can be a violation of the *Charter* by Tarnopolsky JA in *R v Videoflicks* (1984) 48 OR (2d) 395, 412–9, another Sunday closing case that was eventually dealt with in the Supreme Court in *R v Edwards Books And Art Ltd* (1986) 2 SCR 713.

[815] *R v Big M Drug Mart* (1985) 18 DLR (4th) 321, at 352, 354, 362. Dickson CJ added that the interpretation of the *Charter* was to be generous rather than legalistic, aimed at securing for individuals the full benefit of the *Charter*'s protection.

[816] See Supreme Court decisions, *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] SCC 6, requiring exemptions to Sikh students from general laws banning the carrying of weapons in schools and *Alberta v Hutterian Brethren of Wilson Colony* [2009] SCC 37 where the general applicability of laws relating to photographs on driver's licences was not a consideration.

[817] See 5.5.1 above.

[818] Such as *Feau v Department of Social Welfare* (1995) 2 HRNZ 528, concerning a conviction of a Seventh-day Adventist which required him to attend an induction programme which only ran on a Saturday morning. The claim of infringement of religious freedom was rejected but on grounds that this was the price of the crime. It was accepted that the requirement was an infringement of religious freedom, even though it would appear that the Saturday induction programme did not have the purpose of causing any

NZBOR should be more akin to the minority view in *Smith*[820] because the *ICCPR* from which it was derived listed very specific limits to infringement of religious freedom which would suggest that there is no general limit based on neutral generally applicable laws.

All the Indigenous sacred place cases in New Zealand where religious freedom was raised involved neutral or generally applicable laws, but there was no suggestion that this was an automatic disqualification.[821]

10.5 The Abandonment of Any Protection in the Public Sphere

The protection of neutral generally applicable laws, or laws which do not have a specific purpose (explicit or necessary implication) of affecting religious freedom, means that most of the laws intended to operate in a public sphere are immune from religious freedom issues as long as they do not intend to intrude in the religious sphere. In this way, a clear distinction is drawn between the spheres and religious freedom is confined to the private sphere.

The obvious result is that most, if not all, the laws causing difficulties for Indigenous sacred places, such as laws concerning mining and development, which are generally applicable laws not aimed at religion at all, will be immune from any religious freedom challenges.[822]

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restriction in religious freedom. Similarly in *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88, the Court of Appeal held that the appointment of the Public Trustee as an interim caretaker of the property of a religious group had nothing to do with freedom of religion as it did not affect the ability of persons to conduct themselves in religious activities as they saw fit. However, the court did not attempt to dispose of the claim on the basis that the laws appointing Public Trustees did not have a purpose of affecting religious freedom.

[819] In Rishworth et al, above n 231, at 297.

[820] The minority supported the retention of the strict scrutiny test based on burdens on religious exercise (which in O'Connor J's case meant coercion).

[821] For instance, *New Zealand Underwater Association Inc and Maruia Soc Inc v Auckland Regional Council and Ports of Auckland Ltd* (Unreported, Planning Tribunal, A131/91, 16 December 1991) did not rely on the fact that the *Water and Soil Conservation Act* did not have any purpose of affecting religious freedom (see the facts in 5.5.2, n 405 above). Nor did *Beadle and Wihongi v Minister for Corrections* (Unreported, Environment Court, A74/02, 8 April 2002) nor *Ngati Hokupu Ki Hokowhitu v Whakatane District Council* (Unreported, Environment Court, C168/2002, 13 December 2002): see facts in 5.5.2, n 405 above.

[822] There may be an exception where the government specifically permits the destruction of sacred places, as an exception within heritage protection legislation, and thus where the action is not neutral nor generally applicable, but this is far from clear. Such an argument did not succeed in the Canadian case of *Nanoose Indian Band v The Queen and Intrawest Corporation* [1994] CanLII 1806 where Justice Hutchinson in the Supreme Court of British Columbia simply rejected the religious freedom claim noting that nothing in the *Heritage Conservation Act* which allowed the Minister to grant permits to damage heritage sites infringed freedom of religion. Unfortunately there was no analysis of this issue and the weight that the case holds is limited.

James Renwick has raised this question of whether s 116 could apply in relation to a Minister under the Northern Territory Sacred Sites legislation authorising the destruction of a sacred site. He simply noted that the issue was whether the purpose was prohibiting exercise of religion or merely resolving competing land uses and referred to the *Lyng* case as not holding out much promise. The particular article does not

The effect then is the expansion of the public sphere and governmental reach to everything other than what is specifically aimed at religion and shrinks the private protected sphere to what is left. As Walter Berns suggested, this viewpoint involves "rendering to Caesar what Caesar demands and to God whatever Caesar permits".[823]

Those in favour of reducing the scope of religious freedom in this way, such as Scalia J in *Smith*, like many who argue for principles of responsible government rather than bills of rights,[824] point to the solution being by way of the political process rather than the courts. Along with O'Connor J and the dissenting justices in *Smith,*[825]and even acknowledged by Scalia J himself,[826] many commentators in the USA[827] and Australia[828] have criticised this as an abdication of the role of the judicial review to protect minority rights. It has been suggested that the claimed neutrality is in effect not neutral but populist. It has been noted that it is religious freedom that allows minorities to obtain rights that mainstream religions already have through the political process,[829]

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analyse the differences between the coercion of *Lyng* and the purpose-based test even though these raise different questions, see Renwick, above n 186. Jennifer Clarke has briefly questioned the application of s 116 in relation to the legislation to remove the Hindmarsh Island from the protection of the Commonwealth Aboriginal heritage legislation. She was not optimistic about the applicability of s 116 due to the type of purpose-based analysis used by the High Court: Jennifer Clarke, 'Should Parliament Enact the Hindmarsh Island Bill 1996?' (1997) 3(89) *Aboriginal Law Bulletin* 15. The question is whether the composite legislation package is for the purpose of heritage protection, albeit with limits on this, rather than for the destruction of such places. David Ritter has put the argument that legislation is designed to legitimise destruction, in David Ritter, 'Trashing Heritage: Dilemmas of Rights and Power in the Operation of WA's Aboriginal Heritage Legislation' in Christine Choo and Shawn Holbach (eds), *History and Native Title* (2003), although that is not to suggest that the legislation will be characterised that way by the courts.

[823] Walter Berns, *The First Amendment and the Future of American Democracy* (1985) at 44.

[824] In Australia, for example, where the purpose-based test has always had primacy, the policy behind this is consistent with the historical embracing of the concept of responsible government and the rule of law rather than bills of rights to ensure protection of freedoms: see, for example, Clifford L Pannam, 'Travelling s 116 With a US Road Map' (1964) 4 *Melbourne University Law Review* 4; Haig Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25(2) *Federal Law Review* 211; Owen Dixon, 'Address at Annual Dinner of the American Bar Association' (1942) 16 *Australian Law Journal* 192; Robert Moffat, 'Philosophical Foundations of Australian Constitutional Tradition' (1965–7) 5 *Sydney Law Review* 59; Geoff Kennett, 'Individual Rights, the High Court and the *Constitution*' (1994) 19 *Melbourne University Law Review* 581; Geoffrey de Q Walker, 'Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Foray with Freedom of Religion' (1985) 59 *Australian Law Journal* 276.

[825] O'Connor J in *Employment Division v Smith,* 494 US 872 (1990) at 902–3.

[826] Scalia J acknowledged that this would place those religious practices that are not widely practised at a relative disadvantage. He said this was an "unavoidable consequence of democratic government" and must be preferred to a system in which each conscience was a law unto itself or in which judges weighed the social importance of all laws against the centrality of religious beliefs: ibid at 790, 890. O'Connor J in *Lyng* also suggested a political result was preferable: *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988) at 453–4.

[827] See, for example, the criticism in Amor, *Religious Intolerance in the US*, above n 324; David Getches, Charles Wilkinson and Robert Williams, *Cases and Materials on Federal Indian Law* (3rd ed, 1993) at 762; Jesse Choper, 'The Rise and Decline of the Constitutional Protection of Religious Liberty' (1991) 70 *Nebraska Law Review* 651; Rhodes, above n 7; James E Wood, 'Abridging the Free Exercise Clause', (1990) 32(4) *Journal of Church and State* 741; Derek Davis, above n 99; Carter, *Culture of Disbelief,* above n 22; Cinotti, above n 22; Richard Brisbin, 'The Rehnquist Court and the Free Exercise of Religion' (1992) 34(1) *Journal of Church and State* 57, 70–74; Beaman, above n 29, at 140.

[828] A point made by James Richardson, 'Minority Religions (Cults) and Law: Comparisons of United States, Europe and Australia' (1995) 18 *University of Queensland Law Journal* 183. See also McLeish, above n 243; Maddox, *Indigenous Religion,* above n 76.

[829] McConnell, 'Free Exercise Revisionism', above n 22.

as no government would dare to bulldoze the sacred places of mainstream religions, such as important churches, nor to enforce a ban on the sacramental use of wine contrary to what occurredin *Lyng* and *Smith*[830] because they would have been awake to the religious effects of such actions or at least not so indifferent to them.[831]

Of course, there is no reason why the political process and the courts cannot both provide protection. If the political process did so, there would be no need to resort to the courts. In the USA, there are additional problems caused by the Establishment Clause which might prevent accommodation by the political process.[832]

Concerns of Anarchy

At the heart of the arguments for reducing religious freedom protection is a fear of the consequences. Scalia J's policy behind the purpose-based test is to give priority to the interests of governments and to assume that religious freedom limits on this would be "courting anarchy".[833] This is an approach that gives precedence to the interests of order over rights and feelings of religious adherents.[834]

The "anarchy" argument is yet another symptom of the private–public dichotomy. If the purpose is thought to be a proper one for the public sphere and the religious concerns seek to intrude into this arena, it is classified as disruptive of the "just bounds between religion and the state" and thus gives rise to "anarchy".

In relation to Indigenous sacred places, the aim sought by the plaintiffs is to leave the place alone. This does not create disruption but prevents new damaging activities. The main fear of the courts and others in relation to the Indigenous sacred place cases has been about hampering of the government's untrammelled ability to develop its own land. This potential limit to property rights may be what some courts and governments

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[830] Suggested by people such as Stephen L Carter, 'The Resurrection of Religious Freedom' (1993) 107 *Harvard Law Review* 118; Robert Clinton, 'Isolated in their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government' (1981) 33 *Stanford Law Review* 979.

[831] McConnell said that the real evil is not only outright hostility, but ignorance and majoritarian presuppositions and indifference, in McConnell, 'Origins', above n 68 and McConnell, 'Free Exercise Revisionism', above n 22. Carter described it as allowing religious rights to be trampled upon, as long as it was by accident: Carter, *Culture of Disbelief,* above n 22.

A similar position has been acknowledged in Australia: see Wojciech Sadurski, 'Last Among Equals: Minorities and Australian Judge-made Law' (1989) 63 *Australian Law Journal* 474; McLeish, above n 243; Kennett, above n 824; Maddox, *Indigenous Religion,* above n 76. The point has also been made in relation to the European situation: see Carolyn Evans, *Freedom of Religion,* above n 16, chapter 8.

[832] See 5.2.3 and 7.4 above.

[833] As indicated at 494 US 872 (1990) at 878–80

[834] The effect is to downplay the right to religious freedom as something of secondary importance only: McConnell, 'Free Exercise Revisionism', above n 22. It has also been suggested that the real concern is about preserving government sovereignty: see Scott C Idleman, 'Why the State must Subordinate Religion' in Stephen M Feldman (ed), *Law and Religion: A Critical Anthology* (2000).

regard as “anarchy” and it is certainly in some ways subversive of an economic fundamentalist view of the world. This issue has been lurking behind many of the policy decisions taken by the courts, and it is best examined separately in the next chapter.

Chapter 11 – The Role of Property and Development Interests in Limiting Religious Freedom

11.1 Introduction: Religious Freedom as Intrusion into Property Rights

Previous chapters show the history, especially in the USA, of various tests used to narrow the scope of religious freedom claims in relation to Indigenous sacred places. Much has turned on the assumption that religion belongs firmly in the private sphere and that such a sphere is a small one. The scope is limited for religious freedom to interfere in government activities in the "public sphere" or even more so in the activities of other private individuals, as such interference is seen as an intrusion into their private spheres. This chapter explores one of the key motivations behind keeping religious freedom and the sacred in the private box, that is, the protection of property rights. The lack of property ownership is a major factual distinction between Indigenous sacred places and those of mainstream religions which mostly own their sacred places or places of religious activities.

11.2 Lack of Property as a Disqualification or Policy Factor in the Indigenous Sacred Place Cases

There are some cases in the USA which have explicitly excluded religious freedom claims due to the lack of property rights held by the plaintiffs. More commonly, the religious freedom rights have been excluded because of concerns about interference with property rights of others.

The Indigenous cases in the other countries have not explicitly turned on the property rights issues but there are certainly strong hints in some of those cases that this too lies behind the underlying policy reasons for limiting the scope of religious freedom on other people's land.

11.2.1 Disqualification Based on the Lack of Property Rights

Some of the early US Indigenous sacred place cases rejected Free Exercise claims on the grounds that the plaintiffs lacked property interests in the land in question. The lack of a property interest in these cases was required to distinguish decisions in the *Pillar*

of Fire cases[835] where the Colorado Supreme Court found that the Free Exercise Clause could apply to preserve a building that was said to have unique religious significance. The *Pillar of Fire* cases did not even require that the building should have particular sacred qualities or that it would be a breach of the tenets of the religion to destroy it.

In *Badoni v Higginson,* Aldon J in the US District Court at Utah at first instance distinguished *Pillar of Fire* on the basis that the property in question was owned by the religious group and not a third party and held that a person could not assert First Amendment rights to the disruption of the property rights of others.[836] He went on to compare the situation to one in which a person might sincerely believe that the Lincoln Memorial is a sacred religious shrine due to a religious experience encountered there, and that such a person could hardly call on the courts to enjoin all other visitors from entering it.[837]

At first instance in *Sequoyah v Tennesee Valley Authority*, the District Court Judge Taylor also relied on the lack of a proprietary interest to dispose of the claim. He said that the federal government uses the land it owns for a variety of purposes, many of which require limiting or denying public access to the property. He said there were no cases cited which engrained the Free Exercise Clause with property rights and the Clause was not a licence in itself to enter property, government owned or otherwise, when religious practitioners had no other legal right of access. He then rejected the Free Exercise claim because the plaintiffs claimed no other legal property interest in the land in question.[838]

The appeal courts in both the above cases, however, rejected the view that Free Exercise claims could not be sustained on land where the plaintiffs did not have a property interest.[839] In the 6th Circuit Court of Appeal in *Sequoyah v Tennessee Valley*, Judge Lively[840] said that the lack of such a proprietary interest was a factor to be considered, but it should not be conclusive in view of the history of the Cherokee expulsion from Southern Appalachia followed by the "Trail of Tears" to Oklahoma and

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[835] *Pillar of Fire v Denver Urban Renewal Authority,* 509 P 2d 1250 (Colo, 1973) and *Denver Urban Renewal Authority v Pillar of Fire*, 552 P 2d 23 (Colo, 1976). See 6.3 above for a discussion of those cases.
[836] 455 F Supp 641 (1977) at 645.
[837] Ibid.
[838] 480 F Supp 608 (1979) at 611.
[839] They decided against the claims on other grounds already discussed in previous chapters.
[840] Lively J handed down the majority decision.

the unique nature of the plaintiffs' religion.[841] Perhaps an implication was that the lack of a proprietary interest was the result of past violations of the Free Exercise Clause by the federal government and could not be relied on to exonerate the government from later Free Exercise claims. In 10th Circuit Court of Appeals in *Badoni v Higginson*, Logan J[842] held that the government must manage its property in a manner that does not offend the *Constitution*.[843]

All the same, the lack of a property interest surfaced again in Circuit Court of Appeals in the District of Columbia in the Snow Bowl case of *Wilson v Block.* This case was again contrasted with *Pillar of Fire* on the basis that government taking of a privately owned religious property involved different considerations than a claimed First Amendment right to restrict the government's use of its own land.[844]

In none of the cases that turned on the lack of a proprietary interest did the courts say why the lack of such an interest meant that no cognisable religious freedom claim could arise. They seemed to assume that the idea that religious freedom could interfere with property rights of third parties was obviously untenable. Though it was not spelt out, such a view could well be based on an assumption that this went beyond protection of the individual's private sphere rights and in fact intruded on the rights of others.

There do not appear to be any Indigenous cases in the other countries which have failed on the grounds that no property interest was held by the plaintiffs.

Rights of the Public

It is interesting to note that, in some of the Indigenous sacred place cases, amongst the concerns of the courts about the plaintiffs' religious claims were the impacts on the rights of members of the public, in particular tourists, that is, people who did not own the land either.[845] The effect seems to be that the rights of members of the public who had no special interests in the area were elevated above those of the religious

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[841] *Sequoyah v Tennessee Valley Authority,* 620 F 2d 1159 (6th Cir, 1980), at 1164, footnote 2. This was not expanded on but refers to the infamous forced removal of the Cherokee people from their traditional homelands to a reservation in Oklahoma in the winter months of 1838 to 1839.
[842] Logan J delivered the decision of the Circuit Court.
[843] 638 F 2d 172 (10th Cir, 1980) at 176.
[844] *Wilson v Block,* 708 F.2d 735 (DC Cir, 1983) at 742.
[845] See in *Badoni v Higginso,* 455 F Supp 641 (D Utah, 1977) at 645, where the court was concerned about a hypothetical example of people who had religious experiences at the Lincoln Memorial excluding other visitors. On appeal in *Badoni,* in response to concerns about disruptive activities of tourists, the court said that the First Amendment could not deprive the public of its normal use of an area and there is no constitutional right to have visiting tourists act in a respectful and appreciative manner: 638 F 2d 172 (10th Cir, 1980) at 177–9. In *Hopi Indian v Block,* the District Court was also concerned that the claim would restrict the rights of the public and any development of the property to facilitate the exercise of the beliefs: [1981] US Dist Lexis 18421 at 17.

concerns of the Indigenous plaintiffs who were disqualified from asserting any rights because they too had no property interests in the land.

Naturally, the distinctions can be argued on the basis that public use of the land was part of the intended use by the owner of the land, that is, the government. Also there may be a distinction between requiring the government to take positive action to protect the area from the public, such as closing it off, as opposed to simply doing nothing to stop public access. The point here is that courts which elevate the rights of property ownership have nevertheless seemed particularly protective of the interests of others who do not have property rights to use the land either, even protecting their freedom to desecrate sacred places and defeat the religious concerns of Indigenous peoples.

Contrast to Free Expression Cases on Land Not Owned by the Plaintiffs

Arguments about a lack of a property interest in the US cases do not make jurisprudential sense as a disqualifying factor in a First Amendment claim. There are numerous cases concerning Free Exercise claims which relate to activities on public land. These "public land religious expression" cases have drawn heavily from freedom of speech principles in relation to places classified as public fora and have accepted reasonable limits based on time, manner and place restrictions, but have certainly not disqualified Free Exercise claims for lack of a property interest.[846] Free exercise rights have also been upheld on privately owned land open to the public.[847]

The lack of a property interest has not been a concern in similar cases in Canada either.[848] These too have drawn from public fora principles developed under the *Charter* for freedom of expression.[849]

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[846] Examples include *Cantwell v Connecticut,* 310 US 296 (1940), a case involving soliciting in streets and homes; *Kunz v New York,* 340 US 290 (1951) which invalidated the conviction of a religious minister for holding a religious meetings in city streets without a permit; *Niemotko v Maryland,* 340 US 268 (1951) concerning a conviction for holding Bible talks in a public park without a permit.

[847] In *Marsh v Alabama,* 326 US 501 (1946), a Jehovah's Witness had been arrested for refusing to stop distributing religious literature on a sidewalk in the town of Chickasaw which was owned entirely by a private company. The Supreme Court overturned the convictions declaring that the fact of private ownership did not give the rights to abridge the constitutional freedoms, at least where the area had been opened up to the public.

[848] See the early pre-*Charter* case of *Saumur v City of Quebec* (1953) 4 DLR 641 overturning a conviction for distribution of material without a permit; and the *Charter* case of *Ontario (Attorney General) v Dieleman* (1994) 20 OR (3d) 229 concerning anti-abortion protests, which involved claims of religious freedom as well as freedom of expression, but the court preferred to deal with it as a free expression issue under s 2(b) of the *Charter* using a public fora analysis similar to the USA.

[849] The Supreme Court of Canada dealt with these issues in *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 where the Court formed the view that preventing people raising political issues in an airport terminal infringed freedom of expression guaranteed in s 2(b) of the *Charter*.

The distinctions between Indigenous sacred place cases and non-Indigenous cases involving activities on public land cannot all be justified on the basis that one concerns claims to allow actions by the plaintiffs and the other concerns exclusions of members of the public, because both types of claims by the Indigenous plaintiffs have failed.[850]

Different Treatment on Properties Owned by the Religious Group

As set out above, the *Pillar of Fire* case was distinguished on the grounds of property ownership. It is interesting to note that one case has also sought to distinguish the Indigenous cases on the basis that they lacked a property interest. In *Yonkers Racing Corporation and St Joseph's Seminary v City of Yonkers,*[851] concerning the acquisition of part of the land of a religious seminary for the purposes of redevelopment, the *Lyng* case was distinguished. The seminary's Free Exercise claim was based on the religious practices of priestly formation requiring the retention of vacant land surrounding the seminary as an "apron of quietude". The Circuit Court reasoned that *Lyng* was to be distinguished because it turned on what the government could do with its own land whereas the church in this case owned the land. It remanded the case to test the facts as to whether the taking of the surrounding land would substantially affect the work at the seminary and whether the land was essential to the seminary's mission. In *Yonkers* the Court in effect suggested, as *Wilson v Block* had, that there may be two definitions of a burden, one for religious exercise on private property and one on someone else's land. Again the judgment did not attempt to justify the distinction by reference to legal principles.

It is hard to draw comparisons with damage to non-Indigenous places of significance as such cases are rare. When most mainstream religions own their property, the occasions for interfering or damaging them are limited. Perhaps even if the governments wished to acquire such property, they would not usually take the often-unpalatable political step of simply taking or damaging such places of important religious significance.[852]

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[850] The next section 11.2.2 discusses whether the more relevant difference is the degree of restriction sought to be placed on the owner of the property, not the nature of the property interest itself.

[851] 858 F 2d 855 (2nd Cir, 1988).

[852] It is not surprising that, prior to the *Pillar of Fire* case, the main examples where this has occurred relate to what were, at the time, politically disfavoured religions. One concerned the Church of Latter Day Saints which had been dissolved and its property taken on the grounds of the practice of polygamy. In *The Late Corporation of the Church of Jesus Christ of Latter day Saints v US,* 136 US 1 (1890) the Supreme Court upheld the claims of the US government to take property, including the Temple block, said to be the site of the most sacred of buildings in Mormon theology (see Worthern, above n 25), although this point was not mentioned in the judgment. The Court gave short shrift to the Free Exercise Clause argument. A case with a contrasting result, but still concerning a politically powerless group, was *Kotohira Kinsha v McGrath,* 90 F Supp 892 (D Hawaii, 1950), dealing with the seizure of a Shinto shrine. See discussion in 6.3 above.

Prior to the use of the centrality test in the town planning cases of the 1980s,[853] there had been many such cases allowing town planning requirements to be overridden for places of worship owned by the religious groups. In many of these cases, however, town planning restrictions had been struck down on the basis that such regulations were a deprivation of property and not to occur without due process;[854] in other words, the line of cases was about protecting property rights of religious groups against arbitrary limitation. Perhaps that was why courts may have been more comfortable about continuing to protect them on Free Exercise grounds as well,[855] or at least not as uncomfortable as when faced with the relatively novel and threatening claims of people without such proprietary interests.

These distinctions became legally irrelevant in the USA with the *Smith* decision in which general and neutral zoning laws potentially overrode freedom of religious land use. However, the property distinction was resurrected in statutory form in the *RLUIPA*[856] which only applied to land if the claimants have an ownership, leasehold, easement, servitude or other property interest in the regulated land, or a contract or option to acquire such an interest.[857] In other words, only Free Exercise rights relating to interference to one's property interests were to be protected.

Is Property Ownership Relevant?

Despite the attempts to distinguish the *Pillar of Fire* case, that case's rationale did not involve any discussion of the ownership of the building and it simply turned on whether the demolition of a significant building could be a burden on the religion. Similarly, the cases concerning zoning requirements in relation to the non-Indigenous places of worship do not speak of property rights as an element of the burden. Perhaps this is because the courts are quite comfortable about extending the "private" conception of free exercise of religion to what is essentially still the private property of the religious

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[853] See 8.1 above.

[854] *Diocese of Rochester v Planning Board of Brighton,* 136 NE 2d 827(NY, 1956) is one such case that outlines many other earlier authorities in this regard. See Note, 'Churches and Zoning' (1957) 70 *Harvard Law Review* 1428; Laurie Reynolds, 'Zoning the Church: The Police Power Versus the First Amendment' (1984) 64 *Boston University Law Review* 767. The position has been described as a "New York" position, although it has been adopted by other state courts as well: see Kenneth Pearlman, 'Zoning and the Location of Religious Establishments' (1988) 31 *Catholic Lawyer* 314.

[855] Examples of such Free Exercise cases include *Board of Zoning Appeals of Decatur v Decatur, Indiana Company of Jehovah's Witnesses,* 117 NE 2d 115 (1954), *Community Synagogue v Bates,* 136 NE 2d 488 (NY, 1956), *Columbus Park Congregation of Jehovah's Witnesses v Board of Appeals of the City of Chicago,* 182 NE 2d 722 at 725 (Ill, 1962), *Westchester Reform Temple v Brown,* 239 NE 2d 891(NY, 1968), *Jewish Reconstructionist Synagogue of the North Shore Inc v Incorporated Village of Roslyn Harbor,* 342 NE 2d 534 (NY, 1975), *Lubavitch Chabad House of Illinois v City of Evanston,* 445 NE 2d 343 (Ill App Ct, 1982) and *Islamic Society of Westchester and Rockland v Foley,* 96 AD 2d 536 (NY Sup Ct, 1983).

[856] *Religious Land Use and Institutionalized Persons Act of 2000*, 42 USC §§ 2000cc – 2000cc-5. The background to this is in 5.2.2.

[857] By reason of the definition of land use regulation in § 2000cc-5(5).

group or individuals. It seems only when faced with the demands of Indigenous sacred places that property ownership comes to the fore as a new requirement in order to deny relief.

If the rationale of the religious freedom was concerned with respect for human dignity or autonomy, then property has no role to play in that analysis. The right one is dealing with is free exercise of *religion*, not free exercise of property rights. No doubt, third-party property interests may be relevant at the balancing stage, but there is no jurisprudential justification for these being used as a disqualifying factor as to whether there is a prima facie infringement on religious freedom. The lack of property appears to have been used as an excuse to draw an arbitrary line to exclude relief for the Indigenous cases. The reasoning behind this is probably not so much about the lack of a property right but the fear of the potential effect on the rights of others. This is illustrated more clearly by the cases in the next section.

11.2.2 Interference with the Property Rights of Others and the Government's "Own Land"

Indigenous Sacred Place Cases

The corollary of the concern about the plaintiffs' lack of property interests in the Indigenous sacred place cases is the concern about the intrusion into the property rights of others, such as the government or third parties. This has been evident in the dicta referred to in some of the cases in the previous section. Many of the early unsuccessful Indigenous sacred place cases referred to religious freedom not being available to affect the government's rights to use its land.[858] There was also concern about the religious imposition on the government, expressed as a fear of achieving the result of a government-managed "religious shrine"[859] or a "vast religious sanctuary".[860]

While the appeal courts in all the above cases found other ways of denying relief, the issue of not allowing Free Exercise claims to encumber property rights of others finally became the accepted orthodoxy when used by the US Supreme Court majority in *Lyng*.[861] O'Connor J said that government simply could not operate if it had to satisfy every citizen's religious needs and desires and she asserted that the First Amendment

[858] In *Badoni v Higginson,* 455 F Supp 641 (1977) at 645, Anderson J in the District Court said that to hold that a person might assert First Amendment rights to the disruption of the property rights of others, even if the other person is a government, could and would be likely to lead to unauthorised and very troublesome results.
[859] *Hopi Indian v Block* [1981] US Dist Lexis 18421 at 21–22
[860] *Inupiat Community of Arctic Slope v US,* 548 F Supp 182 (D Alaska, 1982) at 188–9
[861] *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988).

does not give a veto over public programmes that do not prohibit free exercise of religion.[862] Echoing the concerns of some of the District Court judges, she said that no disrespect for the Indian practices was to be implied, but such beliefs could easily require "de facto beneficial ownership" of some rather spacious tracts of public property and that the diminution of the government's property rights would be far from trivial. She then concluded with the oft-quoted statement that whatever rights the Indians might have to use the area, those rights "do not divest the government of its right to use what is, after all, its land".[863]

These comments about the government's property rights were not the ratio of the decision but only an indication of the Court's motives for finding a narrower jurisprudence. Nevertheless, the words seemed to take on the character of a mantra cited by the subsequent opinions,[864] which all seemed to embrace keenly the result in the *Lyng* case, in particular the desire to avoid imposing on government property rights.

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[862] Ibid, at 452.
[863] Ibid, at 453.
[864] See the following:

US v Means, 858 F 2d 404 (8th Cir, 1988) at 407 where the 8th Circuit Court repeated the *Lyng* view that upholding such claims would result in the imposition of religious servitude on 800 acres of national forests and could easily require beneficial ownership of spacious tracts of public property.

Manybeads v US, 730 F Supp 1515 (D Ariz, 1989) at 1517–8, a case concerning the Navajo–Hopi settlement where the Navajo were removed from Hopi land and away from their sacred places there. The Court said that the fact that a government action might destroy a religion was not found by *Lyng* to allow a religious servitude on government land, let alone on land held in trust for another sovereign tribe. The judge repeated the concerns about de facto beneficial ownership of public or private land and that the government could not operate if it had to satisfy every citizen's religious needs and desires. He said that rights given by the Act for access to shrines may not satisfy the plaintiffs but they far exceeded the right of access afforded to any other religious group in this country. He then concluded with the *Lyng* mantra that religious rights do not divest the government or a property owner of its right to use "what is, after all, its land".

Attakai v US, 746 F Supp 1395 (D Ariz, 1990) about concerns of the Navajo relating to fencing in and prevention of religious activities at sacred places in the Hopi Indian Reserve. At 1403–4, Carroll J ruled again that the *Lyng* case was binding and provided direct and dispositive answers to First Amendment claims. The Court referred to the statements in *Lyng* about religious servitude being imposed on property, concerns of a de facto ownership and not divesting the government of its rights to use "what is, after all, its land". The Court concluded that the fact that the ability to practise a religion may be virtually destroyed did not mean that a religious servitude could be imposed on the property of a government, much less the property held in trust for a third party, the Hopi tribe.

Havasupai Tribe v US, 752 F Supp 1471 (D Ariz, 1990). At 1486, Strand J threw in the now-obligatory refrain from *Lyng* about the rights to use the area not divesting the government of "its rights to use what is, after all, its land" and that giving a veto power over activities on federal land would amount to a "de facto beneficial ownership of some rather spacious tracts of public property". This was in response to the claim concerning the grant of an exclusive mining lease for uranium over land including sacred places of the Havasupai people.

Lockhart v Kenops**,** 927 F 2d 1028 (8th Cir, 1991) concerning a land swap of land in South Dakota, which related to the sacred Black Hills area. At 1036, the case of *Lyng* was relied on to say that the Free Exercise Clause does not require the government to conduct its own affairs to comport with the religious beliefs of its citizens and reference was again made to the concern about limiting the government's use of its own land. The Court said that it could be a breach of the First Amendment, presumably the Establishment Clause, to impose a religious servitude on the property.

Bennally v Kaye [2005] US Dist Lexis 39751 at 13. This related to restrictions on Navajo who wanted to perform the Sundance in the Hopi area. Judge Wake said that the plaintiffs claim was dependent on an entitlement to practise their religion on the property of another and said that *Attakai* applied. He rejected attempts to distinguish *Attakai* and *Lyng* on the grounds that they

At the heart of the reasoning was a fear of the potential extent of the Free Exercise claims over large tracts of government land. The sacred for Indigenous people was not able to be neatly confined to discrete areas. In *Navajo Nation v US Forest Service and Ors*, the spectre of lands covered by sites came up in the Court's comments[865] which relayed with concern that millions of acres of Forest Service public lands and other federal lands were considered sacred to the plaintiffs and that there were several thousand sacred sites in Navajo country, thousands of sites sacred to Havasupai and hundreds of Hopi sacred sites, with new sacred areas continuously being created. This echoed the concerns in *Lyng* about "spacious tracts" of land and the impact on the government's property rights being less than trivial, and those of Fitzgerald J in *Inupiat* about a "vast religious sanctuary" beyond territorial waters.

The report of the Task Force set up under the *AIRFA* in 1979[866] sought to pacify fears about unknown extents of sacred places. In relation to the impact of such a policy of protection of sites, it said, probably incorrectly,[867] that most major sites were already well known and that any concern about future controversies had to revolve around known sites and not additional sites that might come into being. This was no doubt an effort to reassure people that religious rights of Native American tribes would not open floodgates.[868]

This is a major difference to the cases concerning typical Western religious activities like proselytising or gathering for one-off worship at public places. Those activities do not impact to any significant extent on the activities intended by the government for those venues and thus do not have any extensive impact on government property rights. The non-Indigenous cases have, by and large, not affected any significant development plans by the government like infrastructure or mining. Exceptions were *Pillar of Fire* and *Yonkers* which did involve upholding the possibility of religious

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were not trying to prevent to Hopi tribe or the US government from doing what they wanted with "their land". The reasoning was that a religious servitude was attempted whether the non-landowner sought to limit the owner's use of the land to protect the non-landowner's religious practices or to make affirmative use of the and for the same religious purposes.

Navajo Nation v US Forest Service and Ors, 408 F Supp 2d 866 (D Ariz, 2006) and on appeal 535 F 3d 1058 (9th Cir, 2008), a case brought under the *RFRA* over the Arizona Snow Bowl development. At 903–4 of the District Court decision, the property argument came up again when the court said that the *RFRA* does not provide a free-standing right to free exercise of religion on another person's property. It also said that if this was the case, the Forest Service would be left in a precarious situation as it attempted to manage million of acres of public lands, in Arizona and elsewhere, that are considered sacred. The majority at the Circuit Court at 1073 also stressed the Forest Service's right to internal management of its own land.

[865] 408 F Supp 2d 866 (D Ariz, 2006) at 897–8 and on appeal 535 F 3d 1058 (9th Cir, 2008) at 1066.

[866] US Department of the Interior, *AIRFA Report*, above n 8, at Appendix A.

[867] The incorrectness of this point has been made in Michaelsen, 'Significance of the *AIRFA*' above n 152, at 107.

[868] US Department of the Interior, *AIRFA Report,* above n 8, at 12, 89.

freedom claims in the face of competing uses for the land, but there the property was owned by the religious groups, not the government or third parties, so there were no impacts on third-party property rights.

The relief granted in typical Free Exercise cases faced by the courts is also far more limited in its impacts on the perceived "property rights". Most cases concerned the grant of individual *exemptions* from laws, where those laws could in fact continue to apply most of the time for most of the population. Such exemptions generally do not require the complete cessation of particular projects.[869] Protection of Indigenous sacred places, therefore, often has a far greater effect on government actions and thus may extract "more" from the government instead of simply minimising what the government cannot do to individuals.

This leads to the justification for drawing the line at direct coercion used in *Lyng*, where it was said that the Free Exercise Clause was not able to be used to extract a particular type of behaviour from the government. It is arguably only a matter of degree. As pointed out by the Supreme Court in *Smith,* most successful Free Exercise cases, even those involving exemptions, do in some sense require the government to change the way it operates. Scalia J said that it was hard to see why the government had to tailor health and safety laws but not tailor management of public lands.[870] Perhaps an answer could lie in the special significance of property rights to manage one's own land in the Western mindset.

The fear has come about in the recognition that Indigenous sacred place claims are subversive of property interests and, rather than go through the balancing process of weighing up religious interests against property interests, the courts have preferred to cut religious interests off at the pass by devising tests like coercion or centrality that will limit them.

This concern for property rights is not a phenomenon unique to the USA, though the US courts have been the most explicit about it. In Canada in *R v Sioui*, the religious freedom claims made by the Huron concerned a national park owned by the government. Although the religious freedom claims were upheld by the Canadian Supreme Court based on the interpretation of the terms of the treaty, the Court also

[869] Gordon, above n 133, points out that the difference between many Indigenous and non-Indigenous religions is that the remedy sought is different, ie stopping the government programme as opposed to obatianing exemptions. Choper in 'Rise and Decline', above n 827, has suggested that lines could be drawn at ensuring exemptions rather than preventing programmes, which may indirectly be what the *Lyng* court did.

[870] *Employment Division v Smith,* 494 US 872 (1990), at 885. Scalia J, of course, preferred to read the Free Exercise Clause as not requiring the government to tailor management of either type.

believed that there had to be some implied limits to the free exercise of religion, and this limit applied where the exercise of religion was incompatible with the occupancy by the Crown in a conservation park.[871] The Court recognised that there were two rights in opposition, that is, on the hand, the ownership rights of the Crown, which suggested that ordinarily the Crown can do whatever it likes on its land, and on the other, the rights to practise religion.[872] The onus was said to be on the Crown to prove that the religious rites were incompatible with the occupancy of the park and that such religious activity would prevent the realisation of the government's purpose. The Court held that public ownership did not require exclusive use of the park.[873] So, while there was nothing explicitly said about the limits based on the occupancy by the Crown, the Court implied the existence of such limits as a matter of interpretation of the Treaty terms and intentions. It only accepted the religious freedom claim because there was no significant interference with the Crown's property rights. It is worth noting that the case was decided in 1990, after the *Lyng* decision, and the reference to the government ordinarily being able to do what it liked on its land was no doubt an allusion to that *Lyng* mantra.

In New Zealand, the case of *New Zealand Underwater Association Inc and Maruia Soc Inc v Auckland Regional Council and Ports of Auckland Ltd*,[874] concerned the discharge of dredgings into Hauraki Gulf which was said to be offensive to the Maori peoples because the gulf was sacred and deserved to be protected. The Tribunal noted that the whole of the gulf area was of spiritual significance to the Maori tribes and that their attitude would be the same to a discharge anywhere else in the gulf. The fear evident in that case was of a right of veto being granted over activities throughout the whole gulf area. This certainly has overtones of the fears of a "de facto beneficial ownership" of "spacious tracts of land" in *Lyng*.

The Environment Court in the New Zealand case of *Ngati Hokupu Ki Hokowhitu v Whakatane District Council*,[875] was more explicit about the *NZBOR* not applying to override property rights. The case did not concern large amounts of public land but land owned by the District Council which was subject to a sale agreement to a Maori Trust Board who wanted to develop a marae complex on the land in question. The Court simply concluded that it could not find that a person's exercise of their property rights on the block, if otherwise legal under the *Resource Management Act*, would be a

[871] [1990] 1 SCR 1025, at 1070.
[872] [1990] 1 SCR 1025, at 1069.
[873] [1990] 1 SCR 1025, at 1072.
[874] Unreported, Planning Tribunal, A131/91, 16 December 1991, at 53.
[875] *Ngati Hokopu ki Hokowhitu v Whakatane District Council* (Unreported, Environment Court, C168/2002, 13 December 2002) per Judge Jackson.

breach of the human rights unless there were off-site effects. The Court thus disposed of the freedom of religion argument on the assumption that property rights must prevail over any such human rights.

There do not appear to be any equivalent cases in Australia. Given the purpose-based test in s 116, there is little need for a specific exclusion of activities on areas belonging to others, as these could usually be catered for by neutral and generally applicable property laws.

Comment

As mentioned previously, while balancing of property interests can legitimately be included in a process of balancing competing interests, the balancing process should be carried out at a stage after a burden or infringement on religious freedom has been found. The fact that a religious exercise may impact on the property of another does not make an action any less a restriction of religious exercise.

This was the basis of Brennan J's critique of the obsession of the *Lyng* majority about interfering with the government's ability to manage and use its own land. He recognised that this represented yet another stress point in the longstanding conflict between two disparate cultures, namely the dominant Western culture, which viewed land in terms of ownership and use, and that of Native Americans, in which concepts of private property were not only alien but contrary to a belief system that holds land sacred.[876] He said that disclaiming the responsibility for balancing those competing interests and turning it over to the legislature effectively gave one party unilateral authority to decide the issue; but the *Constitution* demanded, and Native Americans deserved, more.[877] The concerns about vast tracts of land being subject to a religious servitude could not justify a refusal to recognise the constitutional requirement.[878] Brennan J reiterated that there had been no compelling government interest found; the problem was that the Court's view was, in effect, that the government prerogative as a landowner should always take precedence over Free Exercise claims of this sort.[879]

The clash of cultures and values has also been commented on by Lori Beaman who has pointed out that the dominant narrative in cases like *R v Sioui* was about preserving a park for common usage, and in *Lyng* it was the highway, but in none of

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[876] *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988) at 473.
[877] Ibid.
[878] Ibid, at 476.
[879] Ibid, at 465.

these was there a recognition of Aboriginal spirituality as an important freedom or right to be protected in a manner consistent with the constitutions of the US and Canada, even though on their face, they suggest that religious freedom is every citizen's entitlement.[880]

The significance of the "property right feature" in the Indigenous sacred place cases has been noted by some other commentators as well. Allison Dussais traces it back to the history of repression of Native American religion in the 19th century in the interests of individual property rights, without which civilisation was not thought to be possible.[881] Carpenter has summarised it by saying that in a legal world based on the ownership model, the owner always wins.[882] Worthern has criticised the Free Exercise law for coming down from a "nuanced theory" to a simple test focussing largely on the landowner's right to exclude.[883] Michaelsen[884] has seen this as part of a fundamental clash of worlds epitomised in different views of land, on the one hand, as property to be owned and, on the other, as something for which one has a responsibility to care for. Brian Brown has criticised the courts for viewing the land only as property rather than as sacred reality.[885] These opinions are all consistent with the laws not catering for the different views of land discussed in Chapters 2 and 3.

It has been suggested that the sacred place cases should not be seen by the courts as a straight conflict between the rights of a property owner and plaintiffs seeking to exercise their religion. Byler[886] has pointed out that permitting religious activities to take place on public land is often consistent with a government policy of multiple use, as religious activities often do not require complete or permanent exclusion of others. Where there are inconsistent desires, such as the exclusive mining tenement in the *Havasupai* case,[887] she points out that the conflict is actually between two private users of the land and about incompatible uses. These are all points that would favour a balancing test, rather than a test that saw any infringement on governments having an untrammelled right to select whichever use they would prefer for the land regardless of rights of religious freedom.

The narrowness of the bias towards property rights does not make sense given that there are often many other government or third party interests and programmes (such

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880 Beaman, above n 29, at 144.
881 Dussais, above n 7.
882 Carpenter, 'A Property Rights Approach', above n 26.
883 Worthern, above n 25.
884 In Michaelsen, 'Dirt in the Court Room', above n 137.
885 Brian Brown, above n 483. A similar critique has been given in Deloria, 'Sacred Lands and Religious Freedoms', above n 165.
886 Byler, above n 561.
887 *Havasupai Tribe v US,* 752 F Supp 1471 (D Ariz, 1990).

as traffic regulation, social security systems, schooling and the like) that have been accepted as infringing religious freedom. If these other kinds of interests are able to be weighed up in the balancing process, there is no logic why property interests should be treated differently.

The perceived problem with relying on a balancing test, however, is that the balance may in fact be in favour of the protection of religious freedom. It is noteworthy that in the *Lyng* case the government had already failed in the lower courts to prove a compelling interest that justified infringing the religious freedom of the Native Americans. This meant that the Court was faced with having to find that there was no burden in order to deny relief. This betrays a view that any interference with property rights should not be permitted and, if it is, the jurisprudence has to be altered accordingly.

11.3 Property Development as the Status Quo and Religious Freedom as "Making Demands of the Government"

Another feature of the primacy of the property narrative is in assuming that development of property is the status quo rather than the new competing use. A common feature of the religious freedom case law is that the rights protected are generally regarded as negative, that is, they do not require affirmative action on the part of governments to protect religious freedom.[888] This fits with the idea that such human rights are to prevent intrusion into the individual's sphere of autonomy rather than to prevent what occurs in a public sphere.

A key message of the *Lyng* case is that the religious freedom provision was about what the government could not do, rather than what the individual could extract from the government.[889] The assumption was that the plaintiffs were the ones seeking protection from the government, not that there was a positive action of government that infringed

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[888] See *Mendelssohn v Attorney General* (1999) 2 NZLR 268 at [14] saying that religious freedom provisions of the *NZBOR* do not impose positive duties. See also the statement of Douglas J in *Sherbert v Verner,* (1963) 374 US 398, 416 used in *Lyng* that the Clause is written in terms of what the state cannot do to an individual, not in terms of what the individual can exact from the state. This was also cited in *Baxter v Baxter* (1983) 7 DLR (4th) 557, at 560, by the Ontario Supreme Court in a case concerning an objection to a divorce on the basis that to allow it would infringe on the husband's marriage vows and thus his right to practise his religion by adhering to those vows. This claim was rejected on the basis that the *Charter* did not mean he could demand that the government exclude his marriage from the *Divorce Act.* These cases can be contrasted with comments about Article 27 in the *ICCPR* which may be said to impose positive obligations on states to ensure survival of minority religions and culture, see United Nations Human Rights Committee, *General Comment No 23 (Art 27): The Rights of Minorities*, 50th Sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994); Alexander Blades, 'Article 27 of the International Covenant on Civil and Political Rights: A Case Study on Implementation in New Zealand' [1994] 1 *Canadian Native Law Reporte*r 1.

[889] *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988) at 451.

on religious practices, that is, authorising road-building and logging. It was the government that was intruding on the sacred place and activities there and the plaintiffs were seeking to maintain the status quo, not asking for anything new from the government but for things to continue as they had before.[890] As Scott Idleman has characterised it, the courts have painted the government's interests as proprietary and extant while the religious practitioners have been cast as the intruder or squatter.[891] A similar attitude to the *Lyng* case was indicated in *McCrady v Ontario* in Canada where the Ontario Court of Justice said in relation to s 2(a) of the Canadian *Charter* that it does not oblige the state to support any religion or religious belief.[892]

The contrast with the rights of other members of the public to disturb religious worship of Indigenous people[893] also seems to reflect the view that such disturbance is the norm, the status quo, whereas attempts by the Indigenous plaintiffs to stop intrusion are seen as seeking positive action in their favour. This was the way the Circuit Court in *Badoni v Higginson* described their attempts to prevent tourists from disturbing ceremonies.[894]

However, the concerns in most Indigenous sacred places cases have been aimed at preventing some *new* action by the government, whether that relates to construction work or actions to increase the volume of visitors. In this way, the government has changed the status quo and the actions are precisely about what the government may not do.

A more sympathetic view of requirements to take action to remove infringements on religious freedom when the government has entered into some form of regulation can be seen in dicta from Le Bel J of the Canadian Supreme Court in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine.*[895] LeBel J mentioned that, in some cases, positive government action may be required to make a fundamental freedom meaningful, for example, where the state creates a situation which interfered with the exercise of a freedom, it may need to take positive steps to put an end to the

[890] A point also made by McAndrew, above n 660.
[891] Idleman, above n 834.
[892] *McCrady v Ontario* (1993) 61 OAC 286 at 308.The *McCrady* case is arguably different on the facts as the action complained of was the failure of the Registrar under the Cemeteries legislation to declare and thus protect a possible wider burial area. It would have been interesting to see if the result would have been any different if the plaintiffs had challenged the operative grant of licences for the project instead because it was that action which allowed the desecration, not the failure of the Registrar to then take affirmative steps to stop it.
[893] As discussed in 11.2.1 above.
[894] 638 F 2d 172 (10th Cir, 1980) at 178.
[895] [2004] SCC 48, a case in which Jehovah's Witnesses challenged a refusal to grant a zoning change for a property they owned in a commercial zone which would have excluded their place of worship. The Supreme Court held that the decision should be set aside on procedural fairness grounds.

interference.[896] On this reasoning, there would arguably be a positive obligation on the government to ensure that it put an end to any interference it may cause to the carrying out of worship or rituals at a particular place when the government itself had caused the problem.

The attitude of the courts in the Indigenous sacred place cases under the religious freedom model shows that property rights have become so deeply ingrained in the legal thinking that the right to exercise full property rights is treated as the status quo even if the actual activities are completely new and will seriously interfere with centuries of sacredness and Indigenous religious practices. Indigenous people have been required to justify why they are seeking something from the government and the government has not been required to justify its destruction and damage of sacred places. Yet, as is obvious from the zoning cases discussed previously,[897] the same attitude does not prevail when zoning laws have been in place and non-Indigenous religious groups seek to move into or build on their often newly acquired land in ways that do not conform to the existing rules. In those cases it would appear that they are seeking an exemption from pre-existing laws and yet the courts have not refused relief on the basis that they are seeking to extract something from the government rather than seeking to restrain that which the government cannot positively do. The difference in attitude is marked one, indicating the bias towards ownership regardless of the real status quo.

11.4 The Balancing Tests

Naturally, even if property interests are not treated as complete blockages to religious freedom claims, it is likely that they would be expected to play a significant part in the balancing of the rights of others as against religious freedom. While balancing interests is a more appropriate way of dealing with public interest concerns with religious freedom than arbitrary rules against all but the most privatised of religious activities, the assumption of non-intrusion into property rights in the balancing tests still needs to be overcome. This is where ethnocentric views and clashes of value systems are in danger of coming to the forefront to create what is in effect an imbalance. Given that most of the Indigenous sacred place cases have not reached this point, this thesis does not deal with the full range of issues associated with it, other than a few

[896] Ibid, at [76]–[79]. It was suggested in that case that if no land was available within a municipality to establish a place of worship, then this would be direct interference and public authorities would have to take positive action to amend the by-law.
[897] Such as those in 11.2.1 above.

illustrations of the devaluing of religious interests in the face of property and development.

The traditional strict scrutiny test that developed in the USA was an onerous one, requiring the government to prove that its interest was compelling and was the means least restrictive on the religious freedom of achieving that interest.[898] It has, however, been accepted[899] that courts have rarely applied the test properly in general Free Exercise cases, and, as discussed below, this is also the situation with many of the Indigenous sacred places.

One case that was ultimately resolved on the basis of the government's compelling interest was *Badoni v Higginson*,[900] concerning the flooding of the sacred Rainbow Bridge area by the dam and reservoir at Glen Canyon. The Circuit Court held that the dam was of vital importance and did not weigh that up against any religious interest nor did it consider if there was a less restrictive means of achieving water storage and irrigation. The approach has been criticised by commentators as not complying with the strict scrutiny test by not considering the relative value of the religious interest, particularly not in terms of the harm caused to the plaintiffs.[901] In effect, the religious value was given no weight because the Court assumed that as the government said it was an important development, this must outweigh any potential religious interest. In a similar vein, the court in *Inupiat Community of Arctic Slope v US* said that the generalised religious claims could not strike a balance in favour of the plaintiffs against the government's significant stake in development of energy resources and its treaty obligations to keep the high seas freely available for international passage and fishing.[902] In doing so the judge seemed to require the Inupiat to provide a counterbalancing interest rather than require the government to show a compelling interest.

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[898] See *Sherbert v Verner,* 374 US 398 (1963), especially at 406 where Brennan J used the language of *West Virginia State Board of Education v Barnette* in saying that "only the gravest abuses endangering paramount interests give occasion for permissible limitation". Also in *Wisconsin v Yoder,* 405 US 205 (1972) at 214–5 the Court repeated a similar test for religious freedom to be denied, that is, there had to be a state interest of sufficient magnitude to override the protection under the Free Exercise Clause. There was no question that the government interest in education was a legitimate and important one, but it was found that this was insufficient to justify refusing Amish children exemptions from the additional years at school as there was insufficient evidence that forcing them to stay at school for an extra two or so years after eighth grade would make much difference to the state's interests. See also discussions by Ensworth, above n 612; Gould, above n 643.

[899] See McConnell, 'Free Exercise Revisionism', above n 22; Ellis West, 'The Case against a Right to Religion-Based Exemptions' (1990) 4 *Notre Dame Journal of Law, Ethics and Public Policy* 591.

[900] 455 F Supp 641 (D Utah, 1977) at 646–7.

[901] See Brian Brown, above n 483; Cohen, above n 294; Ensworth, above n 612; Gould, above n 643; Rosenberg, above n 612; Loesch, above n 553; McAndrew, above n 660; Camala Collins, 'No More Religious Protection: The Impact of *Lyng v Northwest Indian Cemetery Protection Association*' (1990) 38 *Washington University Journal of Urban and Contemporary Law* 368; Brooks, above n 660.

[902] 548 F Supp 182 (D Alaska, 1982) at 189.

In *Fools Crow v Gullet*, the Court held that the defendants had met their burden of showing a compelling government interest in completing construction for environmental and administrative reasons at Bear Butte that would outweigh any temporary restriction on access.[903] However, the Court selected only a minor burden namely the temporary restriction of access, against which to balance the government interest and did not consider any burden arising from the desecration of the land. This made it easier to find a compelling interest to outweigh it.

In *Navajo Nation v US Forest Service and Ors*, the Court found that there was no religious freedom infringement. As this concerned a recreational activity like the Snow Bowl, the interest would at first hand appear to be trivial compared with the religious concerns but the Court was able to focus instead on safety issues and even compliance with the Establishment Clause as a compelling interest.[904] By assuming that the existence and function of the Snow Bowl was a pre-existing "given", the Court was able to concentrate on whether there was a less restrictive means of making snow and was not prepared to consider any less restrictive means that would lead to a loss of the facility altogether.[905]

When the courts applied the strict scrutiny compelling interest test literally, the result favoured the Indigenous plaintiffs. Examples were *Northwest Indian Cemetery Protective Association v Peterson* at District and Circuit Court levels, where the conclusion was that the road through the sacred High Country would not improve the economy or increase jobs or the amount of timber harvested,[906] and in *US v Means* which rejected a compelling interest in timber grazing and recreational interests.[907]

However, even where the compelling interest test is applied properly, there is still wide scope to find that the government interest is compelling in accordance with a different value system. The problem with the balancing test is that it is really comparing apples to oranges. Where a matter is viewed objectively in the eyes of the dominant culture, then the more-familiar values of property and development usually prevail.[908] The

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[903] 541 F Supp 785 (DSD, 1982) at 792.
[904] 408 F Supp 2d 866 (D Ariz, 2006) at 906.
[905] Ibid, at 907.
[906] *Northwest Indian Cemetery Protective Assoc v Peterson,* 565 F Supp 586 (ND Cal, 1983), *Northwest Indian Cemetery Protective Association v Peterson,* 795 F 2d 688 (9th Cir, 1986) at 694–5, *Northwest Indian Cemetery Protective Association v Peterson* 764 F 2d 581 (9th Cir, 1985) at 586–7
[907] 627 F Supp 247 (DSD, 1985) at 263. This case was different though in that it was not a situation where the government sought to develop or use the land in question at all, but simply refused a special use permit for the Lakota group.
[908] A comment was made in Marquez and Fishman, above n 733, that one is measuring dollars against an abstract religious interest and that utilitarian approaches emphasise the costs factors. See also Richard Collins, above n 23. As it was aptly put by Patrick Noonan in relation to the *Lyng* case, a tradition which places the highest reverence on natural resource development and land use would itself have no difficulty rationally tipping the scale in favour of constructing the road: Patrick Noonan, above n 33. The point has

danger of a balancing test that appeals to public interest is that public interest is usually defined in terms of what is in the interests of the majority,[909] and thus operates to defeat the religious concerns of the minority.

The balancing test in Australia under s 116 is far less onerous. The test is not framed as requiring a compelling interest and there appears to be no particular weight given to any factor.[910] The Indigenous cases have not reached the balancing stage.

Both Canada and New Zealand have a justification clause for infringing religious freedom, both framed as being *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*[911] This formulation does not impose a compelling interest test although the onus has been said to be on the party relying on the justification and a "stringent standard".[912] It is probably not dis-similar in form to the strict scrutiny test in the USA.[913] This will no doubt raise issues of what is valued more in a society or by the judges, and the same issues as for the US cases will arise.

Turning to the Indigenous sacred place cases in Canada, as mentioned above, the *R v Sioui* case saw the implied limits to freedom as being where the exercise of religion was incompatible with the occupancy by the Crown in a conservation park.[914] In that

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been made in another context that balancing tests are driven by the results sought to be achieved in West, above n 899. In an Australian context a similar point has been made by Frank Brennan in 'Land Rights: The Religious Factor' in Maxwell John Charlesworth (ed), *Religious Business: Essays on Australian Aboriginal Spirituality* (1998).

[909] A danger mentioned for instance in Gaze and Jones, above n 16.

[910] In the early major case of *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, the court did not articulate any precise test or place any onus on the government. It seemed to merely accept that freedom of religion was not absolute and could be subject to laws aimed at protection of the community and social order or the rights of others. In *Kruger v Commonwealth* (1996) 190 CLR 160 at 212, Gaudron J did suggest that a proportionality test may be appropriate, but did not need to spell that out. In *Aboriginal Legal Rights Movement v South Australia (No 1)* (1995) 64 SASR 551 at 556, Debelle J mentioned that it was necessary to maintain a balance between the legitimate interests of those who seek to pursue a course of conduct and those who have a religious belief which seeks to prevent the desired course of conduct. This did not purport to be part of a balancing test analysis for the purposes of the weighing up the limits to religious freedom, but can be an indication of the weight that may be given to the importance of forensic tactics ahead of coercion to act against religious beliefs.

[911] *Canadian Charter* s 1, *NZBOR* s 5.

[912] *R v Oakes* [1986] 1 SCR 103 at 136. A similar test or a slightly modified version of the *Oakes* test, has been applied in New Zealand, see Rishworth et al, above n 231, at 182–3; *Minister of Transport v Noort* [1992] 3 NZLR 260 at 271–273, 277–284; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [18] –[19]. The test provides that the objective to be achieved must be sufficiently important to override a constitutionally guaranteed right and the means chosen had to be reasonably and demonstrably justified. The means had to be carefully designed to address the objectives, to impair the freedom as little as possible and there had to be proportionality between the limiting effects and the objectives. The proportionality requirement meant that the more severe the effects, the more important the objective had to be.

[913] Though there has been comment about the inconsistent applications of *Oakes* and that courts have sought to "clarify" or, in effect, water it down: see Gerald A Beaudoin and Errol P Mendes (eds), *The Canadian Charter of Rights and Freedoms* (3rd ed, 1996), chapter 3; Andrew Lokan, 'The Rise and Fall of Doctrine Under Section 1 of the *Charter*' (1992) 24 *Ottawa Law Review* 163; Rishworth et al, above n 231 at 178–9, 188.

[914] [1990] 1 SCR 1025, at 1070.

case, the claim succeeded because there was no impending project or need for that part of the land to be used by the Crown. It may well have been different if the Crown had wanted to do something incompatible with the area.

In New Zealand, the *New Zealand Underwater Association Inc and Maruia Soc Inc v Auckland Regional Council and Ports of Auckland Ltd* case[915] was one that was decided under environmental and planning legislation requiring a balancing exercise. Despite the raising of an issue under s 20 dealing with religious and cultural freedom rights of minorities, there was no consideration of the balancing that would be required under s 5 of the *NZBOR* as the finding was that religious freedom was not infringed by the discharge of dredgings into the gulf against the precepts of the religion. Having found that there was an urgent need to dredge the area so as to maintain the deep water required for the port, the Tribunal examined the alternatives such as disposal of the dredgings on land and found that they were not reasonable. After claiming to weigh all the concerns, the grant of the dredging rights was affirmed with conditions being imposed to minimise impact. This case then did involve at least some consideration and recognition of the sacredness of the area and a desire to balance that in a respectful way, though, given the finding that there was no infringement of religious freedom, it appeared ultimately to be based on what weight the Tribunal gave to the religious interest on its own assessment of it and the assumed high weight given to the need for a port, all reflecting the values of the dominant culture.

A contrast can be seen in the terms of Article 18(3) of the *ICCPR* [916] where the discretion is ostensibly limited by listing the specific categories of interests which may override religious freedom, namely the limitations *necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others*.[917] On the face of it, this kind of clause may not include limitations based on economic gain or cost factors because property or development rights are not included in the list of fundamental rights and freedoms in the *ICCPR*.[918]

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[915] Unreported, Planning Tribunal, A131/91, 16 December 1991.
[916] Article 1(3) of the 1981 *Religion Declaration*, above n 423, seeking to elaborate on Article 18 of the *ICCPR*, has a similar limitation clause.
[917] This narrower limitation has been left out of the Canadian and New Zealand provisions and the ACT and Victorian provisions in Australia in favour of using only the more general justification clause.
[918] Although it is possible that these terms might be given a slightly wider meaning. Carolyn Evans, in discussing the *European Convention on Human Rights* which has a similar type of limitation clause to the *ICCPR* in Article 9(2), has referred to the relevant Court and Commission decisions which generally regard the rights and freedom of others as being those listed in the Convention, but notes that sometimes the vague use of terms suggests that it might go beyond those rights and freedoms, in Carolyn Evans, *Freedom of Religion,* above n 16, at 7.7.4.
General Comment 22 of the UN Human Rights Committee has argued that Article 18(3) should be strictly interpreted and no restrictions are to be allowed on other grounds, even national security, see UN Human Rights Committee, *General Comment 22,* above n 422. See also Tahzib, above n 232, and Donna J Sullivan, 'Advancing the Freedom of Religion or Belief through the UN *Declaration on the Elimination of Religious Intolerance and Discrimination*' (1988) 82 *American Journal of International Law* 487, noting the

11.5 Public and Private Spheres and the Trivialisation of Religion

Using the public secular – private religious dichotomy which underlies this thesis, religious exercise on one's private property fits in well with the "private" aspect of religion, with one's private property as an extension of one's person. This, however, does not suit a situation when the sacred place is on land owned by the government or third parties as that is either part of the public sphere or someone else's private sphere into which religion is not meant to intrude. The limited exceptions may be for public proselytising or public worship, traditional Christian activities that the courts are familiar with and accept as long as they do not unduly interfere with the aims of others. These too tend to be restricted to public places where the government does not have a particular competing use for the property.

Where the government owns the property, its use of its own land has come to be seen as its own private or "internal" affair. In *Lyng*, the government's construction of a road and grant of logging permits was equated to the situation in *Bowen v Roy* dealing with the government's internal use of a social security number,[919] which the Supreme Court in *Bowen v Roy* had in turn equated to an objection to the size or colour of the government's filing cabinets.[920] So the government's private sphere expands enormously to squeeze out the Indigenous religions to their own private confined spaces, which is not much use if the sacred places are not located there. In this scenario, any claim made to government land for religious activities, even if ancient and pre-existing, are treated as intrusions into a sphere where they do not belong and where they have to pass various tests to be considered justified.

The view of one's own property as "internal" may reveal traces of one's property as an extension of one's own individual person. Mary Ann Glendon[921] has traced the property

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narrowness of the limits, and the exclusion of national security as one of them. The UN Committee was of the view that the limitations could only be applied for the purposes for which they were prescribed and had to be directly related and proportionate to the specific need on which they are predicated. Special Rapporteur Krishnaswami came to a similar conclusion in his report and proposed a rule that any limits imposed on that freedom should be exceptional, confined in the narrowest possible bound prescribed by law and solely for purposes stated: Krishnaswami, above n 421.

[919] *Lyng,* 485 US 439 (1988) at 449–50.

[920] *Bowen v Roy,* 476 US 693 (1986) at 699–700. The dissenting justices in *Lyng* said that *Roy* could be contrasted because it clearly concerned external action in a public place, see Brennan J at 485 US 439 (1988), at 472. See also the criticism of applying the internal distinction in *Roy* to public land in *Lyng:* in Brian Brown, above n 483; Byler, above n 561; Falk, above n 565; Hardt, above n 567; McAndrew, above n 660; Brett Pritchard, above n 763; Ray, above n 711; Joshua D Rieveman, 'Judicial Scrutiny of Native American Free Exercise Rights: *Lyng* and the Decline of the *Yoder* Doctrine' (1989) 17 *Boston College of Environmental Law Review* 169; Lupu, above n 25.

[921] In Glendon, above n 136.

rights rhetoric in the USA to John Locke's views in his "*Second Treatise on Government*" where he spoke of the original "property" as the property in one's own person and identified property with individual natural rights into which the "government", which presumably included courts, should not interfere. The echoes are clearly there in O'Connor J's rhetoric in *Lyng*.

Within the government's own land, its internal sphere, the relative importance of the activities becomes less relevant as all that matters is what the government chooses to do. Religious activities are trivialised down to matters of personal choice, akin to choosing cabinet colours. The destruction of sites and of religions is treated similarly. This fits in with the earlier discussion[922] about religion being privatised to the extent that it is seen as a matter of personal preference or even taste. Religion in this context becomes something that is an idiosyncrasy to be indulged, but only as long as it does not impede the interests of the majority to any significant extent. Similar comments have been made about Indigenous sacred place protection.[923] Such religious values are not likely to hold much weight in any balancing against secular interests like the interests of economic development. In such battles between God and Mammon, the courts have clearly been of the view that Mammon must win.

The broader policy and jurisprudential issues are returned to in the concluding chapter after an examination in Part C of the treatment of sacred places when co-opted into the public sphere.

[922] In Chapters 4 and 9.
[923] See for instance, Rhodes, above n 7, at 58 has said that courts will indulge Native American religions when the costs to the government are minimal.

PART C – THE HERITAGE MODEL

Chapter 12 – Introduction to Part C

12.1 Overview: Types of Heritage Legislation

This Part C explores the other side of the public–private divide in which the possibility of sacred places within the public sphere is acknowledged in the form of places of religious significance within heritage law. However, what the legislative schemes and judicial reasons reveal is that when such a sacred place is recognised by law in the public sphere, it gets taken out of its context of religious faith and is instead required to satisfy tests designed and suited for Western secular values seen as appropriate for that public sphere. This is the realm of civil religion which may bear little resemblance to the actual religions whose heritage is sought to be preserved. The tests used have different principles from those for privatised religious freedom explored in Part B. Sometimes Indigenous sacred places can fortuitously pass the secular tests of heritage law but sometimes they fail because the tests are unsuitable for dealing with matters of faith.

As seen in the next chapter, all the countries studied have heritage laws that cover cultural heritage. This concept is, explicitly or implicitly, able to cover matters of religious/spiritual cultural significance. In most cases, the general heritage laws cover Indigenous heritage as well, so would include Indigenous sacred places. In addition, in some legislation, notably in Australia and New Zealand, there are specific statutes or specific mention within legislation of Indigenous places of significance. As a result, there are at least some laws in most of the jurisdictions studied that could provide protection for Indigenous sacred places, though the type and the timing of the protection varies substantially.

In all four countries, there are also environmental laws aimed at protecting environmental values for the general public. These are structured in a way to restrict the untrammelled use of private property in a manner which would damage the environment to the detriment of the wider society.[924] Some such laws also include

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[924] At least this is one perspective of environmental law. Those setting out a philosophy of environmental protection would usually prefer to see it as an aspect of a much wider perspective based on principles of sustainability: see eg, Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law* (2004); Maurice Evans, *Principles of Environmental and Heritage Law* (2000); Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (2005).

provisions which protect not only natural heritage but also cultural and archaeological heritage, thus arguably items that may be important for their religious, including Indigenous religious, heritage. This is because heritage places are seen as part of the environment.[925] Examples are also mentioned in the next chapter. In most cases, where the legislation incorporates requirements in relation to such cultural heritage, the descriptions, tests and principles are similar to that of the general or archaeological heritage, even if the precise methods or procedures for protection differ. Cases and interpretations concerning Indigenous sacred places under environmental legislation are also dealt with in this Part as the models are sufficiently similar to come within the general public heritage model.

Some of the conceptual difficulties are introduced below, but this is not to suggest that there are not alternative views of heritage that have become prominent in recent decades which emphasise the ownership of heritage by the people from whom it orginated. These views have been reflected in the language of many international studies of heritage, including in relation to Indigenous heritage. Some of these key trends are discussed in the concluding chapter of this thesis. As will be seen in this Part, however, these trends have not been reflected in much of the legislation or case law on Indigenous heritage.

12.2 Deficiencies of a Heritage Model that is Principally Public and Secular

12.2.1 Failure to Recognise Indigenous Values

Despite the existence of public heritage legislation, there are, as in the religious freedom cases (discussed in Part B) significant deficiencies in the ultimate protection that has been provided. There is no doubt that a major problem is the failure to accord sufficient value to the protection of Indigenous sacred places in the face of competing public interests. Unlike the situations discussed in Part B, many attempts to protect such places have failed at the balancing stage. What are of greater interest for this thesis, however, are the situations where unsuitable tests or arguments have been used, both in determining whether places might qualify for protection and in the

[925] Boer and Wiffen, above n 924 at 8, have said that heritage conservation can be seen as “an integral, albeit specialised, part of the broad sweep of environmental law”. This is also the thrust the argument in Maurice Evans, above n 924. See also Paul E Wilson and Elaine Oser Zingg, ‘What is America’s Heritage? Historic Preservation and American Indian Culture’ (1974) 22 *University of Kansas Law Review* 413.

process of arriving at such determinations when objective and secular values have been applied to places of religious significance.

No criticism of incorporating Indigenous heritage within the national or regional idea of heritage (what is considered "mainstream") is intended. Indeed the celebration and recognition of the importance of Indigenous heritage to the whole society in recent decades is a positive and essential move. The difficulties arise from one of the unnecessary but common consequences of this, that is, the requirement that in order to qualify for protection such Indigenous heritage must comply with the same secular Western rules and criteria as other general heritage.[926] The problem is that it is often not possible for religious significance and values to be protected adequately without recognising that such significance is religious in nature and subject to particular meanings and behaviours in accordance with the beliefs of a specific community, or even of a specific group within such a community.[927] This is exacerbated in the case of Indigenous values because they are not familiar to the makers or interpreters of the law. One size does not necessarily fit all.

The heart of the problem appears to lie in the origin of the models of heritage protection in the four countries in question. Heritage legislation was modelled on two major strands of heritage, the archaeological and the historic landmark styles of heritage, discussed below. While they might have some different aims and emphases, both have a strong public educational component and there is much similarity in the structures adopted, such as listing sites on a register.[928] Much of the early legislation dealing with

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[926] David Ritchie, for instance, has noted that legislation that conceives of Aboriginal heritage primarily as part of the heritage of the region or nation and is subject to assessment according to objectively applied criteria can never satisfy the aspirations of Indigenous people, in David Ritchie, 'Aboriginal Heritage Protection Laws: An Overview' in Julie Finlayson and Ann Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (1996). While Ritchie's criticism seems aimed more at archaeological heritage protection, the comments may be apt to general cultural heritage as well. The suggestion has also been made that the policies and laws then become contingent on the public values: Nigel Stubbs, 'What Can We Do You For? Naïve Conception of the Value of Indigenous Cultures and Communities' (2005) 6(10) *Indigenous Law Bulletin* 18. Couvalis and McDonald have also alluded to this issue in their concerns about the concepts of national and world heritage, whereby governments have control and make decisions and their interests also define heritage significance, in George Couvalis and Helen Macdonald, 'Cultural Heritage, Property and the Position of Australian Aboriginals' in Martin Chanock and Cheryl Simpson (eds), *Law and Cultural Heritage* (1996). Maureen Tehan has pointed to the Hindmarsh Island saga as demonstrating the problems with testing Aboriginal heritage according to the rules of the dominant world view: see Maureen Tehan, 'A Tale of Two Cultures' (1996) 21 *Alternative Law Journal* 10. Bridget Mosley in New Zealand has criticised the use of British legal terminology to describe and re-define Maori values and thus assimilate them, in Mosley, above n 204. In Canada, the comment has been made about the problems of continuing colonisation of Indigenous ways and the need for First Nations to adapt to Western concepts of heritage: see Catherine Bell and Val Napoleon, 'Introduction, Methodology and Thematic Overview', in *Protection and Repatriation of First Nations Cultural Heritage Research Project* (2006), University of Alberta Faculty of Law <http://www.law.ualberta.ca/research/aboriginalculturalheritage/intro.pdf>.

[927] Gelder and Jacobs have commented that when the sacred enters the public domain it becomes bureaucratic and compromised, in Gelder and Jacobs, *Uncanny Australia,* above n 33.

[928] Although the rationales may be similar, the precise processes available for protection under archaeological and general heritage legislation do differ, for instance, in whether protection is provided on a blanket basis or requires listing and identification first. Archaeological legislation tends to provide blanket

heritage concerned itself with either archaeological or relics-based heritage or else historical monuments.[929]

12.2.2 Aims and Problems of the Archaeological Model

Amongst the major aims of archaeology is the pursuit of scientific information about past cultures, eras and processes of changes. Archaeology records information to understand and explicate the past though scientific studies and materials, as an “objective” exercise.[930] The legislation for the protection of relics or archaeological objects and sites was designed to facilitate the retention of information to be studied and recorded. What has been important to archaeologists is to salvage items for research institutes and museum collections. The nature of the protection sought was to protect the areas and objects from bounty hunters who would deprive the world of the information.[931] The archaeological rationales have been heavily criticised in all the countries examined in this thesis as being unsuitable for protection of Indigenous

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protection to preserve all such objects, subject to permits to damage or move them. The general heritage preservation legislation is far more selective and usually requires places to be identified and listed before there is any effective protection. Environmental legislation provides yet another model without a listing of sites, but based on analysis of, inter alia, the impact of the project, although from the relevant case law discussed later, the courts have reverted to a similar site-based approach in many instances. These differences are not important for this thesis which deals with problems of the treatment of concepts of sacred place, as opposed to effectiveness of the enforcement of the legislation. The different protection and enforcement mechanisms are seen in the specific Indigenous heritage legislation dealt with in this Part, but the problems discussed apply equally to most of the different forms of heritage protection because of the common rationales and interpretations used in relation to the concepts of sacred places.

[929] See overview in Chapter 13.

[930] For example, see the discussions of the aims of processual archaeology as a science in Jacqueline Rossignol and Luann Wandsnider (eds), *Space, Time and Archaeological Landscapes* (1992) and especially in Lewis R Binford, ‘Seeing the Present and Interpreting the Past and Keeping Things Straight’ in Jacqueline Rossignol and Luann Wandsnider (eds), *Space, Time and Archaeological Landscapes* (1992). This also applied in Australia in the scientific views of archaeology in the 1960s and 70s: see Laurajane Smith, ‘Towards a Theoretical Framework for Archaeological Heritage Management’ in Graham Fairclough et al (eds), *The Heritage Reader* (2008). See also discussion of aims of this legislation in New Zealand in Waitangi Tribunal, *Te Roroa,* above n 31; Harry Allen, ‘Protection of Archaeological Sites and the NZ HPT Register of Historic Places, Historic Areas, Wahi Tapu and Wahi Tapu Areas’ (1994) 37(3) *Archaeology in New Zealand* 205.

An explicit statutory example is the Ohio legislation, in OHIO REV CODE ANN §149.54, referring to the archaeological society adopting rules to ensure that archaeological and salvage work is “conducted in a scientific manner” and in OHIO REV CODE ANN §149.51 referring to maintaining a registry of archaeological sites to ensure that “scientific knowledge about both prehistoric and historic North American Indian cultures is made available to the public and is not willfully or unnecessarily destroyed or lost”. See also South Dakota’s SD CODIFIED LAWS § 1-20-17 (2008) which refers to the public’s right to the knowledge to be derived and gained from the scientific study of archaeological resources, and Washington’s WASH REV CODE §§ 27.53.010 (2009) and Utah’s UTAH CODE ANN §9-8-301(1) (2009) in similar terms. This is otherwise often implicit in the types of people who can get permits for archaeological excavation.

[931] See Dennis Byrne, ‘Western Hegemony in Archaeological Heritage Management’ in Graham Fairclough et al (eds), *The Heritage Reader* (2008); Shelley Greer and Rosita Henry, ‘The Politics of Heritage: The Case of the Kuranda Skyrail’ in Julie Finlayson and Ann Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (1996); Bob Ellis, ‘Rethinking the Paradigm: Cultural Heritage Management in Queensland’ (1994) 10 Ngulaig; Waitangi Tribunal, *Te Roroa*, above n 31. For a discussion of the policies of museums and the conservation of objects, see Miriam Clavir, *Preserving What is Valued: Museums, Conservation and First Nations* (2002). The fear of pillage is specifically mentioned in North Carolina’s A*rchaeological Resources Protection Act of 1981*, at NC GEN STAT § 70-11(3) (2008).

sacred places because such legislation does not primarily seek to protect the spiritual values or integrity of the sites or landscapes where such material is found. These types of provisions completely ignore sacred places where there are no physical remains. Not only has the archaeological legislation been inadequate to protect many aspects of a living faith, but it has sometimes been positively harmful to Indigenous religions. For instance, the ownership of the material taken has often been vested in the government rather than the Indigenous communities whose ancestors owned it or, in the case of human remains, whose ancestors they are. This may, in fact, be seen by Indigenous people as authorising desecration and depriving them of their religion by taking away that which is sacred or cutting off access to such places and objects.[932] Far from recognising and catering for the fact that one is dealing with matters sacred to Indigenous people and their religions, the archaeological legislation is aimed at preserving items and sites for the information and education of the archaeological or historical professions and in turn for the wider public. In Australia, various members of the High Court confirmed these principles in *Onus v Alcoa* when it was held that the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972* was not passed for the benefit of Aboriginal people but to preserve archaeological and Aboriginal relics for the benefit of all Australians, or at least the general Victorian community.[933]

There have been many improvements in relation to issues of ownership of burial objects and human ancestral remains of Indigenous peoples, especially in the USA.[934] An analysis of these laws is beyond the scope of this thesis which concentrates on areas rather than objects. Almost all jurisdictions in the four countries have legislation dealing with archaeological objects including human remains, a far more extensive

[932] See critiques in Barry Morris, 'The Politics of Identity: From Aborigines to the First Australian' in Jeremy Beckett (ed), *The Past and the Present: the Construction of Aboriginality* (1988); Ritchie, above n 926; Greta Bird, *The Process of Law in Australia: Intercultural Perspectives* (1993); Fourmile, 'Aboriginal Heritage Legislation' above n 31; Dongoske and Anyon, above n 199; Rebecca Tsosie, 'Indigenous Rights and Archaeology' in Nina Swidler et al (eds), *Native Americans and Archaeologists: Stepping Stones to Common Ground* (1997); Gary White Deer, 'Return of the Sacred: Spirituality and the Scientific Imperative' in Nina Swidler et al (eds), *Native Americans and Archaeologists: Stepping Stones to Common Ground* (1997); Swan, 'Spots of the Fawn', above n 40; Suagee, 'Mother Earth's Caretakers', above n 36; Francis P McManamon, 'Cultural Resources and Protection under United States Law' (2000–1) 16 *Connecticut Journal of International Law* 198.

[933] (1981) 149 CLR 27, per Gibbs CJ at 34–35, Stephen J at 39–40, Aickin J at 48–49, Wilson J at 59–60.

[934] Such as in the US *Native American Graves Protection and Repatriation Act 1990,* 25 USC §§ 3001–3013 (2006) ("*NAGPRA*") and also state legislation that has implemented such principles. For the history and changes in the federal US legislation, see summaries in Patty Gerstenblith, 'Identity and Cultural Property: The Protection of Cultural Property in the United States' (1995) 75 *Boston University Law Review* 559; John H Jameson Jr, 'Cultural Heritage Management in the United States: Past, Present and Future' in Graham Fairclough et al (eds), *The Heritage Reader* (2008); Dean B Suagee and Karen J Funk, 'Cultural Resources Conservation in Indian Country' (1993) 7(4) *Natural Resources and Environment* 30; Tsosie, 'Indigenous Rights and Archaeology', above n 932; Larry J Zimmerman, 'Remythologizing the Relationship between Indians and Archaeologists' in Nina Swidler et al (eds), *Native Americans and Archaeologists: Stepping Stones to Common Ground* (1997). There is a listing and overview of much of the US state legislation in Christopher Amato, 'Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage' (2002) 27 *Columbia Journal of Environmental Law* 1; Gerstenblith, 'Identity and Cultural Property', above n 934.

coverage compared with the legislation to protect sites of cultural or religious significance. Perhaps this is because archaeological objects are small and discrete, not likely to cause major land-use conflicts, and so are more politically palatable.[935] Perhaps too it is the acceptability of protecting scientific and historical research aims for the whole community.

12.2.3 Aims and Problems of the General Heritage Legislation Model

While the rationales of the general cultural heritage legislation have differed from the archaeological legislation, they have still primarily been to satisfy the values and interests of the public, as envisioned by the majority, rather than to protect or facilitate the interests of the various communities whose efforts or beliefs gave rise to the heritage.[936] The early aims sought to represent and enhance patriotism and national pride, with preservation of historic monuments commemorating famous people and events or great artistic or architectural feats. The choice for preservation was often based on a ranking system designed to preserve what was regarded as the "best of its kind".[937] This was summed up well as the critique of heritage in the United Kingdom as being the "historicised image of the Establishment".[938]

In the 1960s and 1970s, the heritage movement expanded at an international level and generally in the Western world, including in the four countries in question. The earliest pieces of general heritage legislation appeared in USA and Australia and eventually spread through all the four countries by the 1990s, an overview of which is provided in the next chapter. During this time a wider concept of heritage developed which took into account social and cultural significance and the less grandiose features of history, such as the preservation of industrial buildings or sites or buildings associated with ethnic or other minorities.[939] In such instances, the aim was to find samples that were "representative" and informative rather than the most attractive or spectacular. There

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[935] This type of legislation often had little effect on private property rights as the aim was usually to salvage and remove objects but not to cause long-term disruption in the use of the area by others. In such cases blanket protection of all such objects or sites could be imposed, subject to the removal of the protection by use of the discretion of a government body or person. Such discretion was usually aimed at checking the legitimacy of the credentials of the person seeking the permit, that is, the professional nature of the project rather than private looting: see eg, the discussion of the aims of the US *Antiquities Act* in McManamon, above n 932.

[936] See discussion in articles such as Byrne, 'Western Hegemony", above n 931.

[937] See Chris McConville, '"In Trust"?: Heritage and History' (1984) 16 *Melbourne Historical Journal* 60.

[938] Graeme Davison, 'The Meaning of Heritage' in Graeme Davison and Chris McConville (eds), *A Heritage Handbook* (1991). See also Barbara Bender, 'Stonehenge: Contested Landscape (Medieval to Present-Day)' in Barbara Bender (ed), *Landscape, Politics and Perspectives* (1993).

[939] See summaries of the history of heritage attitudes in Graeme Davison and Chris McConville (eds), *A Heritage Handbook* (1991); Maurice Evans, above n 924; Harry Allen, *Protecting Historic Places in New Zealand* (1998); Boer and Wiffen, above n 924. Also see Nick Merriman, 'Understanding Heritage' (1996) 1 *Journal of Material Culture* 377, referring to this move in all the four countries.

was never any consideration of preserving everything, nor could there be. While the aims expanded beyond the retention of great works, or monuments to great people or events, the aims have still been very much about creating unifying myths, narratives and identities, at a national or regional level.[940]

The general heritage legislation and principles incorporate some of the same educational aims of archaeology, that is, scientific analysis and preservation of information about the past for the purpose of knowledge and understanding,[941] such as through retaining evidence of great people and events and samples of different historical periods and different communities. There is another kind of education, maybe more appropriately referred to as indoctrination, in the creation of identity and stories about who "we" are and have been. Some have also touted the benefits of heritage preservation for tourism and for recreation.[942] Finally, there is the enrichment value of heritage seen in the appreciation of the intrinsic values of some heritage items for their own sake.[943] This is obvious in the case of items of aesthetic or artistic significance or natural heritage, especially in principles behind protecting pristine environments, but it

[940] As just one example, the *New York State Historic Preservation Act 1980*, in its declaration of purpose at NY PAR LAW § 14-01 (2009), refers to historical, cultural and other heritage offering residents "a sense of orientation and civic identity" and of the purpose of fostering civic pride. See also the discussion of this purpose at a Canadian level in Brian S Osborne, 'Landscapes, Memory, Monuments and Commemoration: Putting Identity in its Place' (2001) 33(3) *Canadian Ethnic Studies Journal* 39 and, in Australia, in Davison, 'The Meaning of Heritage', above n 938; Graeme Davison, 'Patrimony to Pastiche' in Graham Fairclough et al (eds), *The Heritage Reader* (2008); McConville, 'In Trust?', above n 937; Byrne, Brayshaw and Ireland, above n 29. The National Estate Committee of Inquiry ("Hope Inquiry") in *National Estate: Report of the Committee of Inquiry* (1974) spoke of National Estate items inculcating "a sense of pride in being Australian". A New Zealand discussion can be found in Mosley, above n 204. For the US, see Wilson and Zingg, above n 925. See also Lyndel V Prott and Patrick J O'Keefe, *Law and the Cultural Heritage* (1984), vol 1; Lakshman Guruswamy, Jason C Roberts and Catina Drywater, 'Protecting the Cultural and Natural Heritage: Finding Common Ground' (1999) 34(4) *Tulsa Law Journal* 713. This has also been set out in relation to the British heritage: eg, Stuart Hall, 'Whose Heritage? Unsettling "the Heritage", Re-imagining the Post-nation' in Graham Fairclough et al (eds), *The Heritage Reader* (2008). This also applies to depictions in museums: eg, Michael L Blakey, 'American Nationality and Ethnicity in the Depicted Past' in Peter Gathercole and David Lowenthal (eds), *The Politics of the Past* (1990); Clavir, above n 931.

[941] See clause 2.1 in the Guidelines for Cultural Significance adopted by the Australian ICOMOS in 1984 and subsequently revised in 1988, [Australian ICOMOS, *Guidelines to the Burra Charter: Cultural Significance* (1988)], which speak of places that are likely to be of cultural significance as those places which "help an understanding of the past" or "enrich the present". Similarly, Davison describes how what makes a building of historic significance is the light that it can throw on the past, not as antique or shrine, but as a document, in Graeme Davison, 'What Makes a Building Historic' in Graeme Davison and Chris McConville (eds), *A Heritage Handbook* (1991). The development of education is specifically listed as one of the aims in West Virginia's W VA CODE § 8-26A-1(c) (2009) and in Wisconsin's WIS STAT § 44.30 (2009). See also New Brunswick's *Municipal Heritage Preservation Act*, S.N.B. 1978, c. M21.1 at s 2. The *Alaska Historic Preservation Act*, ALASKA STAT §41.35 (2009) at 41.35.230 refers to historical resources providing "information pertaining to the historical or prehistorical culture of people in the state as well as to the natural history of the state".

[942] Such as in the Hope Inquiry, above n 940, where such values were described as a supreme justification for conservation of the National Estate. See an English discussion in Bender, 'Stonehenge' above n 938. The *New York State Historic Preservation Act 1980,* in its declaration of purpose at NY PAR LAW § 14-01 (2009), refers to the economic benefits to the state of historic preservation and includes as one of the purposes of the preservation, enhancing "the state's attractions to tourists and visitors". A similar sentiment has been stated in West Virginia's W VA CODE § 8-26A-1(c) (2009).

[943] See an argument for intrinsic values of heritage in Sarah Harding, 'Value, Obligation and Cultural Heritage' (1999) 31(2) *Arizona State Law Journal* 291; Guruswamy, Roberts and Drywater, above n 940. Wilson and Zingg, above n 925 also take the view that the concerns of historic preservationists are for the impact of history on the quality of contemporary human life, not for enlargement of knowledge per se.

is sometimes extended to the value of cultural diversity to the society as a whole, such as the value in simply knowing that such cultures exist.[944] This is reflected in the idea that diversity in itself is good for society, that society would be poorer if certain cultures such as Indigenous ones were to disappear.[945] It has been argued that communities and their religions are in themselves as much resources as are minerals and timber.[946] There is an ethic behind this, similar to what has been described as the ethic of biodiversity of species, that is, that the earth is shared by a variety of forms of life and cultures that each deserve respect regardless of whether they are of value to anyone else, and that no one can claim the earth solely as their own.[947] Here too is the principle of reciprocity where the protection of others' places enhances one's own sense of integrity and sense of place.[948] This principle carries obligations to preserve such heritage items and places for the benefit of future generations.[949] However, intrinsic significance may be very different for the community whose culture or religion it concerns and their identity and survival may often be dependent on the continuing maintenance of their heritage.

Assessments of heritage places are inevitably influenced and thus biased by the perceptions of the people making the assessments, in many cases being heritage professionals[950] or political appointments. What is selected as "heritage" is often contested, but generally the contest favours the "mainstream" or dominant cultures.[951] The express purpose was to select and preserve places which "we" (that is, the society as a whole or the "general public") want to keep or what "we" value, that is, the aim was to protect commonly held cultural values.[952] For example, the expansion to cover heritage of ethnic minorities, was often aimed at celebration of a national identity

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[944] See Guruswamy, Roberts and Drywater, above n 940; Harding, above n 943; Guinn, *Faith on Trial,* above n 16; Sinacore-Guinn, above n 17. The issue of cultural diversity is returned to in the concluding chapter.

[945] See Robert S Michaelsen, 'Law and the Limits of Liberty' in Christopher Vecsey (ed), *Handbook of American Indian Religious Freedom* (1995); Gordon, above n 133; US Department of the Interior, *AIRFA Report*, above n 8.

[946] Robert Ward, above n 152.

[947] See Commonwealth of Australia, Department of the Environment, Sport and Territories, *National Strategy for the Conservation of Australia's Biological Diversity* (1996). Moustakas has based his argument on the intrinsic right of a group to exist and flourish, in John Moustakas, 'Group Rights and Cultural Property: Justifying Strict Inalienability' (1989) 74 *Cornell Law Review* 1179. Mose has referred to the comment of the jurist Grotius that the destruction of sacred objects shows contempt for humanity, in Mose, above n 427.

[948] An argument put by Ragsdale, above n 733.

[949] Australian Heritage Commission, *Protecting Heritage Places Information and Resource Kit: 10 Steps to Help Protect the Natural and Cultural Significance of Places* (2000).

[950] See, for example, Davison, 'Patrimony to Pastiche', above n 940. There is a critical exploration of the role of professional archaeologists in the heritage system in Laurajane Smith, above n 930.

[951] Brian Osborne, above n 940; Stuart Hall, above n 940; Byrne, Brayshaw and Ireland, above n 29; Jim Russell, 'Debating Heritage: From Artefacts to Critical Perception' (1993) 24 *Australian Geographer* 12; Mosley, above n 204; Harry Allen, *Protecting Historic Places ,* above n 939; Brian Graham, 'Heritage as Knowledge: Capital or Culture' (2002) 39(5/6) *Urban Studies* 1003.

[952] See Trapeznik and McLean, above n 160, at 15; Hope Inquiry, above n 940.

marked by diversity of origin. The Burra Charter in Australia[953] speaks of places of cultural significance reflecting the diversity of “our communities”, telling us about who “we” are and the past that has formed us and the Australian landscape. The term “we” is extended in particular not only to the present but also future generations for whom heritage must be retained and preserved.[954]

The next overview chapter discusses the various criteria used for cultural or social significance. Questions of to whom heritage is significant and the assessment of significance are addressed in more detail in Chapters 14 and 17. These show that the general statements for the protection of heritage are framed to reflect the values of the wider public. At an international level, the concept of world heritage expanded the term “we” to all of humanity, with use of terms like “the common heritage of humankind”.[955] International declarations similarly spoke of duties of international cooperation to spread knowledge and culture for the education of humanity.[956] However, the fact that the selection of the heritage reflects dominant values means that there is a tendency to define the views of the Establishment as the common values of the whole society. Furthermore, the criteria and aims of heritage have been framed as objective and

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[953] The Charter of the Australian National Committee of ICOMOS, the International Council on Monuments and Sites, adopted first in 1979 but revised, most lately in 1999. It is found at Australian ICOMOS (International Council on Monuments and Sites), *Charter for the Conservation of Places of Cultural Significance (Burra Charter)* (1999), ICOMOS <http://www.icomos.org/burra_charter.html>.

[954] Ibid. In Maurice Evans, above n 924, at 31, reference is made to H S Perloff's description of heritage preservation, in H S Perloff, *Planning for the Post Industrial City* (1980), as a conscious decision to maintain certain assets for future generations. Similar sentiments have been expressed in other countries, such as in the USA in the preamble to the *National Historic Preservation Act of 1966,* 16 USC § 470, which speaks of the “spirit of the nation” reflected in the heritage and that it should be preserved as a “living part of *our* community life and development in order to give a sense of orientation to *the American people*” and for its legacy to be “maintained and enriched for future generations of Americans”. In Kentucky, for example, KY REV STAT ANN § 42.705(4) (2009) refers to “what things we hold to be important to us”. See also examples of such sentiments in Australian Heritage Commission, *Australia's National Heritage: Options for Identifying Heritage Places of National Significance* (1997).

[955] For example, in the reference to ancient monuments as “a common heritage” in the Preamble to the *International Charter for the Conservation and Restoration of Monuments and Sites* (“Venice Charter”) (1964), adopted by the 2nd International Congress of Architects and Technicians of Historic Monuments and by the International Council on Monuments and Sites (ICOMOS) in 1965; the reference to the “cultural heritage of all mankind” in the Preamble to the 1954 *Hague Convention*, ie United Nations, *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954) and in the UNESCO, *Declaration on the Principles of International Cultural Cooperation* (1966), in Art 1; and in the reference to “world heritage of mankind as a whole” in the Preamble to UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage* (“*World Heritage Convention*”) (1972). Similar language was also used in the Preamble of the *World Heritage Convention* which speaks of the disappearance of any item of cultural or natural heritage as a “harmful impoverishment of the heritage of all the nations of the world”, see *World Heritage Convention,* above. Similarly, the Operational Guidelines for the *World Heritage Convention* speak in terms of heritage of outstanding universal importance transcending national boundaries to be of common importance for all humanity: UNESCO, *Operational Guidelines under World Heritage Convention* (2005) at [49]. See also the discussion of the concept of “the common heritage of humankind” in international developments in Boer and Wiffen, above n 924, especially at 27–28. It has been argued that this in effect has resulted in Western heritage values being imposed on a non-Western world: see Rodney Harrison, ‘The Politics of the Past: Conflict in the Use of Heritage in the Modern World’ in Graham Fairclough et al (eds), *The Heritage Reader* (2008).

[956] Such as UNESCO, *International Cultural Cooperation*, above n 955, especially in the Preamble and Art IV.

generally applicable and thus secular rather than sectarian.[957] In the USA in particular, due to the Establishment Clause, the aims of such heritage protection must explicitly be secular and non-religious.[958]

Many of the comments about the "public" and "secular" nature of non-Indigenous heritage could apply equally to Indigenous heritage schemes. Apart from a few exceptions which are covered in the next chapter, the general concept of heritage is intended to encompass Indigenous heritage places, including those of religious significance. This is particularly so in much of Canada and the USA which lack the specific Indigenous heritage legislation of the kind developed in Australia. The rationales and models for Indigenous heritage protection in those general schemes are, therefore, the same as for the general and archaeological heritage, that is, for the information, ideals and interest of the wider public, not specifically for the benefit of Indigenous communities.

12.2.4 Making the Private Public and the Contest between Private Property and Public Heritage

Not only does heritage belong in the public sphere in Western thinking, it is seen as belonging to the public or society as a whole. The heritage preservation process has been described by Graeme Davison as "asserting a public or national interest" in things "traditionally regarded as private",[959] in other words, making private property public. Chris Johnston has also referred to the process of preserving places with social value as challenging the conception of place and space as "primarily private rather than public".[960] Similar effects on private property come about through environmental protection laws.[961] None of this necessarily involves a change of legal ownership, as heritage property is often still in private hands, but it does substantially encroach on the legal rights of such private owners in relation to their property. In this way, heritage protection is seen as an aberration from the norm and a specific limited exception carved out for the public from the rights of private property. The setting of "just bounds"

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[957] See criticism that preservation of sacred sites is reduced to a secular issue, in Cummins and Whiteduck, above n 196. Clavir also discusses the extent to which public museum policy is based on Enlightenment principles, emphasising their secular, scientific and European nature: see Clavir, above n 931.

[958] See 5.2.3 above and 14.4.2 below.

[959] Davison, 'The Meaning of Heritage', above n 938; Davison, 'Patrimony to Pastiche', above n 940.

[960] Chris Johnston, *What is Social Value? A Discussion Paper* (1992).

[961] See Coyle and Morrow, above n 924; Maurice Evans, above n 924; Tsosie, 'Tribal Environmental Policy', above n 133.

between the public sphere and the private in this area, as between religion and the state, is also highly contested.[962]

The contest between private property rights and public interest in heritage applies at least as much in the case of Indigenous heritage. Unlike the religious freedom model for Indigenous sacred places in Part B, the heritage model produces many instances where the assessors or courts have had to balance competing interests of property and heritage and in many of these situations the interest in protecting particular sacred places has been overridden.[963] In this way, Indigenous places are subject to the same

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[962] For a discussion of the battle between heritage protection and the unfettered ability to develop land, see Simon R Molesworth, 'Barbarians at the Gate of the Garden of Eden – Revisted: Heritage Protection Foundation for the New Millennium' in Paul Leadbeter, Neil Gunningham and Ben Boer (eds), *Environmental Outlook No 3, Law and Policy* (1999) at 222–47. Ruth Davis, 'Heritage: Opening the Castle to the Public' in Martin Chanock and Cheryl Simpson (eds), *Law and Cultural Heritage* (1996), presents some case studies in New South Wales on the "clash between private and public interests", as does Harry Allen, *Protecting Historic Places,* above n 939. The report of the Hope Inquiry in Australia in 1974 also characterised the public interest in conservation as being against immediate private interests: Hope Inquiry, above n 940. Examples of opposition to early heritage legislation in England, due to its infringement on private rights, is presented in Bender, 'Stonehenge' above n 938, where she discusses the eventual compromise of the National Trust blurring the distinction by privately owning heritage buildings for the public. It has been suggested that both heritage and environmental law reflect the choices of a community to limit public (as in government) and private rights in a wider public interest: Maurice Evans, above n 924. Coyle and Morrow, above n 924, acknowledge this perception, though they propose a different way of looking at environmental law and private property.

[963] Some of the history of the lack of federal ministerial declarations under *ATSIHPA* have been given in Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (1996); Department of Aboriginal Affairs, *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984: A Review* (1986). Accounts of various consents by the Minister to damage heritage under the Western Australian legislation have been summarised in Tracey Chalconer, *Aboriginal Heritage Act 1972: A Clash of Two Cultures: A Conflict Between Two Laws* (2004).

In New Zealand, decisions of the Environment Court under the *RMA* have often weighed Maori spiritual interests in protecting wahi tapu against other interests in development and supported the latter. These are too numerous to list but some notable comments include those made by Baragwanath J in the High Court in *Ngati Maru Ki Hauraki Inc v Kruithof* [2005] NZRMA 1, 20 that the Court should not give any more uncertainty and delay to Kruithof that would "deprive him of the right of a British subject to be left alone in the peaceful possession of his property". In *Glendon Trust Partnership, Wellington Regional Council, Rangitaane O Wairarapa Iwi Authority and Te Unu Unu IC3 Ahu Whenua Trust and Smith v Carterton District Council* (Unreported, Environment Court, W97/2000,14 December 2000), the Environment Court said at 21, in words reminiscent of the *Lyng* decision of the US Supreme Court discussed in Part B, that to stop development on the site for spiritual and cultural reasons would disenfranchise the Trust from *the use of its own land* in an entirely legitimate manner. Similarly in *Canterbury Regional Council v Waimakariri District Council* [2002] NZRMA 208, the Environment Court expressed concern about the request being in effect to "sterilise" a large amount of land from further use, at [56].

There have at the same time been decisions favourable to Maori interests which include cases such as *CDL Land New Zealand v Whangarei District Council* (Unreported, Environment Court, A099/96, 25 November 1996), concerning rezoning of rural land to residential; *Tainui Hapu v Waikato District Council & TV3 Network Service Ltd* (Unreported, Environment Court, A75/96, 21 August 1996), which was upheld on appeal to the High Court in *TV3 Network Services Ltd v Waikato District Council & Tainui Hapu* [1998] 1 NZLR 360, concerning the building of a TV transmitter but without considering other more expensive locations; *Mason-Riseborough v Matamata-Piako District Council* (Unreported, Environment Court, A143/97, 11 December 1997), where it was said that the benefit to the community in having better cell phone reception must be weighed against cultural sensitivity and that technology must give way to culture.

A similar balancing process has been undertaken in the USA in relation to statutes like the *NHPA* and the *NEPA*. The role of these agencies is to consult and consider matters, but they ultimately make the decisions and there are very few examples of projects being stopped following full consideration. The cases brought by Indigenous peoples which have succeeded have largely done so on procedural grounds and the relief has been temporary. Failed appeals against decisions permitting development over the wishes of Indigenous groups to protect their sites include *New Mexico Navajo Ranchers v Interstate Commerce Commission,* 850 F 2d 729 (DC Cir,1988); *Native Americans for Enola v US Forest Service,* 832 F Supp 297 (D Or, 1993); *Apache Survival Coalition v US,* 21 F 3d 895 (9th Cir, 1994); *Muckleshoot*

pressures and treatments as other public heritage in the balancing process, but they suffer the greater difficulty of lesser weight being given to the relevant beliefs simply because they are not shared by the decision makers.[964] For these reasons, Indigenous heritage legislation has been described not as a protective mechanism but as a means to facilitate the destruction of heritage.[965] It is beyond the scope of this thesis to analyse the ways competing interests have been balanced. Of greater relevance is how, as in Part B, the concerns about impacts on existing or potential property interests have shaped the questions of whether a place is regarded as falling within the terms of the heritage legislation in the first place. The analysis in Part C shows how, through arguments for a smaller size of site, for a longer tradition or for a higher standard of proof of significance,[966] proponents of development have tried to exclude inconvenient sacred places from the application of heritage legislation.

This Part shows that, unlike most other areas of public heritage, the arguments used against protection also include accusations of Indigenous people using heritage as attempts at privatisation, with imputations of improper private motives of “land grabs”. These echo characterisations of religious values as “intrusions” into the pubic sphere where they do not belong. In this way, arguments about separation of spheres become additional arguments to reduce the impact of sacred places on development and property rights.

Such arguments have also been used by advocates for Indigenous rights in an affirmative way. There have been calls to pass control of sacred places from public authorities to Indigenous peoples to enable them to define what is sacred for them and how it should be treated, a matter that is discussed later in Part D.

Indian Tribe v US Forest Service, 177 F 3d 800 (9th Cir, 1999); *Pit River Tribe v Bureau of Land Management,* 306 F Supp 2d 929 (ED Cal, 2004).

In Canada, there have been many cases concerning injunctions to prevent logging and other developments, especially in British Columbia, but most of these have failed and the courts have found that the inconvenience to developers has outweighed that to Indigenous peoples. Examples that reached the Court of Appeal in British Columbia include *Lax Kw'alaams Indian Band v British Columbia (Minister for Forests)* [2004] BCCA 392; *Hill v Minister of Small Business* [1999] 2 CNLR 181. Different results on an interlocutory basis, however, were reached in *International Forest Products Ltd v Pascal* [1991] CanLII 2343 and in *MacMillan Bloendel v Mullin* [1985] 2 CNLR 26. A survey of some of the major cases is included in Ross, above n 24, who has been critical of the greater value given to economic interests.

[964] Illustrations of these difficulties are provided in Chapter 17. Frank Brennan, in ‘Land Rights’ above n 908 commented that when the state determines the weighting to be given to the religious factor in the Aboriginal relationship to land, there will always be grounds for objecting that the decision maker has wrongly weighted that factor against criteria which are not more objective, but simply more comprehensible and appealing to the decision maker. He described the decision makers as “non-believers whose economic or national interests are presumed sacrosanct” because these interests are the ones held by the decision makers.

[965] Ritter, above n 822; Chalconer, above n 963.

[966] See Chapters 15 to 17.

12.3 Summary and Outline of Part C

Part D discusses the important, though relatively recent, conceptual advances in Indigenous and other heritage philosophy. The problem that remains, as set out in this Part, is that most laws in the four countries have not caught up with these changes and are still based on older models.

In the study of the legislation, reports and cases in this Part, it can be seen that there is a range of different philosophies reflected in heritage legislation specifically covering Indigenous places of religious significance, and also differences in the aims and wording of the specific Indigenous heritage protection legislation and models used. Nevertheless, the overall structure of the relevant Indigenous heritage legislation is similar to the general heritage and archaeological legislation and often appears within the same statutory schemes. An example is the use of a similar model of identifying sites or areas of significance and protecting them. Even though laws may ostensibly be aimed at protecting places that are of significance to Indigenous peoples, the tests applied are often those appropriate for the "secular" general heritage values based on information and benefit to the wider public rather than on respect for and protection of religious values and beliefs of the relevant Indigenous community. At the heart of the issue is the question of whose heritage is being protected and why. The Australian courts, dealing with specific Indigenous legislation, have nevertheless referred to the heritage as that of the Australian community as a whole. There have been attempts in more recent legislation to recognise issues of Indigenous ownership and control of their own heritage, but, as discussed in this Part, these still fall far short of a different model and are not necessarily sufficient to overcome the difficulties displayed in the actual cases.

As will be seen, while some might secretly disapprove of the sacred intruding into the public sphere and some might more openly fear the legal implications of too much public heritage intruding into the private sphere, there is a real problem in the failure of the lawmakers to move beyond the limitations of their imagination or desires in order to fashion protection for religious beliefs within the traditional public sphere.

Despite the major differences in legal treatment between a privatised view of religious freedom and a secularised view of public religious heritage, there is one major contest that both have in common and which is one of the strongest underlying motives for limiting the relative space available for the sacred in both viewpoints. It is the contest with the most sacrosanct of places in the law of the four countries, that of private

property rights. In the law of heritage protection, as in the law of religious freedom, private property has not been taken into account only at the "balancing of interests" stage but in shaping the elements of what qualifies for protection in the first place. It is the jealous protection of these private property rights from a very uncertain and subjective reach of the "Indigenous sacred" that provides incentives to limit the protection of those places, with principles and concepts that satisfy a narrower heritage model than one which simply protects all sacred places.

Part C analyses the problems caused by expectations for sacred places to satisfy the same criteria as secular public heritage. In the next chapter, there is a brief contextual overview of the types of legislation that purport to protect Indigenous sacred places. There is an examination of the rationales of the heritage legislation in Chapter 14 and then in following chapters, a closer analysis of some of the key issues that have caused difficulties for Indigenous sacred places. These include the concept of a site and boundaries to it,[967] questions of tradition and antiquity,[968] issues of assessment of sacredness and desecration with tests of objective truth, as well as issues of natural justice and confidentiality in the open testing of claims.[969]

The issues discussed in this Part are of course not the only areas of concern in the application of Indigenous heritage provisions, but are the main ones relevant to the inability to handle the concepts of Indigenous sacred places under a system designed for a regional or national "public" and "secular" sphere.

[967] In Chapter 15.
[968] In Chapter 16.
[969] In Chapter 17.

Chapter 13 – Overview of the Relevant Law Relating to Indigenous Sacred Places under the Heritage Model

The laws relating to heritage and environmental protection in each of the four countries derive from ordinary statutory provisions. Each country has a type of heritage legislation that can provide some protection for Indigenous sacred places, although the nature and style of legislation often varies substantially. Arguably the strongest form is the type of statute that specifically makes it an offence to damage Indigenous places of significance, whether declared or registered or not, unless permission is given to allow such damage.[970] There are also weaker forms, such as typical general heritage statutes that give discretion to government authorities to list places of significance, which then allow them to be protected,[971] or "environmental style" legislation where heritage issues are to be considered in an approval process.[972] There are slight variations on each of these models.

In general terms, most of these models derive from the style of archaeological and landmark heritage legislation discussed in the previous chapter or use similar basic principles. As this Part demonstrates, despite the significant differences in the types of "heritage model" legislation, there are commonalities which reflect the problems of dealing with Indigenous sacred places within a model designed for the general public sphere.

These specific problems and the statutory provisions that give rise to them are discussed in more depth in the remaining chapters in this Part. This chapter provides an overview of the main types of statutes[973] in each country, briefly outlining the main differences in the form of the statutes, in order to set the legal context for the particular issues to be discussed.

13.1 Australia

[970] Such as in the "blanket protection" style of legislation in many of the Australian jurisdictions discussed in 13.1.1 below; and in California, Connecticut and Nevada in the US summarised in 13.3.1 below.
[971] Found in some of the Indigenous-specific NSW and federal legislation in Australia: see 13.1.1 below, and in the British Columbia legislation in 13.4; also in the general heritage legislation in all the countries.
[972] Notably in New Zealand: see 13.2 below; and in most of the general environmental legislation in most of the jurisdictions. This is also the effect of the US federal heritage and environmental legislation: see 13.3 below.
[973] In addition to the main Indigenous heritage, general heritage and environmental legislation, there may be many statutory provisions governing such things as discretionary approvals, where the sacredness of a place to Indigenous peoples may be a public interest consideration, but these are not covered in this Part which deals only with the main models of heritage protection legislation.

13.1.1 The Indigenous-specific Provisions Covering Sacred Places

Separate Indigenous Legislation or Indigenous Provisions in General Heritage Legislation

Out of the four, Australia is the country with the most specific pieces of legislation aimed at protecting Indigenous places of significance, including sacred places. This form of legislation dates from the early 1970s and is now found at the federal level and in legislation in all of the states and territories except Tasmania.[974] These appear either as legislation dealing only with Indigenous heritage or else as Indigenous-specific sections within general heritage legislation.[975] Prior to the 1970s and subsequently, there were a few statutes that dealt with areas that could incidentally be Indigenous sacred places but the protection offered was for purposes of archaeological or historical reasons and some of these concerned primarily the protection of *objects* associated with Aboriginal history.[976]

The first piece of legislation that specifically protected places for their significance to Aboriginal people was the Western Australian *Aboriginal Heritage Act of 1972*. That Act followed the old form of archaeological legislation but extended the coverage to, inter alia, sacred sites. This and other legislation of its kind in Australia typically provided protection to places of significance to Indigenous people which went further than sacred places but would clearly include those sacred places. While there have been many variations within the general structure, all of the Australian statutes dealing with

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[974] The relevant statutes in existence are the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) *('ATSIHPA'); Northern Territory Aboriginal Sacred Sites Act 1989* (NT)*; Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 1988* (SA)*; Aboriginal Heritage Act 2006* (Vic); *Aboriginal Heritage Act 1972* (WA). Space does not permit a summary of the specific statues or their provisions. A summary of these can be found in Boer and Wiffen, above n 924; Butterworths, *Halsbury's Laws of Australia*, Title 5 (III), [5-1032] to [5-1750] (Aboriginals and Torres Strait Islanders: Cultural Heritage), LexisNexis <lexis.com>; Evatt, *Review,* above n 963.

[975] In the *Heritage Act 2004* (ACT) and the part of the earlier legislation it replaced, the *Land (Planning and Environment) Act 1991*(ACT) (relevant sections now repealed); *National Parks and Wildlife Act 1974* (NSW), the Indigenous provisions only appeared within a general statute. There are also specific Indigenous heritage provisions in the more general *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC'*). The other jurisdictions (other than Tasmania) all have specific Indigenous-heritage statutes.

[976] The earliest piece of legislation in Australia that protected places which could be considered as sacred to Indigenous people, the *Northern Territory Native and Historical Objects and Areas Preservation Ordinance*, as amended and re-named in 1961, extended the protection from objects only (as in the original 1955 version of the Ordinance) to limited sites where there were human or other ancient remains or to places which were or had been used by Aboriginal natives as ceremonial, burial and initiation grounds, in s 9H of the legislation. It also allowed the Administrator in Council to prescribe areas for protection or declare areas as prohibited areas, in s 9A. It did not, however, protect places on the grounds of their sacredness but primarily for archaeological or historical reasons, a criticism made for instance by Maddock, *Your Land is Our Land,* above n 155. Subsequent "Aboriginal relic protection" legislation which extended to a limited extent to protecting sites which contained such relics included the *Aboriginal Relics Preservation Act 1967* (Qld) (repealed); *Aboriginal and Historic Relics Act 1965* (SA) (repealed); *National Parks and Wildlife Act 1970* (Tas); *Aboriginal Relics Act 1975* (Tas); *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) (repealed).

Indigenous places of significance contain, inter alia, a basic format like that used in general archaeological or "landmark" heritage statutes. This essentially involves identifying or protecting *sites*[977] which satisfy the required types of significance covered by the statute,[978] assessment of those sites by a government official or government-appointed committee[979] and recording these on a register.[980]

Main Types of Protection: Designation First or Blanket Protection

When it comes to the protection offered, there have been two main divergent types within Australia. There are those statutes which are akin to the standard heritage legislation, that is, they only make it an offence to damage Indigenous places that have already been assessed and declared to be of required significance.[981] The other type of legislation provides what is commonly called "blanket protection", that is, the legislation makes it an offence to damage[982] an Aboriginal site, whether registered or declared to be significant or not.[983] The "blanket protection" system was common to the protection given to archaeological relics where excavation and removal was usually prohibited unless allowed by permit.[984] In all cases, however, the protection is usually able to be overridden by permits from a government official or government appointed body.[985] The

[977] The issue of the site-based approach is discussed in Chapter 15.
[978] The question of to whom a place is significant is dealt with in Chapter 14 and the issue of the required level of significance is dealt with in Chapter 17.
[979] The assessment issue is discussed at Chapter 17.
[980] Exceptions to the existence of a statutory register are: *ATSIHPA; National Parks and Wildlife Act 1974* (NSW), both of which required declarations before protection was given. The latter did not provide for a register as it was intended to be protective legislation of the last resort, but even so did provide for notification of declarations of protection to the Australian Institute of Aboriginal Studies if that institute kept a register, in s 14.
[981] Such as the *National Parks and Wildlife Act 1974* (NSW) ss 84 and 90, give protection only for places declared by the Minister to be of special significance with respect to Aboriginal culture. The *ATSIHPA* also uses this approach. See also the *Aboriginal Heritage Act 1979* (SA) (repealed) s 21.
[982] Distinctions have been drawn in terms of the types of "damage" or "desecration" and these are discussed further below at 17.3. There are also a range of different "mental states" required for an offence or types of culpability and defences based on lack of knowledge in the different jurisdictions. These range from those which, in effect, give no defences to damage to a site [such as in the *Aboriginal Heritage Act 1988* (SA)] to those which require negligence [such as in *Heritage Act 2004* s 75 (ACT); *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 23; *Aboriginal Heritage Act 2006* (Vic) s 27)], to those which have a defence of not knowing or not being reasonably expected to know that the place damaged was of significance [such as in the *Aboriginal Heritage Act 1972* (WA) s 62]. An analysis of these different types of mental states required is beyond the scope of this thesis.
[983] Such as Part III Div 5 of the old *Land (Planning and Environment) Act 1991*(ACT) (relevant parts repealed); *Heritage Act 2004* (ACT) dealing with Aboriginal places; all the legislation dealing with the Northern Territory, namely the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 69 and the *Aboriginal Sacred Sites Ordinance 1978* (NT), the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT); *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 1988* (SA); *Aboriginal Heritage Act 2006* (Vic); *Aboriginal Heritage Act 1972* (WA).
[984] The contrast between archaeological and non-archaeological heritage can be seen in the *National Parks and Wildlife Act 1974* (NSW) where Indigenous places of significance fall within the typical heritage style requiring assessment and declaration of significance by the Minister before they are protected, whereas archaeological relics are subject to blanket protection without any need for a declaration.
[985] See 17.4.1 below.

more recent statutes in Queensland and Victoria[986] have introduced far more detailed procedural requirements that have to be satisfied before obtaining a right to damage places of significance.

Access

The legislation governing the Northern Territory ("NT") goes further in also making it an offence to enter and remain on land which is an Aboriginal sacred site, other than in accordance with Aboriginal tradition.[987] This has not been followed elsewhere.[988] The NT legislation also provided for access to sites in accordance with Aboriginal tradition, as opposed to just protecting the sites themselves from damage.[989]

General Comments

There have been many battles over the years[990] between developers and governments and Aboriginal people trying to protect their sacred places and many of these have influenced the enactments, amendments to and reviews of the legislation mentioned above. One of the major reviews of the *ATSIHPA* was conducted in 1996 by Elizabeth Evatt[991] who recommended many changes which have not been enacted yet.[992]

The specific Indigenous legislative provisions have been the main provisions relied on in attempts to protect Indigenous sacred places and have given rise to the key cases and reports, so there has been little need to refer to other Australian statutory provisions for the issues raised in this part, but these are mentioned in the next section for completeness.

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[986] The *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld) and the *Aboriginal Heritage Act 2006* (Vic). See 17.4.1 below.

[987] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 69; *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s 33-4 and the former *Aboriginal Sacred Sites Ordinance 1978* (NT) s 31. There were exceptions in the 1989 NT legislation for owners, in *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s 44.

[988] Although under the *Aboriginal Heritage Act 1988* (SA) s 24, the Minster can give directions prohibiting access. It is also common in the various pieces of legislation for the relevant Minister or other official to have wide powers to give directions which may include such prohibitions. However, this would still leave matters in the hands of the government, typifying the public nature of the protection.

[989] *Aboriginal Sacred Sites Ordinance 1978* (NT) s 31A (repealed); *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s 46. There is also a provision for access to sites across the land of others, in *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s 47. In South Australia, a different form of provision was introduced in *Aboriginal Heritage Act 1988* (SA) s 36 which enabled the Minister to make directions authorising access to sacred areas.

[990] Some of these key contests giving rise to much litigation, such as over Hindmarsh Island in South Australia, the Swan Brewery, Crocodile Farm and Noonkanbah in WA, will be discussed in subsequent chapters in relation to the specific issues raised.

[991] Evatt, *Review,* above n 963. Relevant recommendations are mentioned in later chapters.

[992] The Commonwealth government has recently (in 2009) been seeking comments on reform proposals, as has the NSW government.

13.1.2 General Heritage and Environmental Legislation

Heritage

There are other forms of legislation that may be used in attempts to protect Indigenous sacred places but, as these have not been used much, they do not add to the discussion in this thesis. For present purposes, it should be noted that Indigenous sacred places can (with some express exceptions[993]) also be covered by most of the Australian legislation that deals with general (that is, not Indigenous-specific) heritage as well, because most of these can be used to provide protection for one or more of "social", "historical" or "cultural" significance,[994] and some specifically mention "religious" or "spiritual" significance.[995] While there are instances of such legislation being used to protect Indigenous sacred places,[996] they do not generally give any greater protection than that available under the specific Indigenous legislation. None of this legislation provides protection for places unless they are first assessed and listed

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993 The specific exceptions are in the *Queensland Heritage Act 1992* s 61; *Historic Cultural Heritage Act 1995* (Tas) s 98; *Heritage Act 1995* (Vic) s 5, which all specifically exclude Aboriginal heritage. The *Heritage Places Act 1993* (SA) specifically excludes objects covered by the *Aboriginal Heritage Act 1988* (SA) (in s 3 definitions of "objects") and its long title refers to conserving places and objects of "non-Aboriginal significance", but it does not specifically exclude coverage of places of Aboriginal significance.

994 The meanings of these terms appear to cover similar issues. For example, Mason J in the High Court case concerning the protection of Aboriginal sites of significance in the Tasmanian Wilderness area under World Heritage legislation, *Commonwealth v Tasmania* (1983) 158 CLR 1, at 158 referred to the term "cultural heritage" as encompassing historical and *spiritual or religious* heritage. The Australia Heritage Commission Criteria for the Register of the National Estate included Criteria G: "strong or special associations with a particular community or cultural group for social, cultural or spiritual reasons." [These criteria are reproduced in Graeme Aplin, *Heritage: Identification, Conservation and Management* (2002) and in Sharon Sullivan (ed), *Cultural Conservation: Toward a National Approach* (1995).] See also David Throsby, 'Cultural Heritage in the New Economic Environment' in Christine Debono (ed), *The National Trust into the New Millennium,* Conference Proceedings (2000), at 23, describing cultural heritage as encompassing spiritual, social and historic values. Similar comments have been made in Aplin, above, and also Australian ICOMOS, *Burra Charter*, above n 953, at Article 1.2; Randall Mason, 'Assessing Values in Conservation Planning: Methodological Issues and Choices' in Graham Fairclough et al (eds), *The Heritage Reader* (2008). Many commentators have included Aboriginal sites of religious significance under the concept of social, cultural or historic significance, eg, Josephine Flood, 'Aboriginal Sites: Identification and Significance Assessment at a National Level' in Sharon Sullivan (ed), *Cultural Conservation: Toward a National Approach* (1995). The "cultural landscapes" category in the *World Heritage Convention* Guidelines has also been used for Indigenous sacred places, and Uluru, Kakadu, Willandra lakes and the South West Tasmanian wilderness have been included in this category because of their Indigenous significance, which includes religious components: see Sarah M Titchen, 'Extending the Limits of the World Heritage List: Towards the Identification, Assessment and Conservation of Cultural Landscapes of Outstanding Universal Value' in Sarah M Titchen (ed), *Indigenous Cultural Landscapes and World Heritage Listing: Proceedings of Australian ICOMOS Workshop, Canberra, Australia in February 1995* (1995), especially in discussing the listing of Tongariro in New Zealand and Uluru in Australia; Sarah M Titchen, 'Changing Perceptions and Recognition of the Environment: from Cultural and Natural Heritage to Cultural Landscapes' in Julie Finlayson and Ann Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (1996); Evatt, *Review*, above n 963, at [3.8].

995 See, for example, *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) ('*EPBC* Regulations') regs 10.01A, 10.03A; *Heritage Act 2004* (ACT) s 10; *Heritage Act 1993* (SA) s 16. This is also mentioned in the Australian ICOMOS, *Burra Charter*, above n 953, at Art 1.2.

996 Such as through World Heritage listing, especially before the Commonwealth Government enacted the Indigenous heritage legislation, for example, in the Tasmanian wilderness case discussed in *Commonwealth v Tasmania* (1983) 158 CLR 1 dealing with the now repealed *World Heritage Properties Conservation Act 1983* (Cth) and see n 994 above.

on a heritage register by a government body, so there are often political processes that need to be satisfied first before protection can be gained.

Environmental

Environmental protection legislation is another instance of potential protection for Indigenous places, especially where there is a requirement for environmental impact statements and approvals for projects that could cause adverse effects on the environment. Indigenous sacred places can be included in the concept of the "environment" and in many instances cultural or historic heritage places are specifically referred to in such legislation.[997] This type of legislation does not give direct protection to such places but makes their heritage significance one consideration in the process of approving development activities. In one sense, this type of legislation could be considered weaker protection because the heritage status of a place does not give it any immediate form of protection, even on a temporary basis.[998]

13.2 New Zealand

13.2.1 Heritage Legislation with Maori Heritage Provisions

In New Zealand, the early legislation dealing with protection of places relevant to Maori heritage also tended to emphasise protection for archaeological significance rather than sacredness.[999] The first specific mention of places protected because of their significance to Maori people was the 1980 *Historic Places Act.* This enabled places to be declared "traditional sites" which included places sacred to Maori peoples.[1000] After

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[997] See, for example, the *EPBC* s 528 which defines "environment" to include "heritage values of places". The *Environmental Protection Act 1986* (WA) defines environment in s 3 to include "social surroundings" and these have in turn been treated as including physical heritage, see Environmental Protection Authority WA, *Assessment of Aboriginal Heritage, No 41* (2004). See also similar inclusive types of definitions of "environment" in *Environmental and Planning Assessment Act 1979* (NSW) s 4; *Environmental Assessment Act 1982* (NT) s 3; *Environmental Protection Act 1994* (Qld) s 8; *Environmental Protection Act 1993* (SA) s 3; *Environmental Management and Pollution Control Act 1994* (Tas) s 3; *Environmental Protection Act 1970* (Vic) s 4. See generally Boer and Wiffen, above n 924; Byrne, Brayshaw and Ireland, above n 29.

[998] Although the frequent use of permits to damage places protected by blanket protection or heritage listing may mean that there is not much better protection under those statutes. However, an analysis of the relative strengths and frequency of use of the permit systems is not covered in this thesis.

[999] For example, the *Historic Places Act 1954*, though this did also cover lands associated with Maoris and places associated with events of national or local importance, at s 3(a) and (b).

[1000] A traditional site was defined in s 2 as "a place or site that is important by reason of its historical significance or spiritual or emotional association with the Maori people or to any group or section thereof." It could be argued that sacred places would have been covered by the more general concept of historic places in any event.

extensive criticism and review of the 1980 legislation,[1001] it was repealed and replaced by the *Historic Places Act 1993*.

The current situation is governed by that 1993 *Historic Places Act,* a statute dealing with different aspects of heritage, including archaeological sites and general historic places.[1002] Most relevantly there are provisions dealing with registration of wahi tapu, defined in s 2 as “places sacred to Maori in the traditional, spiritual, religious, ritual or mythological sense”.[1003] The registration of such places involves assessment by the Maori Heritage Council.[1004] A kind of “blanket protection” is provided for archaeological sites, whether registered or not,[1005] but not for historic places, a concept that includes wahi tapu places. Mere registration of wahi tapu or other historic places does not carry any legal forms of protection in this Act.[1006] In this way, the legislation in itself is far less effective as a protective mechanism than the Australian legislation outlined above. The *Historic Places Act* provides powers for acquisition of the place, heritage orders and heritage covenants to be negotiated in order to provide some form of protection. With the exception of places under interim registration, offences are only prescribed for such places which are vested in the Historic Places Trust or subject to heritage orders or covenants.[1007]

13.2.2 *Resource Management Act*: The Key Planning and Development Statute

The main way[1008] in which people have sought to protect for wahi tapu and the basis of the bulk of legal proceedings attempting to protect them has come under the provisions

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[1001] Such as in Department of Conservation, Ministerial Advisory Committee*, Historic Heritage Management Review Report* (1989); Manatu Maori, above n 38; Waitangi Tribunal*, Manukau Claim,* above n 133; Waitangi Tribunal, *Te Roroa,* above n 31.

[1002] These may be able to cover sacred places as well, as “historic places” are defined in s 2 as including any land that forms part of the historical and cultural heritage of New Zealand. Section 23 allows the Historic Places Trust to register historic places for, inter alia, their social, cultural, traditional spiritual significance. Note that the NZ ICOMOS Charter definition of “cultural heritage value” also includes spiritual significance: ICOMOS New Zealand, *Charter for the Conservation of Places of Cultural Heritage Value* (1993), in the Preamble.

[1003]. There are some slightly different definitions of wahi tapu in other statutes, such as *Te Ture Whenua Maori Act 1993* s 338 (a place of special significance according to tikanga Maori); *Education Act 1989*, s 214 and *State-Owned Enterprises Act 1986*, s 27D (land of special spiritual, cultural, or historical tribal significance).

[1004] In ss 32, 33, 85.

[1005] For example, s 99. It is an offence to damage them without a permit, which can be granted to allow this.

[1006] Though some protection is given to interim registrations pending final registration by making it an offence to damage such places: s 103.

[1007] In ss 97–98.

[1008] There are specific and limited protections for wahi tapu in a range of statutes, such as the *Conservation Act 1987* especially ss 6, 27A, 39; *Environment Act 1986* s 17; *State-Owned Enterprises Act 1986*, s 27D; *Crown Forests Assets Act 1989* ss 18, 22; *Hazardous Substances and New Organisms Act 1996* s 6(d); *Fisheries Act 1996* s 121; *Biosecurity Act 1993* ss 57, 60, 72, 76; *Te Ture Whenua Maori Act*

of the *Resource Management Act 1991* ('*RMA*').[1009] The *RMA* is a general statute dealing with a range of planning and development issues and approvals, including environmental and historic heritage matters. Issues of protection of wahi tapu and other cultural heritage places[1010] come about by the requirements in ss 6 and 7 of the *RMA*. There are duties on all persons exercising functions and powers under the *RMA* to recognise and provide for a list of matters said to be of national importance as well as a list of some other matters to which they must have "particular regard". Amongst the matters of national importance in s 6 are:

> *(e) the relationship of Maori and their culture and traditions with their ancestral lands, waters, sites, waahi tapu and other taonga.*

Matters that persons exercising functions under the *RMA* are to have particular regard to under s 7 include:

> *(a) kaitiakitanga,*[1011]
> *(aa) the ethic of stewardship.*

Under s 8, account is also to be had to the principles of the Treaty of Waitangi.[1012]

There is no "blanket protection" granted for wahi tapu under the *RMA* and these are only matters to be, at most, "recognised and provided for", along with other matters of national importance. The *RMA* does not prohibit developments that may cause damage or desecration to these places. In this way the effect is similar to the Australian environmental form of legislation.[1013] Many of the key pieces of litigation concerning wahi tapu have been brought in relation to the grant of resources consents under the *RMA*, that is, development approvals. These have often involved appeals over the extent to which such grants have failed to comply with the requirements to recognise and provide for wahi tapu or to take other necessary considerations into account.[1014] Heritage orders can be made under the *RMA* as well[1015] and where they are made,

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1993 ss 338–340; *Local Government Act 2002* ss 81–82; *Overseas Investment Act 2005* Sched 1 Part 1; *Maori Affairs Act 1953* s 439; *National Parks Act 1980* especially s 4(2), s 60(k); *Reserves and Other Lands Disposal Act 1995,* s 3; *Te Uri o Hau Claims Settlement Act 2002* s 32; *Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008* s 106; *Foreshore and Seabed Act 2004* s 54; *Education Act 1989* s 214.

[1009] This has been extensively amended, particularly in 2003.

[1010] The definition of historic heritage in s 2 *RMA* includes sites of significance to Maori including wahi tapu, in clause (iii) of the definition.

[1011] A term undefined in the *RMA*, but referring to Maori guardianship.

[1012] The Treaty, whereby sovereignty over New Zealand was ceded to the British Crown, was entered into in 1840 between a representative of the Crown and over 500 Maori chiefs. For the purposes of this thesis, one of the key terms of this in Article 2 related to the guarantee by the Crown to the Maori peoples of the full and undisturbed possession of their lands and other properties. There are discrepancies between the English and Maori versions of the Treaty: see for instance, Claudia Orange, *The Treaty of Waitangi* (1987).

[1013] Though, perhaps, arguably of a stronger degree due to listing such matters as points of national importance that *are* to be provided for, or as matters to which one *must* have particular regard.

[1014] Some of these cases are dealt with later in this Part where relevant.

[1015] These are dealt with in Part 8 of the *RMA*.

further protection may be provided, but most of the disputes and thus interesting legal issues have not concerned such orders.

Issues of historic heritage and environmental issues are dealt with in the *RMA* in the same resource consent context as the considerations listed above and therefore do not add to the concepts associated with sacredness of the place to Maori groups.

13.3 USA

13.3.1 The Indigenous-specific Provisions

Like the other countries, the USA had early legislation protecting places for archaeological purposes[1016] and sensitivity in the archaeological legislation towards Indigenous issues, relating particularly to burial areas and human remains has increased over time.[1017] Unlike Australia and New Zealand, however, provisions protecting places for their specific Indigenous sacred significance are very limited. At the state level, very few [1018] have specific legislation which directly prohibits damage to

[1016] At the federal level, for example, the early legislation included the *Antiquities Act 1906* [also known as the *National Monument Act*], 16 USC §§ 431–33 (2006), *Historic Sites, Buildings and Antiquities Act 1935,* 16 USC §§ 461–67 (2006); *Archaeological and Historic Preservation Act 1974* [amending the *Reservoir Salvage Act 1960*]*,* 16 USC §§ 469–469c (2006).

[1017] For instance, the requirement for Native American consultation has been recognised in the federal *NAGPRA,* above n 934. A good summary of most of the state legislation is found in Amato, above n 934. For an overview of the historical trends in US heritage, see Jameson, above n 934.

[1018] The relevant key examples are found in California, Connecticut and Nevada, outlined below.

California

This appears in various sections of the Californian Public Resources Code. The *Native American Historical, Cultural and Sacred Sites Act 1976*, CAL PUBLIC RESOURCES CODE §§ 5097.9–991(2009) applies to pubic agencies or people operating under a public licence or other authority, and the *Native American Historic Resource Protection Act 2002*, CAL PUBLIC RESOURCES CODE §§ 5097.993–5097.994 (2009) aimed more widely, though with more specific provisions, for burial areas.

The 1976 Act was referred to above in Chapter 5 of Part B. It has a free exercise of religion clause, but also specifically prohibits public agencies or private parties using or occupying public property or operating on public property from causing "severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site or sacred shrine located on any public property, except on a clear and convincing showing that the public interest and necessity so require": CAL PUBLIC RESOURCES CODE § 5097.9 (2009). Note that this is limited to public property.

The 2002 Act in CAL PUBLIC RESOURCES CODE § 5097.993 (2009), provides that "[a] person who unlawfully and maliciously excavates upon, removes, destroys, injures, or defaces a Native American historic, cultural, or sacred site that is listed or may be eligible for listing in the Californian Register of Historic Resources … including any ... burial ground … or historic site, any inscription made by Native Americans at such a site ... any historic Native American rock art ... or any historic feature of a Native American historic, cultural, or sacred site, is guilty of a misdemeanour if the act was committed with specific intent to vandalise, deface, destroy ... a Native American historic, cultural or sacred … site ... and the act was committed … on (A) public land, (B) on private land by a person other than the landowner …". There are various exemptions for acts carried out pursuant to other statutes. The 2002 provisions were aimed at preventing desecration and vandalism to sacred and other sites, to extend the offence to private as well as public land (though exempting landowners themselves) and to increase penalties, see Californian State Senate, Committee on Public Safety, *Analysis of SB 1816*, 2 April 2002; California State Assembly, Committee on Public Safety, *Analysis of SB 1816*, 30 April 2002.

There were also specific consultation provisions added in SB 18 in 2004 which made amendments to the Californian Government Code at §§ 65040.2, 65351 and 65352. SB 18 was a watered-down version of the

Indigenous sites for their sacredness, at least without showing some overriding public interest requirement. The provisions of these states have similarities in form to many of the Australian Indigenous-specific provisions, though are more restrictive in their application.

At the federal level, as indicated in Part B, there were many unsuccessful attempts from the 1980s to introduce legislation, both under a free exercise of religion model and also of a kind akin to the Australian style of Indigenous heritage legislation.[1019] An argument raised against legislation specifically protecting places for their religious significance was based on the "Establishment Clause" in the First Amendment of the Bill of Rights in the US *Constitution* which applied to federal and state legislation.[1020] Instead, President Clinton issued the very heavily qualified *Executive Order 13007* of May 1996[1021] to require federal agencies to accommodate access and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sites.

At the federal level there have also been specific pieces of legislation dealing with areas which are sacred areas, and for which the sacredness of the area to the relevant

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earlier attempted SB 1828, Native American Sacred Sites Protection Bill (introduced on 22 February 2002) and the original SB 18, Traditional Tribal Cultural Sites Bill (as introduced on 2 December 2002), which could not be agreed between the Governor and the State Assembly.

A summary of the history of attempted amendments of the Californian legislation can be found in Amber L McDonald, 'Secularizing the Sacrosanct: Defining "Sacred" for Native Americans Sacred Sites Protection Legislation' (2004–5) 33 *Hofstra Law Review* 751.

The *Surface Mining and Reclamation Act 1975,* CAL PUBLIC RESOURCES CODE §§2710–2796.5 (2009) was also amended in 2002 by SB 483 which introduced a requirement in § 2773.3 not to approve a reclamation plan for surface mining of various minerals, or financial assurances for such an operation if the operation was located within 1 mile of any Native American sacred site and was located in an area of special concern, unless certain conditions were met. These were intended to prevent damage to such sites from potential environmental impacts by cyanide leach mining: see California State Assembly, Committee on Natural Resources, *Analysis of SB 483*, 28 August 2002.

Connecticut

Introduced in Public Act 89-368 in 1989 and codified in CONN GEN STAT §§ 10-381 to 10-391 (2009) (Native American Cultures, Policy Concerning Archaeological Investigations), § 10-390 provided in (a) that "[n]o person shall excavate, damage or otherwise alter or deface any … sacred site on state lands" and in (c) that "[n]o person shall engage in any activity that will desecrate, disturb or alter any Native American burial, sacred site" without a permit. This was introduced as part of a statute dealing with Native American Tribes: see Christopher Reinhart, *Questions about State Recognition of Indian Tribes* (2002).

Nevada

Within the general historic preservation legislation in Nevada, in 2005 there was a provision inserted into the definition of "prehistoric sites" to include "sites of religious or cultural importance to an Indian tribe": NEV REV STAT § 33-381.195 (2010). The provision was introduced in SB 81, approved in May 2005. It made it a violation to "investigate, explore or excavate … [a] prehistoric site on federal or state lands" without a permit: NEV REV STAT § 33-381.197 (2010).

[1019] These bills have included § 109 of **S 2269** in July 1994 entitled Native American Cultural Protection and Free Exercise of Religion Act, which sought to prohibit anyone from damaging what they know to be a Native American sacred site without federal authorisation; and § 2 of the Native American Sacred Lands Act, **HR 5155**, in July 2002, and § 2 of the **HR 2419**, the Native American Sacred Lands Act of June 2003 which both required federal departments and agencies to avoid significant damage to Native American sacred lands.

[1020] See 5.2.3 and 7.4 above. It applied to state legislation by virtue of the Fourteenth Amendment. Some of the implications of the Establishment Clause are also discussed at 14.4.2 below.

[1021] **Executive Order 13007** (1996) 61 FR 26771, above n 327 This however was so heavily qualified that it did not give rise to any legal rights.

Indigenous peoples may have been a key motive for the legislation, but where the provisions themselves do not turn on sacredness.[1022] Some of these have also occurred at the state level.[1023] Similarly, there have been specific legislative measures to allow access to sacred places for religious ceremonies.[1024] In 1990 there was a major piece of federal legislation protecting human remains and burial objects.[1025]

13.3.2 General Heritage and Environmental Legislation

Heritage Legislation

Federal

The most relevant provisions under the heritage model at the federal level are in the 1966 *National Historic Preservation Act* ("*NHPA*") and regulations.[1026] This was significantly amended in 1992 and 2000 in relation to consultation with Native American tribes.[1027] The *NHPA*, like typical heritage legislation, provides for a National Register

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[1022] The most famous example of this was the return of the sacred Blue Lake to the Pueblo de Taos tribe in New Mexico in December 1970 by way of Pub L 91-550 (1970), the *Taos Blue Lake Act*, also known as *An Act to Amend Section 4 of the Act of May 31 1933 (48 Stat 108)*. The Lake area was to be kept as a wilderness area and used only for traditional purposes. While the legislation itself did not spell out any criteria based on sacredness of the area, the reports leading to it showed it was because it was one of the most sacred of shrines, in *Senate Report 91-1345* regarding Taos Blue Lake, above n 303.
Another example is the return of land to the Yakima people: Federal Executive Order 11670 of 20 May 1972, *Providing for the Return of Certain Lands to the Yakima Indian Reservation*, 37 CFR § 10431.
See also *Grand Canyon National Park Enlargement Act of 1975*, 16 USC § 228i (2006) dealing with the setting up of the Havasupai Indian Reservation.
The Island of Kaho'olawe was also returned to the State of Hawaii by the US Department of Defense in the *Department of Defense Appropriations Act 1994*, Pub L 103-139, Title X. This island had sacred significance to Native Hawaiians and was included in the National Register of Historic Places for its historical, cultural and archaeological purposes (§ 10,001). The legislation provided for a memorandum of understanding to be entered into dealing with the means of protecting, inter alia, religious sites and artefacts (§10,006). Hawaiian legislation also provides that the Kaho'olawe Island Reserve is to be used for practice of all rights customarily and traditionally exercised by Native Hawaiians for cultural, spiritual, and subsistence purposes: HAW REV STAT §§ 1-1-6K-3 (2009).

[1023] For example, in Mississippi, an Act was passed in 2007 to return the Nanih Waiya State Park to the Choctaw Tribe on the explicit basis that it was the location of a sacred mound and venerated by the Choctaws, *An Act to Return the Nanih Waiya State Park and Mound to the Band of Choctaw Indians of 2007,* 2007 Miss Gen Laws 310, 2007 Miss SB 2732, § 1.

[1024] Such as the *El Mapais National Park Act of 1987*, 16 USC §§ 460uu-1 to 460uu-47 (2006), in which § 460uu-47 provided for access by Indians for "traditional cultural and religious purposes". See also other examples in 5.2.2 above.

[1025] *NAGPRA,* above n 934. This was a landmark piece of legislation concerning protection of Indigenous graves, which are often considered to be sacred places. As the major thrust of the legislation relates to the taking and protection of remains and objects rather than of the place itself, the details of this legislation are not relevant for this thesis.

[1026] Codified at 16 USC §§ 470 to 470x-6 (2006). Relevant regulations include the *National Register of Historic Places Regulations,* 36 CFR § 60 (2009); *Procedures for State, Tribal and Local Government Historic Preservation Programs Regulations,* 36 CFR § 61 (2009); *Determination of Eligibility for Inclusion in the National Register of Historic Places Regulations,* 36 CFR § 63 (2009); *National Historic Landmarks Program Regulations,* 36 CFR § 65 (2009) and *Protection of Historic Properties Regulations,* 36 CFR § 800 (2009).

[1027] 16 USC §§ 470a(d) and 470h-2 (2006) and *Protection of Historic Properties Regulations,* 36 CFR § 800 (2009).

of Historic Places and processes to identify and assess places for inclusion on the Register. The heritage to be protected includes, inter alia, the significance ascribed to sites that illustrate the heritage of the USA in history and culture, associated with events that represent broad national patterns of US history or commemorate a way of life or culture.[1028] Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organisation may be determined to be eligible for inclusion in the National Register.[1029] There is no blanket protection, nor even automatic protection for registered places. The main mechanism for protection is found in what is called the "section 106" procedure whereby decisions about federal undertakings or approvals require prior consideration by the agency of the effect of the undertaking on any sites included or eligible to be included on the National Register, and the Advisory Council on Historic Preservation is to be given a reasonable opportunity to comment on these.[1030] The protections granted were procedural only[1031] because once the places of historical significance, if eligible for the Register, are considered and the processes followed as required, their protection can be outweighed by other considerations. This then is similar in form to typical environmental statutes. While they may not give substantive protections, a failure to follow the procedures can form a basis for injunctions or setting aside decisions which could stall projects.[1032] The *NHPA* is very limited in its jurisdiction and application, being restricted in the main to federal undertakings or approvals.

State

Most states have also enacted general historic preservation legislation, some of which provide protection for listed places of historic significance. Unlike the other state provisions in Australia and Canada, which tend to follow similar patterns, the US state provisions often vary markedly.[1033] An interesting state provision which goes beyond

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[1028] This is in the criteria for eligibility set out at *National Register of Historic Places Regulations,* 36 CFR § 60 (2009), at § 60.4(1) and (5). Culture is said to include traditions, beliefs, practices and lifeways: see National Park Service, *National Register Bulletin No 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties*, (1990, revised 1998). This criterion is discussed further at 14.4.2 below.

[1029] 16 USC § 470a(d)(6)(A) (2006).These came to be called "traditional cultural properties" (also known as TCPs) and the regulations encapsulated the policy set out in *Bulletin 38,* ibid.

[1030] 16 USC § 470f (2006).

[1031] Described as "stop, look and listen" legislation in *Narragansett Indian Tribe v Guibert* 934 F 2d 4 (1st Cir 1991); *Muckleshoot Indian Tribe v US Forest Service* 177 F 3d 800, 805 (9th Cir 1999).

[1032] This occurred, for example, in the context of sacred places in *Hopi Indian v Block* [1981] US Dist Lexis18421 (DDC, 1981); *New Mexico Navajo Ranchers Association v Interstate Commerce Commission,* 702 F 2d 227 (DC Cir, 1983); *Colorado River Indian Tribes v Marsh,* 605 F Supp 1425 (CD Cal, 1985); *Attakai v United States,* 746 F Supp 1395 (D Ariz, 1990); *Pueblo of Sandia v US,* 50 F 3d 856 (10th Cir, 1995); *Muckleshoot Indian Tribe v US Forest Service,* 177 F 3d 800, 805 (9th Cir, 1999).

[1033] These statutes are too numerous to outline for present purposes and their format too diverse to summarise. This thesis includes only some as examples of various points. See the Bibliography which includes references to them. A summary of some of these is found in Jane Papademetriou Kourtis,'The Constructive Trust: Equity's Answer to the Need for a Strong Deterrent to the Destruction of Historic Landmarks' (1989) 16 *Boston College of Environmental Affairs Law Journal* 793.

the usual form of general heritage protection is found in Ohio where purposeful damage to items and places of great historical significance, as well as specific sacred objects or places of worship, whether listed or eligible or not, is termed a "desecration" and made an offence.[1034] There are some other similar offences of desecrating places of worship, though usually only in the context of public order offences.[1035] On the face of it, this would also provide a kind of blanket protection to Indigenous sacred places that may come within those terms.

Environmental Legislation

The federal *National Environmental Policy Act 1969* ("*NEPA*")[1036] also sets out procedures for agencies of the federal government to prepare detailed statements on environmental impacts of major federal actions significantly affecting the quality of the human environment. The concept of preventing damage to the environment included the preservation of important historic and cultural aspects of the US national heritage.[1037] This statute too was only procedural and described as a "look before you leap" statute.[1038] This gives no direct protection to sacred places but makes it procedurally necessary to consider such places. Like the *NHPA*, the *NEPA* has been used to set aside decisions which have not adequately considered Native American places of historical and cultural significance.[1039] There are other pieces of federal legislation dealing with forests or national parks that also provide procedures for protecting cultural resources.[1040] These federal environmental statutes are also limited to federal government action and places.

One piece of legislation that does refer to sacred sites and places is the legislation from the Virgin Islands in the context of the duties of the State Heritage Preservation Officers to carry out surveys, though no direct protection seems to flow from this: *Antiquities and Cultural Properties Act of 1998*, *Virgin Islands Code* at §§ 29-17-952 and 29-17-953 (c). Another is *Alaska Historic Preservation Act,* ALASKA STAT § 41.35 (2009), which allows the commissioner to issue permits to excavate and remove heritage resources, but provides in § 41.35.080 that if the resource involved is one "which is, or is located on a site which is, sacred, holy, or of religious significance to a cultural group, the consent of that cultural group must be obtained before a permit may be issued under this section". See also the Nevada legislation referred to at n 1018 above.

[1034] OHIO REV CODE ANN § 2927-11(A) (2009) (Desecration). This section applies to a range of objects including the flag and public monuments. However, it also prohibits purposeful damage to or physical mistreatment of: in (3) any "Indian mound, earthwork or cemetery" [which last term specifically includes burial places containing American Indian human remains, see § 2927-11(C)] and "any site or great historical or archaeological interest"; in (4) "a place of worship"; and in (6) "any other object of reverence or sacred devotion".

[1035] Such as, provisions making it an offence to desecrate a place of worship, eg in Delaware at 11 Del Code § 1331 (2010); Georgia at GA CODE ANN § 16-7-26 (2009); Kentucky at KY REV STAT ANN § 525.110 (2009); Montana at MONT CODE ANN § 45-6-104 (2009); Tennessee at TENN CODE ANN § 39-17-311 (2009).

[1036] 42 USC § 4321–70f (2006).

[1037] 42 USC § 4331(b)(4) (2006).

[1038] Zellmer, above n 653.

[1039] Such as in *The Indian Lookout Alliance v Volpe,* 345 F Supp 1167 (D Iowa, 1972); *The Indian Lookout Alliance v Volpe,* 484 F 2d 11 (8th Cir, 1973); *Colorado River Indian Tribes v Marsh,* 605 F Supp 1425 (CD Cal, 1985); *Muckleshoot Indian Tribe v US Forest Service,* 177 F 3d 800 (9th Cir, 1999)

[1040] Such as the *National Forest Management Act,* 16 USC § 1604 (2006); *Policy in Lands, Wildlife and Waterfowl Refuges and Historic Sites,* 49 USC § 303 (2006).

Most states have similar environmental protection legislation which can also be, and some have been, used to set aside decisions impacting on Indigenous sacred places which have not followed proper procedures relating to places of cultural significance.[1041]

13.4 Canada

13.4.1 General Heritage and Environmental Legislation

Heritage and Archaeological Legislation

Canada does not have any federal statutes specifically to protect Indigenous sacred places, although it has archaeological and historical legislation such as the *Historic Sites and Monuments Act 1985*[1042] which can be used to protect Indigenous sacred places with historic significance.[1043] National Historic Sites can also be set aside under national parks legislation,[1044] which would have specific relevance for areas significant to Indigenous peoples. At the provincial level, there are also historic and archaeological protection statutes in most provinces and territories which protect places of historical or

[1041] One notable one is the Connecticut legislation, CONN GEN STAT §§ 22a-1 to 22a-1d (2009) (Environmental Department and State Policy) where § 22a-1b(8) specifically provides that environmental impact statements when required must, inter alia, include a description of the effects of the proposed action on "sacred sites". There is also the *Californian Environmental Quality Act of 1970*, CAL PUBLIC RESOURCES CODE §§ 21 000 to 21 117 (2009). This was used to uphold challenges to decisions in breach of the procedural requirements and to failures to properly consider matters in approvals of developments impacting on cultural sites, whose significance included religious significance: see, for example, *Society for California Archaeology v County of Butte,* 65 Cal App 3d 832 (1977); *Environmental Protection Information Center v Johnson,* 170 Cal App 3d 604 (1985); *Citizens of Goleta Valley v Board of Supervisors,* 197 Cal App 3d 1167 (1988); *City of Santa Monica v City of Los Angeles* [2007] Cal App Unpub Lexis 7409. Other examples that specifically refer to historic or cultural sites in the concept of the environment include Georgia's *Environmental Policy Act of 1991*, GA CODE ANN at § 12-16-3 (2009); the *Minnesota Environmental Rights Act of 1971,* esp. MINN STAT § 116B.01 (2009); New York's *State Environmental Quality Review Act of 1975*, NY ENVIRONMENTAL CONSERVATION LAW esp. § 8-0105 (2009) and Regulations, 6 NYCRR Part 617 (2009) (re State Environmental Quality Review); *North Carolina Environmental Policy Act of 1971,* NC GEN STAT esp § 113A-3 (2008); *South Dakota Environmental Policy Act of 1974,* SD CODIFIED LAWS § 34A-9 (2009); Virginia's VA CODE ANN § 10-1-08 (2008) (Conservation, Definitions); Washington's WASH REV CODE esp § 43.21C.020 (2009) (State Environmental Policy). Even where this is not spelt out, the concept of the environment may include such heritage issues.

[1042] RS 985 c H-4. There are also assorted provisions which could incidentally cover First Nations' sacred areas or objects, although that is not the major purpose of the legislation, such as the *National Historic Parks General Regulations 1982*, SOR 82-263, made pursuant to the *Canada National Parks Act,* SC 2000, c 32, in reg 3 which prohibits disturbance, removal, damage or destruction of any archaeological site or historic resource in a National Historic Park without a permit, or the *Indian Act,* RSC 1985, c 1-5, s 91(1) which prevents people from acquiring title to Indian grave houses or poles or rocks embellished with carvings on reserves without consent of the Minister.

[1043] Examples of some such First Nations' places in the list of National Historic Sites are mentioned in Catherine Bell and Michael Solowan, *A Selected Review of Legislation Affecting First Nations Cultural Heritage*, 2004, University of Alberta Faculty of Law <http://www.law.ualberta.ca/research/aboriginalculturalheritage/researchpapers.htm>.

[1044] Such as under s 42 of the *Canada National Parks Act,* SC 2000, c 32. Indirect protection can be granted by national park or wilderness status under that legislation as well.

cultural significance.[1045] It may be argued that historic places can include places significant for religious reasons.[1046] Most of these statutes involve identifying and designating historic sites, including places in a register[1047] and not providing any form of blanket protection prior to such designation or registration, except in the case of burial grounds or archaeological objects. Protection is accorded to registered places, subject to the grant of permits to allow damage.

Indigenous Provisions

There are some provisions within some provincial heritage legislation that do deal specifically with Indigenous areas of cultural significance that can clearly cover places for their religious significance. Many of the relevant cases have come under the British Columbian *Heritage Conservation Act 1977* which is a general piece of heritage legislation but specifically refers in the definition of a heritage site to land that has heritage value to an Aboriginal people.[1048] Such sites can be designated as a Provincial Heritage Site or agreements can be entered into under that Act with a First Nation about such heritage sites and it then becomes an offence to damage them without a permit to do so.[1049]

In the absence of a prior agreement or designation of an Indigenous area as a provincial heritage site, there is no protection under the British Columbian legislation except for blanket protection for burial sites, rock paintings or rock carvings, which could be sacred places as well,[1050] perhaps because these are thought to be more akin to archaeological relics and fall within their usual form of protection. More limited

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[1045] A listing of these can be found in Bell and Solowan, above n 1043. Some of the main examples include the Alberta *Historical Resources Act,* RSA 2000, c H-9; British Columbian (“BC”) *Heritage Conservation Act,* RSBC1996, c 187*;* Manitoba *Heritage Resources Act* CCSM c H-39.1; New Brunswick (“NB”) *Historic Sites Protection Act,* RSNB 1973, c H-6 ; Northwest Territories (“NWT”) *Historical Resources Act*, RSNWT 1988, c H-31; NWT *Territorial Parks Act,* RSNWT 1988, c T-4; Nova Scotia (“NS”) *Heritage Property Act*, RSNS 1989, c 199; NS *Provincial Parks Act*, RSNS 1989, c 367; NS *Special Places Protection Act,* RSNS1989, c 438; *Ontario Heritage Act,* RSO 1990, c O-18; Prince Edward Island (“PEI”) *Heritage Places Protection Act,* RSPEI 1988, c H-3.1; Quebec *Cultural Property Act* RSQ, c B-4; Saskatchewan *Heritage Property Act,* SS1979-80, c H-2.2; Saskatchewan *Parks Act*, SS 1986, c P-1.1; Yukon *Historic Resources Act*, RSY 2002, c 109. While the terms “historic” and “cultural” significance are commonly used, none of the statutes refer specifically in definitions to religious or spiritual significance.

[1046] Spiritual significance is included as part of the definition of heritage value in Parks Canada, *Standards and Guidelines for Conservation of Historic Places in Canada* (2003) and Aboriginal sacred sites are mentioned as examples of historic places covered by the Guidelines.

[1047] There is no statutory provision for a register in the federal *Historic Sites and Monuments Act*, RSC 1985, c H-4; NB *Historic Sites Protection Act,* RSNB 1973, c H-6 (1954); NWT *Historical Resources Act*, RSNWT 1988, c H-31.

[1048] RSBC 1996, c 187 at s 1. The amendments to refer to Aboriginal people came about particularly in amendments made by the BC *Heritage Conservation Statutes Amendments Act of 1994*.

[1049] BC *Heritage Conservation Act 1977,* RSBC 1996, c 187, at ss 4 and 9 re designation and agreements and s 13 making it an offence to damage such places without a permit under s 12. Sections 12 and 13 were held to be within the constitutional power of the province in *Kitkatla Band v British Columbia* [2002] SCC 31.

[1050] BC *Heritage Conservation Act,* RSBC 1996, c 187, at ss 12 and 13. Permits can be issued to authorise damage.

protective provisions are also found in the Saskatchewan heritage legislation which makes it an offence to destroy or desecrate pictographs, petroglyphs and medicine wheels, in addition to the usual burial places and human remains, without a permit.[1051]

There do not otherwise seem to be any statutory provisions to provide direct blanket protection to Indigenous sites for their significance to Indigenous people, although such legislation has been recommended by Commissions and reviews.[1052]

Environmental and Other

Canada also has environmental legislation which, like that in other countries, can cover Indigenous sacred places as part of the concept of the environment.[1053] Like the others, this does not give rise to direct protection but to considerations in the approval process. There are also some specific protections for sacred places covered in various comprehensive claims agreements.[1054]

[1051] Saskatchewan's *Heritage Property Act,* c H-2.2 at s 64.

[1052] For instance the Royal Commission on Aboriginal Peoples recommended an urgent review of legislation to Aboriginal organisations and that communities have access to urgent remedies to prevent or arrest damage to significant heritage sites, along with greater control by Aboriginal peoples: at Canada, Royal Commission on Aboriginal Peoples, above n 8, [3.6.2] to [3.6.3], [2.4.58] to [2.4.59].

[1053] For instance, the federal *Canadian Environmental Assessment Act,* SC1992, c 37 s 2, where environmental effects are defined as including effects on physical and cultural heritage or sites of historic significance. Other examples include the BC *Environment Assessment Act*, SBC 2002, c 43 ss 6 and 10 which refer to heritage, as does NS *Environment Act*, SNS 1994–95, c 1 s 3(v). The Yukon Territory's *Environment Act*, RSY 2002, c 76, in the Preamble and ss 36, 53, 66 provide for partnerships and consultation with Yukon First Nations. The BC *Environment Assessment Act*, SBC 2002, c 43, s 29.1 also requires specific notice and consultation with First Nations in relation to their treaty lands. See Bell and Solowan, above n 1043. The use of environmental legislation in Canada is mentioned in Byrne, Brayshaw and Ireland, above n 29.

[1054] Some of these are covered in Bell and Solowan, above n 1043, and also in Ross, above n 24. An example includes the Nisga'a Final Agreement attached to the BC *Nisga'a Final Agreement Act,* SBC 1999, c 2, especially in clause 95 whereby British Columbia agrees to designate the sites listed in the Appendix as Heritage Sites; clauses 98–121 designating certain areas as parks, including those where the primary aim is to promote Nisga'a history and culture, and Chapter 17 clauses 36–39 dealing with Nisga'a managing the heritage protection process, However, these are specific negotiated agreements and do not assist in the issues covered by this thesis.

Chapter 14 – Whose Heritage and What Heritage?

14.1 Introduction

As mentioned in Chapter 12, the heritage movements and rationales were very much based on "generally applicable" values, such as science, education and aesthetics, as well as the promotion of cohesion and unity. In such a context, heritage was seen as common to the society and for the benefit of the public rather than owned or controlled or existing for a particular group. The answer to the questions of "whose heritage?" or "for whose benefit is it preserved?" is "the whole society", or even "all humanity". This is consistent with a philosophical categorisation of heritage, even heritage of religious significance, as belonging to a "general public and thus secular" rather than "private religious" sphere. As foreshadowed, there have been shifts in perspectives and a growing recognition of the rights and interests of the group from which the relevant heritage emanated, including Indigenous peoples. Specific Indigenous heritage statutes or provisions have been enacted, albeit in the traditional heritage model. The recurring question explored in this Part C is the extent to which the heritage provisions that can and are specifically aimed at protecting Indigenous heritage take into account the particular religious subject matter and values or whether they still reflect and require conformity to the old secular "public" values.

This chapter opens the examination at the level of the stated rationales of the legislative provisions.[1055] The generally applicable heritage and environmental laws usually either do not mention for whom the protection is designed or state explicitly that it is for the benefit of the people (supposedly all) of the relevant level of society.[1056]

[1055] There will be more explicit references to the purposes of US statutes, because they tend to have express provisions declaring the purpose of the legislation and legislative findings whereas the other three countries tend to either have very brief and general statements of objects or no mention of purposes or objects at all.

[1056] Such as the *Heritage Act 1977* (NSW) which speaks of the heritage *of the state* and describes state heritage significance as what is of *significance to the state* (in s 4A and in the long title to the Act); the *Queensland Heritage Act 1992* refers to the greatest sustainable benefit *to the community* [in s 3(2)(b), though Indigenous heritage is excluded, in s 61]; the *Australian Heritage Commission Act 1975* (now repealed) spoke in s 4 of the National Estate as being of value for future generations (of Australians) as well as the present community. Some legislation refers to the benefit to the community or to a group, eg *Historical Cultural Heritage Act 1995* (Tas) s 3 (though Aboriginal traditional heritage is excluded in s 98)*;* *Heritage Act 1990* (WA) s 3; *Heritage Act 2004* (ACT) s 3(2)(b).

In the USA, the *NHPA* refers in 16 USC § 470 (2006) to the benefits "to the American people" and "future generations of Americans". The Massachusetts statute, now codified as *Historic Districts Act*, MASS GEN LAWS § 1-7-40C-2 (2008), which was described as typical of state legislation, in Kourtis, above n 1033, spoke of the purpose of historic preservation as being "to promote the educational, cultural, economic and general welfare of the public". Other examples of more explicit statements from the USA which speak of historic preservation as being for the benefit of the public as a whole include the *Alaska Historic Preservation Act,* ALASKA STAT § 41.35 (2009) at § 41.35.010; Michigan's *Local Historic Districts Act of 1970*, MICH COMP LAWS § 399.202(e) (2009); *New York State Historic Preservation Act 1980*, NY PAR

Given the same statutory scheme applies across the board to all types of heritage covered, it is logical that similar aims and criteria are applied to all such heritage, Indigenous or not, including the aim of protection being for the benefit of the whole society and for the same general scientific, aesthetic and educational reasons. The real question to be examined in this chapter, however, is whether the statutes which specifically mention Indigenous heritage depart at all from these general aims.

As outlined in 14.2, apart from the earlier "archaeological relic" models,[1057] there is little doubt that the majority of Indigenous heritage provisions that protect places of significance, whether inserted into general heritage legislation or into specific Indigenous heritage legislation, are ostensibly intended to protect what is significant to Indigenous peoples. However, even if the legislation protects places significant to Indigenous people, there are further questions of who the primary intended beneficiaries of the legislation are, that is, the whole community or primarily Indigenous peoples, and what values (for example, religious or universal secular values) are protected, matters discussed in 14.3 and 14.4 below. Despite the apparent, and maybe even sincere, statutory intention to advantage Indigenous people and protect places of significance to them, by enacting provisions within the general protection of the heritage of the whole society (whether state, nation or the world), and by using the same concepts and the mechanisms, it may be only the general public values that are protected. The overall picture that emerges is that legislators assume (sometimes wrongly) that the public interest in protecting Indigenous heritage is the same as the Indigenous interests. This chapter examines only the aims of the legislation. The fact that such an approach can in practice compromise the protection for Indigenous sacred places is illustrated in the specific issues discussed in subsequent chapters.

14.2 Heritage of Significance to Indigenous Peoples: Whose Heritage?

Most modern provisions which relate specifically to Indigenous heritage,[1058] both within general heritage statutes and in specific Indigenous statutes, have a specific intention to protect places of significance to Indigenous people rather than just the wider community. The terminology used for most of the specific Indigenous provisions is

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LAW § 14-01 (2009); Pennsylvania's *History Code*, 37 PA CON STAT §§ 37-102(3) (2009); Washington's WASH REV CODE § 27.34.200 (2009).
The BC legislation in Canada has different wording, as set out below at 14.3.1, but most of the other Canadian legislation does not state specifically to whom the place is to be significant or who is to benefit from its protection, nor does the New Zealand legislation.

[1057] See Chapter 12.

[1058] Canvassed in Chapter 13.

"significance to" the relevant Indigenous people,[1059] or, in the definition of wahi tapu in New Zealand, "sacred to" Maori people.[1060]

Others are less explicit but imply this by description. For example, the Californian legislation refers to "Native American" sacred sites, suggesting that such places only have to be significant to Native Americans.[1061] Another form is to refer to significance or sacredness in accordance with Indigenous tradition or culture,[1062] implying that it is about significance to Indigenous people. The wording of the Western Australian legislation implies this by context in that an Aboriginal site is described as a "sacred, ritual or ceremonial site which is of importance or special significance to persons of

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[1059] In Australia, this is usually set out in the definition of an Aboriginal site or the type of place or area which is to receive protection. There are references to places of "particular significance to Aboriginal people" in the *ATSIHPA* s 3*, Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 9, or simply "significance to Indigenous people", in the *EPBC* definition of Indigenous heritage value in s 528. There is also the term "special significance and importance to persons of Aboriginal descent" used in the *Aboriginal Heritage Act 1972* (WA) s 5, though that legislation has it as an additional requirement: see 14.2 and 14.4 below and n 1117 and n 1118. Justice Evatt said in the context of *ATSIHPA* that this significance had to be considered from the perspective of Aboriginal people, in Evatt, *Review,* above n 963, at [8.3]. As she did not recommend any change, it is apparent that she accepted that this was the clear meaning of the legislation.

In the USA, the Nevada provision NEV REV STAT § 33-381.195 (2010) similarly refers to "sites of religious or cultural importance to an Indian tribe". The *NHPA* at 16 USC § 470a(d)(6)(A) refers in one criterion to "properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization". (Note that these *NHPA* sections still have to pass the general criteria for eligibility for the National Register as protections are based not on being a traditional cultural property but being eligible for the Register.)

In the BC *Heritage Conservation Act,* RSBC 1996, c 167, s 3, the definition of a historic site refers to "heritage value to ... an aboriginal people".

There appears to be little distinction between "significance" and "importance" and "heritage value" in Indigenous heritage arguments or cases, though in a general heritage context Prott and O'Keefe have suggested that the term "*value*" may be wider than the term "*significance*": Prott and O'Keefe, above n 940.

[1060] The New Zealand ("NZ") *Historic Places Act 1993* in s 3 defines wahi tapu as a "place sacred to Maori in the traditional, spiritual, religious, ritual or mythological sense". While there are other slightly varying definitions of wahi tapu in different NZ legislation, such as "a place of special significance according to tikanga maori" in *Te Ture Whenoa Maori Act 1993* s 338, and "land of special spiritual cultural or historical significance" in s 27D of the *Treaty of Waitangi State Enterprises Act 1988* and in s 214 of *Education Act 1989*, the implication in all of these is that it is referring to places of significance only to the Maori.

[1061] The *Native American Historical, Cultural and Sacred Sites Act 1976,* at CAL PUBLIC RESOURCES CODE § 5097.9 (2009) refers to a "Native American sanctified cemetery, place of worship, religious or ceremonial site or sacred shrine" and the *Native American Historic Resource Protection Act 2002,* at CAL PUBLIC RESOURCES CODE § 5097.993 (2009) refers to a "Native American historic, cultural or sacred site".

[1062] The terms "significance in accordance with (or to) Aboriginal tradition" are used in Australia in *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3 and the *Aboriginal Sacred Sites Ordinance 1978* (NT) s 3; the *Northern Territory Aboriginal Sacred Sites Act 1989* s 3; the *Aboriginal Heritage Act 1988* (SA) s 3; *Aboriginal Heritage Act 2006* (Vic) s 4. The terms "special significance with respect to Aboriginal culture" are used in *National Parks and Wildlife Act* 1974 (NSW) s 84. A slight variation is "importance as part of local Aboriginal tradition" in *Heritage Act 2004* (ACT) s 10.

In the USA, the Connecticut CONN GEN STAT § 10-381 (2009) defines "sacred sites" or "sacred lands" as "any space, including an archaeological site, of ritual or traditional significance in the culture and religion of Native Americans". A very convoluted definition of this kind appears in the federal regulations dealing with *Protection of Archaeological Resources* at 43 CFR § 7.32 (2009) where a site of religious or cultural importance is defined as meaning a location which has traditionally been considered important by an Indian tribe because of a religious event which happened there, because it contains specific natural products which are of religious or cultural importance, because it is believed to be the dwelling place of, the embodiment of or a place conducive to communication with spiritual beings, because it contains elements of life-cycle rituals such as burials and associated materials, or because it has other specific and continuing significance in Indian religion or culture.

Aboriginal descent". It is clear that despite the sentence structure, the sacredness of the site is sacredness to Aboriginal people.[1063]

This trend also appeared in the general heritage principles where a concept of heritage significance to a particular community within the wider society developed alongside the traditional concept of public significance. This idea of "ethnic value" as distinct from "public value" has allowed for the inclusion in a nation's or region's heritage such places that have particular religious, mythological or special importance for a discrete section of the population only.[1064]

The idea of Indigenous heritage significance nevertheless does not mean that the legislation is necessarily for the primary purpose of benefiting Indigenous people, though this is no doubt an important motivation behind the legislation. This difficulty is addressed below.

14.3 For Whose Benefit Is Indigenous Heritage Protected?

As previously noted, the problem does not lie in simply recognising that protection of Indigenous heritage, such as sacred places, is also for the benefit of the whole community, but difficulties arise when the community interest in preserving heritage excludes or outweighs the interests of the Indigenous community to whom the place is sacred. For instance, one attitude could be that protecting the sacred values and places of each Indigenous group out of respect for those groups is good for the wider society because it fosters important values of respect, recognition and inclusion. An alternative view could be that it benefits the whole community to retain an assortment of heritage of significance to different groups, because this offers aesthetic enjoyment, education, enhancement of multicultural identity or cohesion of the whole community. If the aim is the latter, the emphasis is on preservation of diverse cultural heritage akin to a museum where it is a loss to society if some items in the collection disappear forever. The aims and method of selecting items for protection may differ greatly from the ways that the Indigenous group would value and treat that heritage. Failing to distinguish the various heritage aims courts the dangerous assumption that what is good for general Western heritage values would also be good for Indigenous ones. It is a concern that

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[1063] In s 5(b). The ungainly wording came about in the 1980 amendments to the Act which originally said "*any* place, *including* any sacred, ritual or ceremonial site, which was of importance and special significance to persons of Aboriginal descent" (*emphasis added*). The amendment was designed to restrict the protection to sacred, ritual and ceremonial sites not just any place of significance. There seemed to be no intent to remove the requirement of significance to Aboriginal people.

[1064] A distinction referred to by Flood, above n 994.

this failure is evident in the rationales of much of the legislation designed to protect Indigenous sacred places.

The underlying rationales are discussed below in relation to:

- first, Indigenous provisions inserted into general heritage legislation;
- secondly, legislation that relates only to Indigenous heritage.

Issues of natural justice, notifications and standing also reflect the perceived intent of who is to benefit from statutory provisions and these are also examined below.

14.3.1 Indigenous Heritage Inserted into General Cultural and Historic Heritage and Environmental Legislation

As previously discussed, the tenor of general heritage and environmental legislation is preservation for the community as a whole. When there are, within the general statutes, specific Indigenous heritage provisions that protect places that are sacred, it appears obvious in the vast majority of cases, that this specific protection is seen to benefit Indigenous peoples, as it concerns and protects their heritage, *and* that the protection of this heritage is also of benefit to the whole community. In other words, both types of "heritage" interests are regarded as being satisfied and not much attention is given to any distinctions between them. However, there are some differences of emphases through the range of this type of legislation, as outlined below.

Where the specific Indigenous heritage provisions are inserted into more general heritage or parks legislation, the assumption can be made that such Indigenous heritage is being protected as one aspect of the heritage of the whole jurisdiction. The general heritage statutes often refer to the heritage being preserved for the whole community and these general aims have not been changed by the (usually later) insertion of Indigenous provisions.[1065] Very often, specific Indigenous heritage provisions were inserted because the general legislation failed to include Indigenous heritage as part of the protected heritage. For example, in New Zealand, the specific legislative provisions dealing with wahi tapu remain part of the same heritage legislation, as do other forms of non-Indigenous heritage. One of the complaints prior to

[1065] See examples in 14.1 above. For example, the NSW provisions are in the Parks and Wildlife Legislation. The Report of the Parliamentary Select Committee said that such Aboriginal sites were part of Aboriginal heritage but also general Australian heritage and that protection and preservation should be the concern not only of the Aboriginal people but of the Australian nation as a whole, in NSW Select Committee Upon Aborigines, above n 362. The objects in s 2A of the *Parks and Wildlife Act* (NSW) inserted in 2001 include mention of "places, objects and features of significance to Aboriginal people" in s 2A(1)(b)(i), but these are placed alongside other forms of heritage.

the enactment of the 1993 *Historic Places Act* was that there was one standard for sites of significance to New Zealanders as a whole and another lesser standard for sites of significance to Maori peoples, in that those sites were protected for their scientific or research value rather than their value to Maori culture.[1066] The solution was to include in the statute provisions for the assessment of wahi tapu by a Maori Heritage Council and its registration. The objects of the legislation still refer generally to the protection, preservation and conservation of historical and cultural heritage of New Zealand[1067] but in the section dealing with the purposes of the legislation there is a reference to persons exercising functions under the Act doing so recognising "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga".[1068] While there is no doubt that the legislation is intended to provide protection to Maori sacred places,[1069] it was nevertheless incorporated in a general heritage scheme in which Maori values were to be recognised along with other values.[1070] Similarly the references to wahi tapu in the NZ *RMA* include these as a consideration in general planning legislation, along with other considerations relevant to other forms of heritage and environmental protection.[1071]

An illustration of how the general environmental scheme of the *RMA* is pitched at the broader community can be seen in the series of cases concerning the pipeline through Matukuturua Stonefields. At first instance in the case of *Minhinnick* v *Watercare*[1072] the Environment Court said[1073] that the test under the *RMA* as to whether an activity affecting wahi tapu will be "offensive and objectionable to such an extent that it is likely to have an adverse effect on the environment" had to be judged by the standards of a reasonable ordinary person who is the representative of the community at large.[1074] On

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[1066] See Waitangi Tribunal*, Manukau Claim,* above n 133. The Coad Report also made much of the lack of protection for Maori sites, Department of Conservation, *Historic Heritage Report,* above n 1001.
[1067] In s 4(1).
[1068] In s 4(2)(c).
[1069] This is evident in the parliamentary debates on its introduction: New Zealand, *Parliamentary Debates,* 5 May 1993, 15,214-9 (Denis Marshall, Minister for Conservation, Second Reading Speech of Historic Places Bill) and New Zealand, *Parliamentary Debates,* 5 May 1993, 15,223-6 (Debates on the Historic Places Bill, in Committee). There was concern, however, that it did not go far enough to provide for the application of the principles of the Treaty of Waitangi.
[1070] It has been criticised as assimilating Maori values within a British conception of heritage, eg by see Mosley, above n 204.
[1071] A similar ambiguity can be found in the Yukon in Canada where the general *Environment Act*, RSY 2002, c 76, in ss 36, 53, 66, contains provisions dealing with partnerships and consultation with Yukon First Nations and speaks in the Preamble of the "spiritual relationship with the environment". However, the Preamble also provides that "resources of the Yukon are the common heritage of the people of the Yukon, including generations yet to come".
[1072] [1997] NZRMA 289.
[1073] Ibid, at 310.
[1074] That is, rather than a member of a particular iwi or other section of the community. It was said that such a person is one who does not put greater value on wahi tapu than informed members of the community at large do. It was found in that case that a general member of the community would regret that wahi tapu would be disturbed, but would consider in all the circumstances it is not objectionable or offensive to such an extent as to have an adverse effect on the environment. In saying this, the Court may well have assumed that its own views were those of the "reasonable well-informed member of the community at large", as there was no other evidence of this. Evidence had been led, on the other hand, by

appeal,[1075] Salmon J in the High Court came to the contrary view that while the test was an objective one, it could be judged on the basis of what was offensive to the reasonable Maori person.[1076] However, the Court of Appeal[1077] reversed the decision saying that reference had to be made to the community at large. It said that the Court itself acts as a representative of the community at large and had to consider all the factors, including the cultural concerns. [1078] That approach favoured the views of the wider public over offensiveness as a religious concern of a particular Indigenous group.

The Supreme Court in Canada, in *Kitkatla Band v British Columbia*,[1079] in the context of a challenge to the powers in the BC *Heritage Conservation Act*[1080] to permit destruction of Indigenous heritage,[1081] held that the legislation was able to be characterised as dealing with heritage property and civil rights, which were within the power of the province, and not as legislation which singled out Indians for special treatment, for which the federal legislature had exclusive powers. The relevant legislation had a general purpose of facilitating protection and conservation of heritage property in British Columbia,[1082] but had in its definitions of "heritage object" and "heritage site" a reference to "British Columbia, a community or an aboriginal people".[1083] The Supreme Court majority commented that the Act considers First Nations' culture as part of the heritage of all residents of British Columbia and this had to be protected, not only as an essential part of the collective memory of First Nations, but as part of the shared heritage of all British Columbians.[1084]

Maori witnesses who said that the sewage pipeline in question that would run through stonefields said to be wahi tapu. It was considered objectionable and offensive that wahi tapu was able to be disturbed: ibid, at 310.

[1075] In *Minhinnick v Watercare Services Ltd* [1998] 1 NZLR 63.

[1076] Ibid, at 76. Salmon J held that the Environment Court had misdirected itself by referring only to the community at large and not considering the importance of cultural elements. He said that the possibility that something that was offensive to a section of the community, even if the rest of the community did not find it so, could still be considered, because the wider community would respect the views of that smaller section. He thought that if the proposal was offensive or objectionable to a reasonable Maori person, this would usually be sufficient, because the rest of the community would respect that attitude. This test was still based on what the wider community would regard as "offensive" because the wider community might include in this concept not only what offended them personally but also what might cause offence to others, taking cultural elements into account.

[1077] *Watercare Services Ltd v Attorney-General and Minhinnick* [1998] 1 NZLR 294, 304–5 in a judgment delivered by Tipping J.

[1078] This notion of the court acting as a representative of the community as a whole in making assessments of what is offensive and objectionable has been followed in other Environment Court decisions in New Zealand, for example, in *Te Ohu O Nga Taoga Ngati Manu* v *Stratford District Council and Marabella Enterprises Ltd* (Unreported, Environment Court, W 74/97, 24 February 1997), at 6–7. This was a case concerning an oil exploration well in a place alleged by an objector to be wahi tapu. In the particular case, the court decided that the objector was in the minority and more concerned about sovereignty and control of resources of the land. The question of objective assessments will be dealt with in Chapter 17.

[1079] [2002] SCC 31.

[1080] RSBC 1996, c 187.

[1081] In the case in question, it was culturally modified trees which were said to have cultural and spiritual significance.

[1082] In s 2.

[1083] In s 1.

[1084] *Kitkatla Band v British Columbia* [2002] SCC 31, at 45.

The Report of the Committee of Inquiry into the National Estate in Australia[1085] also recommended protection of Aboriginal sites as part of the National Estate.[1086] It noted the criticism that Aboriginal sites have been preserved chiefly for the scholarship of "European man" (sic) and not in any direct way for the benefit of "the Aboriginal" (sic) and that the National Estate is primarily seen as that of European man in Australia and that an Aboriginal may find the concept of National Estate deficient in this respect. Faced with this issue, the Committee simply said, "We cannot make any real attempt to answer the implicit question."[1087]

14.3.2 Indigenous-specific Legislation

Lack of Clear Statements of Intent to Benefit Indigenous Peoples.

Australia and USA have some entire Indigenous-specific heritage statutes.[1088] Apart from the Californian legislation discussed later, it is, however, still not common to see any specific reference to the heritage being protected for the benefit of Indigenous peoples. Many say nothing about who is intended to benefit from the preservation of the heritage.[1089] The Western Australian statute states explicitly that Aboriginal heritage is preserved for the benefit of the whole community.[1090] The heritage provisions in the

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[1085] Hope Inquiry, above n 940.

[1086] "National Estate" was a term defined in inclusive terms, referring to items that needed to be conserved and presented as part of the heritage of the world, of the nation as a whole and for the benefit of the community as a whole: Hope Inquiry, above n 940, at 35, 334. The recommendations in regard to Aboriginal heritage are found at 166–175, 340. One recommendation was for separate legislation for uniform protection, on a national basis, of Aboriginal sites of significance throughout Australia, that is, the intention was for specific Indigenous legislation rather than general heritage legislation.

[1087] Hope Inquiry, above n 940, at 170 at [5.21]. The inquiry report also described the needs for protection of the National Estate in the flavour of building the "collection", especially in its discussion of the need for "a balanced and viable representation of as many aspects as possible" of the heritage and lamenting a "loss in the chain of the National Estate", at 30, [1.64] –[1.65]. There were also comments, however, to stress the need to work in accordance with the wishes of Aboriginal people and understand what is significant to them, at 169, but these could not be put forward as a complete answer to the question.

[1088] In Australia, there is now the *Aboriginal Heritage Act 1972* (WA); *ATSIHPA; Aboriginal Heritage Act 1988* (SA)*;* NT *Aboriginal Sacred Sites Act 1989; Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) and *Aboriginal Heritage Act 2006* (Vic). In the USA, there is the Connecticut Public Act 89-368 in 1989, now codified in CONN GEN STAT §§ 10-381 to 10-391 (2009) (Native American Cultures, Policy Concerning Archaeological Investigations) and the Californian *Native American Historical, Cultural and Sacred Sites Act of 1976*, CAL PUBLIC RESOURCES CODE §§ 5097.9–991(2009).

[1089] For instance, in Australia, in relation to the *ATSIHPA,* the purposes in s 4 refer to the preservation and protection of "areas and objects of particular significance to Aboriginals in accordance with Aboriginal tradition", but do not say for whose benefit this is. Other Australian statutes also speak of the purpose of preserving Aboriginal heritage without going any further.
In the USA, the Connecticut CONN GEN STAT §§ 10-381–10-391 (2009) (Native American Cultures, Policy Concerning Archaeological Investigations) appears to be modelled on the general heritage legislation and there is no specific statement of who is to benefit from the preservation.

[1090] In the long title to the *Aboriginal Heritage Act of 1972 (*WA). The 1992 Bill, intending to amend it by providing that it was for "the preservation on behalf of the community and *in particular the Aboriginal community*" (emphasis added), was not passed. Clive Senior noted in his report on the legislation that this

Connecticut statute as a whole are more concerned with archaeological sites and permits than sacred sites, and the definition of sacred sites is linked to places eligible for the National and State Registers of Historic Places,[1091] suggesting an aim of historic preservation for the whole community. However, the statute enacting those heritage provisions also dealt with a range of provisions which indicated a purpose of benefitting Native American tribes as well.[1092] Some more recent statutes in Australia give more of that flavour of an intention to benefit Indigenous peoples by way of statements about respect for Indigenous culture and tradition,[1093] primary guardianship by Indigenous people[1094] or recognition of the role of Indigenous people in conservation.[1095] However, none of these Australian provisions go as far as to state explicitly that the primary purpose of the preservation of the heritage is to benefit Indigenous peoples. The *Northern Territory Aboriginal Sacred Sites Act 1989,* in its long title, speaks of the Act intending to create a *practical balance* between preserving Aboriginal cultural tradition in certain lands on the one hand and the aspirations of "Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement" on the other, hinting that the preservation of such places would really not be for the benefit of the wider community.[1096]

Assumed "Convergence of Benefits"?

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still would not give sufficient emphasis to a intent to benefit Aboriginal people and recommended that the Act should have the explicit purpose of providing for protection and preservation of Aboriginal heritage by and on behalf of Aboriginal people and the community generally and also to recognise and give effect to the rights and responsibilities which Aboriginal people have in relation to their heritage: Minter Ellison Northmore Hale (Dr CM Senior), *Review of the Aboriginal Heritage Act 1972* (1995). In *Traditional Owners – Nyiyaparli People v Minister for Health and Indigenous Affairs* [2009] WASAT 71, the State Administrative Tribunal decided that decision making in relation to places and sites to which the *Aboriginal Heritage Act* (WA) applied, was to be exercised by the Minister, acting on behalf of the community: at [18], [21].

[1091] CONN GEN STAT § 10-381(5) defines "sacred site" or "sacred land" as meaning any space, including an archaeological site, of ritual or traditional significance in the culture and religion of Native Americans, that is listed or eligible for listing on the National Register of Historic Places (16 USC § 470a, as amended) or the State Register of Historic Places defined in section 10-410, including, but not limited to, marked and unmarked human burials, burial areas and cemeteries; monumental geological or natural features with sacred meaning or a meaning central to a group's oral traditions; sites of ceremonial structures, including sweat lodges; rock art sites; and sites of great historical significance to a tribe native to this state.

[1092] The statute which enacted the provisions, Public Act 89-368 also dealt with the recognition of five Native American tribes of Connecticut as self-governing entities with powers over tribal members and reservations. It dealt with matters relating to state–tribe relationships, though in relation to the heritage provisions, apart from providing for a Native American Heritage Advisory Council, there is little control given to tribes. The Office of Legislative Research in Connecticut in a report in 2002 on the state recognition of Indian tribes has mentioned that Public Act 89-368 came out of the work of the Indian Affairs Task Force and much of the debate in the legislature concerned archaeology and Indian heritage: Reinhart, above n 1018.

[1093] For instance, in the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act* 2003 (Qld) s 5; *Aboriginal Heritage Act 2006* (Vic) s 3.

[1094] *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 5; *Aboriginal Heritage Act* 2006 (Vic) ss 3 and 12. These statutes also speak of recognising ownership, though these statements of principle are limited to human remains and secret or sacred objects and do not apply to places.

[1095] Such as in the *EPBC* s 3(f) and (g).

[1096] Though the balancing issue does not address the issue of communal heritage versus Aboriginal heritage. It may be that the NT legislation is simply more honest about the real aims of the legislation.

As mentioned before in relation to the legislation to preserve Aboriginal relics in Victoria, the Australian High Court was explicit in finding that the legislation was not passed for the benefit of Aboriginal people but for the Australian or at least Victorian community generally.[1097] When it came to Australian legislation that specifically protected Aboriginal places of significance, French J in *Tickner v Bropho*[1098] said that the *ATSIHPA*[1099] was enacted "for the benefit of the whole community" to preserve "what remains of a beautiful and intricate culture and mythology". He identified the protection as being a matter of public interest and contrasted this with the potential to clash with private interests, which the Minister had to balance. This language too suggests that the aim was to preserve something for "the collection" rather than for the religious values of the Aboriginal people, though the intention was no doubt that both interests would be served. The "dual interest analysis" was also suggested in *Minister for Indigenous Affairs v Catanach*,[1100] when Pullin J, referring to the WA *Aboriginal Heritage Act 1972*, mentioned that Aboriginal sites are not only of value to Aboriginal people but to the Australian community as a whole, and this made a breach of the legislation a violation of a "public right" for which the Attorney-General could take action.

The "convergence of benefits of heritage protection" approach was also the majority choice in a different federal–state balance issue in the Tasmanian dam case in the Australian High Court, *Commonwealth v Tasmania.*[1101] This occurred during the discussion on the issue of whether the specific legislative provisions[1102] to protect sites of particular significance to people of the Aboriginal race could be justified by the Commonwealth government's "race" power.[1103] The Tasmanian government had argued that the areas protected were for their universal value and significance to people as a whole, not only for people of a special race, and Aboriginal people were not given any special benefits or rights under the legislation. The minority of justices agreed and held that the race power did not apply. The majority, however, held that a

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[1097] In Chapter 12, regarding *Onus v Alcoa* (1981) 149 CLR 27. The High Court did hold that the Aboriginal people whose heritage it was did have a special interest over and above other members of the community as far as standing to bring an action in relation to breaches of the legislation is concerned, but this "standing question" involved a different test and issues and did not go to why the relics were being preserved.
[1098] (1993) 114 ALR 409, 449.
[1099] This does not explicitly state for whose benefit the legislation is passed.
[1100] [2001] WASC 268 at [45].
[1101] (1983) 158 CLR 1.
[1102] In the *World Heritage Properties Conservation Act 1983* (Cth) (now repealed and replaced by the *EPBC).*This was not legislation dealing only with Indigenous heritage but was general heritage and environmental legislation. However, it had specific discrete provisions in it which were said to be enacted as "*special laws for people of the Aboriginal race*" and referred to applying to an Aboriginal site "the protection or conservation of which is, whether by reason of the presence on the site of artefacts or relics or otherwise, of particular significance to the people of the Aboriginal race": see s 8.
[1103] This is a reference to s 51(xxxvi) of the Australian *Constitution* which gave the Commonwealth power to legislate with respect to the people of any race for whom it is deemed necessary to make special laws.

law with respect to cultural heritage of a race was a law with respect to race and within the "race" power. Amongst the decisions of the majority justices on this issue were comments to the effect that the legislation was a law for the benefit of all Australians but also a special law for Aboriginal people.[1104] Although Mason J acknowledged that the actual protection which a site received under the legislation may be unrelated to features which made it significant to Aboriginal people and that the true object of the law was to protect the property which forms part of the world heritage, he went on to add that this would nevertheless result in the protection of the features that made them significant to Aboriginal people and that the needs of the Aboriginal people in relation to protection of their sites of particular significance could differ from the needs of mankind (sic) due to the special and deeper significance to the Aboriginal people whose heritage it was.[1105] While the majority did not see a conflict between the provisions being both in the interests of the wider community and Aboriginal people specifically, there is some recognition by at least Mason J that the interests and significance are not necessarily the same. There was no need to address any such conflict or the consequences of this in the case.

Californian Religious Freedom Contrasts

By contrast, the Californian provisions[1106] dealing with prohibitions on destroying Indigenous sacred sites have been linked with freedom of religion for Native Americans.In this context it can be assumed that the benefit of the provisions are not so much to protect heritage for the wider community but to protect specific religious rights of Indigenous peoples. Similarly, statements have been made in Californian legislation about protection of sacred places in the context of relationships with tribal governments rather than general heritage protection for the community.[1107] It could be argued that these provisions stand outside the general public heritage model. One can only speculate as to whether the private sphere approach of religious freedom might get imported into these provisions.

[1104] (1983) 158 CLR 1 per Mason J, at 159, Murphy J, at 172 (dealing with world heritage generally) and 181 (on the race power), Deane J, at 275. Brennan J, the other justice in the majority, did not deal with the issue of whether it was for the benefit to the wider community.

[1105] Mason J, at 159.

[1106] The Californian *Native American Historical, Cultural and Sacred Sites Act 1976*, CAL PUBLIC RESOURCES CODE §§ 5097.9-5097.991(2009) in § 5097.9 mentions prohibitions on destroying sacred sites in the same sentence as not interfering with free exercise of Native American religions. This legislation has been said to have influenced the *AIRFA* discussed in Part B: Michaelsen, 'Significance of the *AIRFA*', above n 152. This was also the format of many of the attempted federal Bills and also the original 2002 form of the Californian attempted SB 18: see above at 13.3.1.

[1107] The *Native American Historic Resource Protection Act 2002,* CAL PUBLIC RESOURCES CODE §§ 5097.993–5097.994 (2009) had a long section 1 which outlined the findings and declarations of the Legislature and spoke of continuing ties to the land and the need for government-to-government partnerships with Native American tribes.

14.3.3 Notifications, Standing and Natural Justice

One symptom of the lack of clarity as to who is the beneficiary of the legislation, even when it is specific legislation to protect Indigenous places of significance, is the uncertainty created on questions of rights to be notified, standing and natural justice. Some, especially recent, Indigenous heritage provisions in the four countries have specific requirements about notifying relevant Indigenous organisations or groups about registration of sites or grant of permits to damage sites.[1108] These provisions implicitly recognise that even if the legislation is not primarily for their benefit, Indigenous peoples do have special interests in their heritage and suffer particular damage from their destruction.

Many of the general heritage and environmental provisions and some of the earlier Indigenous heritage provisions, however, have no such notification or consultation requirements. The absence of such provisions suggests that Indigenous people are not recognised in the legislation as having any such special rights even to be notified about matters affecting their places of significance. They are left to fall back on the common

[1108] Such as, in Australia, in the *Aboriginal Heritage Act 1988* (SA) s 13 where a failure to consult properly before a decision was made was able to invalidate the decision: see *The Aboriginal Legal Rights Movement Inc v South Australia and Stevens* (1995) 64 SASR 558; the *Heritage Act 2004* (ACT) s 31; *Aboriginal Heritage Act 2006* (Vic) from s 38; *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) from s 57 and in Cultural Heritage Duty of Care Guidelines 2004, Queensland Government Gazette No 80 at 1423 (16 April 2004) <http://www.nrme.qld.gov.au/cultural_heritage/pdf/duty_of_care_guidelines.pdf >; NT *Aboriginal Sacred Sites Act* 1989, from s 19F on.
In the USA, notification and consultation provisions have been inserted into the *NHPA* at § 470a(d) and the *Protection of Historic and Cultural Properties Regulations* 36 CFR § 800 (2008). These have been interpreted as giving rise to requirements for good faith consultations in *Pueblo of Sandia v US*, 50 F 3d 856 (10th Cir, 1995); *Attakai v US,* 746 F Supp 1395 (D Ariz, 1990). There were also extensive consultation requirements inserted in 2004 by way of the passage of SB 18 into the CAL GOVERNMENT CODE §§ 65351–65352.4 (2009) and § 65562.5 (2009), to require opportunities for Native American tribes to be involved in preparation or amendment of the general plans prepared by local government and for proposed actions to be referred to the Native American tribe for the area listed on a contact list of the Native American Heritage Commission ("NAHC") and for them to be consulted. The CAL GOVERNMENT CODE § 65040.2 (2009) was also amended in 2004 by SB 18 to provide for guidelines for planning to contain advice developed in consultation with NAHC for consulting tribes for preservation or mitigation of impact to historic, cultural and sacred sites.
In Canada under s 13(4) of the BC *Heritage Conservation Act 1977,* there are limited requirements for the Minister to consult with First Nations on exempting sites from the protective provisions of s 13(2). These have been used to set aside decisions made without consultation, in *Nanoose Indian Band v The Queen and Intrawest Corp* [1994] CanLII 1806. The Yukon Territory's *Environment Act*, RSY 2002, c 76, in the Preamble and ss 36, 53, 66(2) provide for partnerships and consultation with Yukon First Nations. The BC *Environment Assessment Act*, SBC 2002, c 43, s 29.1 also requires specific notice and consultation with First Nations in relation to their treaty lands.
In New Zealand, this consultation requirement is limited to registration of a wahi tapu site or area: *Historic Places Act 1993* s 24. However, consultation requirements have been implied in the *RMA* process through the provisions relating to the Treaty of Waitangi, to providing for wahi tapu and to the active protection of Maori interests: see discussions of cases in Ministry for Environment, *Guidelines for Consulting with Tangata Whenua under the RMA: Update on Case Law* (2003) and the earlier Ministry for Environment, *Case Law on Resource Management Decision Making and Consultation with Tangata Whenua* (1999); Paul Beverley, 'The Incorporation of the Principles of the Treaty of Waitangi into the *Resource Management Act 1991*: s 8 and the Issue of Consultation' (1997) 1 *New Zealand Environmental Law Journal* 125; Paul Beverley, 'The Mechanisms for the Protection of Maori interests under Part II of the *Resource Management Act*' (1998) 2 *New Zealand Environmental Law Journal* 121; Ani L Mikaere, 'Maori Issues: *Resource Management Act*' [1995] *New Zealand Law Review* 137.

law of natural justice and standing as to whether they have a right to be heard or to bring court proceedings if they do happen to discover the impending destruction of their heritage. The balance of authority in Australia favours particular Indigenous spiritual custodians of the places or objects under consideration having at least standing to bring action for breaches of the legislation. This is the case even where the legislation is said to be for the benefit of the general community and not for particular Aboriginal people.[1109] Such standing is based on simply having an interest greater than and different from the rest of the community. Similar conclusions have been reached in New Zealand under the *Historic Places Act* in relation to permits to destroy sites,[1110] and standing has been accepted in US cases to enforce the *NHPA* in relation to Indigenous sites of significance.[1111] Mere standing, however, is less than being recognised as the primary beneficiaries or as determining the values and processes to be applied.

On the natural justice aspect, there are cases where Indigenous custodians have been said to have, at least in some limited circumstances,[1112] legitimate expectations to be heard before decisions are made to disturb sites, though these are often based on the policies and actions of the relevant department rather than a recognised inherent interest or procedural right.[1113] The situation is different in Canada at common law because of the existence of fiduciary duties and obligations of the Crown in the context of Aboriginal title claims. There is no clear line of authority supporting procedural fairness simply by virtue of the heritage protection legislation in absence of specific legislative provisions.[1114] The majority of the Full Court of the Western Australia Supreme Court in *Western Australia v Bropho*[1115] had doubted that both standing and

[1109] As was decided by the High Court in *Onus v Alcoa* (1981) 149 CLR 27. In *Bropho v Tickner* (1993) 40 FCR 165, Wilcox J decided that Bropho, who had applied for a de claration for protection of a site of which he asserted that he was a custodian, had standing as a person aggrieved within the principles of *Onus* and also as the person who made the application for a declaration.

[1110] See *Ngatiwai Trust Board v NZ Historic Places Trust and Green* [1998] NZRMA 1 where Grieg J found that the traditional owners of the sites were in the class of people directly affected, even though they had no proprietorial interest.

[1111] See *Attakai v US,* 746 F Supp 1395 (D Ariz, 1990). Note, however, that it has been found that no private action is given by the *NHPA* itself, but aggrieved parties can seek a review under the Administrative Procedure Act: *San Carlos Apache Tribe v US,* 417 F 3d 1091 (9th Cir, 2005).

[1112] For instance, the existence of legitimate expectations has been recognised to arise in various New South Wales cases as a result of the policies and practices of the Department: in *Carriage v Stockland Development* [2004] NSWLEC 553; *Williams v Director-General of Department of Environment and Conservation* [2004] NSWLEC 613; *Anderson v Director-General of Department of Environment and Conservation* [2006] NSWLEC 12.

[1113] See *Country Energy v Williams; Williams v Director-General National Parks and Wildlife* [2005] NSWCA 318.

[1114] For the duty to consult as part of the duty of the Crown, see Canadian Supreme Court cases such as *Taku River Tlingit First Nation v British Columbia* [2004] SCC 74 and *Haida Nation v British Columbia* [2004] SCC 73. In *Cameron v Ministry of Energy* [1998] CanLII 6834, the court did not recognise a duty to consult nor any requirements of procedural fairness for the Kelly Lake Cree group whose traditional country was some distance away from the site: at [165]–[186], [241]–[245].

[1115] (1991) 5 WAR 75. Even though standing had been conceded in that case in which Bropho, as a traditional custodian of the site at the Swan Brewery, challenged a decision of the Minister to consent to the damaging of the site, Anderson J, with whom Franklyn J agreed, said that the concession was

procedural fairness applied, particularly because of the mere "spiritual nature" of the interest in the sacred place. These highlight the difficulties faced by Indigenous people in being recognised as having any special stake in what is their particular heritage and in not being seen as the intended main beneficiaries of the legislation.

14.4 What Heritage? Religion or Culture?

14.4.1 The Absorption of Religious Significance into other Forms of Heritage Significance

One specific manifestation of the general problem raised above is the question of what values are protected. If protection is for the wider community, then are the values primarily the collection of culture and history with the benefits of education and the like, which are the usual aims of general heritage protection? A significant issue for this Part is the extent to which religious values, such as the importance of a place to the faith of the community, are recognised in the public heritage system or whether these are overshadowed by values of greater importance to the public. Many places of religious significance, such as churches, are on the heritage register because of their architectural or historical significance and many Indigenous sacred places may be listed for archaeological or cultural significance. Sometimes the religious significance is what makes a place culturally or historically important, but that culture or history gains a more generalised secular significance, as an example of a community's religious culture or as a record of the history of key religious movements that were socially influential.[1116] As far as the general public are concerned, it is usually these secular values that were more important and led to the listing.

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generous and that the *Onus* case was different because of direct physical association with the site, whereas Bropho only had a spiritual interest and led no evidence of using the site nor did his interest have a tangible or material quality (at 90–92). Furthermore, the majority doubted that Bropho had any legitimate expectations to be heard by the Aboriginal Cultural Material Committee ("ACMC"), which was to assess such things as significance and public interest and make recommendations to the Minister, or to be heard by the Minister, at 93. This was primarily because Bropho had not made any effort nor incurred any expense to persuade the ACMC to make a particular recommendation. Malcolm CJ in that case, however, found that Bropho had standing and he also believed that Bropho would have had a legitimate expectation that he could make submissions to the ACMC, though not to the Minister. White J subsequently decided in *Ngalia Heritage Research Council Aboriginal Corporation v Minister for Aboriginal Affairs and Dominion Mining Ltd* (Unreported, Supreme Court of Western Australia, White J, 6 November 1991) that a corporation representing the custodians did not have standing, but he did not have to decide in that case whether the individual custodians would have. Recently, Martin CJ in the WA Supreme Court in *Woodley v Minister for Indigenous Affairs* [2009] WASC 251 held that there was no obligation on the Minister to accord procedural fairness to the custodians of the relevant site, even if there was a duty on the ACMC to do so, a point which he did not need to decide.

[1116] Well-known Western examples on the World Heritage List include Durham Cathedral in England, inscribed for, inter alia, attesting to the importance of the early Benedictine monastic community, or Canterbury Cathedral, which is also included for being the seat of the spiritual leader of the Church of England. There are memorials to Martin Luther in Eisleben and Wittenberg in Germany, for "bearing unique testimony to the Protestant Reformation". Assisi and other Franciscan sites in Italy are listed for

There can be similar scope for absorbing Indigenous sacred places into a more secularised kind of heritage significance. The term more commonly used in Indigenous heritage legislation, as indicated above, is the more neutral (and secular) term, "significance" rather than "sacredness".[1117] No doubt this is vital for widening the coverage of the legislation to include places that may not be sacred but must also include sacred places as they are an important sub-set of places of Indigenous significance.[1118] However, such places may not have to be dealt with as specifically religious. In this regard, the Northern Territory legislation[1119] is novel in Australia in its use of the term "sacred site". It defines that term to include not only sacred sites but any sites covered by the wider term "sites of significance" so in effect only requires a more general significance to Aboriginal people. The use of the term "sacred" in that

associations with St Francis and the Franciscan order, justified for representing the "cult and diffusion of the Franciscan movement in the world, focusing on the universal message of peace and tolerance even to other religions or beliefs". In France, there is the Vezelay Church, inscribed for the Benedictine monastery which is said to have acquired the relics of St Mary Magdalene and has been an important place of pilgrimage. There are also the Routes of Santiago de Compostela, the famous pilgrimage routes in France and Spain. These reasons for listing could all be of both religious and historical significance. See the World Heritage List, found at UNESCO <http://whc.unesco.org/en/list>.

An Australian Indigenous example of a place on the World Heritage List that notes spiritual and cultural significance to Anangu people is the Uluru-Kata Tjuta National Park. This was initially listed for its natural significance only in 1987, but later, in 1994, was listed as a cultural landscape as well as for having powerful religious associations. Tongariro in New Zealand was also inscribed in the World Heritage List as a cultural landscape for its religious significance in 1993 and was described as a spiritual home to the Maori people and as a gift of sacred land. However, both were first inscribed for their natural features. A discussion of the cultural landscape extension in the World Heritage Criteria and of the above two examples can be found in Titchen, 'Extending the Limits', above n 994, and PH (Bing) Lucas, 'Cultural Landscapes and the *World Heritage Convention*: The Road to Tongariro and Uluru Kata Tjuta', also in Sarah M Titchen (ed), *Indigenous Cultural Landscapes and World Heritage Listing: Proceedings of Australian ICOMOS Workshop, Canberra, Australia in February 1995* (1995). It should be noted that the cultural landscapes criteria for World Heritage listing is only to be used in exceptional circumstances or in connection with other criteria: see UNESCO, *Operational Guidelines,* above n 955, [77(iv)], suggesting that religious significance alone is unlikely to be sufficient.

[1117] See examples given in 14.2 above. Exceptions which expressly refer to "sacred" places as a category of protected places, rather than places of general significance, are in the New Zealand definition of wahi tapu in the *Historic Places Act*; the Californian *Native American Historical, Cultural and Sacred Sites Act 1976* at CAL PUBLIC RESOURCES CODE § 5097.9 (2009); the Connecticut CONN GEN STAT § 10-390 (2009); the Nevada NEV REV STAT § 33-381.195 (2010); and the Western Australian *Aboriginal Heritage Act 1972,* at least as far as s 5(b) which relates to significance to Aboriginal people. (The WA legislation also has other relevant limbs to the definition of Aboriginal site in s 5 which relate more to significance to government bodies or the community, such as "any place of importance and significance where persons of Aboriginal descent have … left any object … for any purpose connected with the traditional cultural life of the Aboriginal people, past or present" or "any place which in the opinion of the Aboriginal Cultural Material Committee is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the state".)

The Manatu Maori department drew a distinction between sacred areas considered wahi tapu and everyday sites of significance in their paper, Manatu Maori, above n 38.

[1118] It was the purpose of the amendment in WA to restrict s 5(b) of the definition of Aboriginal site in the *Aboriginal Heritage Act* to sacred, ritual or ceremonial sites rather than just sites of significance in order to narrow the reach of the Act: note 1059 in 14.2 above. Hal Wootten has noted that the use of the term "significance" is much easier to apply than "sacred" as it avoids the debates as to what is sacred: Hal Wootten, "Resolving Disputes over Aboriginal Sacred Sites: Some experiences in the 1990s' in Elizabeth Burns Coleman and Kevin White (eds), *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society* (2006). See also Kenneth Maddock, 'Yet Another Sacred Site: The Bula Controversy' in Barry Wright, Geraldine Fry, and Leon Petchkovsky (eds*), Contemporary Issues in Aboriginal Studie*s (1987).

[1119] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3 and the *Aboriginal Sacred Sites Ordinance 1978* (NT) s 3*, NT Aboriginal Sacred Sites Act 1989* (NT) s 3.

legislation, however, was recommended by Justice Woodward[1120] in order to convey that it was spiritual or religious significance at stake, not merely social or historical. His belief was that it would be regarded as more important or acceptable due to the analogy to other places of worship. This aim has not been carried through in many of the other pieces of legislation in Australia. As mentioned previously, some Australian politicians have been known to argue that sacred sites are protected on cultural grounds rather than religious ones.[1121]

The New Zealand statute referring to wahi tapu, and the Connecticut and Californian legislation in the US which refer to "sacred sites" or "sacred lands" and "shrines", however, do clearly use the language of sacredness, suggesting that it is the religious values that are paramount in the definition of such places. This wording may bring the religious significance to the fore, though may not in itself override the effect of any secular significance that the places might hold for the wider public.

14.4.2 USA and the Need for a Secular Purpose and Effect

Dealing with sacred places by using secular values is made a legal requirement in the USA. As noted in Part B, the Establishment Clause interpretation, which has required a secular purpose and secular effect for the government action to be valid, has occasionally resulted in what would appear to be obviously religious activities being classified as secular and reflecting traditional and cultural heritage values rather than religious ones. [1122] Similar approaches were adopted in Indigenous cases in the USA

[1120] In A E Woodward, *Second Report,* above n 173.

[1121] See 7.1 above, where it was noted that Alexander Downer, the then Australian Foreign Minister was quoted by Marion Maddox as suggesting that it was "a long bow" to consider sacred sites as being religious rather than cultural. She also quotes Liberal parliamentarian Tony Abbott who spoke of protecting sacred places as being for cultural rather than religious reasons: Maddox, *For God and Country,* above n 12, at 273–4; Maddox, *God under Howard*, above n 73, at 133–4.

[1122] Such as:

- prayer at the commencement of parliamentary proceedings, in *Marsh v Chambers,* 463 US 783 (1983) but cf *Engel v Vitale,* 370 US 421 (1962);
- enforcement of Sunday closing laws, as in *McGowan v Maryland,* 366 US 420 (1961), where despite the religious origins of such laws, they were seen now as motivated by the secular principle of a common day of rest;
- Christmas crèches, such as in *Lynch v Donnelly,* 465 US 668 (1984) where the majority saw a Christmas crèche depicting the Christian holy family as one of a number of government sponsored ways of celebrating the nation's heritage (implying that this was a secular purpose). A similar approach was taken by the majority in relation to a Hanukah menorah next to a Christmas tree in *County of Allegheny v American Civil Liberties Union,* 492 US 573 (1989) which found this acceptable because it was in a setting of secular celebration of holidays;
- the use of "In God We Trust" on coins and currency said in *Aronow v US,* 432 F 2d 242 (9th Cir, 1970) to be patriotic rather than religious;
- one particular method of displaying the Ten Commandments with other historical markers, as in *Van Orden v Perry,* 545 US 677 (2005) where by a majority of one, the US Supreme Court upheld the Ten Commandment monolith in the Texas Capitol grounds on the basis that it had a secular and historic purpose rather than a religious one. There was much debate about the secular–religious characterisation in the "Ten Commandment cases" in the US Supreme Court. Breyer J in *Van*

where courts have classified government plans to protect sacred places as motivated by cultural or historical factors.[1123]

This dichotomy in the law between secular and religious purposes in the USA has resulted in religious places being protected in heritage legislation primarily for their cultural significance. In the *National Historic Landmarks Program Regulations,*[1124] various criteria were set out for National Historic Landmarks. These provided that ordinarily properties owned by religious institutions or used for religious purposes would not be eligible for designation, but would be if such religious properties derived primary significance from architectural or artistic distinction or historical importance.[1125] In this way, religious importance was excluded from consideration and a distinction drawn between this and other secular forms of significance. These criteria were carried over to the *NHPA*[1126] and in regulations made under that Act.[1127] However, § 470(d)(6)(A) of the *NHPA*,[1128] now specifically provides that properties of "traditional religious and cultural importance" to an Indian tribe or Native Hawaiian organisation (known as TCPs or "traditional cultural properties") are eligible for inclusion in the National Register and this requires federal agencies to consult with the relevant Indigenous group that "attached religious and cultural significance to properties".

The National Park Service's *Guidelines for Evaluating and Documenting Traditional Cultural Properties*[1129] clearly included the traditions and beliefs of Native Americans in the concepts of cultural significance and their sacred places as TCPs. Those guidelines also noted that the specific inclusion of the concept of TCPs was responsive to the

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Orden v Perry, 545 US 677 (2005) at 702–3 said that the displays of the Ten Commandments in the State Capitol were secular and other members of the majority said that they were undeniably religious, though still not an impermissible establishment, at 690 (per Rehnquist CJ) and 692 (per Thomas J).This case can be contrasted with another single judge majority decision of the same day in *McCreary County v American Civil Liberties Union of Kentucky,* 545 US 844 (2005) where the Supreme Court found that the Ten Commandments in the court houses did give a religious message.

One legislative example is in the Kentucky KY REV STAT ANN § 42.705 (2009) (display of Historic Artifacts, Monuments, Symbols and Texts), which provides that free exercise of religion is a significant component of Kentucky's historical heritage and may be acknowledged in monuments, symbols etc, but only in a balanced, objective and not solely religious manner and in a manner which promotes the display of Kentucky's historic, cultural, political, and general heritage.

This also reflects the secularised civil religion concept, see 2.2.4 above.

[1123] See the cases that survived the Establishment Clause challenges in 5.2.3 and 7.4 above.

[1124] 36 CFR § 65 (2009). These were made pursuant to the federal *Historic Sites, Buildings and Antiquities Act 1935,* 16 USC §§ 461–67.

[1125] 36 CFR § 65.4(b)(1) (2009). The Regulations also emphasised the "historical" nature of the criteria by providing that ordinarily buildings and properties which have achieved significance within the past 50 years would not be eligible for designation. A similar ineligibility was placed on cemeteries except where they derive primary national significance from graves of persons of transcendent importance. Similar criteria and conditions relating to a religious property also appears for instance in the New York Code, Rules and Regulations dealing with the State Register of Historic Places at 9 NYCRR Part 427.3(b)(1); Tennessee's TENN CODE ANN § 4-11-202(2)(A) (2009); Wisconsin's WIS STAT § 44.36(2)(b)(1) (2009).

[1126] 16 USC §§ 470–470t at 470a(a), though the Secretary of the Interior could establish or revise criteria.

[1127] 36 CFR § 60 (2009) on National Register of Historic Places at § 60.4.

[1128] As amended in 1992.

[1129] This is the National Park Service, *Bulletin 38,* above n 1028.

AIRFA,[1130] though not intended to be limited to Native Americans or ethnic minority groups. It warned against ethnocentrism in evaluating TCPs and stressed that they had to be assessed from the point of view of those who ascribe significance to those places. However, the Guidelines recognised that requirement for additional justification for eligibility "to avoid the appearance of a judgment by the government of the merit of any religious belief" was "fraught with potential for ethnocentrism and discrimination". It encouraged considering the association of the TCPs with religious history or with persons significant in religion, if such significance has "scholarly secular recognition" and noted that the integral relationship in traditional Native American culture, history and religion was widely recognised in "secular scholarship". The Bulletin accepted that places that attained religious significance in the last fifty years would probably not be eligible for not having a sufficient historical perspective. In other words, while the TCPs concept made it clear that the religious significance did not exclude a place from eligibility, secular criteria were needed to make it eligible. This is reinforced in the grants criteria for preservation which also have to be secular.[1131] While these are specific requirements deriving from the US jurisprudence, similar attitudes may pervade the public heritage values in the other countries for other reasons discussed.

As mentioned above, the heritage legislation in California, however, did link protection of burial grounds and other sacred places with the different concept of "freedom of religion", a model which ostensibly puts the religious values to the forefront. The precise validity of these clauses in the light of the Establishment Clause has also been avoided by the courts through various devices like the lack of standing to raise an Establishment Clause challenge.[1132]

[1130] See 5.2 above for the *AIRFA*.

[1131] § 470(a)(e)(4) of the *NHPA* provides that grants may be made for preservation or restoration of religious properties listed on the National Register provided that the purpose of the grant is secular, does not promote religion and seeks to protect those qualities that are historically significant.

[1132] See 5.2.3 above. In *Native American Heritage Commission v Board of Trustees of the Californian State University,* 51 Cal App 4th 675 (1996), there was a challenge to the development by the University of a significant sacred site of the Chinigchinich religion. The Court of Appeal overturned the summary dismissal of the case by the trial judge on Establishment grounds. The challenge was dismissed on the grounds of a lack of standing of a state agency to raise the Establishment Clause which could only be brought by people claiming infringements on their personal constitutional rights. In *People v Van Horn,* 218 Cal App 3d 1378 (1990), as the case concerned the uncovering of an ancient grave by an archaeological company which wanted to retain the artefacts taken from the grave, the Court was able to say that, as the action in question dealt with the specific burial site excavation provisions introduced in 1982 amendments, it was only required to focus on those provisions and said that the 1982 amendments were legislation to prevent skeletal remains from being vandalised and to give Native Americans an opportunity to be involved in the disposition of the remains. As there was no reference to religion in those 1982 amendments, there was no Establishment issue.

14.4.3 Possible Conflicts and Consequences in Protection for Secular Rather Than Religious Significance

The mere coverage of sacred places in many statutes does not mean that they are necessarily protected for their spiritual significance as opposed to a more generalised cultural or heritage significance, even when such spiritual values can be considered. While the practical result of something being protected for being cultural or historic might be the same, it could in some circumstances cause difficulties for the religious significance of the place.

Richard Collins has commented that when legal protections equate religion with culture or other interests, religions can become relatively diminished in importance.[1133] As an illustration of different emphases as to what was important, in *Husby Forest Products v Minister of Forests*,[1134] the Haida Nation had described the culturally modified trees which were under threat as "the sacred workplaces of their ancestors". Garson J in the Supreme Court of British Columbia, however, described the BC *Heritage Conservation Act* as being concerned with the "preservation of a historical record".[1135]

There have been complaints about the emphasis on cultural rather than religious values in heritage protection. For instance, the comment by Kulchyski in Canada, that the heritage industry wants to "label, categorise, circumscribe and define the sacred" and that by using these methods for sacred sites, it "works to destroy the spirit of that which it seeks to protect". [1136] A related complaint is that in such a system sacred places are defined in terms of "cultural resources", which carries with it a sense of commodity.[1137]

In Australia, even where the legislation is specific to Indigenous significance, Marion Maddox in her useful study of the topic of religion in Australia, *For God and Country*,[1138]

[1133] Richard Collins, above n 23.
[1134] [2004] BCSC 142.
[1135] This was said in the context of the Act being found not to be about Aboriginal rights or forestry issues (which is true) and the need for the claimants to then delineate what their precise claim under the legislation was. While the comment about the historical record did not address the issue of sacredness as such, it did illustrate the contrast in the values of the Act compared with what was important to the Haida nation.
[1136] Peter Kulchyski, 'Bush/Lands: Some Problems with Defining the Sacred' in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998). See also similar concerns in Cummins and Whiteduck, above n 196. Gordon Christie has criticised the Aboriginal rights concept that carries with it a Western conception of cultural property and has called for manifestation of culture to be protected not on the basis of ownership of property but on the grounds of sacredness: see Christie, 'Aboriginal Rights', above n 29. Similar comments have been made in Australia about the pressure on Aboriginal people to secularise their beliefs and re-interpret and re-classify them: Annette E Henderson, *Aborigines and the Mining Industry in the Alligator Rivers Region: Divergent Views of Reality and their Implications* (1983).
[1137] Cummins and Whiteduck, above n 196. See also Kulchyski, above n 1136.
[1138] Maddox, *For God and Country,* above n 12.

has noted that there has been little commentary on Indigenous sacred site protection using the word "religion". She concludes that the Australian public is prepared to consider such protection as being about culture or tradition and will even employ words like "sacred" or "spiritual" to describe the significance of such places, but secular Australia is nevertheless reluctant to see the issue as one of "religion". It therefore imposes secular criteria to judge the religious content, hence the criteria are alien to religion.[1139] She suggests that even when the significance of the place is recognised as religious in nature, the secular institutions are not properly equipped to deal with it.[1140] Maddox's analysis is that the sacred is marginalised as it is seen as an intruder in the secular realm. This would appear to run parallel with the notion that if something "private" like religion is allowed into the public realm it has to be judged by the universally applicable legal principles of "public" law.

An interesting comparison might be drawn with the difficulties faced by non-Indigenous religious groups where heritage provisions protect churches and similar buildings for reasons other than their religious significance. For example, when these buildings are protected for their more secular architectural features,[1141] these can contradict and hinder the religious use of the place and thus affect its religious significance. In the USA, there have been cases where churches have fought heritage listing on grounds of religious freedom because the heritage listing has prevented the church from renovating or demolishing such buildings to advance their religious mission.[1142] This is a direct conflict between the secular heritage values and the values of religious significance. An Indigenous example involves the traditional ceremonial practice of painting over ancient rock art in the Kimberley region,[1143] a religious act that has been

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[1139] These conclusions are drawn from specific examples such as the Hindmarsh Island decisions and the Junction Waterhole case which are discussed in subsequent chapters.

[1140] She said they tend to try to muddle along applying "half-remembered" categories from a Christian background: Maddox, *For God and Country,* above n 12.

[1141] A substantial proportion, if not most, of the churches which appear on the heritage lists in the four countries are there for their architectural features rather than their religious significance.

[1142] Some have been successful. For instance, courts have found that historic preservation orders do hinder religion when the renovations sought relate to the parts of church buildings more central to the typical worship rituals, such as changes to location of an altar: *Society of Jesus v Boston Landmarks Commission,* 564 NE 2d 571, 573 (Mass, 1990); or where it was successfully argued that the design of a church was an expression of theological doctrine, in *First Covenant Church of Seattle v City of Seattle,* 840 P 2d 174 (Wash, 1992). Where the renovations were to build a larger facility for religious mission, as in *Keeler v Mayor of Cumberland,* 940 F Supp 879 (D Md, 1996), the District Court of Maryland found the restriction on the church demolishing a monastery and chapel in a historic district was a violation of both the First Amendment and the Maryland Declaration of Rights. The church members had filed affidavits about their religious motivations for the new expanded facilities and how they had discerned that this was part of their religious mission. Some have also failed, particularly after the Supreme Court decision in *Smith,* discussed in Chapter 10, was used to uphold the heritage legislation as neutral and generally applicable and therefore outside the Free Exercise prohibition: as in *St Bartholomew's Church v City of New York,* affirmed 914 F 2d 348 (2nd Cir, 1990).

[1143] Examples of such practices are given in Elkin, *The Australian Aborigines*, above n 147; Ronald and Catherine Berndt (eds), *Aborigines of the West,* above n 145; Council for Aboriginal Reconciliation, *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* (1994). Glowczewski, above n 198, also cites the late David Mowaljarlai of the Ngarinyin who spoke of needing to keep repainting the Wanjina or they would become sad and not provide rain.

criticised for damaging "the cultural heritage of mankind (sic)".[1144] This demonstrates the conflict between the aims of much standard heritage preservation of such art for its age and fabric of the work and what gives religious significance to the art.[1145]

Of course, the problems outlined in this chapter only exist because of the underlying Western legal thinking of a separation of religion and culture as discussed in Part A. Religion as a seamless part of culture and an identification of the benefits for Indigenous and wider communities would not give rise to the same level of practical problems[1146] if the religious and cultural values were identical or, more realistically, if the criteria and processes had the flexibility to vary to suit each particular subject matter. The problem comes about when the "common" secular culture has different values and is treated as the normal mould into which particular religious beliefs have to fit. The particular examples of this in the case of Indigenous sacred places are the subject of more detailed study in the subsequent chapters of this Part.

[1144] See discussion in Sandra Bowdler, 'Repainting Australian Rock Art' (1988) 62 *Antiquity* 517; Byrne, 'Western Hegemony', above n 931; Harrison, above n 955. This is an illustration of where the value of preserving ancient art intact was argued to be more important than the ongoing religious requirement which gave it significance in that religious context.

[1145] Clavir gives another Christian example of the use of an ancient icon by the Russian Orthodox Church where the icon was borrowed by the church from the museum and deteriorated substantially as a result. She notes though that the spiritual association in that case was regarded by the church as more important than the physical preservation and that physical decay may not mean a loss of religious significance: Clavir, above n 931.

[1146] There might still be conceptual problems.

Chapter 15 – Site, Size and Boundaries

This chapter concerns the amount of space that the public heritage model affords the sacred. It demonstrates how a model, designed for "collecting" limited amounts of heritage places or objects for public edification and protection, is inadequate when the sacred does not fit the usual neatly defined parameters. The result has been a debate and tension about what areas are or should be covered by the heritage model protection and what is just too expansive to be contemplated.

The concept of a "site", as inherited from archaeological and general heritage methodology, focuses on specific and discrete locations for protection. However, a concept developed to preserve selections of inanimate monuments, ruins and artefact scatters for the "public heritage collection" is often inadequate for a holistic Indigenous view of sacred earth and for important places of sacred power. There are two main concerns discussed in this chapter. One addresses the principle of selecting only discrete areas for protection[1147] and the other is the requirement to delineate such specific sites or areas, manifesting in tensions about identifying precise boundaries, and pressures to restrict the size of the relevant protected area and of "buffer zones" around sites. Finally, there is a discussion of how the unboundedness of sacred space feeds into the fears, discussed in Part B, of the sacred inappropriately extending beyond its designated private sphere in a grab to privatise other space. The attitude reflected in legislation is that if the sacred encroaches into the public sphere, it can only do so on that sphere's usual terms.

15.1 The Notion of Site as a Discrete Location Only

The traditional Western heritage model has tended to protect "monuments" and "sites".[1148] "Site" has generally been seen as a locus of human activity, usually with material traces, which has a size and shape and can be plotted on a map.[1149] A "site"

[1147] Some other specific problems of the site identification process, such as significance, assessment and proof, are discussed in later chapters.

[1148] Reflected perhaps in the name of the leading International heritage organisation, the International Council on Monuments and Sites (ICOMOS). The *World Heritage Convention,* above n 955, uses the two descriptions of monuments and sites to describe cultural heritage in Article 1.1. Under this Convention, "monuments" refer to places significant for their artistic, architectural or scientific values whereas "sites" are works of man (sic) or combined works of man and nature which are significant more for anthropological reasons. There appears to be much of an overlap in these terms particularly with historical and aesthetic aspects. These have been said to reflect European concepts of cultural heritage as manifested principally in forms of archaeological sites and monuments: Henry Cleere, 'The Uneasy Bedfellows: Universality and Cultural Heritage' in Robert Layton, Peter G Stone and Julian Thomas (eds), *Destruction and Conservation of Cultural Property* (2001).

[1149] See Prott and O'Keefe, above n 940. More detail has been provided by Robert Dunnell who has traced the archaeological notion of a site from something that had its common meaning as just a place or

has been called the smallest unit of space dealt with by archaeologists,[1150] with a discrete location and boundaries marked perhaps by relative changes in artefact density.[1151] The locations of such sites were usually depicted as isolated dots on maps.[1152] The narrow view of a "site" has now led some archaeologists to prefer using alternative terms like "place" to signify more than just the location of artefacts but also the location of human interaction with the landscape.[1153] While this may present an expanded and more flexible notion of what a "site" represents and its potential size, it still suggests a discrete location and it is still only this discrete location that is protected.

The term "site" was used in much of the earlier archaeological and also general heritage legislation[1154] to designate the places to be protected. The Indigenous heritage

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location, to that specific archaeological term: Robert C S Dunnell, 'The Notion Site' in Jacqueline Rossignol and Luann Wandsnider (eds), *Space, Time and Archaeological Landscapes* (1992). For some statutory examples of the artefact-based view of a site, see: Maine's ME REV STAT ANN § 27-13-373A (2009) which defines "site" in (8) as "an area containing archaeological artifacts or materials or other evidence of habitation, occupation or other use by historic or prehistoric people"; the *Minnesota Field Archaeology Act of 1963* at MINN STAT § 138.31 the definition of a state site as one where, inter alia, "there are objects or other evidence of archaeological interest"; Pennsylvania's *History Code*, 37 PA CON STAT § 37-103 (2009) where significant archaeological site is defined as "an area of land which contains extensive evidence of previous prehistoric or historic human habitation or stratified deposits of animal or plant remains or manmade artifacts or human burials".

[1150] Dunnell, above n 1149, though this could still be very large. See also Dennis Byrne, 'Nervous Landscapes: Race and Space in Australia' (2003) 3(2) *Journal of Social Archaeology* 169.

[1151] Dunnell, above n 1149.

[1152] A description by Bob Ellis, 'Rethinking the Paradigm' above n 931.

[1153] See discussion in introduction in Jacqueline Rossignol and Luann Wandsnider (eds), *Space, Time and Archaeological Landscapes* (1992), especially chapters in that book by Binford, above n 930, and by, Claudia Chang 'Archaeological Landscapes: The Ethnoarchaeology of Pastoral Land Use in the Grevena Province of Northern Greece'.

[1154] For example, in USA, in the *Historic Sites, Buildings and Antiquities Act 1935* 16 USC §§ 461–467. For examples of US state laws, "archaeological sites" or "historic sites" are referred to in various statutes such as the *Alaska Historic Preservation Act*, ALASKA STAT §41.35 (2009); ARIZ REV STAT §§ 41.841–843 (2009) (Archaeological discoveries); ARK CODE ANN §§13.6.302 to 13.6.308 (2010)(Archaeological Research – Sites); CONN GEN STAT §§ 10-381 to10-391 (2009) (Native American Cultures. Policy Concerning Archaeological Investigations); IDAHO CODE §§ 67-4111 to 67-4130 (2009) (State Historical Society); ME REV STAT ANN §§ 27-13-371 to 27-13-378 (2009) (State-owned objects and specimens); MASS GEN LAWS §§ 1-2-9-26 to 1-2-9-28 (2010) (Massachusetts Historical Commission); *Minnesota Field Archaeology Act of 1963*, MINN STAT §§ 138.31 to 138.42 (2009); *Minnesota Historic Sites Act of 1993*, MINN STAT §§ 138.661 to 138.669 (2009); *Nebraska Archaeological Resources Preservation Act of 2005*, NEB REV STAT §§ 82-501 to 82-510 (2010); NEV REV STAT §§ 33-381.195 to 33-381.227 and 33-383.11 to 33-383.125 and 33-383.400 to 33-383.440 (2010) (Preservation of Historic and Prehistoric Sites); NJ STAT ANN §§ 13-1B-15.100 to 13-1B-15.118 and 28-1-4 to 28-2-1(2009) (Historic Sites); *New Mexico Prehistoric and Historic Sites Preservation Act*, NMSA §§ 18-8-1 to 18-8-8 (2009); ND CENT CODE § 55-03 (2009) (Protection of Prehistoric Sites and Deposits); ND CENT CODE § 55-10 (2009) (Preservation of Historic Sites and Antiquities); OR REV STAT §§ 358.905 to 358.961 (2009) (Archaeological Objects and Sites); *History Code*, 37 PA CON STAT §§ 37-103 to 37-104, 37-303 (2009); SC CODE ANN §§ 60-12-10 to 60-12-80 (2009) (Protection of State-Owned or Leased Historic Properties); SD CODIFIED LAWS §§ 1-19A-1 to 1-19A-29 (2009) (Preservation of Historic Sites); TENN CODE ANN §§ 11-6-102 to 11-6-106 (2009) (Archaeology); VT STAT ANN §§ 22-14-701 to 22-14-791 (2009) (Historical preservation); *Virginia Antiquities Act*, VA CODE ANN §§ 10.01-2300 to 10.01-2306 (2010); WASH REV CODE §§ 27.53.010 to 27.53.901 (2009) (Archaeological Sites and Resources); W VA CODE §§ 29.1.1 to 29.1.14 (2009) (Division of Culture and History); W VA CODE §§ 8-26A-1 to 8-26A-11 (2009) (Municipal and County Historic Landmark Commissions); WIS STAT §§ 44.3 to 44.48 (2009) (Historic Preservation Program).

The term "site" is used in most of the heritage and archaeological legislation in Canada, such as the federal *Historic Sites and Monuments Act* RSC 1985, c H-4; Alberta *Historical Resources Act*, RSA 2000, c H-9; BC *Heritage Conservation Act*, RSBC 1996, c 187; Manitoba *Heritage Resources Act*, CCHM, c H-39.1; NB *Historic Sites Protection Act*, RSNB 1973, c H-6; Newfoundland *Historic Resources Act,* RSNL 1990, c H-4; PEI *Archaeology Act*, RSPEI 1988, c A-17.1; Quebec *Cultural Property Act*, RSQ, c B-4

protection legislation too followed a format of protecting such discrete places. The precise terminology used in the various pieces of heritage legislation governing Indigenous areas varies, although the general notion of designating areas for protection is similar. The early Indigenous heritage legislation also used the term "site"[1155] and the term "sacred site" became a common description of such places in popular parlance. The idea of such a site as a discrete location has been explicitly carried over into the definition used in Executive Order 13007 entitled "Indian Sacred Sites" issued by President Clinton in the USA[1156] which defines a sacred site in § 1 as a "*specific, discrete, narrowly delineated location* on federal land that is identified by an Indian tribe … as sacred by virtue of its established religious significance to or ceremonial use by an Indian religion" (emphasis added). In other instances, the idea of a site as a discrete location is clearly implied by the legislative scheme.

Following the traditional archaeological and general heritage connotations of the term, there have also been some perceptions that a "site" should also be identifiable by evidence of buildings, artefacts or physical geographical features,[1157] although there is nothing in most statutes or in the ordinary meaning of the term that requires this.

More recent pieces of legislation do not use the term "site" but words connoting a slightly larger space, like "area"[1158] or "place"[1159] or both.[1160] In the case of the *ATSIHPA* in Australia, the term "area" was said to be deliberately chosen to avoid the

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In New Zealand the term "site" is used for archaeological places: in *Historic Places Act 1980* and *Historic Places Act 1993.*

By contrast, most of the, generally later, pieces of general heritage legislation in Australia use the term "place": see *Heritage Act 1977* (NSW); *Heritage Conservation Act 1991* (NT)*; Queensland Heritage Act 1992; Heritage Places Act 1993* (SA)*; Heritage Act 1995* (Vic)*; Heritage Act 1990* (WA)*; Historical Cultural Heritage Act 1995* (Tas)*; Heritage Act 2004* (ACT). This is also used in the US *NHPA,* referring to historic places.

[1155] Such as *Aboriginal Heritage Act 1972* (WA)*; Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 69 and the *Aboriginal Sacred Sites Ordinance 1978* (NT)*; Northern Territory Aboriginal Sacred Sites Act 1989* (NT)*; Aboriginal Heritage Act 1979* (SA)*(repealed); Aboriginal Heritage Act 1988* (SA)*;* Californian *Native American Historical, Cultural and Sacred Sites Act 1976*, CAL PUBLIC RESOURCES CODE § 5097.9 (2009) [in the title but the term "sacred places" is used in the body of the legislation to include religious and ceremonial sites as well as "places" of worship, "shrines" and "cemeteries"], the CONN GEN STAT § 10-390 (2009) (Native American Cultures. Policy Concerning Archaeological Investigations); the *Antiquities and Cultural Properties Act of 1998*, Virgin Islands Code 29-17-952(x) (2009) refers to "sacred site." The New Zealand *Historic Places Act 1980* (now repealed) referred to traditional "sites", though this was defined to include a place or a site.

[1156] 61 FR 26771 (1996) See 5.2.2 above.

[1157] In Minter Ellison, *Senior Review,* above n 1090, it was suggested that the term "site" had a meaning as a place in which something is situated and was more appropriate in a cultural heritage context as referring to specific features in the landscape rather than an area which could cover broad tracts of land. This is also reflected in some debates concerning buffer zones discussed below.

[1158] Such as in *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld).

[1159] Such as in the *ATSIHPA; EPBC; National Parks and Wildlife Act 1974* (NSW). The NZ *Historic Places Act 1993* refers in the definition of wahi tapu in s 2 to "place". The US *NHPA* refers to Historic Places (as well as properties). Most of the US state provisions, while often referring to historic sites (or sometimes "resources" or "properties", call their Register a State Register of "Historic Places".

[1160] The term "Aboriginal place" is used in the *Aboriginal Heritage Act 2006* (Vic), but this is then defined as an *area* in Victoria or the coastal waters of Victoria. It is said to be inclusive of such things as an area of land or expanse of water: s 5.

"narrow and artificial approach to sites as discrete geological formations".[1161] The US *NHPA* uses the term "properties" but defines historic property in narrow language that does not suggest anything larger than the term "site".[1162] Whether the term "site" or the potentially wider terms "place" or "area" are used, the same issues of boundaries and size discussed below still arise. All cases are still talking about a discrete location separated out from the surrounding land.

More recently in general heritage parlance, wider terms like "landscape" have been used to extend protection to larger areas, such as where the value of a group of features as a whole, like a set of buildings, are greater than the sum of the individual parts and need to be protected as a whole[1163] or where the areas of cultural associations go beyond the physical evidence of human activity.[1164] It has been suggested that these landscapes do not neatly fit the legislative schemes,[1165] but even if they do, these landscapes still signify discrete, albeit larger, locations.

15.2 The Identification of Discrete Areas of Significance

In all the protection schemes in the four countries, heritage places are seen as pockets of exceptions to the general rule, as special, protected places legally differentiated from the rest which are unprotected. In a society where great value is placed in the freedom to use one's own private property (or the government to use its own property) and where the rest of the land is open for acquisition or development, the boundaries of heritage places carved out and quarantined in the public interest are seen as needing to be clearly delineated so people know where the limits to their "private freedoms" lie.[1166]

[1161] In Second Reading Speech by the Minister for Aboriginal Affairs Clyde Holding in Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 9 May 1984, 2130. The speech particularly made it clear that the concept of "area" was designed to include adjacent areas that should not be entered beyond the site itself, in other words, to include the buffer zones, but not to "close off huge areas".

[1162] In 16 USC § 470w (5) the definition of historic property/resource is "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource".

[1163] See Prott and O'Keefe, above n 940.

[1164] Such as in UNESCO, *Operation Guidelines*, above n 955. See Titchen, 'Changing Perceptions', above n 994; Titchen, 'Extending the Limits', above n 994; Elaine Stratford (ed), *Australian Cultural Geographies* (1999).

[1165] Harry Allen has referred to changes in the English trend from scheduling single monuments to landscapes and contrasted this with the New Zealand situation where the old approach has still been carried through to the 1993 *Historic Places Act:* Harry Allen, *Protecting Historic Places,* above n 939 and Stephenson, above n 31. The same could no doubt be said for much of the heritage legislation in the other three countries studied here. Ellen Lee, writing of the Canadian situation, has noted that the idea of a cultural landscape does not fit neatly within the legislative frameworks which deal with smaller areas: Ellen Lee, 'Cultural Connections to Land: A Canadian example' in Graham Fairclough et al (eds), *The Heritage Reader* (2008).

[1166] Issues of intrusions into private property or Crown-owned resources open to all have been used as arguments against vague and expansive definitions of heritage sites. For example, in British Columbia, concerns were expressed about large areas like whole mountains being designated with spiritual

In the typical case of places of religious significance to Western Christian communities of faith that get heritage-listed, such as church buildings, the notion of discrete locations is not generally a problem because that is what they are. In Western thought, the sacred is often seen as distinct and set apart from the profane.[1167]

When it comes to Indigenous sacred places, however, there is difficulty even with the notion of identifying discrete places to be classified as sacred, as this suggests that particular sites are sacred and places around them and beyond are not. This may be a problem of importing features of Western divisions of the sacred and profane into Indigenous contexts.[1168] As noted previously, a common perception amongst Indigenous peoples is that the whole earth is in some senses sacred and thus significant.[1169] The problem with identifying sites as sacred is the suggestion that other areas are thereby not sacred. The assumption is that the sacred can be neatly marked off from the profane in a two-dimensional physical division.[1170] This might be mitigated by protecting areas of "*particular* significance",[1171] that is, not to suggest that areas outside it are not significant or sacred but that it is a matter of degree and of the

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significance and thus taken out of a harvestable timber area and limiting forestry, razing or fishing rights: see British Columbia, *Parliamentary Debates*, Legislative Assembly, 12 May 1994, 10,804–10,807 (in Committee, *Heritage Conservation Statues Amendment Act 1994*). In Australia, debates over the wide discretion of the Minister to protect "unlimited areas of land" as an Aboriginal place of significance in the proposed *ATSIHPA* was seen as an attack on property rights: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 31 May 1984, 2683 and 2689 (Debates on Aboriginal and Torres Strait Islander Interim Heritage Bill). Gelder has noted that mining companies prefer to keep sacred places bounded because indeterminacy frustrates their ambitions to move into legitimised areas: Gelder, 'Coronation Hill', above n 45.

[1167] See discussion in 2.3 above.

[1168] Bridget Mosley in New Zealand, for instance, has commented that by translating "wahi tapu" into the term "sacred site" there is the incorrect assumption of a conceptual link with Western views of sacredness: Mosley, above n 204. She has pointed to the precise problem of heritage management strategies being unable to cope with this and preferring discrete sites, particularly marked by material remains, and argues that wahi tapu should not be reduced to such a legislative construct. See also a discussion of a similar preference for the site concept as in Australia, because it is simpler: Byrne, 'Nervous Landscapes' above n 1150.

[1169] In 3.1.2 above.

[1170] A comment made in Elias, above n 172. Elias also points to the places in between particular named sites as not being empty or devoid of significance just because they may not have a name or require restriction of certain mining activities. Ronald Berndt noted that the dividing line between what was sacred and what was not was not easy to draw and there were degrees of sacredness: Ronald Berndt, *The Sacred Site,* above n 178. Maddock too has noted that to mark off some places as non-sacred is a flagrant contradiction of the assertion that all land is sacred: Maddock, 'Metamorphosing', above n 42. Owen J, in *Djaigween v Western Australia* (Unreported, Supreme Court of Western Australia, Owen J, 18 January 1994, reasons delivered on 4 February 1994) at 24, also acknowledged that there was a danger in applying conventional ideas of subdivision to the Aboriginal perspective of land ownership and then ascribing significance to only parts of the land.

A discussion of the dangers of applying Euro-American concepts of discrete sacred space divided by clear lines in the context of debates over the Taos Blue Lake in the USA is found in Nabokov, above n 180. He also cites the Hopi view that it was not possible to point on a map of a mountain to its sacred parts when the entire mountain, land surrounding it and the whole earth is sacred.

In Canada, Ellen Lee has also pointed out that elders find it hard to select specific sites for special consideration because all the land is sacred: Ellen Lee, above n 1165.

[1171] This concept is explored further in 17.2.3 below.

suitability of the proposed use.[1172] However, even areas that are of particular focal religious importance are often not able to be easily identified as discrete sites nor protected as such, which is the way much of the legislation is framed.[1173] In identifying specific sacred sites, there is also the implicit suggestion that the rest of the land can be used and developed in whatever way the owners or occupiers wish. Tonkinson has said that by requiring Aboriginal people to make decisions about more, less and not sacred localities and tracts, they are being asked to de-sanctify land and render it eligible for desecration and possible oblivion.[1174]

Some of these difficulties of pinpointing specific areas for consideration were reflected in a slightly different context[1175] in the report of Justice Jane Mathews in relation to the application under the *ATSIHPA*,[1176] in relation to the proposed bridge from the mainland to Hindmarsh Island.[1177] Mathews reported on the need for the Minister to be satisfied that there would be a desecration of the particular area that was the subject of the application, that is, the bridge corridor, as opposed to a desecration of the island and surrounding area generally.[1178] She noted that it was "inimical to Aboriginal culture to single out a small discrete piece of land and say this will be the area desecrated". Mathews accepted that, for the Aboriginal witnesses, the land was "a single and indivisible part of their culture" and segments of land had to be viewed as part of the

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[1172] In New Zealand, Mosley, above n 204, has described this as varying degrees of tapu, depending on the status and significance of the activity. Australian examples are discussed below in relation to buffer zones.

[1173] Renwick, for instance, has suggested that the concept of a site as a discrete location means that not all of the Northern Territory can be a site even though it may all be regarded as sacred: Renwick, above n 186. Some of these difficulties are further illustrated in instances below in this chapter.

[1174] Robert Tonkinson, 'The Cultural Roots of Aboriginal Land Rights' in Rhys Jones (ed), *Northern Australia: Options and Implications* (1980). A similar criticism has been made in the USA of the Chimney Rock area in the *Lyng* case on the basis that, if a whole area is sacred, it is not possible for important parts to be outlined and protected allowing for uncontested use of the rest: Grieser, Jacques and Witmer, above n 761.

[1175] The context of the discussion was whether the specific area would be desecrated, rather than whether there was a discrete sacred area distinct from the rest of the land, but the discussion acknowledges the general problem in Indigenous thought of looking at discrete areas in isolation from the rest of the area.

[1176] That Act empowered the Minister to act on an application to protect an area from injury or desecration, if the Minister was satisfied that the area was a significant Aboriginal area and was under serious and immediate threat of injury or desecration: ss 9–11. The report by Justice Mathews was commissioned by the Minister under s 10 of the Act to make recommendations in relation to the application.

[1177] Jane Mathews, *Report pursuant to s 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act: An Application for Protection of an Area between Goolwa and Hindmarsh Island said to be Threatened by the Construction of a Bridge* (27 June 1996). The application to prevent the Hindmarsh Island bridge and the resulting Royal Commission (conducted by Commissioner Iris Stevens), set up to investigate whether the beliefs were fabricated, all spawned a huge controversy and litigation in Australia, many aspects of which are referred to in different contexts throughout this thesis. The applicants asserted that the Hindmarsh Island and Goolwa channel between it and the mainland formed an area of particular significance and would be desecrated by the construction of bridge joining the Island to the mainland. The area that was under threat from the bridge construction and covered by the application was the bridge corridor, not the entire Hindmarsh Island or surrounding waters. The Minister granted a declaration under the *ATSIHPA,* but this was subsequently set aside by courts. The controversy has been subject to much commentary. The history is set out in various places including Margaret Simons, *The Meeting of the Waters: The Hindmarsh Island Affair* (2002); South Australia, Hindmarsh Island Bridge Royal Commission, *Report* (1995) ("Stevens").

[1178] Justice Mathews noted that the applicants seemed to believe that it was enough to show that the bridge would result in the desecration of the *island* without addressing the bridge corridor specifically.

whole. She cited Rhonda Agius' comment about how Western society puts things in little boxes and did not see the world holistically or recognise that damage to any part of the land would desecrate the whole. Nevertheless, she concluded that the legislation required the confinement of the consideration to the precise area for which protection was sought.[1179]

Justice Seaman, in his Aboriginal Land Inquiry report, favoured the identification and mapping of broad zones of significance rather than particular sites, to avoid the need for in-depth site identification surveys and problems with confidentiality of disclosing information and locations about such sites.[1180] This would get around the difficulty of pinpointing specific dots in a map but does not deal with the issue of designating the rest of the land as not sacred or significant.

The requirement to identify specific sacred areas arises directly in schemes where specific places have to be listed or declared before they can be protected. It might be argued that a "blanket protection" scheme, which simply prohibits damage to any significant Indigenous places, registered or not, focuses on whether a project adversely impacts such an area of sacredness, without having to say that other areas are not sacred. However, the problem of defining an area remains, as it is only such discrete areas that are protected. As illustrated later below, there are still factual questions of whether the area impacted is within an area of the relevant significance or outside it.[1181]

A better model may be that of typical environmental legislation which concentrates on adverse impacts of a project without requiring findings of the nature and extent of impacts on particular discrete areas. Thomas King warned against proposed legislation in California of the kind that identifies and registers Indigenous sites and recommended instead that it would be best to have legislation that does not mention sites at all but protects the spiritual qualities of the environment generally, with requirements to

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[1179] Mathews, above n 1177, at 191–2.
A similar approach was taken by the Court in the 2003 case of *Williams v Minister for Environment and Heritage* [2003] FCA 535, a decision of Wilcox J in relation to a declaration by the Minister under *ATSIHPA*. The Minister had recognised that the wider area of Lake Cowal was of particular significance but made no finding in relation to the specified area subject to the application where mining was proposed to take place. The Federal Court ruled that the failure to make such a decision about the significance of the particular area meant that it was legally flawed.

[1180] Paul Seaman, *The Aboriginal Land Inquiry* (1984). These notified zones then could be subject to greater protection. Such an approach has also been favoured by Chalconer, above n 963. Issues of confidentiality are mentioned below in 17.4.3.

[1181] Similar comments apply to the approach under the New Zealand *RMA,* which in s 6 requires decision makers to provide for matters of national importance such as the relationship of Maori to wahi tapu or the protection of historic heritage. While this does not involve compiling a list of wahi tapu or saying the rest of the land is not, the tendency of the cases is to decide whether the places to be impacted are in fact wahi tapu or historic places. Some examples are discussed below in 17.5 in relation to proof of significance.

consult and consider sacred places.[1182] This is a similar approach to that of the New Zealand *RMA* which requires wahi tapu and other matters to be provided for in planning and approvals.[1183] The shortfall of such legislation is the lack of automatic protection; sacredness of the place is just one important consideration amongst many. A stronger extension would be to prohibit any desecrating use of or impact on land or waters. This would avoid the need to classify the rest as not sacred, and, as not all uses or impacts create desecration, activity can still be carried out over most of the land.[1184] Such an approach may still invite challenges as to limits of areas within which uses are permitted, but at least it does not require any implication that certain areas are sacred and others not. However, the schemes we currently have for Indigenous heritage seem unable to acknowledge that, like the environment, the sacred can be everywhere rather than confined to particular places. Sacredness is only protected when it conforms to standard public heritage approaches, not on its own terms.

15.3 Need for Certainty of Boundaries and Size

Apart from assuming that sacredness is found only in specific areas, a further difficulty that the public heritage model causes for Indigenous places is the need for clear delineation of the sites, either by fixed boundaries or by restricting the sites to visible features, particularly so they can be defined by objective means rather than by someone's subjective faith.

When sites need to be listed, precise definition is required to identify the site, preferably by outlining its exact boundaries[1185] or at least clearly describing its extent. This is usually not hard for typical Western sacred places like consecrated churches or churchyards, which are marked out by property boundaries or at least measurable by physical buildings or features. The Western fascination with fences and boundaries

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[1182] Thomas F King, *Sacred Sites Protection: Be Careful What You Ask For* (2002). Criticisms of a process of identifying and listing sites under the general heritage model have also been made in Boer and Wiffen, above n 924, though they do not make similar recommendations for a more comprehensive scheme but look to other causes of action beyond criminal sanctions.

[1183] The NZ legislation, however, has still led to courts defining sites and their boundaries. Some illustrations are provided below in 17.5.

[1184] This is useful as the degree of distinction between places that are particularly sacred and the general sacredness of the whole land is often found in the different acceptable uses of the land. This was illustrated in the dissenting judgment of Fletcher J in *Navajo Nation v US Forest Service* 535 F 3d 1058, (9th Cir, 2008) at 1097–8 where he described the evidence that even activities like camping and hunting would not be permitted in the special holy mountains whereas they would be allowed throughout most of the rest of the otherwise "generally sacred" territory.

[1185] For example, the *World Heritage Convention* Guidelines require adequate delineated boundaries: UNESCO, *Operational Guidelines,* above n 955, at [97]–[99]. Precise boundaries must also be set out between the site and the buffer zone: at [104]. Boundaries also have to be delineated for registration of properties under the *NHPA* in the USA. King mentions that the National Register is "hung up on boundaries": Thomas F King, *Thinking about Cultural Resource Management: Essays from the Edge* (2002).

marking the division between sacred and profane, as well as marking out property, has already been noted.[1186]

Even if the principle of discrete locations of greater sacredness can be accepted, the notion of mappable boundaries of sacred places does not feature in much Indigenous thought.[1187] They may involve physical features, some of considerable size, but these often extend to wide landscapes, frequently with vague descriptions.[1188] Sacredness is often seen as emanating from a charged centre with a great deal of vagueness as to the outer boundaries.[1189] In addition, even though one may be addressing particular sacred sites, sometimes dreaming tracks and pathways between them also have spiritual significance.[1190] The dimensions of these tracks are naturally imprecise and it has been noted that it is nonsensical to ask how wide one is.[1191] Further, sites tend not to be distinct and separate but interconnected.[1192]

[1186] See 2.3 and 2.4 above. Robert Michaelsen has suggested that Terminus, the Roman god of boundaries, is the appropriate symbol for Western law: Michaelsen, 'Law and the Limits of Liberty', above n 945. Terminus has also been described as a god whose name means "Stop" and who symbolises the split between the sacred and profane: Jonathan Smith, 'Topography', above n 116.

[1187] Ward has quipped that the notion of physical boundaries "overwhelms the believer and challenges the protector": Robert Ward, above n 152. Others have said that the need for mappable boundaries for historic purposes makes a poor fit with preservation needs of Native American communities: Peter Gardner, 'The First Amendment's Unfulfilled Promise in Protecting Native American Sacred Sites: Is the *National Historic Preservation Act* a Better Alternative?' (2002) 47 *South Dakota Law Review* 68. See also Kelley and Harris, above n 40. Abramson, above n 135, discusses this as a problem with mythical lands generally.

[1188] For example, in New Zealand, the whole of the Waikato River, including banks, beds, waters, streams, tributaries, vegetation, fisheries and the flood plain, was said to be a metaphysical being and sacred: *Mahuta v Waikato Regional Council* (Unreported, Environment Court, A91/98, 29 July 98). Alex Nathan, was quoted in Waitangi Tribunal, *Te Roroa,* above n 31, as saying that all of the area of Waipoua is tapu, including valley and streams feeding into river, because of mauri and mana imbued in them.

In the USA, the sacredness in *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988) was the entire "high country" and in *Sequoyah v Tennessee Valley Authority,* 480 F Supp 608 (ED Tenn, 1979), it was the whole valley. The Pueblo Taos had difficulty initially in convincing Congress that the whole 50,000 acres of watershed of the Blue Lake area was needed for their worship: see R C Gordon-McCutchan,'The Battle for Blue Lake: A Struggle for Indian Religious Rights' (1991) 33 *Journal of Church and State* 786.

In Canada, in the Siska Creek cases, the sacred area involved the whole valley and the group disavowed any suggestion of concentrating on specific culturally modified trees: *Siska Indian Band v British Columbia (Minister of Forests)* [1999] CanLII 2736.

[1189] Such as in the description of sacredness as spilling out and extending from a secret-sacred ground in Berndt, *Australian Aboriginal Religion,* above n 12. Abramson described mythical lands as precise, strong and uncontestable at their sacred centres, whereas beyond these centres definition wanes, like ripples working their way centrifugally from the spot where a pebble has been thrown into the water: Abramson, above n 135.

[1190] See Ronald Berndt, 'Gove Dispute', above n 160; Ronald Berndt, *The Sacred Site,* above n 178; Morphy, 'Landscape', above n 158; Elias, above n 172; Elizabeth Moulton Eggleston, *Submission to Senate Standing Committee on Environmental Conditions of Aborigines and Torres Strait Islanders and the Preservation of their Sacred Sites* (1971); Graeme Neate, *Aboriginal Land Rights Law in the Northern Territory* (1989) vol 1, citing Dr Nash, a witness in a desert claim.

In the USA, this has applied too to pilgrimage trails between sites. An example is the Quechan trail connecting two sacred places, Avikwlal (Plot Knob) and Avikwaame (Newberry Mountain) in California, a 170-mile straight line distance, discussed in the California Bureau of Land Management, *Record of Decision for Imperial Project Gold Mine Proposal* (2001), at Bureau of Land Management <http://www.blm.gov/ca/pdfs/elcentro_pdfs/Glamis_ROD_final_1-01.pdf>.

[1191] A comment referred to in Layton, 'Relating to the Country', above n 178.

[1192] Or are extensions of place: see Swain, *A Place for Strangers,* above n 164; Tonkinson, 'Cultural Roots', above n 1174; Glowczewski above n 198; James Weiner, 'Afterward' in Alan Rumsey and James Weiner (eds), *Emplaced Myth: Space Narrative and Knowledge in Aboriginal Australia and Papua New Guinea* (2001). An example of the interconnectedness of holy places from the Navajo was described as a

Nevertheless, clarity of extent or boundaries is usually a statutory requirement in situations where Indigenous areas have to be declared prior to protection being available, as it is necessary to identify what is the area covered in the declaration.[1193] Sometimes boundaries may be arbitrarily set by the decision maker as a compromise between competing public interests.[1194] However, where the legislation provides automatic protection based simply on whether an area falls within a particular definition of the significance or sacredness, a factual analysis is needed to establish whether a particular location comes within the definition or falls outside it. This is difficult when the area of significance cannot be neatly described, especially where it is not circumscribed by observable features.[1195]

The requirement for boundaries and observable features was illustrated in the US Court of Appeals decision in *Hoonah Indian Association v Morrison.*[1196] In that case, the Sitka Tribe unsuccessfully challenged a failure to designate an area to commemorate the route of the Kiks.adi Survival March.[1197] The reason for the non-designation, which was upheld on appeal, was that the precise route was not known and did not have physical signs or documentation to identify it as the accurate location of the route.[1198] The Court said that the fact that important things may have happened in a general area is not enough to make that area a "site" and there had to be good evidence of just where the site is and what its boundaries are for it to qualify for designation as a historical site.[1199] This interpretation largely flowed from the Court's view that the term "site" meant something concretely bounded and defined.

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prayer having 12 parts involving different holy places which had to work together equally and that, if one part was missing, would no longer be complete: see Nabokov, above n 180.

[1193] For example, *ATSIHPA* in s 11 requires a declaration protecting an Aboriginal area to describe that area with sufficient particulars to enable it to be identified. In the USA, for registration under the *NHPA*, National Park Service, *Bulletin 38,* above n 1028, points out that, while the requirement for boundaries presents a problem, boundaries need to be defined more narrowly than, for instance, a wider area necessary for ensuring quietness and extensive views, even if this is arbitrary. The BC *Heritage Conservation Act 1977* in s 13(4) provides that the Minister may define the extent of site protected under s 13(2). This sub-clause 13(4) was introduced following a major debate during the passage of the 1994 *Heritage Conservation Statutes Amendment Act* about the problems with vague and nebulous notions of a cultural heritage resource in the context of an amendment to the *Forest Act 1979*: British Columbia, *Parliamentary Debates*, Legislative Assembly, 12 May 1994, 10804–10814 (in Committee, *Heritage Conservation Statues Amendment Act 1994*) and on 8 June 1994 at 11680.

[1194] The arbitrariness of such compromises is reflected in the fact that there may be no intrinsic or natural distinction between what is chosen to be protected as heritage and what is not, but it is simply the result of a professional or political choice.

[1195] Michaelsen has noted that the nature of many of the Native American claims, unlike claims over other religious properties, involve whole areas with such "inclusive and seemingly imprecise" designations as "the high country": Michaelsen, 'Promise and Perils', above n 144.

[1196] 170 F 3d 1223 (9th Cir, 1998). The case did not concern what was said to be a sacred place, but the similar logic would apply.

[1197] The march of the group of Tlingits who retreated following a reconquest of their area by the Russians in the 19th century.

[1198] The court noted at 170 F.3d 1223 at 1232 that the Tribe's submission was that the location was a symbolic one rather than the actual location.

[1199] At 170 F.3d 1223 at 1232. It noted the advice from the Historian of the National Register of Historic Places that where trails which had been designated, such as the Lewis and Clark trail, it was only the

The need for certainty of bounds comes into sharp focus when an area of sacredness is seen as threateningly large and intrusive. No heritage legislation prescribes that a site must be small. On the non-Indigenous front, one could imagine that archaeological sites could include a whole ancient metropolis as a historic precinct. In such a situation, however, the area may at least be easily delineated by physical structures or remains.

However, where there are no objective means of identifying the limits to sites, their potential uncontrollable size and resulting impact on the realm of freedom to use and develop land has raised concerns.[1200] This has led to unsuccessful attempts to restrict the types of sites recognised in statutes to the early archaeological concept of places where there is physical evidence of human activities,[1201] though these attempts have ultimately failed, probably due to their obvious inappropriateness. Rather than rely on the stage at which public interest balancing can take place, proponents of development have often sought instead to challenge the potential extent of the sacredness itself. This has been reflected in the examples below illustrating attempts either to avoid the

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particular rock formations, ruts and other identified physical features where the trail was confined to a narrow corridor that was listed. The Court at 1232 gave the example that Abraham's tomb was an identifiable site but the wanderings of the Jews in the Sinai wilderness could not be, due to the lack of any accurately identifiable path.

[1200] Such as in the speculation by Maddock that all of Australia may be a sacred site: Maddock, *Your Land is Our Land,* above n 155, and Maddock, 'Metamorphosing', above n 42. King has also speculated about this in relation to the USA: Thomas King, *Essays from the Edge,* above n 1185. Chapter 11 shows how the courts, in discussing freedom of religion cases such as in *Lyng v Northwest Indian Cemetery Protective Association,* 485 US 439 (1988), especially 453 and 476, and *Inupiat Community of Arctic Slope v United States,* 548 F Supp 182 (D Alaska, 1982) at 189, face a recurring concern that vast tracks of land could be subjected to "religious servitude". Roger Anyon has described the Zuni tribe's view that a 35-square mile area was all a traditional cultural property for purposes of the *NHPA* but that the agencies said this would make management of TCPs impossible: Roger Anyon, 'Zuni Protection of Cultural Resources and Religious Freedom' (1996) 19(4) *Cultural Survival* 46. Concerns have been echoed in relation to the Indigenous heritage legislation. For example, during the debates over the *ATSIHPA,* Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 31 May 1984, 2672, one complaint from the Opposition was the ability for the Minister to protect "unlimited areas of land as an Aboriginal place of significance". Senator Chaney in the Senate debates pointed to the width of the definition and the fact that all land had significance for Aboriginal people traditionally associated with it: Commonwealth of Australia, *Parliamentary Debates*, Senate, 14 June 1984, 3183–4.

[1201] In British Columbia, concerns about the potential width of the definition of cultural heritage resource proposed in 1994 amendments to the *Forest Act 1979* led to an unsuccessful amendment to restrict the term to situations where there was sufficient historical or physical evidence to enable it to be identified, substantiated, measured and judged for authenticity: see British Columbia, *Parliamentary Debates*, Legislative Assembly, 12 May 1994, 10804–10814 (in Committee, *Heritage Conservation Statues Amendment Act 1994*) and on 8 June 1994 at 11680.

A similar step was taken in the US Congress in 1995 when Representative Herger moved an amendment to the *NHPA* to provide that any unimproved or unmodified natural landscape feature which did not contain artefacts or physical evidence of human activity that had unique significance in history or pre-history was not eligible for inclusion on the National Register of Historic Places nor to be considered a historic or pre-historic property or historic resource for purposes of the *NHPA* or any other federal law: in HR 563, An Act to amend *National Historic Places Act* to Prohibit Inclusion of Certain Sites on the National Register of Historic Places, 104th Cong (1995). HR 563 was not enacted. The history of the bill can be found at the Library of Congress website, Thomas <http://thomas.loc.gov>.

Even where there is no such legislation, some have still expected sites to be so restricted. For example, Wordsworth in the Legislative Council in Western Australia said that when the *Aboriginal Heritage Act 1972* (WA) was introduced people thought that sacred sites should be identified easily by stones on the ground or in limbs of trees: see Western Australia, *Parliamentary Debates,* Legislative Council, 16 September 1980, 1483 (Bill Wordsworth, Second Reading Speech of Aboriginal Heritage Amendment Bill and Debates).

issue altogether or to restrict the area of sacredness to particular features rather than a larger encompassing area.

Uncertainty of Size

No attempt to protect Indigenous sites has been rejected simply on the basis that the site is too large. In the Northern Territory land rights legislation that uses the term “sites”,[1202] Toohey J as the Land Rights Commissioner in the Walpiri claim rejected any tendency to think of such sites as only particular features of the landscape occupying relatively little space and rendering unimportant the area around it.[1203] He saw sites, as referred to in the land rights legislation, as places usually possessing some particular feature such as a hill, creek or waterhole, but not delimited by the precise amount of space occupied by that feature and potentially including the land around it. However, Toohey J did suggest that the situation may be different under legislation to protect such sites.[1204] The Environment Court in New Zealand in one case nevertheless accepted that a large area like the whole of Horea could be wahi tapu.[1205] The US Bureau of Land Management also accepted the religious significance of long pilgrimage trails of over 150 miles in California and debated whether the whole area was a site complex that would qualify as a single large traditional cultural property site or a series of linked properties.[1206]

Other cases have, however, tried to avoid the implications of accepting large and undefinable areas of sacredness. One avoidance method is illustrated by the series of cases in New Zealand concerning the domain of the mythical creature, the taniwha, at Ngawha. The Minister for Corrections had approved the development of a prison at Ngawha in spite of opposition from some Maori objectors who saw it as desecrating the domain of the taniwha.[1207] On appeal, the Environment Court was concerned about the

[1202] The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
[1203] John Toohey, *Report by Aboriginal Land Commissioner on the Walpiri and Katangarruru Kurintji Land Claim* (1979). This view was followed by Justice Kearney in the Upper Daly Claim: William Kearney, *Upper Daly Land Claim* (1989).
[1204] Toohey, ibid, when he said at [69]–[71] that whatever justification there is for giving the word a narrow meaning in legislation aimed at identifying and protecting places of significance, there is none within the framework of the *Land Rights Act*.
[1205] In *Tainui Hapu v Waikato District Council & TV3 Network Service Ltd* (Unreported, Environment Court, A75/96, 12 August 1996), at 8–9. This was upheld by the High Court in Hamilton in *TV3 Network Services Ltd v Waikato District Council & Tainui Hapu* [1998] 1 NZLR 360, at 370–1.
[1206] See Bureau of Land Management, above n 1190. The BLM requested that the question of ultimate boundaries be left open. This issue did not need to be decided as the project area would damage at least 55 individual sites within the complex as well.
[1207] It was said that the taniwha Takauere was the guardian of all the waters of the Tai Tokerau and the whole area including all the waterways was part of his domain. The Waitangi Tribunal in its report on the Ngawha geothermal resource also noted that Maori believe there is interconnectedness between springs of Ngawha and other surface manifestation some distance away, eg at Omapere, through the Taniwha Takauere who lives at Omapere but whose tail whips Ngawha and other places. The Tribunal said that the Ngawha springs was not a single isolated or discrete phenomenon but was like the face or eye of the

varying sizes and pathways of the taniwha and its domain and said that the requirement for provision to be made for wahi tapu in the *RMA* could not warrant an extension to "diffuse relationships" with whole districts and with features that may be many kilometres distant from the particular prison site.[1208] No reason was given for why such an extension was not permissible under the terms of the *RMA*.

Narrow Features as Sites Rather Than Wider Landscapes

Another avoidance method has been to concentrate only on smaller sites made up of specific identifiable features and to ignore a wider landscape of sacred significance. This became a major issue in New Zealand highlighted by the Ngunguru Sandspit case[1209] concerning permits given by the Historic Places Trust to disturb individual archaeological sites, which individually were not seen as having any particular importance to justify preserving them in situ and preventing a housing development.[1210] However, the Ngatiwai viewpoint saw the area as a whole sacred cultural landscape,[1211] not individual sites. In the process of granting permits to damage particular sites, no consideration was given to an assessment of the landscape as a whole as an area of significance. It was obvious here that the test of scientific significance of the particular sites was applied ahead of any spiritual or cultural significance of the area.[1212] The approach has been applied elsewhere in New

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resource while the heart was below the ground and connected to other surface manifestations in the district and that it was all a single taonga: Waitangi Tribunal, *Report on the Ngawha Geothermal Resource* (WAI 304) (1993) at [1.1.3], [2.4.3]–[2.4.4].

[1208] *Shayron Lee Beadle and Ronald Wihongi and Riana Wihongi v Minister of Corrections* (Unreported, Environment Court, A 74/02, 8 April 2002) at [440] and [497]. The Court also ruled that the claims about metaphysical beings were not justiciable and could not be taken into account. On appeal, the High Court said that such issues needed to be taken into account, though the appeal was dismissed by interpreting the Environment Court's decision as a factual finding that the taniwha was not affected: *Friends and Community of Ngawha v Minister for Corrections* [2002] NZRMA 401 (High Court, per Wild J, 20 June 2002) and *Friends and Community of Ngawha v Ronald Wihongi* [2002] NZCA 322 (Court of Appeal, per Blanchard J for the court, 17 December 2002). These findings are dealt with further at 17.5.2 below.

[1209] .*Ngatiwai Trust Board v NZ Historic Places Trust and Green* [1996] NZRMA 222.

[1210] The application was made under s 11 of the *Historic Places Act 1993* to disturb specific identified sites, namely middens, not an application for a general authority under s 12 to modify all sites in an area. The Maori Heritage Council was consulted as required but only in relation to the value of the particular archaeological sites and it advised only on that issue. The Planning Tribunal held that the Trust was limited in its consideration to the particular application before it, that is, to destroy the specific archaeological sites, and consideration of the wider site was not relevant to the particular application. It said that to place conditions on the authority requiring a survey of the wider area would be for an ulterior purpose and unreasonable. The appeal to the High Court at Auckland was dismissed on the merits of the case: *Ngatiwai Trust Board v NZ Historic Places Trust and Green* [1998] NZRMA 1, decision of Grieg J, 29 August 1997. Further leave to appeal on all but one narrow point was denied by the High Court: *Ngatiwai Trust Board v NZ Historic Places Trust and Green* (Unreported, High Court, Hammond J, HC No 3/97, 15 October 1997).

[1211] It was said to be the site of a major historic battle. This aspect was not challenged in the above decisions.

[1212] This incident has been used as a case study of the problems of delimited sites and of a divided heritage protection scheme in Parliamentary Commissioner, *Historic and Cultural Heritage Management,* above n 204, which saw it as highlighting the lack of protection for wahi tapu. Mosley, above n 204, critiques the division of the landscape into single isolated points which can then be destroyed one by one. She refers to the case as an example of heritage assessment which reflects the values of the assessor.

Zealand.[1213] It is interesting to note that the New Zealand *Historic Places Act 1993* has separate categories for "wahi tapu" and "wahi tapu areas",[1214] with the latter defined as an area with a group of wahi tapu places, suggesting that the wahi tapu definition only refers to single places.[1215] In addition, there are a line of New Zealand Environment Court decisions which have opted for a narrow definition of "wahi tapu" restricting it to specific discrete areas, often associated with historical events or the existence of human remains rather wider sacred landscapes.[1216]

Commentators have expressed concerns about the protection of discrete sites distinct from the significant landscape around,[1217] particularly noting that discrete sites may form a wider site complex.[1218] The emphasis on identifying only discrete sites has led to

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[1213] Such as, in *Taipari v Pouhere Taonga (NZHPT) and Kruithof* (Unreported, Environment Court, A102/97, 27 August 1997), where the Court would not interfere with a decision of the council to approve works interfering with various middens for a housing development without considering the effect of that interference on wairua or spiritual values of the whole vicinity.

[1214] Definitions in s 2.

[1215] However, the "wahi tapu area" definition did not assist in the Sandspit cases referred to above as they were able to be dealt with under the separate archaeological site provisions only, highlighting the problems of division of categories and processes and not having a single holistic process of assessment.

[1216] Some include *Land Air Water Association* v *Waikato Regional Council* (Unreported, Environment Court, A110/2001, 23 October 2001); *Winstone Aggregates Ltd and Heartbeat Charitable Trust v Franklin District Council* (Unreported, Environment Court, A80/02, 17 April 2002); *Te Kupenga O Ngati Hako Inc v Hauraki District Council and HG Leach* (Unreported, Environment Court, A10/2001, 23 January 2001); *Berkett v Minister of Local Government*, (Unreported, Environment Court, A6/97, 23 January 1997); *Tangiora* v *Wairoa DC Mahia Boating and Fishing Club Inc* (Unreported, Environment Court, A006/98, 22 January 1998). These are discussed in more detail below in 17.5.2 relating to the assessment of significance.

[1217] See Kulchyski, above n 1136, who describes attempts to define a cultural landscape as a series of codified sites as part of the process of dispossession of lands and a continuance of the extinguishment policy.

Byrne, Brayshaw and Ireland have also pointed to Aboriginal people not thinking in terms of sites but country. They have given the example of an occasion when archaeologists were looking for points on a map, but the Aboriginal women were more interested in their memories of fishing, activities that involved a wider landscape: Byrne, Brayshaw and Ireland, above n 29. See also Annette Henderson, above n 1136, who points out that sites and land are not easily separated in Aboriginal thinking. See also comment of Toohey J who referred to Howard Morphy's evidence on the difficulty of locating and protecting particular trees of significance when the issue was controlling a totemic landscape environment: see Morphy, 'Colonialism', above n 149.

Kelley and Harris, above n 40, also talk of sacred places as being an inseparable part of a larger landscape in Navajo thought, and McCormack, above n 133, cites similar comments by Robert Drozda about the Alaskan Yup'ik. Janet Stephenson speaking of the New Zealand approaches under the *Historic Places Act* and *Resource Management Act* has noted their failure to recognise landscape heritage in the broad sense. She said they are firmly focussed on physical components of heritage with little leeway to recognise cultural values. She saw these as resulting from silo thinking caused by different professionals focusing on their own areas and failing to fit human responses into categories of aesthetic or historic value: Stephenson, above n 31.

[1218] An example is the situation discussed by Hal Wootten in the Junction Waterhole Report to the Minister under the *ATSIHPA* where he noted that there were particular smaller areas which might be identified as sites, or better, as site complexes. These were locations of particular events which were significant not in isolation but as points in two continuous dreaming journeys and the whole area derived continuous importance from passage of dreaming tracks which converged and interacted in the area. He also noted that the NT Government had approved the project because of a misconception that the area only concerned smaller sites which would not need to be impacted: see Hal Wootten, *Significant Aboriginal Sites in the Area of the Proposed Junction Waterhole Dam Alice Springs* (1992) and Hal Wootten, 'The Alice Springs Dam and Sacred Sites' in Murray Goot and Tim Rowse (eds), *Make a Better Offer: the Politics of Mabo* (1994). Kelley and Harris, above n 40, point to the whole of the Black Mesa as being a sacred Navajo landscape but that there are also specific places of special power within it. King discusses the example of Lake Superior which has many sites of cultural significance around it but is itself significant as a whole as the great Medicine Lodge in Chippewa tradition: Thomas King, *Essays from the Edge,* above n 1185.

these being protected but with activities being permitted around them which could be just as disruptive to their sacredness.

Buffer Zones

The idea of a discrete site identified by a particular feature, such as a building or a hill or a spring, raises the question in heritage law of whether there should be a buffer zone around it that is also afforded protection, although it is not itself the relevant “site”. The Burra Charter in Australia dealing with general heritage principles also has a concept of a “related place” which contributes to the cultural significance of another place[1219] and some Canadian heritage legislation allows designation of areas around heritage properties for conservation purposes.[1220] Prott and O’Keefe have suggested that such protective zones are common for monuments but less common for “sites”.[1221] This may be because the archaeological site, particularly under an earlier scientific model, was valued for the objects and information gained from it rather than the setting itself. With the requirement for small delineated sites, buffer zones may be necessary to ensure that the sites are actually protected.

Most of the legislation covering heritage, including Indigenous heritage, does not mention buffer zones for sites.[1222] An exception is the *Aboriginal Heritage Act 2006* (Vic) in s 5(2)(e) which extends the definition of the area of an Aboriginal place to the area immediately surrounding any natural feature, formation or landscape or archaeological site “to the extent that it cannot be separated from the thing without diminishing or destroying the cultural heritage significance attached to the thing by Aboriginal people”. The Victorian legislation only provides for such a buffer zone to specific Aboriginal places that are constituted by the natural feature or the archaeological site. Perhaps this assumes that the buffer might already be included in the other wider definitions of “area” of land.

[1219] *Burra Charter*, above n 953, at Article 1.13.

[1220] For example, the BC *Heritage Conservation Act 1977* in s 4(2) allows the Lieutenant-Governor in Council to designate land that does not have heritage value as a provincial heritage site if designation is necessary or desirable for conservation of other heritage sites. The Manitoba legislation also allows the listing of a site which has no heritage significance in itself but should be designated as a site because of proximity to or for protection of another heritage site: s 3 *Heritage Resources Act of 1985*, CCHM c H-39.1. Similar provisions exist in the Alberta *Historical Resources Act*, RSA 2000, c H-9, s 20(2) (where the Minister can include adjacent land in the designation of a historic resource) and the Yukon *Historic Resources Act*, RSY 2002, c 109 ss 16, 38 (where sites with no inherent significance can be included in a historic site).
In the USA, the *Alaska Historic Preservation Act,* ALASKA STAT §41.35 (2009) provides in § 41.35.030 that the Governor may designate as a part of a historic monument or site “as much land as is considered necessary for the proper access, care, and management of the object or site to be protected”.

[1221] Prott and O’Keefe, above n 940.

[1222] The *Heritage Act 1977* (NSW), for instance, in s 32(3) provides for listing of a curtilage of a building or land where a relic or work is situated, but says nothing about buffer zones for places generally.

Similarly, the fact that a buffer zone is not mentioned in other legislation does not mean it is not included. It may be that such a zone is already part of the "site" or "place" or "area" as defined. This was clearly the intent, for instance, of the *ATSIHPA.*[1223]

Buffer zones may signify the extent of power radiating from a particular Indigenous site.[1224] Buffer zones may also be necessary for the performance of ceremonies at sacred places as a means of ensuring privacy.[1225] Such a zone may also need to take into account the requirement for uninterrupted views from a site or as part of a site.[1226] The extent of buffer zones required can vary substantially.[1227]

There have been well-known controversies in relation to Indigenous sacred places over a kind of "buffer zone", namely the concept of a "sphere of influence" around a sacred site. One of the best-known disputes about such spheres emerged in relation to the sacred place at Pea Hill[1228] on Noonkanbah Station in the Kimberley area of Western Australia.[1229] The issue related to drilling for oil at a location, not at Pea Hill itself, a place largely accepted as being sacred to Indigenous people, but some kilometres away. An anthropological report commissioned by the Museum indicated that the location of the proposed drilling was within the sphere of influence of the Pea Hill site and should not be carried out.[1230] This was challenged by the Western Australian government[1231] and other critics who, amongst other arguments, alleged that there was no such thing as a "sphere of influence" and that this idea had been created as an obstacle to mining.[1232] These critics pointed to various pastoral works such as the

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[1223] See Second Reading Speech by the Minister for Aboriginal Affairs Clyde Holding in Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 9 May 1984, 2130, where it was said that the concept of "area" was designed to include adjacent areas that should not be entered beyond the site itself, in other words, to include the buffer zones, but not to "close off huge areas".

[1224] See examples below.

[1225] See Noel Wallace, above n 178.

[1226] Deward Walker, above n 169, gives examples of needs to receive the first rays of the sun or have undisturbed views of certain landscapes to be taken into account as part of the geographical extent of sites.

[1227] See Kelley and Harris, above n 40, who gave an example of 15 square miles being required around some sacred Navajo mountains but perhaps only 1 square mile around every home.

[1228] Sometimes also referred to as "P-Hill". Its proper name was Umpanpurru. It was a fertility site but also significant for association with at least two dreaming stories.

[1229] Accounts of the controversy can be found in Hawke and Gallagher, above n 173; Kolig, *Noonkanbah Story,* above n 30; Philip Vincent, 'Noonkanbah' in Nicolas Peterson and Marcia Langton (eds), *Aborigines Land and Land Rights* (1983). A viewpoint from the WA Government of the time is found at Western Australian Government, '*Noonkanbah: The Facts*' (September 1980).

[1230] The sphere of influence was said to extend about 5 km from the site.

[1231] See, for instance, in comments of Bill Grayden, in Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 September 1980, 1112 and 9 September 1990, 1192. See also other speeches denying sacredness of areas of influence such as those of Councillors Withers and Wordsworth in Western Australia, *Parliamentary Debates,* Legislative Council, 16 September 1980, 1385 and 17 September 1980, 1483; Commonwealth of Australia, *Parliamentary Debates*, Senate, 14 June 1984, 3166–3179, in a speech of Senator Noel Crichton-Browne. This was also set out in the pamphlet, Western Australian Government, '*Noonkanbah',* above n 1229. The matter was eventually resolved politically by the Minister directing the Trustees of the Museum to grant a permit to damage the site.

[1232] See, for example, in the Second Reading speech for the 1980 amendments to the WA *Aboriginal Heritage Act* following the Noonkanbah dispute, where Bill Grayden spoke of the original purpose of the

homestead and other improvements being constructed within the said sphere. What the critics failed to comprehend was that certain types of activities on the surface of the land may be acceptable within a sphere of influence but not activities underground.[1233] Their critique of the sphere of influence made the assumptions outlined in 15.2 above that the site is the only locus of sacredness, leaving the rest of the area outside the delimited site as profane and open for any activity.

Spheres of influence also featured in the Coronation Hill controversy in the Northern Territory[1234] where Jawoyn claimants said that such spheres extended for some distance, in some cases about 10 km from the focal Bula sites where Bula was said to enter the ground. The Jawoyn therefore asserted that the proposed mining area of Coronation Hill was within the wider sacred area and should not be allowed to be mined. The Resource Assessment Commission noted in its report that Jawoyn religious thought had developed to a point where the "Sickness Country" was viewed as a single region affected by Bula and in which Bula sites were interconnected with spheres of influence around them.[1235] These conclusions too had their critics.[1236] Maddock saw the division of viewpoints as being between those who saw sites as pinpoints on a map and those who saw them as more diffuse, represented as smudges.[1237] However, another view of the division is that between those who

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Act being largely lost and that sections of the community in a highly organised campaign had used the Act for political purposes to further their claim for land and mineral rights: Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 September 1980, 838. There is also an account of the allegations of government ministers and CRA representatives in Western Australia in relation to Noonkanbah in Rod A Dixon, 'In the Shadow of Exclusion: Aborigines and the Ideology of Development in Western Australia' in Rod A Dixon and Michael C Dillon (eds), *Aborigines and Diamond Mining* (1990).

[1233] Kolig has described the explanation given to him that the sacredness operated like a battery underground emitting power and generating life. Disturbance underground, even some distance away, may affect this subterranean force in a way that works on the surface that did not greatly damage the land a similar distance away may not. He said that anthropologists have long recognised the difficulty of drawing perimeters to sacred places as power can radiate some distances from sites and whether activities are permissible may depend on a variety of factors such as the power of the site, the nature and impact of the activity, individual interpretations and exegesis: Kolig, *Noonkanbah Story,* above n 30. See also a similar description in Hawke and Gallagher, above n 173.

[1234] Along with the Hindmarsh Island application referred to above, issues concerning the sacredness of the Coronation Hill mining area created a major controversy in Australia as far as public and academic debate was concerned. Accounts of the controversy can be found in Resource Assessment Commission, above n 217; Maddock, 'Yet Another Sacred Site', above n 1118. Like the Noonkanbah situation, the matter was also resolved politically in the end, but with a different result as the Federal Government decided to protect the area and prohibit mining.

[1235] Resource Assessment Commission, above n 217, chapter 7.

[1236] Notably Ron Brunton in a series of articles such as Ron Brunton, 'The Controversy over Sickness Country: The Battle Over Coronation Hill' (1991) 35 *Quadrant* 16; Ron Brunton, 'Mining Credibility: Coronation Hill and the Anthropologists' (1992) 8(2) *Anthropology Today* 1. See also Stephen L Davis and J R V Prescott, *Aboriginal Frontiers and Boundaries in Australia* (1992). The arguments about the registration of sites as part of an expansion of Jawoyn territory were also canvassed in the report by the Resource Assessment Commission and the analysis is discussed further at Chapter 16 in the context of changing tradition: Resource Assessment Commission, above n 217.

[1237] Maddock, 'Yet Another Sacred Site', above n 1118. He also noted that, under the NT legislation, it was not necessary to show that the extended area was sacred, only that it was of significance, being a lesser test. However, such a distinction may be harder to draw when the significance relies on the sacredness.

accepted the diffuse and extended nature of sacred power and those who saw the expanded reach of sacredness as a land grab.[1238]

15.4 Privatisation Arguments

While the results have been mixed, it is apparent that Indigenous sacred places have regularly been faced with arguments seeking to limit them to smaller discrete dimensions, to fit into the typical conception of "sites" developed under a public heritage model. The normal rules of engagement in the political contest over how much space can be carved out for heritage protection are not appropriate to contain many Indigenous understandings of sacredness. The element of sacredness has made the usual mode of debate awkward because it involves an area of religious belief which the governments and outsiders often feel they cannot objectively debate.[1239] The tactic used instead in some of the above illustrations has been to deny or avoid the problem of sacredness by characterising the beliefs as disingenuous and being really about land grabs or political ambitions.[1240] These can then be attacked in the normal course of disputation in the public arena. However, the "land grab" accusations may also reflect a perception that claims of sacredness are in fact a move towards the privatisation of space. Instead of seeing the heritage system as an encroachment for a public purpose, when religion is involved, it becomes characterised as a private purpose.

Much of the fear of the potential size of Indigenous sacred places and buffer zones is reminiscent of another debate about religious space in a different context, yet with its similarities. Davina Cooper[1241] has described the planning objections to Jewish eruvs[1242] in the United Kingdom as objections to the privatisation of space and

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[1238] An example of the latter approach is in Davis and Prescott, above n 1236, where registration of a vast tract as a site was described as enabling territoriality to be exercised in favour of the Jawoyn people over the wider area for which they were not the primary spiritual owners. The issue of sacredness versus land grabs or wider ownership issues has also emerged in New Zealand Environment Court cases, discussed in Chapter 17 in relation to proof. See also the point of above at 15.2 about a desire to limit the "quarantined" areas of significance to minimise impact from use by others.

[1239] Or to use the description of Gelder and Jacobs, it is "uncanny" in the sense of being unfamiliar and uncontrollable: Gelder and Jacobs, *Uncanny Australia,* above n 33.

[1240] Neil Andrews, 'Dissenting in Paradise? The Hindmarsh Island Bridge Royal Commission' (1998) 5 *Canberra Law Review* 5 has noted that recent invention is a common feature of many religions. The Royal Commission in its report on Hindmarsh Island found that there was an unacceptable fabrication because the belief was an invention for the purpose of seeking a declaration to stop development and that this was a secular economic purpose. This issue is of fabrication or insincerity is discussed in more depth in Chapters 16 and 17.

[1241] Davina Cooper, '"And Was Jerusalem Builded Here": Talmudic Territory and the Modernist Defensive' in Rex J Ahdar (ed), *Law and Religion* (2000).

[1242] The Talmud restricts adherents from carrying out certain activities on the Sabbath, like transporting objects outside their own home or domain. An eruv is a symbolic or real fence that has the effect of extending the boundaries of the private home to a wider area (perhaps a whole neighbourhood) thus enabling the activities to be carried out over this wider area on the Sabbath.

withdrawal of space from other residents. She saw the public concerns about the eruv as a contaminating threat to the secular character of the public sphere in a society that believed that difference should be expressed in private behind closed doors. In some ways, the attitudes of those objecting to large and undefined Indigenous sacred places or the extension of spheres of influence are similar, that is, the sacred is seen to intrude on the space that is available for their preferred activities and is identified as privatising public space. In this way, Indigenous religious beliefs are losing out again on both fronts. They are stymied by the structural limitations of the secular public heritage model, but when these are able to be adapted to include the needs of sacredness, the accusation turns to one of inappropriate intrusion of private religion on public space, in which the "public" is defined as the majority culture.

When one compares this situation with the free exercise of religion jurisprudence, one obvious difference is that the latter had difficulties recognising the relevance of discrete sacred places at all, as opposed to the religious activities of individuals.[1243] Nevertheless, there are many commonalities in the fears of unbounded sacredness and its intrusion into private or government-owned land[1244] and these have been used in attempts to limit its geographical expanse, whether through restrictions to the private space or through limiting the availability of public recognition beyond discrete sites.

Ultimately the conceptual problem is one which operates on the basis of a separation of spheres, seeing something as fitting into either the sacred and private or secular and public, ignores the possibility of co-existence of both in the same place. The co-existence issues are returned to in Chapter 18.

[1243] As analysed in Chapter 6.
[1244] See especially in the discussion of property rights in Chapter 11.

Chapter 16 – Tradition and Age

This chapter provides another example of how the typical values of heritage in the public sphere are unsuitable for the needs of the sacred in many Indigenous beliefs. The issue here concerns the public valuing of antiquity, the longevity of significance and the tensions raised about how far the heritage model should protect a living and growing faith tradition. The starting point is a discussion of the importance of age, both within the heritage model and in the use of the term "tradition". This has arisen in the Indigenous context when there has been a long religious tradition but a new recognition within that tradition of a place being sacred. Policy issues are raised as to whether legal protection should cover recent elaborations of sacredness and changes which may have a political or secular flavour.

Contrasts are made with the freedom of religion model's recognition of the need to protect a person's current beliefs, no matter how novel or unorthodox. Nevertheless, the same fears as those discussed in Part B can be seen in the resistance to ever-expanding locations of the sacred. In the Part B analysis, the sacred was controlled through restrictions in the private sphere. In the heritage model, antiquity becomes another control mechanism.

16.1 The Notion of Antiquity in Heritage

In general heritage legislation, the language often refers to "significance", which does not carry any temporal element, particularly when it comes to social or cultural significance. Even the concept of "historical" significance does not necessarily require any particular antiquity.[1245] However, a sense of age is common in usual understandings of the word "heritage" because what is prized in public heritage is often antiquity and history.

The notion of "heritage" usually refers to something being handed down from generation to generation,[1246] particularly from the distant past. Often the most prized are relics and museum pieces, having particular value because of their age.[1247] This

[1245] For instance, an event happening today could be called an "historic" moment.
[1246] Graeme Davison has suggested that heritage originally meant the property parents handed to their children: Davison, 'The Meaning of Heritage', above n 938. See also Tony Davies, 'Aboriginal Cultural Property?' in Martin Chanock and Cheryl Simpson (eds), *Law and Cultural Heritage* (1996) referring to the dictionary definition of heritage as anything that has been transmitted from the past or handed down by tradition.
[1247] Clavir, for instance, has noted that heritage in Western society is often seen as a production of the past and museums value antiquity: Clavir, above n 931.

aligns with a common view of heritage as being about a manifestation of the past.[1248] A sense of the past with evidence of age and timeless continuity can enhance one key aim of heritage of constructing a national identity.[1249] Objects and places are valued primarily because of their antiquity, especially as this is often what makes them unique.[1250]

This has been encapsulated to some extent in the "fifty year" requirement in regulations made for the National Register of Historic Places and for historic landmarks in the USA.[1251] It is also reflected in the preamble to the *NHPA* which speaks of the spirit and direction of the nation being founded upon and reflected in its *historic heritage* and refers to the *historical and cultural foundations* of the nation,[1252] suggesting that heritage is very much about the nation's origins and past. The Nevada statute that protects Indigenous sacred places may have an even longer age requirement because the protection is for "prehistoric sites", though the actual definition of a prehistoric site does not refer to any particular time requirement.[1253] However, most statutes make no specific reference to an age requirement.

[1248] See, for example, Merriman, above n 939, describing the rise of interest in heritage in terms of pursuit of the past.

[1249] Noted, for example, in Graham, above n 951, who suggested that the notion of antiquity conveys and underpins the idea of continuity and the need to connect present to the past in unbroken trajectory to legitimise the present. Similarly, the paradigm of continuity and the idea of history and culture as a linear narrative has been referred to in Bjonar J Olsen, 'The End of History? Archaeology and the Politics of Identity in a Globalised World' in Robert Layton, Peter G Stone and Julian Thomas (eds), *Destruction and Conservation of Cultural Property* (2001). Bender's article on Stonehenge in the UK is one example of a desire to protect what is packaged as a deep national (albeit frozen) past ahead of contemporary use and significance: Bender, 'Stonehenge', above n 938.

[1250] A discussion of the preference for the ancient can be found in David Lowenthal, 'Age and Artifact: Dilemmas of Appreciation' in Donald William Meinig (ed), *The Interpretation of Ordinary Landscapes: Geographical Essays* (1979). See also the discussion of archaeological value in David Lowenthal, 'Conclusion: Archaeologists and Others' in Peter Gathercole and David Lowenthal (eds), *The Politics of the Past* (1990); Creamer, 'Perceptions of the Past', above n 199. Lowenthal has also spoken of heritage being increasingly valued because we live less with it: see David Lowenthal, 'Heritage and Its Interpreters', [1986, Winter] *Heritage Australia* 42.

[1251] The federal regulations for the *National Historic Landmarks Program*, 36 CFR § 65 at § 65.4, made for the *Historic Sites, Buildings and Antiquities Act 1935* (16 USC §§ 461 to 467) and the regulations for the *National Register of Historic Places*, 36 CFR § 60 at § 60.4 set out very similar criteria for such Historic Landmarks and for the National Register for Historic Places. These provide that ordinarily properties which have achieved significance within the past 50 years are not eligible for designation. The exceptions are when the property achieving significance within the past 50 years is of "exceptional importance", or in the case of national landmarks, of "extraordinary national importance". See similar provisions in New York Code, Rules and Regulations dealing with the State Register of Historic Places at 9 NYCRR Part 427.3(b)(1); TENN CODE ANN § 4-11-202(2)(A) (2009); Wisconsin's WIS STAT § 44.36(2)(b)(1) (2009). This requirement has been said to be because a sufficient historical perspective needs to exist to determine that the property is exceptionally important and will continue to retain that distinction in future: National Park Service, *Bulletin 38,* above n 1028.

[1252] 16 USC § 470.

[1253] NEV REV STAT §381.195 (2007) defines prehistoric sites as "any archaeological or paleontological site, ruin, deposit, fossilized footprints and other impressions, petroglyphs and pictographs, habitation caves, rock shelters, natural caves, burial ground or *sites of religious or cultural importance to an Indian tribe"* (emphasis added). The assumption is that such religious and culturally important sites are prehistoric, but the definition does not explicitly require them to be so.

Recent thinking has moved heritage beyond the restricted sphere of old buildings, just as the term historical significance has tended to be replaced by cultural or social significance.[1254] The language of cultural or social significance speaks of what is significant to communities today. There is no reason why, in the absence of terminology implying an age requirement, such should exist. However, regardless of what qualifies as significant under the general heritage legislation, in the absence of a specially significant event, personality or outstanding aesthetic achievement, what in practice is heritage-listed is usually old: its age makes it valued and irreplaceable.

Most difficulties for Indigenous places relating to age do not arise from the wording of "significance" in the general heritage legislation but from reference to "tradition" in some of the Indigenous heritage provisions, a term that borrows heavily from the old meanings of "heritage" discussed above. It is this troublesome issue that is discussed in the next few sections.

16.2 The Use of the Term "Tradition" in Indigenous Heritage Legislation

This section deals with whether there is a notion of longevity when the term "tradition" is used[1255] as a requirement in some pieces of heritage legislation that can cover Indigenous sacred places.[1256] This term is used only in some Australian legislation described below, though the *NHPA* in the USA also uses the term.

Most legislation that refers to tradition does not explicitly define the word as requiring any particular age. The South Australian legislation includes in the definition of "Aboriginal tradition" traditions that "have evolved or developed" but requires these traditions to have originated prior to European colonisation.[1257] Some Australian pieces

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[1254] See Davison, 'What Makes a Building Historic', above n 941.

[1255] The Indigenous heritage legislation that does not have a requirement of tradition is referred to below in 16.5.

[1256] The emphasis here is on the use of tradition in heritage legislation, not in native title law. There is, of course, a substantial body of law dealing now with the idea of "traditional laws and customs" in native title jurisprudence, flowing particularly from the High Court decision in *Members of the Yorta Yorta Aboriginal Community v Western Australia and Ors* (2004) 212 CLR 422 which enunciated a requirement of a normative system of laws to be not only handed down from generation to generation but to stem from a society in existence as at sovereignty. This logic was based on native title law only recognising a normative system already operational at sovereignty and not the creation of a new parallel system of post-sovereignty Aboriginal laws. It has been suggested that this was due to the emphasis on the process of "traditio" rather than the content of the tradition: H Patrick Glenn, 'Continuity and Discontinuity of Aboriginal Entitlement' (2007) 7(1) *Oxford University Commonwealth Law Journal* 23. This is not explored further as requirements to stem from sovereignty have come about from the quirks of the native title philosophy and should not play a role in the ordinary meaning of tradition nor the meaning as set out in the Indigenous heritage legislation. The topic has been explored at length elsewhere, for example in Young, above n 693.

[1257] *Aboriginal Heritage Act 1988* (SA) in s 3 defines Aboriginal tradition as meaning "traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and

of legislation have definitions of tradition that do not carry any explicit temporal connotations.[1258] Some Australian Acts do not define tradition[1259] and most of the legislation of the other countries does not refer to tradition at all or do so only obliquely as one of a range of types of significance.[1260]

The suggestion of age also comes from the ordinary meaning of the term "tradition". In common usage, this, like the word "heritage", suggests something that has been handed down from the past, perhaps from generation to generation, usually for a reasonable long but unspecified time.[1261] A leading commentary on "properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization" referred to in the *NHPA* section in the USA, codified at 16 USC § 470a(d)(6)(A), has said that "traditional" refers to those beliefs customs and practices of a living community of people that have been passed down through the generations.[1262] Hal Wootten, when discussing the requirements of the *ATSIHPA*, noted this ordinary meaning and pointed out that the Act does not specify the degree of antiquity that must attach to observances customs and beliefs.[1263] However, in *Chapman v Luminis* (No 5),[1264] one of the Hindmarsh Island cases,[1265] Von Doussa J

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includes traditions, observances, customs or beliefs that have evolved or developed from that tradition since European colonisation".

[1258] See *Aboriginal Sacred Sites Ordinance 1978* (NT) s 3, the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT)s 3, both using the definitions in the Clth *Aboriginal Land Rights (Northern Territory) Act 1976*, s 3. All refer to 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 and relationships". The *ATSIHPA* in s 3, the *EPBC* ss 201(4) and 528 and the *Aboriginal Heritage Act 2006* (Vic) in s 4 have almost identical definitions to those.

[1259] The *Heritage Act 2004* (ACT), the *Aboriginal Heritage Protection Act 2003* (Qld) and *Torres Strait Islander Heritage Protection Act 2003* (Qld), all in s 9, define Aboriginal places or areas as places or areas of particular significance to Aboriginal people because of either or both of the following:

(a) Aboriginal tradition;

(b) the history, including contemporary history, of the Aboriginal people.

However, tradition is not defined in those statutes.

[1260] See 16.5 below.

[1261] Glenn, 'Continuity and Discontinuity', above n 1256. In *Members of the Yorta Yorta Aborignal Community v Victoria* (2002) 214 CLR 422, Gaudron and Kirby JJ, in their dissenting judgment, noted at [112] that in ordinary usage, the word "traditional" signifies that which has been handed down from generation to generation. In doing so they cited the definitions of "tradition" in the Macquarie Dictionary and the Australian Oxford Dictionary.

[1262] National Park Service, *Bulletin 38,* above n 1028. This Bulletin also suggested that the documentation in support of such TCPs needs to describe the period of significance. See also Shawna Lee, above n 329, referring to the inter-generational requirement.

[1263] In his report under s 10 of *ATSIHPA* on the Junction Waterhole in the Northern Territory: Wootten, *Junction Waterhole Dam* above n 1218, at [7.1.2]. He defined tradition in its ordinary meaning as being handed down from generation to generation. In that case, he did not need to have any lengthy discussion of the issue as the antiquity of the beliefs about the area was independently confirmed. A similar definition was accepted by Cheryl Saunders in her s 10 report on Hindmarsh Island, though as discussed below, this would become far more contentious: Cheryl Saunders, *Report Pursuant to s 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Significant Aboriginal Area in the vicinity of Goolwa/Hindmarsh Island* (7 July 1994).

[1264] [2001] FCA 1106.

[1265] The cases arising out of an application by some Ngarrindjeri women in South Australia from about 1994 to prevent a bridge being built from the mainland to Hindmarsh Island on the basis that this would be a desecration of a sacred area. The particular case involved a claim by the bridge developers against various anthropologists who prepared reports supporting the application under *ATSIHPA.*

felt that the concept of tradition as handing something down from generation to generation did require a degree of antiquity.[1266] Justice Mathews reporting to the Minister on the Hindmarsh Island application did not identify any particular degree of longevity but also accepted the requirement of generational continuity or repetition.[1267] She did take the view though that, if the tradition was one manufactured only two years ago, then this would not be Aboriginal tradition within the meaning of the *ATSHIPA*.[1268] The context of her comments suggests that she concluded that this flowed from the word "tradition" which would exclude an argument of a recent recognition or interpretation of sacredness.[1269]

The above approaches all point to a requirement that there be at least some degree of age to the tradition, thus excluding completely new beliefs or religions.

The concept of "tradition" implying age does not usually, in itself, face objections from the Indigenous point of view as many beliefs about sacred places are seen within the Indigenous perspective as timeless or at least very ancient.[1270] The problem occurs when, in spite of the ideology of continuity and antiquity, there may be evidence or allegations that the particular beliefs about the sacredness of a place are of quite recent origin, and thus not traditional at all. When this is combined with expressed ideologies of continuity and longevity, the allegations turn into claims of fabrication, implying a lack of credibility or outright dishonesty. This came to the fore in the Hindmarsh Island application.[1271] It could be argued however that if beliefs were simply fabricated, that is, no one really believes in them, then the area is simply not of

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[1266] *Chapman v Luminis* (No 5) [2001] FCA 1106 at [275], though he acknowledged that such tradition could evolve, at [397]–[399]. A similar analysis of tradition, as handed down from generation to generation but potentially evolving, was given by Elizabeth Evatt in her review of the *ATSIHPA*: Evatt, *Review,* above n 963.

[1267] Mathews, above n 1177.

[1268] Ibid, at 115.

[1269] This conclusion followed a discussion of the need for continuity and passing on of a tradition even if it was not static. She was of the view that a recently manufactured belief could not amount to a tradition. It is not clear, however, whether that comment turned solely on the recentness or whether it was also because of the "manufacture" of the belief. Justice Mathews found that the beliefs were genuine and thus not manufactured but she did not make any factual finding about the age of the belief. Her recommendations turned instead on what she found needed to be objective issues of desecration.

[1270] Kolig, *Silent Revolution,* above n 205; Charlesworth, 'Introduction', above n 10. See also mention of this in Ronald Berndt, *Australian Aboriginal Religion,* above n 12; Robert Tonkinson, 'Anthropology and Aboriginal Tradition: The Hindmarsh Island Bridge Affair and the Politics of Interpretation' (1997) 68(1) *Oceania* 1; Kingsley Palmer and Nancy Williams, 'Aboriginal Relationship to Land in the South Blatchford Escarpment of the East Kimberley' in Rod A Dixon and Michael C Dillon (eds), *Aborigines and Diamond Mining* (1990); Ron Brunton, *Blocking Business, An Anthropological Assessment of the Hindmarsh Island Dispute* (1995).

[1271] The South Australian government and proponents of the proposed bridge development and their supporters raised questions as to whether the beliefs of those Ngarrindjeri women opposing the development were not part of a longstanding tradition but were in fact a fabrication or recent invention. A Royal Commission was set up by the South Australian government to investigate whether the women's claims were fabricated and concluded ultimately that they were. The women putting forward the existence of such beliefs said that they were in fact not new beliefs but had been handed down from past generations and no one put an argument for an alternative reading that would allow for a development of traditions to encompass new beliefs.

religious significance at all and questions of the age of the tradition do not need to arise.[1272]

The more interesting issue arises when there has been a longstanding tradition that leaves scope for elaboration and this has resulted in a more recent but sincere recognition or revelation that a particular place is sacred. The question is the extent to which this newly discovered sacredness within the old tradition is covered by heritage protection. The tensions arising are discussed in the next two sections.

16.3 Recent Recognitions of the Sacred Within a Tradition

Indigenous traditions, like most others, are generally accepted as open to change and adaptation rather than as immutable.[1273] The question is whether tradition as changed recently in this way should be protected by legislation.

A controversial example in Australia concerned the claims by Jawoyn people in the late 1980s and early 1990s that mining at Coronation Hill in the Northern Territory should not be permitted.[1274] The Jawoyn people seeking protection of the area from mining spoke of the area being part of a larger Sickness Country complex of sites and also interpreted areas where gold had been discovered as part of the excreted essence of Bula, such as faeces.[1275] The mining Joint Venturers claimed that the heritage value

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[1272] For instance, in the case of the Hindmarsh application, the real public debate was about credibility and whether the women really held that belief or made it up for their own ulterior purposes. Some of the general issues of credibility are discussed later in the context of proof of significance in Chapter 17.

[1273] This was accepted in legal discussions of tradition in Wootten, *Junction Waterhole Dam,* above n 1218, at [7.1.2] and by Von Doussa J in *Chapman v Luminis* (No 5) [2001] FCA 1106 at [397]–[399] who noted in particular that it was unlikely that Ngarrindjeri thinking in pre-contact times would have contemplated an artificial link between the island and mainland any more than it would have contemplated reservoirs or mining activities. He noted that a measure of innovation had to occur in expanding the bounds of Aboriginal belief and tradition to accommodate the changing world. The Resource Assessment Commission report relating to Coronation Hill noted that adaptability and ongoing change was more the rule than the exception in all religious traditions including Aboriginal traditions: Resource Assessment Commission, above n 217, at [7.10]. See also Gray, above n 210; John Reeves, *Building on Land Rights for the Next Generation* (2nd ed, 1998), on the definition in the Clth land rights legislation for the NT, as adopted by the NT Indigenous heritage legislation. Evatt's review has recommended that this be made explicit: Evatt, *Review,* above n 963, as did Clive Senior in relation to the WA *Aboriginal Heritage Act*: Minter Ellison, *Senior Review,* above n 1090; Battiste and Henderson, above n 31.
It has been stated in numerous anthropological accounts as well, such as Ian Keen and Francesca Merlan, *The Significance of the Conservation Zone to Aboriginal People* (1990); Kolig, *The Silent Revolution,* above n 205; Klaus-Peter Koepping, 'Nativistic Movements in Aboriginal Australia, Creative Adjustment, Protest or Regeneration of Tradition' in Tony Swain and Deborah Bird Rose (eds), *Aboriginal Australians and Christian Missions: Ethnographic and Historical Studies* (1988); Robert Bos, 'The Dreaming and Social Change in Arnhem Land' in Tony Swain and Deborah Bird Rose (eds), *Aboriginal Australians and Christian Missions: Ethnographic and Historical Studies* (1988); Swain, 'Reinventing the Eternal', above n 162; Anthony Redmond, 'Places that Move' in Alan Rumsey and James Weiner (eds), *Emplaced Myth: Space Narrative and Knowledge in Aboriginal Australia and Papua New Guinea* (2001); Maddock, *Your Land is Our Land,* above n 155; Tonkinson, 'Anthropology and Aboriginal Tradition', above n 1270; Deborah Bird Rose, 'Ned Kelly Died for our Sins' (1995) 65 *Oceania* 2; James Irwin, above n 145.

[1274] Some of the key facts of which have been set out above in 15.3 under 'Buffer Zones'.

[1275] Resource Assessment Commission, above n 217, at [7.47], [7.55], [7.59]–[7.61], [7.118].

claimed for the Sickness Country was of recent origin, arising no earlier than 1985 in the case of Coronation Hill. The Resource Assessment Commission reporting on the creation of a Kakadu Conservation Zone in the Coronation Hill area found that there was an ancient Bula tradition. It further accepted that the process of interpreting the landscape in terms of existing religious cosmology was characteristic of Aboriginal religion and further noted that the conceptual links made by Jawoyn people between Bula the creator being and the minerals unearthed by non-Aboriginals, including the more recently discovered gold deposit at Coronation Hill, were the result of processes of a "genuinely Aboriginal kind".[1276] The Commission recognised that the process of religious elaboration was typical of a living faith that was not just an archaeological relic.[1277]

The critics, such as Ron Brunton, while accepting that all traditions were constantly changing, nevertheless claimed that legislation should only be construed as applying to long-standing beliefs not recent developments.[1278] This was based on his stated assumption that public willingness to protect significant sites has been largely contingent on the belief that they are ancient and part of relatively static tradition tens of thousands of years old.[1279] It might be argued that this was also the view of Justice Mathews in her Hindmarsh report when she excluded something manufactured two years ago, though it is arguable that her comment referred to a tradition arising for the first time only two years before rather than an elaboration of an older tradition.

A more sympathetic reading of an age requirement could be that, like the *NHPA* situation in the USA, a minimum age requirement is a way of recognising only significance that has stood the test of time. Anthropologist Robert Tonkinson has pointed to this as one way to draw the distinction between what has developed into a "tradition" from practices that are mere fads or transient innovations.[1280] The need for continuity was also stressed by Michael Brown who said that when groups "make claims on public space as part of their process of cultural revitalisation" basic fairness dictates that they bolster this with evidence, particularly of past and present practices.[1281] That test may, however, be passed by the broader religious tradition itself where the change is allowable by and within that tradition, as the Resource

[1276] Ibid, at [7.11].
[1277] Ibid.
[1278] Ibid, at [7.58]. See also Brunton, 'Mining Credibility', above n 1236; Brunton, *Blocking Business* above n 1270. This issue, including Brunton's views are also discussed in Gelder and Jacobs, *Uncanny Australia,* above n 33.
[1279] Brunton, 'Mining Credibility', above n 1236.
[1280] Tonkinson in 'Anthropology and Aboriginal Tradition', above n 1270, has said that the former have survived "an inevitable testing period" and acquired the "status of traditions".
[1281] Michael Brown, above n 25, in discussing both the Hindmarsh Island debates and similar issues around claims that Point Conception in the USA was a sacred Chumash place.

Assessment Commission had approached it in the Coronation Hill case. It is not necessary that use of the term "tradition" automatically excludes recent developments within it. Ultimately the issue is one of policy. To exclude new elaborations not only require traditions to be frozen in order to give them legal recognition but also reflects the heritage notion that values age over potency or sacredness and values ancient history rather than current religious beliefs of a living faith.

16.4 Elaborations of Sacredness Involving Political Motivations or Other Influences

Another issue is whether a distinction can be drawn between developments in a tradition that are acceptable and those which are not. As set out below, it has been suggested that developments motivated directly or indirectly by political or economic concerns, even if genuinely interpreted and believed, are not legitimate developments and should not be protected as part of an evolving tradition. Underlying this theme is the atitude that religious beliefs and traditions are not valid if tainted by secular reasons and that developments can only be legitimate if they occur in a pure "religious" context.[1282] This attitude often runs parallel to one which sees economic or political influences making traditions less authentically Indigenous.[1283]

Anthropologist Ron Brunton was one person putting forward the view that the beliefs in Hindmarsh Island and Coronation Hill were most likely to be invented for political reasons.[1284] At the same time in an article[1285] he also recognised that most traditions are constantly being constructed, often in response to political processes, and that the assumptions behind questions of "fabrication" may have been misguided. He noted that legislation like the *Aboriginal Heritage Act 1988* (SA), even though it provided for evolving traditions, was based on the fallacious assumption that traditions were handed

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[1282] This chapter concentrates on the political element, as that is what appears in the cases and legal decisions. Another similar attitude is the view that the incorporation of European materials or motifs in rock art or other creations can be presumed to be secular rather than religious and interpreted as such, even though the Indigenous viewpoint may be that they are entirely religious. However, the existence of post-contact material tends to be seen as inauthentic for Indigenous religions: see Ian McNiven and Lynette Russell, 'Ritual Response: Place Marking and the Colonial Frontier in Australia' in Bruno David and Meredith Wilson (eds), *Inscribed Landscapes: Marking and Making Place* (2002).

[1283] By painting Indigenous beliefs as purely spiritual, which is in turn assumed to be not political or economic, Tonkinson has noted that only certain elements are deemed by the dominant society to be "Aboriginal" and these do not include traditions impacted by social and historical forces: Tonkinson, 'Anthropology and Aboriginal Tradition', above n 1270. Francesca Merlan, 'Fighting Over Country: Four Commonplaces' in Diane Smith and Julie Finlayson (eds), *Fighting Over Country: Anthropological Perspectives* (1997) notes that it is commonplace (but incorrect) to attribute to many Aborigines an ideological separation of pragmatic material concerns and spirituality in their contemporary dealings over land.

[1284] Brunton, *Blocking Business,* above n 1270; Brunton, 'Mining Credibility' above n 1236; Brunton, 'Sickness Country', above n 1236.

[1285] In Brunton, *Blocking Business,* above n 1270.

down without any conscious manipulation. Despite these recognitions, Brunton still wanted to draw a distinction, albeit difficult, between illegitimate and acceptable inventions of tradition (even if sincere in both situations), with the suggestion that any political or economic impetus was somehow inauthentic and illegitimate.[1286]

The Resource Assessment Commission in its report on Coronation Hill noted such objections and influences but decided that the elaboration of traditions was a traditional Aboriginal process and thus did not need to make a direct decision on the legitimacy of political motivations, though it certainly did not suggest that they invalidated the elaboration.[1287]

These suggestions have been encountered by decision makers in other contexts. Justice Mathews reporting on the Hindmarsh Island application[1288] referred to the report by Rod Lucas that, as history and heritage are an important source of symbols in any society, it is not surprising that places of the past become the focus of political action in the present and that development provides an arena for asserting identity, responsibility and authority. Lucas said that this did not make the concern any less genuine but just located it within the realm of politics. It was suggested that the resurgence in relation to sacred areas was associated with heightened concern over land issues. Although Justice Mathews accepted that the beliefs in the traditional significance of the Hindmarsh area were genuine, she concluded that this was not enough to establish that the bridge would (objectively) be a use of the area in a manner inconsistent with the tradition.[1289] In this way, she avoided having to decide if the political nature of beliefs somehow depreciated their relevance as traditional as opposed to sincere.

The Environment Court in New Zealand faced issues of “modern political revisionism” in the 2001 case of *Te Kupenga O Ngati Hako Inc v Hauraki District Council and HG Leach.*[1290] There was a conflict of evidence among Maori witnesses as to whether the area to be affected by a refuse disposal factory and quarrying operation was wahi tapu or not. The Court preferred the evidence of the witnesses who said it was not. However, it accepted that the Te Kupenga witnesses were genuine in believing that the area was wahi tapu, but said this was based on misinterpretation and inaccurate information. The Court was of the view that the enhanced level of significance in the

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[1286] These ethical assumptions are questioned in Francesca Merlan, ‘The Limits of Cultural Constructionism: The Case of Coronation Hill’ (1991) 61 *Oceania* 341.
[1287] Resource Assessment Commission, above n 217.
[1288] Mathews, above n 1177, at 118–9.
[1289] Ibid at 185–7. Note that she did say that a finding that an area is of particular significance only requires the subjective test of genuine belief, at 159.
[1290] Unreported, Environment Court, A10/2001, 23 January 2001.

minds of those witnesses was derived from a loss of ownership and construction through cultural recovery.[1291] It found that their evidence bore a distinct character of "ideological revisionism" accompanied by a fixed aim to prevent the company from using and profiting from their ancestral land,[1292] in other words, the revisions appeared to be due to political motivations. These witnesses put forward arguments about the waste being unclean and culturally offensive, based on what were traditional beliefs of uncleanliness and reactive avoidance,[1293] so were honest interpretations and elaborations of the tradition. The Court noted that all of this made the concept of "the traditional" problematic as such beliefs had appeared to have been absorbed into contemporary Maori culture and practice and had now become traditional.[1294] In the end, the Court was able to say that there was no veto and its role was to balance all considerations. It decided in favour of the development, but there was no question that the findings of revisionism weighed heavily against the Te Kupenga in that regard.

One argument put against accepting recent traditions for protection is the risk that any place could potentially be sacred. It is thus related to the "land grab" concerns referred to in the previous chapter. The mining Joint Venturers in the Coronation Hill case noted in their submissions that nothing would be free of the potential for interpretation as Aboriginal heritage, even if the beliefs are as fresh as that day's newspaper, and that decisions accepting those principles will not be protecting "Aboriginal heritage" but would serve land ownership ambitions.[1295] Issues of fabricating traditions purely in order to serve land ambitions are discussed in Chapter 17, but the concern here is the suggestion that genuine beliefs are somehow invalid if they also serve such ambitions. Such beliefs have also been described in this context as a major obstacle to mining and commercial mining development,[1296] ignoring that this may simply be an obstacle to a "land grab" by developers.[1297]

Questions of legitimacy of politically influenced revisionism miss the point that developments in religious traditions and theology have over the years regularly been shaped by political and economic factors, for both Indigenous[1298] and non-Indigenous

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[1291] Ibid at 33.
[1292] Ibid at 39.
[1293] Ibid.
[1294] Ibid at 33.
[1295] Noted in Resource Assessment Commission, above n 217, at [7.44].
[1296] Brunton, *Blocking Business,* above n 1270; Brunton, 'Mining Credibility' above n 1236; Chris Kenny, *It Would Be Nice if There Was Some Women's Business: The Story behind the Hindmarsh Island Affair* (1995).
[1297] Something that is assumed to be legitimate, as opposed to a land grab by Aboriginal people!
[1298] See for example the discussion in Morphy, 'Landscape', above n 158, at 203–6; Morphy, 'Colonialism', above n 149; Erich Kolig, 'Government Policies and Religious Strategies: Fighting with Myth at Noonkanbah' in Robert Tonkinson and Michael Howard (eds), *Going It Alone* (1990); Howard Creamer, 'Aboriginality in NSW' in Jeremy Beckett (ed), *The Past and the Present: the Construction of Aboriginality*

religions.[1299] Given, however, that this point was *not* missed by Ron Brunton, the line he sought to draw may have been a practical compromise to reduce the impact of the sacred on mining and other developments. Kolig has spoken of attempts to reduce the time and space allocated to sacredness by seeing sacred enclaves as clearly separated from the predominant secular mundane world.[1300] The last chapter addressed spatial limitations whereas this chapter addresses the temporal ones.

The arguments to draw a line separating the political or economic from the religious have overtones of the desire to separate the secular from the sacred, as if the latter is thereby profaned by secular motives or influences in its development. Sacredness seems to be accepted only where it has developed in its privatised vacuum. It is allowed into public space and given heritage protection when it qualifies as part of the controlled ancient museum collection but not when it is alive or active.

16.5 The Legislation that Does Not Refer to Tradition or Age: Protection on the Basis of Current Sacredness or Significance

In contrast to the views above, the importance of sacredness in most religions is about where it presently exists and is efficacious here and now.[1301] An obvious argument is what should be protected are current beliefs, not merely what is old, as these are what hold significance to the believers.[1302]

(1988); Bob Ellis, 'The Aboriginal Heritage: Sacred and Significant Sites' in Sharon Sullivan (ed), *Cultural Conservation: Toward a National Approach* (1995); Erich Kolig, 'Captain Cook in the Western Kimberleys' in Ronald M Berndt and Catherine H Berndt (eds), *Aborigines of the West: Their Past and Present* (2nd ed, 1980); Wassmann, above n 204.

[1299] In Andrews, 'Dissenting in Paradise', above n 1240, and Neil Andrews, 'Illegal and Pernicious Practices: Inquiries into Indigenous Religious Beliefs' in Julie Finlayson and Ann Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (1996), the point is made that Judeo-Christian religions are always inventing new ideas and this is not treated as a fabrication and that the common law system itself is always undergoing similar changes. See also the discussion of political constructions of Judeo-Christian sacred places in Chidester and Linenthal, 'Introduction', above n 33; Friedland and Hecht, above n 45; Eade and Sallnow, 'Introduction', above n 45; Glenn Bowman, 'Christian Ideology and the Image of a Holy Land: The Place of Jerusalem Pilgrimage in the Various Christianities' in John Eade and Michael J Sallnow (eds), *Contesting the Sacred: The Anthropology of Christian Pilgrimage* (1991); Peter Brown, 'Society and the Supernatural: A Medieval Change' in Peter Brown (ed), *Society and the Holy in Late Antiquity* (1982). There is also the general understanding that all tradition is invented, as discussed by Eric Hobsbawm and Terence Ranger, *The Invention of Tradition* (1983); Robert Wagner, *The Invention of Culture* (revised ed 1981).

[1300] Kolig, *Noonkanbah Story,* above n 30.

[1301] Clavir has drawn the contrast between the secular Western views as reflected in museum policies which value the ancient and the First Nations' views which see their sacred objects as important for the continuity of the living culture and its concrete reality in the present. For some First Nations, new sacred objects may be just as valuable as the old: Clavir, above n 931.

[1302] For instance, Keen has argued that it is the current beliefs of the Jawoyn which should count most in examining significance from the point of view of the Jawoyn, which was the role of the Resource Assessment Commission in relation to Coronation Hill: Ian Keen, 'Undermining Credibility: Advocacy and Objectivity in the Coronation Hill Debate' (1992) 8(2) *Anthropology Today* 6.

It could be argued that the specific Indigenous place provisions that do not require a "tradition" will protect areas of current significance even if that significance is recent. The New Zealand definition of wahi tapu in the *Historic Places Act 1993* does not require tradition or age but means "a place sacred to Maori in the traditional, spiritual, religious, ritual or mythological sense",[1303] so the traditional sense is only one of the options. The same applies for some Australian legislation[1304] and the New South Wales statute only refers to "culture" without mentioning tradition or age.[1305] The British Columbian provisions are set within and form part of the general heritage legislation and refer only to heritage value without using the term "tradition".[1306]

Two of the pieces of US state legislation giving protection to Indigenous sacred sites do not mention any requirement of age or tradition either. The 1976 Californian *Native American Historical, Cultural and Sacred Sites Act,*[1307] set in the context of religious freedom, refers to not damaging, inter alia, Native American places of worship or religious sites, without any statement about tradition. The Connecticut legislation[1308] refers in the definition of a sacred site to any space of "ritual or traditional significance", so while the term "traditional" does appear, it is only one of the options and not a necessary condition.

It remains to be seen whether those pieces of legislation which are set in the context of "heritage" or "history" will be read as requiring some degree of age. Despite the lack of

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[1303] In s 2.

[1304] The *Aboriginal Heritage Act 1972* (WA) refers to Aboriginal sites as including in s 5(b) "any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent". It has been suggested that this Act does not allow for evolving traditions: in Byrne, Brayshaw and Ireland, above n 29 at 97. That comment, however, does not necessarily flow from the words of s 5(b). The ACT *Heritage Act 2004* s 9, *Aboriginal Heritage Protection Act 2003* (Qld) and *Torres Strait Islander Heritage Protection Act 2003* (Qld), both in s 9, and the *Aboriginal Heritage Act 2006* (Vic) s 4 explicitly give the alternatives of covering places of contemporary significance as well as significance within Aboriginal tradition. The definition of Indigenous heritage values in the *EPBC* s 528 has tradition as one option amongst others, that is, "significance to Indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history".

[1305] The *National Parks and Wildlife Act 1974* (NSW) s 84 refers to places of special significance with respect to Aboriginal culture, which may also remove the temporal element.

[1306] The BC *Heritage Conservation Act 1977* definition of heritage value in s 1 "means the historical, cultural, aesthetic, scientific or educational worth or usefulness of a site or object".

[1307] At CAL PUBLIC RESOURCES CODE § 5097.9 (2009).

[1308] At CONN GEN STAT § 10-381(5) (2009) which defines sacred site or sacred land as "any space ... of ritual or traditional significance in the culture and religion of Native Americans that is listed or eligible for listing on the National Register of Historic Places or the State Register of Historic Places ... including, but not limited to, marked and unmarked human burials, burial areas and cemeteries, monumental geological or natural features with sacred meaning or a meaning central to a group's oral traditions; sites of ceremonial structures, including sweat lodges; rock art sites, and sites of great historical significance to a tribe native to this state". The National Register of Historic Places does have an age criteria but the Connecticut State Register of Historic Places does not, referring just to historic landmarks and these are defined as "any ... site that is significant in American history ... culture or a property used in connection therewith, including sacred sites" (see § 10-410).The definition of an archaeological site requires such sites to be not less than 50 years old but no such qualification exists for sacred sites.

a formal requirement of tradition or age, the *Te Kupenga O Ngati Hako* case[1309] in New Zealand has shown that, though sacredness based on new revised traditions is not automatically disqualified, the recent or political nature of the tradition may well be a factor against recognising authenticity of the claims of sacredness or count against the relative value of the sacred area in any balancing process.

An interesting contrast in attitude to provisions dealing with tradition and heritage in previous sections can be seen in the US religious freedom cases which recognise innovation, new beliefs and new places of sacredness, free of the apparent constraints of a frozen tradition.[1310] An example dealing with sacred places is the first instance decision of *US v Means*[1311] where the judge found that there would be an infringement of religious freedom if the Lakota were prevented from setting up a religious camp in the Black Hills even though the particular camp site did not have specific religious significance prior to when it was chosen to be established. The fact that the site was chosen by the elders as one revealed to them as conducive to religious practices gave the site its religious significance even though that significance was not the product of long-standing tradition.[1312]

On the other hand, the Report of the Task Force set up under the *AIRFA* in the USA seemed keen to reassure people who may have had land expansion concerns similar to those outlined above, that Indigenous sacred sites are known now and more sites will not develop later.[1313] This report has been criticised by Michaelsen for its lack of insight about innovation, change and the possibility of new sites arising from the living and continuing nature of the traditions, and its incorrect presentation of tribal religions as museum pieces.[1314] Judge Rosenblatt in *Navajo Nation v US Forest Service* also recognised, with a strong hint of alarm at the consequences, that new sacred areas were being continuously created.[1315]

[1309] *Te Kupenga O Ngati Hako Inc v Hauraki District Council and HG Leach* (Unreported, Environment Court, A10/2001, 23 January 2001). See 16.4 above.

[1310] For instance, in the Supreme Court decision of *Bowen v Roy,* 476 US 693 (1986) discussed in 9.2 above, where the freedom to exercise beliefs that the use of social security numbers by the government would stifle their daughter's spiritual development and rob her of her spirit were rejected on a variety of grounds, but none on the basis that the beliefs were of recent origin. See the statements in the US and elsewhere about the inappropriateness of any tests of orthodoxy beliefs in 4.2.3 and Chapter 8 above.

[1311] 627 F Supp 247 (DSD, 1985). This case is listed in 5.2.2 and discussed at 8.2.2.

[1312] 627 F Supp 247 (DSD, 1985) at 253. Ultimately, that case was overturned on appeal on grounds of a lack of coercion, not on grounds of novelty or lack of tradition: see Chapter 9.

[1313] The report said that the majority of sacred sites are already known and any future controversies will revolve around known sites, not additional sites. Tribes were not expected to go beyond ceremonies or rituals that they were using already and sites originated in creation and migration traditions which by their nature are foreclosed for the remainder of this world: US Department of the Interior, '*AIRFA Report*', above n 8, at 89.

[1314] Michaelsen, 'Significance of the *AIRFA*', above n 152, at 106.

[1315] *Navajo Nation v US Forest Service,* 408 F Supp 2d 866 (D Ariz, 2006) at 898. He seemed to recognise that under the religious freedom claim there would be no difference between these new sacred areas and

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The late Vine Deloria, Sioux academic, summarised the clash of values discussed above by saying that restricting sacred locations to places historically visited is to imply that God is dead. He lamented that a court will protect a religion if it shows every symptom of being dead, but will severely restrict it if it appears to be alive.[1316] This appears to be at the heart of the difficulties caused for Indigenous sacred places by narrow readings of the public heritage model requirements on age and tradition.

The tensions and fears raised by new traditions may, like the matters discussed in the previous chapter, really be about expansion of sacredness into what is perceived to be the space of other people's private interests. Where the matter is confined to the adherents' private space within the religious freedom principles, then the beliefs can be as new and as altered as their religions allow. However, the public heritage compromise may typically allow for only a few confined "outdoor museums" honouring the secular values of antiquity, with anything more being seen as unfair privileging of one type of private interest above other private interests in development.

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the thousands of existing ones. Rosenblatt J used this to justify following the narrower approach of the *Lyng* case: see 11.2.2 above.

[1316] Deloria, 'Sacred Lands and Religious Freedoms', above n 165.

Chapter 17 – The Assessment of Significance and Desecration

A hallmark of the "public" nature of the heritage system is that significance is deemed to be able to be "objectively" ascertained. This chapter deals with the difficulties of applying "objective" tests and processes to assessing sacredness and desecration in an Indigenous context.

Under the traditional public heritage model, what "we want to keep" is usually shaped by what heritage professionals and government believe is sufficiently significant for "us" (the wider community). Significance in turn has historically involved objective assessments of intrinsic values of a place,[1317] with a ranking system to choose which places are sufficiently important or representative to qualify as heritage.[1318] This model has tended to flow through to assessing significance to Indigenous peoples and whether there has been a breach of the protection.[1319]

More recent Indigenous-specific legislative provisions and philosophies have tried to mitigate some of the difficulties, but the problems in the underlying rationales in the models of the four countries have not been overcome. In particular, conceptual and practical problems have arisen in applying objective assessments of evidence to ascertain whether a place has the required significance and whether this has been damaged.[1320] Misunderstandings and prejudices arise from Western styles of reasoning which are assumed to apply neutrally to the whole community's heritage. This has all been exacerbated by tests of reasonableness or orthodoxy to test the claims of sacredness or significance.[1321] The unsuitability of such principles for Indigenous sacred places is explored below.

17.1 The Tendency to Objectify Significance

17.1.1 Intrinsic Significance in the General Heritage Model

There has been an historical attitude that significance is something that inheres in a place which can be objectively ascertained by an independent third party acting on

[1317] See 17.1.
[1318] See 17.2.
[1319] The legislative schemes covering the latter are covered in 17.3.
[1320] See 17.4.
[1321] See 17.5.

behalf of a projected "public". "Significance" has been used to distinguish between what is to be protected by heritage legislation and what is not. The typical Western model for heritage protection developed a set of criteria for what is considered of sufficient significance which then has to be satisfied before a place can be listed. This model has been used or assumed in much general heritage legislation in all the countries in question[1322] and at an international level.[1323] It generally requires some degree of importance or uniqueness that distinguishes a place from all other places that could be significant to some people.[1324]

The idea of having standard criteria and guidelines to assess significance suggests that such significance could be determined objectively as a process of professional judgment. Tainter and Lucas in the USA have argued that the traditional concept of significance is based on a positivist empiricist understanding of intrinsic qualities of a place or building. This understanding is said to have shaped the US heritage legislation in which the required significance is described as a quality *of the place*.[1325] These traits appear too in much of the heritage legislation of the other countries from the 1960s and 70s and are still contained in statutes today.[1326] In this way, significance was assumed

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[1322] See legislation listed in Chapter 13, discussed in Chapter 14 and in the further discussion below. The criteria are sometimes set out in separate guidelines issued by heritage bodies. An overview of the history of significance and criteria has been given in Keith Emerick, 'Use, Value and Significance in Heritage Management,' in Robert Layton, Peter G Stone and Julian Thomas (eds), *Destruction and Conservation of Cultural Property* (2001).

[1323] For example, in the *World Heritage Convention*, above n 955 and the guidelines, UNESCO, *Operational Guidelines*, above n 955.

[1324] Most of the early criteria placed an emphasis on significance through association with *great* people or events, or else on significance through being the *best* representation of a particular style or period. See, for instance, Harry Allen, *Protecting Historic Places*, above n 939; McConville, 'In Trust?', above n 937. See also note 1333 below.

[1325] Joseph Tainter and G John Lucas, 'Epistemology of the Significance Concept' (1983) 48 *American Antiquity* 707. In this article they trace the history of the selection criteria of significance in the US historic preservation standards and in how these and the criteria for eligibility for the National Register in the US regulations (36 CFR § 60, 36 CFR § 65 and 36 CFR § 800) assume that significance is present in sites and objects, as values that they possess. For example, the formulation in 36 CFR § 60.4, dealing with the criteria for the National Register, refers to "sites, buildings, structures or objects *that possess exceptional value or quality* in illustrating or interpreting the heritage of the United States in history, archaeology, architecture, engineering and culture and *that possess* a high degree of integrity of location …".

Other explicit examples are the historic preservation statutes that say "the quality of significance in American … history, architecture, archaeology, and culture *is present in* districts, sites, buildings (etc) *that possess* integrity of location ... feeling and association" and which also satisfy one of the standard criteria for significance: such as New York's *Parks, Recreation and Historic Preservation Law*, NY PAR LAW § 14.07 (2009); *Minnesota Historic Sites Act of 1993*, MINN STAT § 138.663 (2009). Other statutes that refer to historic properties or places "possessing" various types of significance include Georgia's GA CODE ANN § 12-3-50.2(a)(1)(B) (2009); West Virginia's WVA CODE § 8-26A-2(d) (2009).

It is also common for the US statutes to refer to *places* having heritage significance or values, eg, Arkansas' ARK CODE ANN §13.7.102(2) (2010); Kansas' *Historic Preservation Act of 2004*, KAN STAT ANN § 75-2716(c) (2009); New Hampshire's NH REV STAT ANN § 19-227-C-1(VI) (2009); *New Mexico Cultural Properties Act,* NMSA § 18-6-3(B) (2009); *New York State Historic Preservation Act of 1980,* NY PAR LAW §§ 14-03(5) & 14-07(2009); *North Carolina Archives and History Act of 1973*, NC GEN STAT § 121-2(5) (2009); Pennsylvania's *History Code*, 37 PA CON STAT § 37-103 (2009); South Dakota's SD CODIFIED LAWS § 1-19A-2(3) (2009); Vermont's VT STAT ANN § 22-14-701(6) (2009); Wisconsin's WIS STAT § 44.31(3) (2009).

[1326] The US legislation was a forerunner for the legislation in the four countries and the comments appear to be equally applicable to other general heritage models in the 1960 and 70s. For example:

to be something objectively observable in a place or object rather than a meaning assigned to it by each observer or assessor.[1327] This approach was logical in a model designed for preservation of relics and monuments of architectural and antiquarian significance.

Such a view of significance, however, has been criticised as failing to recognise that significance is constructed, contested and varies from time to time.[1328] Assumptions of objectively determined intrinsic significance are inappropriate for Indigenous sacred places where significance turns on a particular belief system not shared by most of the public.

More recent heritage thinking has led to a greater application of an "experiential" model of significance, based on a community's subjective and often emotional appreciations

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- The *World Heritage Convention* speaks of sites and monuments (ie themselves) as being "of universal value", from the points of view of various disciplines (not people), eg historic, anthropological, scientific or artistic, in the Article 1 definitions of "monuments" and "sites" in *World Heritage Convention*, above n 955. Criteria are set out for such significance in the guidelines, UNESCO, *Operational Guidelines*, above n 955.
- The 1977 BC *Heritage Conservation Act* defines heritage value in s 1 as "the historical, cultural, aesthetic, scientific or educational worth or usefulness *of a site* or object", demonstrating a similar approach.
- The 1993 NZ *Historic Places Act* s 23 still refers to areas being placed in the Register if the place or area *possesses* one of various types of significance.
- The *Heritage Act 1977* (NSW) s 4A refers to significance to the state in relation to the value of *the item.*
- The *Australian Heritage Commission Act 1975* (Cth) was designed for protection of the "national estate" which in s 4 was said to consist of "those places … that have aesthetic, historic, scientific or social significance or other social value". In 1990, a range of criteria for such significance of the relevant place was incorporated into the Act. This has been carried through to the *EPBC* that replaced it, which also refers to values belonging to the place, for example, in s 324D, it is said that *a place has* National heritage value if it meets one of the criteria prescribed by the Regulations. Many of the National heritage criteria in the *EPBC Regulation*s, reg 10.01A reflect the type of intrinsic scientific or aesthetic values, such as, having outstanding heritage value to the nation because of the place's "importance in the course, or pattern, of Australia's natural or cultural history" [(2)(a)], "possession of uncommon, rare or endangered aspects of Australia's natural or cultural history" [(2)(b)], "potential to yield information that will contribute to an understanding of Australia's natural or cultural history" [(2)(c)]. (Other criteria relate to social significance, discussed below.)

Various state statutes around Australia and Canada refer to the heritage significance *of the place* [eg, *Heritage Act 2004* (ACT) s 10; *Queensland Heritage Act 1992* dictionary definition of cultural heritage significance and s 35; *Heritage Places Act 1988* (SA) in s 16(1); *Historic Cultural Heritage Act 1995* (Tas) s 3; *Heritage of Western Australia Act 1990* s 3; NZ *Historic Places Act 1993* s 23] or to a place having significance or value, particularly in definitions of historic places or properties [eg, BC *Heritage Conservation Act of 1977* s 1; NB *Historic Sites Protection Act of 1954* s 1; *Ontario Heritage Act* s 1; PEI *Heritage Places Protection Act* s 1; Saskatchewan *Heritage Property Act* s 2(i)].
Similar comments to that of Tainter and Lucas are made about Australian and New Zealand models in Michael Pearson, 'Identification and Significance Assessment of Historic Places at a National Level' in Sharon Sullivan (ed), *Cultural Conservation: Toward a National Approach* (1995); Byrne, Brayshaw and Ireland, above n 29; Harry Allen, *Protecting Historic Places*, above n 939. It has been noted that significance has become a concept that can be tabulated on a scale: in Emerick, above n 1322.

[1327] This fits with the scientific and professional approach to heritage that has been highly criticised. For example, Davison has referred to the taxonomic approach to heritage which rests on a process of classification more natural to botanists and zoologists: Davison, 'Patrimony to Pastiche', above n 940. Laurajane Smith has pointed to the scientific, objective bureaucratic nature of heritage assessments which conform to Enlightenment rationality and fits in naturally with the discourse of governments: Laurajane Smith, above n 930.

[1328] Tainter and Lucas, above n 1325; Byrne, Brayshaw and Ireland, above n 29.

of their environments.[1329] The expansion of categories of significance to cover the social or cultural, and sometimes the specifically spiritual or religious, has also marked a recognition that significance could be peculiar to specific communities and requires people to whom it is significant.[1330] There have been moves in heritage discourse away from merely picking what experts see as the "best" of places to finding a "representative sample"[1331] to take into account such different perspectives. Within these broader categories, however, appropriate criteria have still been created in order to assess whether a place has the qualifying level of significance, as the usual heritage model still requires some level of selectivity as to what are the best representative samples.[1332] This element of selectivity has applied too for Indigenous heritage under the general social or cultural significance provisions or in statutes where only places chosen to be listed are protected.[1333] Cultural significance has usually just been tacked on to the same traditional model as an additional criteria or quality of the place.[1334] In this way, it is easy to resort to old professional habits or to apply the same objective assessment process to cultural criteria as to scientific, aesthetic or educational criteria.[1335]

[1329] Pearson, above n 1326. See also Maurice Evans, above n 924; Harry Allen, *Protecting Historic Places*, above n 939.

[1330] See overview of these in Chapters 13 and 14. In this model of legislation, the significance is still attributed to the place or object, but it is recognised that it is not intrinsic but assigned through the perceptions of others.

[1331] See Michael Kelly, 'Building a Case: Assessing Significance' in Alexander Trapeznik (ed), *Common Ground? Heritage and Public Places in New Zealand* (2000), on the concept of representativeness and see also Chapter 12.

[1332] See, for example, the discussion of this assessment at a national level in Pearson, above n 1326 and in 17.2.2–17.2.3 below.

[1333] Josephine Flood, for instance, in discussing the listing of Indigenous sites under the old Register of the National Estate in Australia, has outlined how a highly selective nomination process has been operating, being those of outstanding undisputed national estate significance and those under threat and that the priorities were to fill the gaps with, inter alia, site types that were unrepresented such as traditional sites of significance and also sites from unrepresented regions: Flood, above n 994. Bob Ellis discussing Aboriginal sites in the same scheme said that the tests were for the sites chosen to be those best documented and most completely capable of explanation and understanding: Bob Ellis, 'The Aboriginal Heritage' above n 1298.

[1334] Most modern general heritage statutes have just extended the concept of significance as a quality of the place, but have added cultural significance alongside aesthetic, natural, architectural and/or historical significance and have cultural significance criteria added as other items on the list of relevant criteria (see Chapters 12 and 13). However, there has been a move away in some from the narrower "intrinsic observable" to link significance more with associations to a particular community. For instance, the Clth *EPBC Regulations* in reg 10.01A, referred to above in n 1326, set out criteria in which the place has outstanding heritage value to the nation for various scientific or aesthetic reasons as mentioned, but also include more social criteria for the importance of the place, such as because of its "strong or special association with a particular community or cultural group for social, cultural or spiritual reasons" [in (2)(g)] or "importance as part of indigenous tradition" [(2)(i)]. There is a similar format in the *Heritage Act 2004* (ACT) s 10; *Heritage Places Act 1988* (SA) s 16(1); *Queensland Heritage Act 1992* s 35; *Historic Cultural Heritage Act 1995* (Tas) s 16. Community associations appear as specific criteria for significance or in definitions of heritage places in various statutes in the four countries, eg, *Historic Cultural Heritage Act 1995* (Tas) s 3; NZ *Historic Places Act 1993* s 23; Michigan *Local Historic Districts Act of 1970*, at MICH COMP LAWS § 399.201(a)(l) (2009); BC *Heritage Conservation Act* s 1.
The Indigenous heritage provisions are different, see 14.2 above and 17.1.2 below.

[1335] It has been noted that even with the move to cover representative samples of heritage from minority groups, the same types of structures with aesthetic significance have tended to be listed and similar criteria applied: McConville, 'In Trust?', above n 937.

This is all exacerbated when faced with legal definitions of significance as decision makers assume that terms in legislation have objectively ascertainable meanings that can be discerned. Traditional principles of positivist statutory interpretation sit far more easily with the old empirical assumptions of significance than with views of variable, subjective or contested meanings.[1336] The analyses set out below show that, despite movements in heritage philosophy, old legal habits die hard.

17.1.2 The Specific Indigenous Heritage Provisions: A Basis for a Contrasting Interpretation

The specific Indigenous heritage provisions also follow a similar format of requiring a type of significance in order to receive protection,[1337] though usually without a specific set of criteria, so assessors are left with determining the meanings of the terms themselves.

One difference between the Indigenous legislation and the general heritage models is that many Indigenous-specific schemes use a “blanket protection” format that applies to all places that qualify, not only a selected sample.[1338] There are a few exceptions, however, which are discussed in the next section.

The fact that legislation speaks of significance or sacredness *to Indigenous peoples* may militate against searching for an objective standard of significance inherent in the place. Objectivity may be needed to ascertain as a fact whether the place is significant to Indigenous people, but, at least in theory, nothing requires one to ascertain whether the reasons for significance are true. Similarly, one would not expect to have to prove that the sacredness of a place has in fact been destroyed or diminished. However, as discussed below,[1339] there have been requirements of objective analysis articulated that sit uneasily with this. This chapter examines the ways the general public heritage

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[1336] Malik, ‘Faith and the State of Jurisprudence’, above n 80, in the context of the British common law’s failure to handle faith-based arguments, has a useful discussion of the tendency of the prevalent analytical jurisprudence to prefer descriptive accounts which favour precise definitions and rational demonstrations devoid of evaluative criteria. For the scope for professional evaluations on a case-by-case basis and also for the tendency of courts to rely on legal rules of expert evidence and accept tangible criteria rather than intuition and experience, at least in relation to archaeological significance, see Gregory N Hammond, ‘Aspects of Legal Significance in Archaeology’ (1981) 13 *Australian Archaeology* 53.

[1337] See the analysis in Chapter 13 and 14.2 above.

[1338] See Chapter 13 overview. Even where there is no blanket protection, as under the New Zealand *Historic Places Act 1993*, the problems of ranking have been recognised and the category of wahi tapu was removed as a separate category from other forms of historic heritage for this reason: see Harry Allen, *Protecting Historic Places*, above n 939.

[1339] In 17.4 and 17.5 below.

criteria impinge on the assessment of Indigenous significance, even under provisions which on their face would logically call for different standards.

17.2 Levels of Significance: Requirement for Ranking?

In the typical heritage legislation where places have to be selected for protection, the selection of best or even "most representative" samples implies a hierarchy or levels of significance. The common assumption is that the significance of a place is something measurable and comparable, perhaps by the standards of a particular discipline or of a particular community. However, it has been well documented that this kind of ranking of significance is regarded as totally inappropriate by many Indigenous communities,[1340] for a variety of reasons.[1341] Sacredness is a difficult, if not impossible, concept to rank. It is not something that can be measured or compared.[1342] It is common for Indigenous

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[1340] For reports of Maori views, see Parliamentary Commissioner, *Historic and Cultural Heritage Management,* above n 204, reporting that Maori at a hui in Auckland said that categorisation and ranking of sites is not appropriate for Maori heritage. Mosley, above n 204, also referred to a Tasman District Council 1995 policy paper to that effect. The Waitangi Tribunal in its Te Roroa report cited the comments of Alex Nathan when he said that a narrow definition of wahi tapu was not possible as "wahi tapu cannot be forced into preconceived categories of importance": Waitangi Tribunal, *Te Roroa*, above n 31, at 6.5. See also Department of Conservation, *Historic Heritage Report,* above n 1001; Kelly, above n 1331; Anna C Hewitt, *Cultural Heritage Management in New Zealand: Waahi Tapu* (October 1998).
Similar views of Indigenous peoples in the USA have been noted in Kelley and Harris, above n 40. The National Congress of American Indians resolved in 2002 that prioritising of sacred places and requirements to show degrees of significance were objectionable: National Congress of American Indians, *Resolution SD-02-027: On Essential Elements of Public Policy to Protect Native Sacred Places* (2002). It has also been noted that the Alaskan Yup'ik are frustrated by compartmentalisation and ranking of values of significance because the different sites and stories all make up a whole cultural landscape, like different episodes make up a story: McCormack, above n 133 citing Robert Drozda on the Yup'ik. Some difficulties in ranking Indigenous sacred places in the USA, arising from concepts of centrality in religious freedom jurisprudence, has already been touched on in Chapter 8.
In Canada, Bell and Napoleon noted that when asking Indigenous people which sites should be protected, the answer was "all of them" and participants struggled with a notion that specific sites could be earmarked for special protection: Bell and Napoleon, above n 926.
Mention of examples of the reluctance of some Australian Aboriginal people to rank sites can be found in Clive Senior, *The Old Swan Brewery: A Report to the Minister of Aboriginal Affairs under s 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (June 1989) where he said that the relative significance of sites is a question which Aboriginal people do not generally wish to comment on and people had said that it is not right to put one place before another.

[1341] Sites may be of importance to each of many smaller groups which cannot then be compared relative to each other. For example, significance for Maori has been said to be in terms of a cultural value a place has for individuals, a hapu or an iwi: Department of Conservation, *Historic Heritage Report*, above n 1001; Kelly, above n 1331. Various sites may make up an overall sacred landscape and the significance of each place cannot be isolated but the whole requires all of them to be in place and protected: see Kelley and Harris, above n 40, who compare sites making up a landscape to different episodes making up a story or different activities making up a ceremony. Joseph Epes Brown has commented that every particular form of land is experienced as a locus of qualitatively differentiated spirit beings, whose individual and collective presence sanctifies and gives meaning to land: Joseph Epes Brown, above n 144. McCormack, above n 133, cites similar comments by Robert Drozda about the Alaskan Yup'ik where he said that significance is in relation to other places. See also Elias, above n 172, about the problems of reducing significance to physical spaces, cut off from the relationships to people and dreams. See also comments about the whole being more than the sum of its parts in Ambelin Kwaymullina, 'Living Together in Country' in Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (2008).

[1342] Bob Ellis has compared the concept of being more sacred to that of being "more pregnant": Bob Ellis, 'The Aboriginal Heritage', above n 1298.Of course aesthetic merit or historical or scientific importance clearly lie in the eye of the beholder and cannot properly be measured, but the public heritage system nevertheless consigns these to be determined by professionals and political representatives to make the

beliefs to require all sacred places to be treated in accordance with the rules relating to each place. It is therefore hard for Indigenous places to satisfy any requirement of a “top ranking” in sacredness compared with other sacred places.

National, World or Other Higher Level of Significance in General Heritage Legislation

The problem of needing a high rank of significance is illustrated by legislation where significance has to reach a “national”[1343] or “world” level[1344] and not merely be significant to a local community. In such schemes places are selected as the most important or representative within a particular “pool” area. Generally the larger the pool, the higher the relative level of significance required within the pool.

As an example, under the Australian *EPBC*, places can be listed on the National Heritage list if the Minister is satisfied the place has one or more National Heritage Values.[1345] The criteria for such national values include the place having *outstanding heritage value to the nation* because of its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons or its *outstanding heritage value to the nation* because of the place’s importance as part of Indigenous tradition.[1346] “Outstanding heritage value to the nation” has been seen as requiring not mere value to a specific Indigenous group but a value that qualifies as outstanding when compared with others around the nation. This approach was demonstrated in the findings of the Commonwealth Heritage Minister in relation to the rock art of the Burrup Peninsula in Western Australia[1347] where he concluded that there was insufficient evidence of how such a landscape compared with other cultural landscapes to find it was of outstanding value at a national level. Also, despite accepting the strong or special association of the area to the local Indigenous people,

decisions on behalf of the wider community and this is done on “secular” grounds based on the relevant discipline and expertise and balancing that with other public interests.

[1343] Some national heritage statutes require national historic significance: for example the *EPBC* or the Canadian *Historic Sites and Monuments Act 1985*. This does not appear to be an explicit requirement in New Zealand or the USA, though it may be implicit in the selection process.

[1344] The Operational Guidelines for the *World Heritage Convention* say that the outstanding universal value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and that the Convention is not intended to ensure protection of all properties of great value but only for a select list of the most outstanding of these from an international viewpoint: UNESCO, *Operational Guidelines* above n 955, at [49].

[1345] Part 15 Div 1A.

[1346] Section 324D and *EPBC Regulations 2000,* reg 10.01A(2)(g) and (i).

[1347] Ian Campbell (Minister for the Environment and Heritage), *Statement of Rreasons for Decision under s 324F* (as it was then*) of the EPBC:-Dampier Archipelago including the Burrup*, 21 December 2006. This followed the relevant assessment of the Australian Heritage Council: Australian Heritage Council, *Assessment of Burrup Peninsula for National Heritage List*, 23 August 2006. Later the Burrup was placed on the List but not for criteria (g) or (i) for similar reasons: see Malcolm Bligh Turnbull, *Determination to include the Burrup Peninsula on National Heritage List under s 324JJ of the Environment Protection and Biodiversity Conservation Act 1999*, Commonwealth Gazette No S127, 3 July 2007.

he concluded that there was also insufficient evidence that the special association of the local people amounted to outstanding heritage value at a *national* level. Concerns about Indigenous heritage usually being local and rarely of national importance have been raised in relation to the *EPBC*.[1348]

Comparisons can be drawn with national heritage criteria that used to exist under the regime of the Australian Heritage Commission[1349] in relation to places of religious significance to non-Indigenous groups. The criterion that related to "strong or special associations with a particular community or cultural group for social, cultural or spiritual reasons" was said to apply only to religious properties which were of outstanding value to the group concerned, beyond the normal values felt by a congregation for its normal place of worship, and a place was not eligible if the association, though strong, was not above the ordinary.[1350]

Particular or Special Significance to Indigenous Peoples

The explicit ranking of significance is not common in Indigenous-specific statutes, but some Indigenous heritage legislation in Australia uses terms such as "special significance"[1351] or "particular significance"[1352] which could suggest that such an exercise may be required.[1353]

The latter view appears to have been taken by Clive Senior in his report to the Minister under the *ATSIHPA* in relation to the Swan Brewery application where he spoke of the need to make value judgments as to relative significance of sites. He concluded that a

[1348] See Senate, Environment, Communications, Information Technology and the Arts Reference Committee, Parliament of Australia, *Report on Environment and Heritage Legislation Amendment Bill (No 2) 2000* (2001). This report noted the concerns of the Australian ICOMOS and Indigenous groups about the move from a comprehensive register to one requiring national importance. The report also noted that the government's response was that it not the intent of this legislation to provide the principal mechanism for Indigenous heritage protection. The problems were also recognised by the Australian Heritage Commission in their discussion of the national heritage: Australian Heritage Commission, *Australia's National Heritage*, above n 954.

[1349] The Commission and the *Australian Heritage Commission Act* were superseded by the provisions of the *EPBC*.

[1350] Criteria G or 6 for the Register of the National Estate: see comment on eligibility by Pearson, above n 1326.

[1351] Such as the *Aboriginal Heritage Act 1972* (WA) which refers to sacred, ritual or ceremonial sites "of importance and special significance to persons of Aboriginal descent" in s 5(b) and also the *National Parks and Wildlife Act 1974* (NSW) in s 84 referring to "special significance with respect to Aboriginal culture".

[1352] The *ATSIHPA* provides in the definition of "significant Aboriginal Area" in s 3 that the area has to be of "particular significance" to Aboriginals in accordance with Aboriginal tradition. It is also used in s 9 of the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) and the *Aboriginal Heritage Act 2006* (Vic).

[1353] These terms are undefined. There has been little judicial commentary on the term "special significance". There is more on the term "particular significance".

site was significant but not of *particular* significance when compared with other sites of significance in the vicinity.[1354]

This view appears to be a minority one, though there is no authoritative alternative interpretation. Other more sympathetic constructions of "particular significance" have seen it as meaning significance that is particular to Indigenous people,[1355] or as denoting places of special or sacred significance as opposed to the general significance of all the rest of the traditional country,[1356] or even as just a "more than minimal" significance.[1357] Most reporters under the *ATSIHPA* have opted for one of these interpretations which do not require comparisons with other sacred places.[1358]

[1354] Senior, *Old Swan Brewery*, above n 1340. He concluded that the relevant site was of significance as it was part of journey of the Waugul and part of larger camping ground known as Goonininup, but he was not satisfied of the *particular* significance compared with other sites of significance in the vicinity. He made this comparative analysis despite recognising that Aboriginal people did not like to make such judgments and had submitted that it was not appropriate to put one place before another, at 19. His views on this point were apparently not accepted by the Minister who made a declaration based on the site being of particular significance.

[1355] Justice Evatt in her review of the *ATSIHPA* came to the same view and did not recommend any change to remove the term "particular significance" as she thought this simply enabled the focus to be on such areas of significance to Aboriginal people: Evatt, *Review*, above n 963, at [6.9], [8.3]–[8.7] and Recommendation 8.1. Mason J in the Tasmanian Dam case, *Commonwealth v Tasmania* (1983) 158 CLR 1, discussing a similar term in the *World Heritage Properties Conservation Act 1983* (Cth), implied that the term "particular" meant particular to Aboriginal people as opposed to others: at 159–160. He was of the view that something could be of particular significance if it was of special and deeper significance to a particular people because it formed part of their cultural heritage.

[1356] Discussed in Chapters 3 and 15. Justice Mathews in the Hindmarsh report accepted that the term particular significance should be taken to mean the area has a degree of significance to Aboriginals over and above the significance they attach to land generally: Mathews, above n 1177, at 115–6. This distinction as one between the significance of all the land and specific sites or areas was also indicated in Minter Ellison, *Senior Review,* above n 1090. For a contrast, see Carr J in *Cheinmora v Striker*, at n 1359 below.

[1357] Brennan J in the Tasmanian Dam case suggested that the phrase "particular significance" could not be precisely defined and all that could be said was that the site had to be of a significance which was neither minimal nor ephemeral and that the significance of the site may be found by the Aboriginal people, in their religion or spiritual beliefs, or in their culture. This seemed to suggest a kind of standard of significance but with a very low threshold of just being more than a de minimis or short-lived fad: *Commonwealth v Tasmania* (1983) 158 CLR 1, at 245. Murphy J agreed with Brennan J, at 172. Deane and Dawson JJ did not deal with this issue specifically but they did not make any comments to suggest that their understanding of the term was any more than this: ibid at 276–7 (per Deane J) and 318–21 (per Dawson J).

[1358] Donald G Stewart, *Report under Section 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 on the Kakadu Conservation Zone* (1991) at [3.14] in relation to the Coronation Hill area did not feel he needed to make a decision on the point but could simply report to the Minister on whether the area was of significance to Aboriginal people and on the evidence that touched upon the degree and intensity of belief about the area. He did advise that the Minister could conclude that the area was of particular significance and there was no discussion of ranking.
Similar approaches were taken in J G Menham, *Report to the Minister of Aboriginal Affairs on the Old Swan Brewery Area* (1993); Saunders, above n 1263. This was also supported by Von Doussa J in *Chapman v Luminis (No 5)* [2001] FCA 1106 at [253], noting that the parties also agreed. Neate in his *ATSIHPA* report on the Murray Downs Golf Club discussed the significance to a particular group of Aboriginal people and defined particular significance as meaningful or noteworthy or important to them as a group and of special importance or of consequence to those Aboriginals: Graeme Neate, *The Preservation and Protection of Significant Aboriginal Areas on Murray Downs Golf Club, NSW: Report to the Minister for Aboriginal Affairs under s 10(4) of ATSIHPA* (1989). This might have required some "special" and not just ordinary importance, but did not necessarily imply some ranking within other areas of significance.
See also Mathews, above at n 1177.

Australian native title cases discussing the term "sites of particular significance" for s 237(b) of the *Native Title Act* (Cth) have suggested that this term requires special and more than ordinary significance, not just any significance particular to Indigenous peoples,[1359] which may be a higher standard than in most *ATSIHPA* reports. However, these have not gone as far as requiring a ranking between sacred places.[1360] Most sacred places in the native title cases have qualified as being of particular significance, largely because sacred areas are assumed to be of special and more than ordinary significance.[1361] Despite the lack of an explicit ranking in most dicta, the lack of clarity as to the proper meaning of the terms could leave open some uncertainty in this regard.

Uniqueness as a Discretionary Factor

Even in legislative schemes which do not require a particular level of significance to be eligible for protection, the fact that the schemes usually have a discretionary element in which the heritage values are weighed up against other public interests in allowing places to be damaged, has often meant that the *relative* importance or significance of the place has come into play.

An example is the injunction application to protect the Siska Valley in British Columbia in *Siska Indian Band v British Columbia Minister for Forests.*[1362] Justice Sigurdson said that the Siska Band had to prove that the watershed was sufficiently unique to justify the inference that harm to the watershed would outweigh the harm of the company seeking to log in the area. The Band argued that the area was pristine and had never been logged, that it was their preferred area for cultural and spiritual pursuits and was an area of exceptional spiritual and cultural significance to members of Band. The judge still held that they failed to show that it was "unique" compared with other pristine

[1359] In *Cheinmora v Striker* and *Dann and Western Australia,* (1996) 142 ALR 21, Carr J in the Federal Court came to the view that the reference to "sites of particular significance" in s 237(b) of the *Native Title Act* (Cth) meant that the site had to be of special or more than ordinary significance to native title holders. This was based on his particular reading of the comments in the Tasmanian Dam case, with which issue might be taken, but space does not permit it here. Carr J's formulation has been followed in many National Native Title Tribunal decisions, such as *Western Australia/Dann/GPA Distributors Pty Ltd* (NNTT, per Member Sumner 10 June 1997); *Western Australia/Winnie McHenry on behalf of the Noongar People* [1999] NNTTA 210 (per Deputy President Franklyn); *Silver v Northern Territory* (2002) 169 FLR 1 (per Member Sosso); *Western Australia/Glen Griffen Venn Money/Jack Britten* [2001] NNTTA 53 (per Member Stuckey-Clarke). See also discussion in Richard Bartlett, *Native Title in Australia* (2nd ed, 2004).

[1360] Carr J in the above cases did not suggest that a site had to be more significant than other sites close by. For instance, he said that there was no reason why there should not be more than one such site in any relevant area: *Cheinmora v Striker* and *Dann and Western Australia* (1996) 142 ALR 21, at 35.

[1361] As suggested by Member Sosso in *Silver v Northern Territory* (2002) 169 FLR 1, where he did note at 35 that if a site was sacred, it would be of particular significance. Member Sumner in *Jack Dann/Western Australia/GPA Distributors Pty Ltd* [1995] NNTTA 43 commented that a site on the Permanent Register (that is, which had been assessed) and with a "Not Open" Access Code and designation "significant" would normally qualify and it would be easier for ethnographic sites to qualify as being of particular significance.

[1362] [1999] CanLII 2736, at [43].

areas. The evidence of exceptional spiritual significance was not seen as sufficient, but a test of uniqueness was imposed in the face of a competing interest, implying a need to rank areas and for a place to be “more irreplaceable” than others.

Michael Ross has argued in response to this case that *all* sacred places are by their nature unique because they do not serve ordinary purposes or functions: this makes them unique relative to other unique sites as well.[1363] He suggested that the decision implied that the sacredness of the area added nothing to its significance. That is a fair comment given the way the judge viewed the matter, as little importance seems to have been paid in the reasoning to the sacredness, compared with whether the particular activities could still be carried out. In this way, the analysis was based very much on what the judge assessed as unique, with little consideration given to the Siska Band’s view. These concerns apply not only to ranking but to assessment generally, issues which are discussed further below.

17.3 The Statutory Assessments Required for Breach: Physical Impacts and Desecration

Objective tests by external decision makers are also applied in the area of what amounts to desecration or damage, especially in statutes where offences are set out for causing certain effects on places that are heritage listed or within a class of protected places.[1364] In such cases, one has to ascertain whether the activities in fact amount to an offence. The requirement for objectivity raises the same sorts of problems as for assessment of significance and some of these are explored together in the next sections of this chapter. The different statutory contexts for assessment of damage and desecration are dealt with here.

There are broadly two kinds of effects that are covered in the statutes, namely physical impacts on the place and impacts on the significance or values of the area.

[1363] Ross, above n 24, at 67–69.

[1364] These issues tend not to arise as explicitly when such effects are just matters to be considered as these tend to leave a wide application and wide discretion. For example, in the US *NHPA* 16 USC § 470f requires agencies to “take into account the effect of the undertaking” on various sites. The *RMA* in New Zealand in s 6 requires persons exercising management and other functions under the *RMA* to recognise and provide for, inter alia, the relationship of Maori with their wahi tapu and other taonga. These do not require a specific type of effect before qualifying for consideration. The provisions prescribing offences have to be more specific as to what is the element of the offence.

Physical impacts tend to be easily and objectively ascertained. This is covered in most heritage legislation by making it an offence to destroy, damage or alter[1365] or conceal[1366] or harm[1367] the relevant places. Another different but physical impact is found in the legislation for the Northern Territory which includes an offence of "entering or remaining" on a site.[1368] All these physical impacts fit easily with the public heritage model which used to be primarily concerned with protection of the physical fabric of sites and buildings, damage to those "fabrics" being what affected their value. They can also be ascertained objectively.

As far as Indigenous heritage is concerned, there are limitations to relying solely on the prevention of physical impacts as these may not prohibit other activities that desecrate a place and violate its ethic by inconsistent use,[1369] with or without any physical alteration. Desecration can occur through noise,[1370] merely seeing a restricted place,

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[1365] The offences of destroying, damaging or altering have been identified as a common formula for heritage legislation internationally: Prott and O'Keefe, above n 940, at 205. It is the format of most of Australian heritage legislation: see Boer and Wiffen, above n 924.
These terms have also appeared in various pieces of Indigenous-specific legislation, such as the *Aboriginal Heritage Act 1972* (WA) s 17 (excavate, destroy, damage or conceal); the *Aboriginal Heritage Act 1988* (SA) s 23 (damage, disturb or interfere); the *Heritage Act 2004* (ACT) s 75 (damage where "damage" includes to disturb and destroy); the *National Parks and Wildlife Act 1974* (NSW) s 90 (destroying, defacing or damaging); the BC *Heritage Conservation Act 1977* s 13(2) (damaging or altering sites, burial places, rock paintings etc), CONN GEN STAT § 10-390 (excavating, damaging, altering, defacing, disturbing); the Californian *Native American Historical, Cultural and Sacred Sites Act 1976*, CAL PUBLIC RESOURCES CODE § 5097.9 (causing severe or irreparable damage) and the Californian *Native American Historic Resource Protection Act 2002,* CAL PUBLIC RESOURCES CODE § 5097.993 (excavating upon, removing, destroying, injuring or defacing). The NZ *Historic Places Act 1993* does not provide for any general offences of damaging wahi tapu but in the case of the limited exception of an interim registration of wahi tapu, there is an offence of demolishing, damaging, modifying or extending it, at s 103.
[1366] *Aboriginal Heritage Act 1972* (WA) at s 17. The BC *Heritage Conservation Act 1977* uses the term "cover" in relation to rock art at s 13(2)(c).
[1367] *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 23 and the *Aboriginal Heritage Act 2006* (Vic) ss 27–28. Aboriginal cultural heritage is in turn defined in both statutes to refer to places or objects rather than values: see s 8 of the Qld legislation and s 4 of the Vic legislation. Harm is defined in the Vic legislation at s 4 as including "to injure, damage, deface, desecrate or destroy".
[1368] Though it is not an offence if it is in accordance with Aboriginal tradition: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 69. This is also in the *Northern Territory Aboriginal Sacred Sites Act 1989* s 33. In s 34 there is the further offence of carrying out work or using a sacred site which would not in most cases add much to entering and remaining. Some exemptions for owners have been provided in s 44. The offence depends primarily on a physical activity, though this could be mitigated depending on the Aboriginal tradition.
The section has been criticised for being far more onerous than an offence of desecration or damage in Maddock, *Your Land is Our Land*, above n 155, who points out that it went further than Justice Woodward's proposed offence of knowingly damaging or desecrating a site of significance, or the original 1975 Labor bill which refers to desecration in which a person shall be deemed to have desecrated a site if, on or near the site, he does an act or causes damage of such a nature that the doing of the act or causing of the damage, as the case may be, would if witnessed by Aboriginals to whom the sites is significant, be offensive to them by reason of the Aboriginal tradition in respect of that site. See also Maddock, 'Metamorphosing', above n 42. However, the qualifier of being "other than in accordance with Aboriginal tradition" may be intended to achieve a similar result: Renwick, above n 186.
[1369] Most Indigenous groups would point to what the ancestral or spiritual powers have lain down as proper behaviour and what is forbidden as a guide to what constitutes a desecration of the place.
[1370] Such as explosives some distance away: see Resource Assessment Commission, above n 217; Bob Ellis, 'The Aboriginal Heritage', above n 1298, at 344. This was one of the interferences with the exercise of religion in *Northwest Indian Cemetery Protective Association v Peterson,* 565 F Supp 586 (ND Cal, 1983), 764 F 2d 581 (9th Cir, 1985) and 795 F 2d 688 (9th Cir, 1986). See also National Park Service,

learning about it[1371] or intrusion or inappropriate trespass or use of a place,[1372] none of which may cause alteration to the physical fabric.[1373] Even in the case of physical damage, whether the impact amounts to "damage or destruction" raises questions of whether the test is purely the degree of physical impact or whether spiritual damage can be included. This brings in the need for the second category dealing with impacts as to significance.

Some legislation makes it explicit that concepts of "damage" include spiritual damage or change.[1374] Alternatively, it may be argued that this is implicit in the generality of terms like "damage". It is also common for legislation to include an express offence of desecration in Indigenous heritage legislation.[1375] Under the *ATSIHPA* in Australia, the terms "threat of injury or desecration" are defined widely as treating an area in a manner inconsistent with Aboriginal tradition, or where, by reason of anything done in or near the area, the use or significance of the area in accordance with Aboriginal

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Bulletin 38, above n 1028, speaking of severe visual or auditory intrusions amounting to an adverse effect on a property.

[1371] Kolig, *Silent Revolution*, above n 205; Keen, *Knowledge and Secrecy*, above n 158. See also Michaelsen, 'Promise and Perils', above n144. An example is the case of *Foster v Mountford* (1976) 14 ALR 71 where an injunction was granted to retrain the publication of confidential information. The issue of disclosure of restricted information was a major issue in the Hindmarsh Island cases (discussed below). See also 3.3 above about restricted information.

[1372] See Lake, above n 168; Best, above n 151, on trespass over tapu places; Biernoff, above n 151; Maddock, *Your Land is Our Land*, above n 155, discussing the offence of trespass in the NT sites legislation. See also the report of Aboriginal Land Commissioner John Toohey, *Daly River (Malak Malak) Land Claim* (1982).

[1373] A Californian illustration of the contrast between the lack of physical impact on the fabric and cultural impacts is the case of *Citizens of Goleta Valley v Board of Supervisors,* 197 Cal App 3d 1167 (1988) where the hotel development proposed parking over burial grounds which would not impact on the human remains but the court accepted that while this protected against physical degradation, it did not address religious and cultural concerns of present day Native Americans. This case was based on environmental statutes and policies which required avoiding adverse impacts on Native American cultural and archaeological sites to the maximum extent possible.

[1374] The BC legislation makes it clear that the term "alter" includes negative impacts on heritage values. This was made explicit in the 1994 amendments to the BC *Heritage Conservation Act 1977* when the definition of "alter" was inserted to include "any action that detracts from the heritage value of a heritage site or a heritage object" in s 1. The 1994 amendments were part of a package aimed at including the heritage of First Nations so the terminology may have been aimed at being inclusive.

The SA legislation makes it explicit that damage includes desecration: in the definition of damage in s 3 *Aboriginal Heritage Act 1988* (SA).

In Victoria, the term "harm' includes desecration: Vic *Aboriginal Heritage Act 2006* s 4.

The Native American Sacred Lands Bill HR 2419, 108th Cong (2003) proposed that "significant damage" be defined in s 1 as any action or activity which results in the loss of the sacred meaning and value of the site to the affected Indian tribe or Native Hawaiian organisation. Such a definition would appear to define damage entirely in terms of impacts in significance rather than physical impacts. This Bill, however, was not enacted.

[1375] Examples are the *ATSIHPA* ss 4, 9–10; the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s 35; BC *Heritage Conservation Act,* RSBC 1996, c 187, s 13(2); CONN GEN STAT § 10-390. Some include desecration in the definition of harm or damage: *Aboriginal Heritage Act 1988* (SA) ss 3, 23; *Aboriginal Heritage Act 2006* (Vic) ss 4, 27–28. This may have been because much of the early thinking about sacred places as places of significance to Indigenous people that needed to be protected and Justice Woodward in his report on the NT recommended that there be an offence of desecration and recommended that a site shall be deemed desecrated by an act done if that act would in law amount to sacrilege or offensive behavoiur if performed in a church: A E Woodward, *Second Report*, above n 173, in Appendix D. One reason why he said it was important that sites be protected was because Aboriginal identification with such sites makes them more important than places of worship to members of other religions, assuming that such places were of the greatest significance to the community. This definition of desecration was never taken up and the limitation has been criticised on the basis that desecration of Indigenous sacred sites is not at all like sacrilege in a church: see Maddock, 'Metamorphosising', above n 42.

tradition is adversely affected, or passage through or over or entry upon the area by any person occurs in a manner inconsistent with Aboriginal tradition.[1376] This definition clearly relies on the impact on heritage values.[1377] It may not cover mere physical damage or alteration where this does not affect the heritage values. One useful factor of the definition of the term "desecrate" in the *ATSIHPA* is that the definition is based on an activity being contrary to Aboriginal tradition. This does not require proof of actual loss of sacredness but only of what the tradition says should not be done, though, as set out in the following sections, this may also be difficult to ascertain objectively.

The term "desecrate" is otherwise rarely defined in legislation. Where undefined, the dictionary definition of the term "desecrate" has been relied on and picks up ideas of sacrilege, violation or deprivation of sanctity.[1378] The legislative understandings of "desecration", based on the idea of what diminishes heritage values, might not be sufficiently wide to cover the need to access the place to perform rituals or other activities, as it may be just as damaging to a place to prevent such access to it.[1379] Explicit rights of access to private lands are very limited in legislation under the heritage model[1380] as opposed to the laws which relate to freedom of religion where

[1376] In s 3(2).

[1377] Justice Mathews in her *ATSIHPA* report on the Hindmarsh Island application noted that in ordinary parlance "injury" would refer to physical hurt or impairment whereas "desecration" would denote a diminution or destruction of sacredness, but the statutory definition gave an identical meaning to both words: Mathews, above n 1177.

[1378] This was the definition used by Basten JA in *Country Energy v Williams; Williams v Director General National Parks and Wildlife* [2005] NSWCA 318 at [39].referring to the Concise Australian Oxford Dictionary. The meaning there for "desecrate" included to violate (a sacred place or thing) with violence or profanity or alternatively to deprive (a church, sacred object etc) of sanctity or to deconsecrate. Ward in the USA has picked up the latter part of the dictionary definition in his proposed definition of the term "desecration" to mean actions having the effect of altering a sacred site so as to divest that site of its hallowed nature from the perspective of the traditional Indian religions: Robert Ward, above n 152.

[1379] For example, where sites or the spirits there require certain ceremonies to take place, the restriction of access to such a site to perform such ceremonies can result in damage or desecration to the site. This was discussed briefly in the Senate Report 103-411, above n 145, in relation to Bill S 2269. An example from Australia is the need for access to rock paintings and increase sites to perform rituals associated with those. For paintings, see 3.2 and n 198 above. In New Zealand, the Waitangi Tribunal in the Te Roroa claim referred to the claimants' evidence that if certain obligations were not fulfilled and if wahi tapu were not cared for and protected the places would start to lose their maouri and tapu and would die and part of Te Roroa would die with them: Waitangi Tribunal, *Te Roroa,* above n 31. Evatt in her report at Recommendation 6.8 said that the minimum standards for legislation should ensure rights of access to significant sites on Crown land for the purpose of protection and preservation and traditional purposes: Evatt, *Review*, above n 963.

[1380] The *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ss 46–47 allows for this. The *Aboriginal Heritage Act 1988* (SA) s 36 provides for this but with Ministerial authorisation. The *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) provides for a requirement that a person who wishes to enter to perform a cultural heritage activity must consult with the owner and occupier about entry, s 153, but there would not appear to be any right to enter.
In Hawaii, the department, in consultation with the Office of Hawaiian Affairs Native Historic Preservation Council, can develop rules governing permits for access by native Hawaiians and Hawaiians to cultural, historic and pre-contact sites and monuments, in HAW REV STAT § 1-1-6E-3(17) (2009).

there is an emphasis on access for ceremonies.[1381] This may be due to the heritage emphasis on the secular values of the place itself rather than its religious significance.

More recently in the general heritage field, the Australian Commonwealth government took the controversial step of altering the *EPBC* to provide that the damage had to be to the heritage values of a place, not mere physical damage.[1382] A similar phrase appears in the *Heritage Act 2004* (ACT), in offences relating to "diminishing the heritage significance of a place".[1383] Such terminology raises the need to make difficult assessments of what the precise heritage values are and what the effects of the relevant activity will be on these values.

The difficulties with assessment of concepts like desecration and impacts on significance are similar to those raised in assessing significance in the first place and both are discussed below.

17.4 Statutory Regimes for Assessment: External and Objective

17.4.1 Assessment by External Decision Makers Outside the Belief System

Assessment of significance is usually involved in decisions as to whether to list or protect places or consent to their destruction. In cases of litigation or prosecutions, the courts or tribunals usually need to be involved in making such assessments.

In general heritage schemes in all four countries, the assessment of significance for heritage listing and other assessment purposes are usually carried out by a government body, committee or official[1384] as a representative of the wider community, which is logical for a scheme that selects places of public or regional heritage.

[1381] See Part B. Statutory provisions allowing access were proposed in bill S 2269, the proposed *Native American Free Exercise of Religion Act 1993* in s 102, and the Senate Report 103-411, above n 145, in support of this bill spoke of the need for access for ceremonies or to gather ritual material. For Canada, there is provision for this in s 4.2 of BC's *Park Act*, RSBC 1996, c 344.

[1382] *EPBC* s 12 re World heritage, s 15B and s 15C re national heritage. While this falls within the "impacts on significance" category, it excludes pure physical impacts which might be easier to prove. This aspect has been criticised as narrowing the scope of protection: Senate Environment, Communications, Information Technology and the Arts Reference Committee, above n 1348, which recommended that the legislation should also cover (physical) impact on the place itself, at [6.39].

[1383] In s 74.

[1384] A common model, especially in Australia and Canada, involves a government-appointed heritage council or committee to make recommendations or make decisions on significance. In Australia, see, for example, under the *EPBC* ss 324JA–324JD, s 324JH, ss 324JM–324JP, ss 341J–341JH, ss 341JL–341JO; *Heritage Act 2004* (ACT) ss 32–40; *Heritage Act 1977* (NSW) s 21; *Heritage Conservation Act 1991* (NT) s 24; in s 16(1); *Heritage of Western Australia Act 1990* s 7.
In Canada, see, for example, federal *Historic Sites and Monuments Act 1935* s 7; BC *Heritage Conservation Act 1977*, Alberta *Historical Resources Act* RSA 2000, c H-9; Manitoba *Heritage Resources*

A similar model tends to be used for some Indigenous heritage legislation as well. While these often require some form of Indigenous representation and advice at a committee level,[1385] rarely[1386] are Indigenous representatives empowered to make the

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Act CCSM c H39.1; NB *Historic Sites Protection Act* c H-6; NB *Municipal Heritage Protection Act* SNB 1978, c M-21.1; NS *Heritage Property Act* RSNS 1989 c 199; *Ontario Heritage Act* RSO 1990 c O.18; Quebec *Cultural Property Act* SQ 1972, c 119; PEI *Heritage Places Protection Act* RSPEI 1988, c H-3.1; Saskatchewan *Heritage Property Act* 1979–80 c H-2.2

In the USA, see, for example, *Alaska Historic Preservation Act*, ALASKA STAT § 41.35.030 (2009); CAL PUBLIC RESOURCES CODE §§ 5020–5029.5 (2009); COLO REV STAT § 24-80-502 (2009); IDAHO CODE § 67-4115(2009).

In most cases where recommendations are made by a committee, the decisions, either to protect or to authorise damage or both, are then ultimately being made by a government minister or other public official or local council, eg:

- In Australia, decisions are made by the relevant Minister under the *EPBC* s 324JJ, s 324JL and s 324JQ for National heritage places; *Heritage Act 1977* (NSW) s 32; *Heritage Conservation Act 1991* (NT) s 26; *Heritage of Western Australia Act 1990* ss 47, 51.
- In the USA, places are registered on the National Register of Historic Places by the Secretary of the Interior: *NHPA* 16 USC § 470a. Similar political officials make decisions in many states, eg *Alaska Historic Preservation Act*, ALASKA STAT §41.35.030 (2009); COLO REV STAT § 24-80-502 (2009); IDAHO CODE § 67-4115(2009).
- In Canada, under federal *Historic Sites and Monuments Act,* RSC 1985, c H-4, ss 3, 7 (Minister); BC *Heritage Conservation Act,* RSBC 1996, c187, ss 9 and 23 (Lieutenant Governor in Council) and s 13 (Minister); Alberta *Historical Resources Act,* RSA 2000, c H-9, ss 16, 19–20, 26 (the Minister and Lieutenant-Governor in Council and municipalities); Manitoba *Heritage Resources Act,* CCSM, c H-39.1, ss 2, 25 (Minister or municipalities); NB *Historic Sites Protection Act,* RSNB 1973, c H-6, ss 2, 4 (Minister); NB *Municipal Heritage Protection Act,* SNB 1978, c M-21.1, s 5 (Municipality with approval of Lieutenant-Governor in Council); Newfoundland *Historic Resources Act* RSNL 1990, c H-4, ss 14, 18 (Lieutenant-General in Council. Minister); NS *Special Places Protection Act,* RSNS 1989, c 438, ss 7–8 (Minster with approval of Governor-in-Council); NS *Heritage Property Act,* RSNS 1989, c 199, ss 8, 12 (Minister and Municipality); *Ontario Heritage Act,* RSO 1990, c O-18, ss 26–29, 52, 56 (Council or Minister. The Minister can authorise damage); Quebec *Cultural Property Act,* RSQ, c B-4, ss 8, 21, 31–35, 84, 95 (Minister and municipality); PEI *Heritage Places Protection Act* RSPEI 1988, c H-3.1 (Minister); Saskatchewan *Heritage Property Act,* c H-2.2, ss 39–43, 44, 55, 64, 71.

Other models involve a government-appointed council or committee itself making the decisions on heritage listing of a place, such as:

- In Australia, see the *Heritage Act 2004* (ACT) ss 33, 40–41;*Queensland Heritage Act 1992* ss 51 and 53; *Historic Cultural Heritage Act 1995* (Tas) ss 17–18; *Heritage Places Act 1993* (SA) ss 5A, 17–18; *Heritage Act 1995* (Vic) s 42 (though the Minister can give directions or call in a matter in ACT, SA and Victoria).
- In New Zealand, the Historic Places Trust is responsible for registration of historic places: NZ *Historic Places Act 1993* s 23;
- In the USA, see eg *Historic Preservation Act of 2004*, KAN STAT ANN §§ 75-2720 to 75-2721 (2009); MASS GEN LAWS §§ 1-2-9-26 to 1-2-9-28 (2010); SD CODIFIED LAWS § 1-19A-25 (2009); VT STAT ANN §§ 22-14-742 (2009); W VA CODE §§ 8-26A-5 (2009).

In the USA, many of the listing functions are carried out by a federal or state historic preservation officer or other government agency, with or without an advisory council, eg ARK CODE ANN §13.7.109 (2008); *Illinois State Agency Historic Preservation Act of 1986,* 20 ILL COMP STAT §§ 3420/1–3420/6 (2009); *Illinois Historic Preservation Act of 1979*, 20 ILL COMP STAT § 3410/6 (2009); NEV REV STAT § 33-383.085 (2010); *New York State Historic Preservation Act of 1980,* NY PAR LAW § 14-07 (2009); *North Carolina Archives and History Act of 1973,* NC GEN STAT § 121-4.1 (2009); *Oklahoma State Register of Historic Places Act of 1983*, OKLA STAT § 53-354 (2009); OR REV STAT § 358-612 (2009); *History Code*, 37 PA CON STAT §§ 37-303, 37-502 (2009); W VA CODE § 29.1.8 (2009).

[1385] Such committees can, for instance, be found in the following, though some do not require the majority on the committee to be Indigenous:

- In Australia: *National Parks and Wildlife Act 1974* (NSW) s 27–28 and schedule 9 (no requirement of Aboriginal majority but the nominators are all Aboriginal groups or organisations); *Northern Territory Aboriginal Sacred Sites Act 1989* ss 5–6 (majority of members of the Aboriginal Areas Protection Authority are custodians of sacred sites); *Aboriginal Heritage Act 2006* (Vic) ss 131–132 (re the committee who must all be Aboriginal persons); *Aboriginal Heritage Act 1988* (SA) s 7 (where the advisory committee consists entirely of Aboriginal people); *Aboriginal Heritage Act 1972* (WA) s 28 (no requirement for any members to be Indigenous). This was recommended to be altered in the 1995 review: Minter Ellison, *Senior Review*, above n 1090, but changes were never enacted. (Note that no such committee exists under the *ATSIHPA*).

ultimate decision on registration or protection of the relevant heritage place.[1387] In the Northern Territory where the Authority (constituted by Indigenous people) does, the Minister still has power to override such recommendations.[1388]

In more recent models of Australian Indigenous heritage statutes in Queensland and Victoria, there are fairly extensive formal requirements for studies and consultations with the relevant Aboriginal people to obtain their assessments of significance.[1389] However, if agreements cannot be reached, objections or disputes can be referred to

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- In New Zealand: *Historic Places Act 1993* s 84 (Maori Heritage Council requires some Maori members but not necessarily a majority.)
- In Canada: under Yukon *Historic Resources Act*, RSY 2002, c 109 s 4, half of the advisory board have to be chosen from people nominated by Yukon First Nations. The same applies for the appeal board under s 5.
- In the USA: Indigenous commissions or advisory councils for recommendations as to heritage places exist, for example, in California, under the *Native American Historical, Cultural and Sacred Sites Act of 1976*, CAL PUBLIC RESOURCES CODE §§ 5097.91–5097.94, 5097.96–5097.97 (2009); CONN GEN STAT § 10-382 (2009); IND Code §§ 4-4-31.4-1 to 4-4-31.4-9 (2009). There are more such committees with functions in relation to human remains or burial objects.

[1386] One exception is the *Alaska Historic Preservation Act,* ALASKA STAT § 41.35 (2009) which, although clearly intended to be a statute preserving heritage for the general public and allowing the commissioner to issue permits to excavate and remove heritage resources, does provide in § 41.35.080 that if the resource involved is one "which is, or is located on a site which is, sacred, holy, or of religious significance to a cultural group, the consent of that cultural group must be obtained before a permit may be issued under this section".

[1387] Such as the *National Parks and Wildlife Act 1974* (NSW) s 84 (dealing with listing of places which in the Minister's opinion are of special significance) and s 90 (Director's powers to decide on significance and consent to damage with appeals to the Minister); *Aboriginal Heritage Act 1972* (WA) ss 18–19 (Minister decides on applications for consent to damage sites and on protected areas); *ATSIHPA* ss 9–10, 18 (Minster makes declarations to protect areas, or in the case of an emergency, an authorised officer can). The case law has made it clear that the Minister under the *ATSIHPA* must personally consider and be satisfied as to the significance of the area: *Bropho v Tickner* (1993) 40 FCR 165; *Tickner v Bropho* (1993) 114 ALR 409; *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 37 ALD 633; *Norvill v Chapman* (1995) 133 ALR 226. See also *Aboriginal Heritage Act 2006* (Vic) ss 144–45 (Secretary can record places on the register), ss 36, 40 (where the Secretary can decide on and give permission to disturb heritage), ss 96, 103 (Minister can make protection declarations subject to appeal to a Tribunal); *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) ss 40–41, 71, 76–79, 89, 109, 111, 117, 120. (The CEO can list cultural heritage on a database and remove it. The CEO makes the decision on whether to record cultural heritage study results on the Register and decides if a Cultural Heritage Management plan is required and is to be approved. These are subject to objection to the Land Court which can make recommendations to the Minister and the Minister makes the final decision.) For the Vic and Qld statutes, see also n 1389 below.

The situation is stronger in the *Aboriginal Heritage Act 1988* (SA) where although the Minister makes the decision on protection, in ss 9, 12–13, 22–4, the Minister has to accept the views of the traditional owners (defined in s 3) of the land on whether it is of significance according to Aboriginal tradition, s 13(2), and they can ask for powers to be delegated to them in relation to a site, in s 6(2). In New Zealand, the Maori Heritage Council can list areas (but there is no immediate protection that follows except for an interim registration): *Historic Places Act 1993* ss 26, 32, 85. The ultimate decisions are usually made by planning authorities or the Environment Court under the *RMA*.

In the USA, at the federal level, while there are consultation requirements and the tribes can assume the functions of a State Historic Preservation Officer for tribal lands and can nominate properties, it is still the Secretary who lists places on the National Register, *NHPA* 16 USC § 470a, 36 CFR § 60, *National Register of Historic Places Regulations.* Under the Californian, Connecticut and Indiana provisions referred to at n 1385 above, the Commission or Council's recommendations are not binding on government agency action and enforcement is left to the government or the courts.

[1388] *Northern Territory Aboriginal Sacred Sites Act 1989* ss 29–32.

[1389] *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) ss 53–69; 91–106; *Aboriginal Heritage Act 2006* (Vic) ss 38–9, 54–63. See also 14.3.3 above concerning consultation requirements.

tribunals for decision in those statutes.[1390] It could be argued that such tribunals run the danger of replacing one ethnocentric decision maker by more.[1391] A requirement to consult with Indigenous peoples also appears in legislation in USA and is implied in New Zealand.[1392] In those pieces of legislation however, the ultimate decisions are made by non-Indigenous government bodies or tribunals. The heritage legislation thus ensures that control of the heritage does not lie with Indigenous people.[1393] In keeping with the themes of this thesis, it could be said that the legislation has "nationalised" heritage assessment.

There have been many calls to separate the issue of assessment from political questions of management and whether to protect a place, as the political considerations have a tendency to corrupt the assessment process.[1394] This thesis, however, concerns the corruption of the assessment process by the very nature of the "objective" assessment required by the public heritage model, even without the human discretions.

17.4.2 Objective Tests for Assessment

As one would expect when dealing with legislation, the task of the decision maker, whether minister, council or court, is to decide whether the place comes within the statutory provisions of places to be protected and whether the protection has been breached. To qualify for protection, places need to have the required type of significance. For a desecration, or non-purely physical damage, to be found, the activity must have that prohibited character. The question of whether a place or activity falls

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[1390] *Aboriginal Heritage Act 2006* (Vic) ss 116–128; *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld), though the Land Court makes a recommendation to the Minister who makes the ultimate decision, at ss 76–79,111–120.

[1391] As has been suggested in Woo, above n 360.

[1392] See also 14.3.3 above concerning consultation requirements.

[1393] A point made by many including in Henrietta Fourmile, 'Who Owns the Past? Aborigines as Captives of the Archives' (1989) 13 *Aboriginal History* 1; Ciaran O'Faircheallaigh, '"Unreasonable and Extraordinary Restraints": Native Title, Markets and Australia's Resources Boom' (2007) 11(3) *Australian Indigenous Law Reporter* 28; Meredith Rowell, *Sacred Sites Protection: Some Problems* (Paper presented at Australian Anthropological Conference, Sydney, 1983); Bourke, above n 415; Chalconer, above n 963.

[1394] Notably in Evatt, *Review*, above n 963, at Recommendations 6.3–6.4, 8.5–8.7. See also the criticism of the WA legislation in Michael C Dillon, 'A Terrible Hiding: Western Australia's Aboriginal Heritage Policy' (1983) 43 *Australian Journal of Public Administration* 486.

Similar recommendations have been made in regard to general heritage legislation as well and have been articulated in the Burra Charter in Australia, above n 953, especially Art 6.1 and the Australian ICOMOS, *Guidelines*, above n 941, especially at clause 1.5. See also Australian Heritage Commission, *National Heritage Convention1998: Key Outcomes* (1998); Boer and Wiffen, above n 924; Sharon Sullivan, 'Introduction' in Sharon Sullivan (ed), *Cultural Conservation: Toward a National Approach* (1995), discussing recommendations from a 1986 workshop; Byrne, Brayshaw and Ireland, above n 29; Molesworth, above n 962. See also Royal Commission into Deaths in Custody, above n 20, at 37.20-37.21 discussing the importance of identification and protection of sites free from government interference.

within the relevant description is simply assumed by the legislation to be an objective fact.

Objective assessments could occur in at least three different ways. One is the common general heritage and environmental approach of a decision maker representing the community at large applying the standards of that wider community rather than of the group for whom something is particularly significant.[1395] A second is in the process of objectively assessing all the evidence to test the credibility of assertions of significance. The third is an objective assessment as to the truth of what is sincerely asserted.

The first way is consistent with the scheme described in the previous section where an external representative of the community makes the decisions. Some of the issues arising from this have been canvassed in Chapter 14. It ought to be less applicable when the statute expressly protects places of significance to Indigenous peoples, though given the same model of external assessment applies, some similar practices will be revealed in the analysis below. The third type of objectivity is never openly admitted, but does nevertheless appear from time to time in ways described in 17.5 and 17.6 below. The requirement and difficulties for objective assessments of credibility of the second kind occupy the remainder of 17.4.

17.4.3 The Requirement for Objective Assessments of Credibility

It is clear that for a place to have the required statutory significance, assertions of such significance can be tested for credibility. There are many Indigenous-specific examples where courts and other assessors have interpreted their task as requiring decisions on significance and desecration to be based on an objective assessment of the probity of all the evidence.

This has been suggested under the *ATSIHPA* in Australia, where it has been said that the Minister must personally consider and weigh up all the evidence. In the 1994 case of *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs*[1396] the comment was made that it was for the Minister to assess the *credibility* of the evidence.[1397]

[1395] See in particular the discussion of the case of *Watercare Services Ltd v Attorney-General and Minhinnick* [1998] 1 NZLR 294, 304–5 in 14.3.1 above. The Court of Appeal, in saying that the test to judge offensiveness was that of the community at large, described the test as an objective one requiring an external standard.

[1396] (1994) 37 ALD 633.

[1397] (1994) 37 ALD 633 at 657, 683, a decision of Carr J in the Federal Court concerning a challenge to the declaration by the Minister on application under the *ATSIHPA* to stop the Broome Crocodile Park from

The important role of testing the evidence and claims is also the stated rationale for parties affected by claims of sacredness being entitled to natural justice and disclosure of even confidential or restricted material.[1398] The courts have given this principle so much importance that it even overrides the religious obligations of non-disclosure.[1399]

The requirement for assessment of evidence has been stated most directly in a range of New Zealand cases in the Environment Court, and its predecessor the Planning Tribunal, under the *RMA* in response to claims of places being wahi tapu.[1400] The relevant aspects of these cases are discussed in more detail in the next section, but the clear line of authority is that the court has to make decisions on the basis of evidence of sacredness, not mere assertions. In the 1995 case of *Greensill v Waikato*

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desecrating sites in Western Australia. The declaration was held to be invalid for the Minster's failure to consider all the representations and other material. However, the court would not overturn the decision on the grounds of unreasonableness because there was evidence upon which the Minister could decide the area was of particular significance and such assessment had to be done by the Minister not the court.

[1398] Maurice, the Aboriginal Land Claims Commissioner in the Northern Territory in the Warumungu case made orders for production of documents which had been resisted on grounds of public interest immunity because of its restricted nature within the relevant beliefs. However, the production was ordered because of the need for claims about sacred sites to be tested and verified: Michael Maurice, *Warumungu Land Claim, Reasons for Decision,* 16 July 1985 (reasons annexed as Annexure 1 to 1988 final report, at 248) and of 1 October 1985, at 148. While the Full Court of the Federal Court in *Aboriginal Sacred Sites Protection Authority v Maurice and Ors* (1986) 65 ALR 247 accepted that public interest immunity could be extended to such cases, it upheld the orders of Maurice and his reasons for doing so as part of the balancing process.

In the Crocodile Farm cases in Western Australia, in *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 54 FCR 144, the Court acceded to the state's request for access to gender-restricted parts of an expert report. The state's argument was that such access was required for preparation and presentation of its case. A similar issue and resolution was dealt with in *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 37 ALD 633. This view was upheld on appeal by the Full Federal Court in *Minister for Aboriginal Affairs v WA* (1996) 149 ALR 78.

Von Doussa J, in an action by the developers for damages over the Hindmarsh Island application, *Chapman v Luminis P/L (no 2)* [2000] FCA 1010, allowed limited access to the developers of restricted material despite finding that Aboriginal tradition did in fact confine the disclosure of the restricted women's knowledge to Ngarrindjeri women chosen as appropriate to be trusted with it. The reason for this was because the evidence was relevant and important to establish the factual basis of issues to be resolved, at [40]. He found that the public interest in requiring the disclosure outweighed the interest in confidentiality. The rationale behind requirements for natural justice and disclosure as part of the processes of just trial and adjudication are to enable parties who may be affected to test the evidence. This was followed in *Chapman v Luminis (No 3)* [2000] FCA 1120 and *Chapman v Luminis (No 4)* [2000] FCA 1121 respectively, in allowing subpoenas to be issued and requiring witness statements dealing with restricted material.

A US example is in the hearings concerning the Northern Lights project. The Commission allowed restricted information to be released to the developers applying for the project permits on a limited basis, because they argued that they needed to make inquiries as to whether the practices are in fact based in a system of religious belief, are sincerely held by the tribes and whether the project would adversely affect or burden the practices, in other words, to verify and test the claims: *Northern Lights Inc*, 16 Federal Energy Regulation Commission Reports (CCH) 63,062 (1982). The compromise in that case was to provide for discovery and interrogatories, but with limitations as to retention and disclosure of the transcript.

[1399] In Australia, the Full Federal Court in *Norvill v Chapman* (1995) 133 ALR 226 made it clear in that Hindmarsh Island case that the obligation of affording natural justice is not limited by confidentiality, per Black CJ at 241. Burchett J said that Aboriginal people who wish to avail themselves of legal remedies must do it on the law's terms, at 253–4. See also previous note. There was criticism of the requirement for full disclosure in Nathan Hancock, 'Disclosure in the Public Interest' (1996) 21 *Alternative Law Journal* 19, but he accepted that disclosure of evidence was required to the extent needed for testing of claims. See criticism referred to in 17.4.4 below in relation to confidentiality.

[1400] The Act, especially in s 6(e), requires the relationship of Maori with wahi tapu to be provided for.

Regional Council,[1401] where evidence was given that kaumata (elders) may know of wahi tapu areas, details of which are not to be generally known, and that tangata whenua themselves accept without question the word of such a person, the Tribunal said it could understand the reluctance of witnesses to give such evidence of sacredness but it was not possible for the witnesses to simply assert a proposition and leave the Tribunal bereft of evidence.

This was reinforced and expanded on in the 1996 case of *Te Rohe Potae O Matangirau Trust v Northland Regional Council and Nicholson.*[1402] It had been argued by counsel for the appellants that the Court did not have to reconcile opposing views about sacredness or cultural importance and it was sufficient if the appellant had reasonable grounds for belief, and, provided the belief or perception was genuine, the Court should respect it and weigh the evidence accordingly. The Court, however, noted that it was sometimes necessary for a consent authority to make findings about the existence and nature of a wahi tapu as part of the process of deciding a resource consent application and this question is decided on evidence of probative value, in the same way as any other question of fact. Similarly, in *Te Toka Tu Moana O Irakewa v Bay of Plenty Regional Council and Whakatane Regional Council* in 2000,[1403] the Court said that the Court was a court of "law not lore" and had to make decisions based on the facts before it and that "he (sic) who asserts must prove".[1404] A similar process of assessing the evidence to analyse whether something is in fact wahi tapu has been adopted in many other Environment Court decisions in New Zealand.[1405]

[1401] Unreported, Planning Tribunal, W17/95, 6 March 95, concerning an appeal against a resource consent for an oyster farm.

[1402] Unreported, Environment Court, A107/96, 18 December 1996. This was another appeal against permitting an oyster farm in which the appeal was dismissed after weighing up the evidence of whether the area was believed to be wahi tapu.

[1403] Unreported, Environment Court, A93/2000, 1 August 2000. This case concerned the question of whether a 100-acre block was wahi tapu. There was conflicting Maori evidence about beliefs as to whether it was or not. The Court held that the evidence that the wahi tapu area extended to the block was genuine and sincere but there was no archaeological evidence of burials in the area and the court preferred the evidence of the elders who said that it was not wahi tapu and never regarded as such by the old people, at [14]–[16] and [28].

[1404] Ibid, at [27].

[1405] Such as in *Land Air Water Association v Waikato Regional Council* (Unreported, Environment Court, A110/2001, 23 October 2001), where the Court made it clear that issues of Maori cultural matters require weighing and an objective determination in the context of the circumstances of each case, at [407]–[408].
In *Winstone Aggregates Ltd and Heartbeat Charitable Trust v Franklin District Council* (Unreported, Environment Court, A80/02, 17 April 2002), it was said that claims of wahi tapu must be objectively established, not merely asserted, and there needs to be material of a probative value which satisfies the Court on the balance of probabilities, at [251]. It was also noted that there is no burden on any party but an evidentiary burden on the person who makes the allegation to present evidence to support it, at [294].
In *Te Kupenga O Ngati Hako Inc v Hauraki District Council and HG Leach* (Unreported, Environment Court, A10/2001, 23 January 2001), concerning a landfill and refuse disposal facility, the Court also assessed the evidence to find that the area in question was not wahi tapu despite the beliefs of the objectors that it was. It was said that the presentation of Maori dimension revealed strongly held views and irreconcilable differences so the Court needed to determine the matter on the "preponderant credibility" of the evidence based on all the circumstances, at 19. (This case is also referred to at Chapter 16 in relation to issues of tradition.)

This all begs the question of how objective assessment of credibility in such matters is possible, especially in relation to beliefs which are not familiar to the decision maker. The difficulty of legal definition of spiritual values has often led to it being avoided in legislation in favour of a requirement to consult.[1406] However, when agreement cannot be reached and matters are litigated, then the objective assessment process is still called into play.

Even if one is only assessing credibility, there are obviously problems of cultural misunderstandings by assessors outside the belief system, discussed in the next sub-section. Problems of objectively assessing religious beliefs at all are dealt with in 17.5 and 17.6.

17.4.4 Western Assumptions in Ascertaining Truth and Credibility

A well-known problem with attempts at objective assessments by external assessors is the risk of ethnocentricity in tests used to assess credibility. There is a danger of failing to recognise the particular beliefs and circumstances that govern the significance of the relevant heritage. By contrast, for much of Western cultural heritage the assessors are from the culture itself.[1407] This is exacerbated when the assessment is conducted under the auspices of that key institution of the public domain, the legal system, whose reasoning is so often shaped by Western cultural expectations rather than Indigenous

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In *Ngati Hokupu Ki Hokowhitu v Whakatane District Council* (Unreported, Environment Court, C168/2002, 13 December 2002), Judge Jackson for the Court said that individual factual propositions about Maori belief systems could be assessed for truth and that it was the court's task to do so. The court could decide issues raising beliefs and values by hearing and examining evidence, inter alia, about whether the values correlate with physical features of the world, people's explanations of their values and traditions, whether there is external evidence corroborating information about the values, the internal consistency of people's explanations, the coherence of those values with others and how widely the beliefs are expressed and held. The values were to be ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions, at [49], [52]–[53]. This case is discussed further below.

[1406] This is what occurred in the *RMA* in New Zealand: David Williams, above n 182, noting Maui Solomon's description that setting down on paper the spiritual cultural beliefs of Maori with respect to the environment is like trying to grasp a handful of water. In the US, similar suggestions have been made, eg in Thomas King, '*Be Careful',* above n 1182. This has been reflected in *NHPA* 16 USC at §§ 470a(d) and 470h-2 relating to historic properties of Indian tribes, where the emphasis is on tribes running their own historic preservation programmes and for the Secretary of the Interior and federal agencies to consult with tribes and others. See also the regulations, *Protection of Historic and Cultural Properties* 36 CFR § 800 (2009).

Consultation, however, can also result in misunderstandings if the results of the consultations are interpreted and assessed by the external observers and consultants. For instance, Thomas King has written of the problems of consulting where misunderstandings have come about due to failure to appreciate concerns of confidentiality and non-disclosure through emphases on issues of mitigation of physical damage when the real concerns may be about contamination: Thomas King, *Essays from the Edge*, above n 1185.

[1407] See for the comment of Ellis who said that they are themselves practitioners of the culture which produced and gave significance to the things they want to keep: Bob Ellis, 'The Aboriginal Heritage', above n 1398, at 343.

forms of expression.[1408] Such concerns have resulted in recommendations in many reviews for ensuring that different parts of the assessment of significance are done by a body that has at least a majority of Indigenous members.[1409] While the risks of misunderstanding may be less, there is even a question about decision making by a panel of Indigenous people who are not from the particular area or culture under assessment making decisions about Indigenous beliefs which are not their own.[1410]

Some of the key misunderstandings that have caused problems for Indigenous sacred places are canvassed in the summary below.

Lack of Documentation and Questioning of Oral Traditions

Most Indigenous traditions are passed on orally. Within a Western culture familiar with long-standing written modes of transmitting religious and other traditions, the authenticity of oral traditions tends to be questioned when not similarly recorded in historical and anthropological literature.[1411] In this Western culture, the written word has somehow attained the status of a means of objective verification, with oral and merely "remembered" traditions being seen as subjective and unreliable.[1412] Similarly,

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[1408] Berndt illustrated the difficulties colourfully in a land rights context, saying that when it is myth that provides the charter of ownership, the "deities themselves are brought into a court of law and paraded for the public scrutiny of unbelievers": Ronald Berndt, 'Profile of Good and Bad', above n 36. Durie has given the example from the Maori Land Court where the elder sang a song of river to claim ownership and the Court only noted that he sang a song but said he had nothing to say: E T Durie, 'Justice, Biculturalism and the Politics of Law' in Margaret Wilson and Anna Yeatman (eds), *Justice and Identity: Antipodean Practices* (1995). See Kwaymullina, above n 1341, referring to the context of native title and the legal requirements which define Indigenous culture through the lens of a Western way of knowing. See also the criticism in Brennan, 'Land Rights', above n 908. Robert Tickner, having been a Minister required to make such decisions noted the difficulties in Robert Tickner, *Taking a Stand: Land Rights to Reconciliation* (2001), in Chapter 13. In Canada, the criticism has been made that sacred sites only need to be recognised by believers as sacred and do not need the blessing of a foreign culture to have legitimacy, as one culture cannot assume to interpret and legitimise another culture: Cummins and Whiteduck, above n 196.

[1409] See, for example, Evatt, *Review*, above n 963, Recommendations 6.3–6.4; 11.6, 11.16; Ministerial Council on Aboriginal and Torres Strait Islander Affairs, *Working Party Report on Item 4.1: Aboriginal Heritage Interaction between States, Territories and Commonwealth* (1995). Various commentators have been supportive of this, such as Woo, above n 360.

[1410] In New Zealand, for example, the idea that the Maori Heritage Council could decide what was wahi tapu and what was not was rejected by Maori groups on the basis that only tangata whenua could judge local tapu: Manatu Maori, above n 38; Harry Allen, 'Protecting Maori Land-based Heritage' in Merata Kawharu (ed), *Whenua, Managing our Resources* (2002). These principles were also noted in Waitangi Tribunal, *Te Roroa*, above n 31, especially at 6.5. See also Hewitt, above n 1340. Clive Senior's report in Western Australia points to area-specific assessors when he recommended not defining who should be consulted for the assessment of significance other than, in general terms, the traditional custodians being those who have, in accordance with Aboriginal tradition, traditional ownership or particular cultural social or spiritual affiliations with and responsibilities for a significant Aboriginal area: Minter Ellison, *Senior Review*, above n 1090.

[1411] Mosley, above n 204; Christine Nicholls, 'Literacy and Gender' (1996) 48 *Journal of Australian Studies* 59; Cummins and Whiteduck, above n 196.

[1412] This point has also been made by Gray, above n 210; Michael Asch and Catherine Bell, 'Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: A Comment on *Delgamuukw*' (1994) 19(2) *Queens Law Journal* 503; Wootten, *Junction Waterhole Dam*, above n 1218. There is a discussion of the suspicion that the evidence of the sacredness of the Black Hills in the USA was a result of a new or revitalised religion because of the (perhaps incorrect) allegation that the sacredness was not recorded in early documents: Nabokov, above n 180.

evidence based on oral hearsay tends to be discounted.[1413] What people believe and what beliefs satisfy Western legal requirements as admissible evidence are not necessarily the same.[1414]

The issue of a lack of historical record of the significance of an area was a major problem in the Hindmarsh Island dispute. The lack of references by previous ethnographers to women's sites was an influential factor in the reasoning of the Royal Commission conducted into whether the information was fabricated.[1415] Scepticism about claims of sacredness based on an alleged lack of prior documentation was also shown by others, notably anthropologist Ron Brunton, in relation to the Hindmarsh area[1416] and Coronation Hill.[1417]

These approaches have been said to privilege what has been studied and recorded by non-Indigenous experts and favour the narratives that they have created.[1418] The result

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[1413] Gray also notes that Western courts distrust second-hand knowledge in the form of hearsay, whereas in Aboriginal systems, such information is given status and authority because it is received through other people, Gray, above n 210. See also Asch and Bell, above n 1412.

[1414] Mosley, above n 204. Gray, above n 210, also points to the first instance decision in the Canadian native title decision of *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185, as the "high water mark" of discounting oral traditions. In that case, the trial judge gave oral histories no independent weight at all for various reasons, including the lack of detail and the fact that knowledge of the oral histories was confined to the communities whose histories they were. While the Supreme Court overturned this aspect in *Delgamuukw* (1997) 153 DLR (4th) 193, 230–9, preferring to adapt the ordinary rules of evidence in the light of obvious evidentiary difficulties of Aboriginal claims, there is no doubt that such attitudes may still play a role in weighing the credibility of the evidence. Lamer CJC for the majority in the Supreme Court did recognise that many features of such oral histories would not be admissible and given little weight if a court took a traditional approach to the rules of evidence, at 232.

[1415] Previous ethnographers, such as the Berndts who had worked with the Ngarrindjeri people, had not recorded any reference to women's sites or stories of the significance of the Hindmarsh Island area or as concerns about a link between the mainland and the Island. The Commission, in Stevens, above n 1177, especially in comments at 244, 257, 279, 297–8, found that that it was inexplicable that the women's business would have remained hidden from all but the anthropologist Deane Fergie when she made her discoveries in 1994. Stevens noted that the Berndts had provided extensive detail of other traditions and it was highly unlikely that there was another major dimension of tradition that would have been overlooked by everyone.

[1416] Ron Brunton regularly pointed to the fact that the Berndts and other anthropologists did not record any mention of this in their research with Ngarrindjeri people: Brunton, *Blocking Business*, above n 1270; Ron Brunton, 'The Hindmarsh Island Bridge and the Credibility of Australian Anthropology' (1996) 12(4) *Anthropology Today* 2.

[1417] See Brunton, 'Mining Credibility', above n 1236.

[1418] A point made by such people as Mark Harris, 'The Narrative of Law in the Hindmarsh Island Royal Commission' in Martin Chanock and Cheryl Simpson (eds), *Law and Cultural Heritage* (1996); Stephen Pritchard, 'Between Fact and Fiction: The Hindmarsh Island Affair and the Truth about Secrets' (2000) 4(2) *Jouvert: A Journal of Postcolonial Studies,* North Carolina State University <http://social.chass.ncsu.edu/jouvert/v4i2/spritch.htm>; Heidi Thavaseelan, 'Privileging the Law Over Religion: Women's Knowledge, Power and the Kumarangk Affair' (2002) 2(2) *e-Valuate.* See also Bourke, above n 415, who points out that the problem is that the mechanisms of reporting, mapping, declaring are all part of the process of translating Aboriginal traditional beliefs into language that can be understood by the legal system and these translations frequently bear little resemblance to the way they are conceptualised by the Aboriginal people. Similar concerns have been made about the situation in USA, see for example, Tsosie, 'Indigenous Rights and Archaeology', above n 932, who notes that what is adequate proof is determined by the dominant society's legal structure and it has been necessary to enlist professionals who are credible to the outside world. Vine Deloria once scathingly said that the information of non-Western peoples becomes valid when offered by a white scholar recognised by the establishment, that is, the colour of skin guarantees scientific objectivity: Vine Deloria, *Red Earth, White Lies, Native Americans and the Myth of Scientific Fact* (1995).

has been to regard the major test of truth as being written proof.[1419] There have been numerous critiques of such attitudes.[1420] Reinforcing the concerns in Chapter 16, written records tend to reify traditions and reliance on these records reflects an assumption that the tradition has to be unchanging and that the earliest research is the baseline data for assessing change.[1421]

Oral evidence faces the added problem of lack of specificity in a legal system that values detailed recollections as more comprehensive and hence reliable.

The difficulty of proof flowing from the lack of specific detail in oral accounts was recognised in an appeal decision by Young J in the High Court in New Zealand.[1422] The Environment Court had not accepted that there were swamp burials in an area sought to be used for a link road despite the evidence of some kaumatua (elders).[1423] Young J on appeal, in a decision somewhat against the trend, held that the Environment Court should not have rejected the oral evidence of the kaumatua simply because the only evidence of swamp burials was cryptic and uncorroborated by records of a back-up history or tradition to support such a concept as swamp burials. He said that it was difficult to see in the case of an oral history pre-dating European presence that more specificity was reasonably possible. Young J was of the view that unless the witnesses were found to be incredible or unreliable or there was contradictory evidence that was accepted, the Court could not reject the evidence.[1424] He was concerned that to require precise location of burial before satisfaction with the evidence is to simply leave many claims of wahi tapu areas unproven.[1425] On the case being remitted,[1426] the majority of the Environment Court approved the road without rejecting the oral evidence of burials

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[1419] Thavaseelan, above n 1418. It has been suggested that the difference between the unrecorded women's business in Hindmarsh and the example of the virgin birth in certain Christian traditions is that there is a wealth of written material over a long period of time about the latter: Simons, above n 1177.

[1420] Examples include a critique that such a viewpoint assumes a negative position, that if it is not recorded, it did not occur, rather than being sensitive to the gaps in the record: see Keen, 'Undermining Credibility', above n 1302. It has been noted that there are different (oral and restricted) ways of recording knowledge and it is not only available in Western forms like documentation: see Mark Harris, above n 1418; Stephen Pritchard, above n 1418. The National Congress of American Indians resolved in 2002 that reliance on recorded information concerning sacred sites was objectionable and that traditional religious leaders needed to be recognised as the authorities on native sacred sites: National Congress of American Indians, *Resolution SD-02-027: On Essential Elements of Public Policy to Protect Native Sacred Places* (2002).

[1421] Stephen Pritchard, above n 1418; Andrews, 'Dissenting in Paradise', above n 1240; Thavaseelan, above n 1418. See also discussion of the Hindmarsh case in Ann Curthoys, Ann Genevese and Alexander Reilly, *Rights and Redemption* (2008) discussing the need for a historiographical critique and contextual reading of old texts and ethnographic styles.

[1422] *Takamore Trustees v Kapiti District Council* [2003] 3 NZLR 496.

[1423] There were four registered wahi tapu areas but the kaumatua gave oral evidence that there were additional burials in the swamp in the proposed corridor.

[1424] Ibid, at 512. He noted that the fact no European was present with pen and paper to record such burials could hardly be grounds for rejecting the evidence.

[1425] Ibid, at 513.

[1426] In *Te Runanga o Ati Awa ki Whakarongotai and Takamore Trustees and Waikanae Christian Holiday Park v Kapiti District Council* (Unreported, Environment Court, W50/2003, 30 July, 2003).

but on weighing public interest factors in favour of the road. The Court, however, did try to justify its earlier decision by pointing out that it has always accepted oral evidence as accurate to the extent of being handed down, but not on the basis that it was necessarily sound in fact and that variations and inaccuracies may have crept in over the centuries, especially in relation to precise geographical locations where such precision was required. On further appeal,[1427] McKenzie J in the High Court held that the Environment Court was entitled to weigh the probative value of the evidence, including the fact that there was little precision as to their location, and to make a finding.[1428] McKenzie J seemed to accept that the Court was entitled to require positive and precise evidence to establish such facts, even where such precision is not likely in oral traditions.

Numbers and Knowledge

Western legal systems also tend to prefer evidence that is corroborated. The more people who know of a belief and share it, the better able such systems are to accept the authenticity of the belief or the tradition. The Hindmarsh Island Royal Commission, deciding on whether claims of "women's business" were fabricated, for example, used not only the lack of recorded information from the past but also the lack of knowledge on the part of other Ngarrindjeri women and even men. The argument was that, even if they were not privy to the details, they would have at least known of the existence of a tradition.[1429]

However, as indicated earlier, religious knowledge about sacred places is often not generally available to all.[1430] Significance does not depend on numerical force.[1431] In

[1427] *Waikanae Christian Holiday Park v Kapiti District Council* (Unreported, High Court, McKenzie J, CIV-2003-485-1764, 27 October 2004).

[1428] McKenzie J said that the evidence of the kaumatua witnesses did not in fact amount to a positive statement that there were burials in the relevant area and the only evidence about it was hearsay about a statement of a seer who was not himself called to give evidence.

[1429] The Commissioner reasoned that if women's business existed and it came from the sources nominated by Doreen Kartinyeri who made the application, then it could not have been kept totally secret from "dissident women" or even other "proponent women": Stevens, above n 1177, at 250–257 and 298.

[1430] See 3.3 above. Sometimes the general tradition is known but not the detail or the reason: see Biernoff, above n 151, referring to people knowing a place is dangerous but not the detail of why. This was also one possible explanation put by Dr Peter Sutton in the Hindmarsh Island Royal Commission as to why people might not know the reason for the prohibition on joining the mainland to the island: see discussion below at 17.5.2 on the Mathews report. Sometimes even the general information may be restricted.

One recurring problem may also be that tribal leaders are not necessarily the best versed in religious traditions. This has emerged in situations where the wrong people have been consulted: see recognition of this issue in Robert Ward, above n 152; Barsh, 'Grounded Visions', above n 210; Nakai, above n 199.

[1431] It has been suggested, for instance, that even a place known only to one person would be recognised by all Navajo as sacred: Kelley and Harris, above n 40. Whether this satisfied the additional requirement that there be a "tradition" was avoided in Australia in *Chapman v Luminis (No 5)* [2001] FCA 1106 as von Doussa J found that more than one person knew of it.

the general public heritage system, however, the limited number of persons to whom a place is significant can be a factor against listing it.[1432]

Disagreement within the group has been a further factor against findings of sacredness. Such disagreements have been used to fuel arguments of fabrication of traditions and beliefs as was particularly illustrated by the Hindmarsh Island case.[1433] However, the use by the Hindmarsh Royal Commission of that lack of knowledge by some women and their dissent has been criticised by many for its failure to recognise that religious knowledge and experience in Indigenous communities, as in most religions, is not uniform and static but highly indeterminate and could be subjective.[1434] By contrast Western legal systems tend to privilege knowledge that is apparently open, objective and quantifiable.[1435]

A view more sensitive to theological and political diversity was taken by the Resource Assessment Commission in its Coronation Hill report[1436] which saw diversity of views as evidence of social vitality, although the Joint Venturers certainly made many submissions about the disagreements between the Jawoyn in that case. Further examples of the assessment of sacredness in the face of dissent within the religious tradition are provided in 17.5.

[1432] See discussion in Flood, above n 994, where, apart from questions of local versus national significance, this issue of numbers to whom a place was significant was discussed as troubling. She said the practice of the Australian Heritage Commission had been that, while even places of significance to a small Indigenous group were seen as eligible to be listed, this was not the case for non-Indigenous groups without other factors of significance for future generations. King in the USA too raised this as an issue to which there was no good answer, as it may be that the person is the last survivor of a community. He seemed to suggest that there would usually need to be some other reason external to that person to accept allegations about a place's significance: Thomas King, *Essays from the Edge*, above n 1185.

[1433] This has led to suggestions that such dissent may have in fact been encouraged by others seeking to discredit the claims of sacredness. Andrews, 'Dissenting in Paradise', above n 1240, suggested that dissent is now actively sought by developers and governments willing to "prise open conflicts in Indigenous communities". In the USA, Michaelsen has referred to intra-tribal conflict being exacerbated in the "time-honoured strategy to divide and conquer" in Michaelsen, 'Promise and Perils', above n 144.

[1434] Such as Andrews, 'Dissenting in Paradise', above n 1240; Greg Mead, *A Royal Omission: A Critical Summary of the Evidence given to the Hindmarsh Bridge Royal Commission with an Alternative Report* (1995); Thavaseelan, above n 1418. Vecsey has said that traditional Indian complexes allow for diversity of belief and even of practice within a single community and that to press them to explain the beliefs that underlie their religious practices may cause them to create the effect of canonising, dogmatising or mummifying the religions that have thrived for millennia by virtue of their fluidity and diversity: Vecsey, 'Prologue', above n 145.

This is exacerbated by assumptions that knowledge is common amongst Indigenous people and decision making is easy, rather than something that is the subject of complex negotiation: Andrews, 'Illegal and Pernicious Practices', above n 1299. See also Chalconer, above n 963.

[1435] For instance, Joanna Bourke has criticised the courts and government bodies for giving less value to knowledge that is "undiscoverable", particularly the type of feminine knowledge: Bourke, above n 415. Similar comments have been made by Thavaseelan who saw the law as privileging the empiricist mode of knowledge: Thavaseelan, above n 1418. These commentators have also described the privileged form of knowledge as being more masculine styles of knowledge, thus favoured over more feminine forms of knowledge. Assumptions, about the openness of truth in Western systems and the misunderstandings of Indigenous systems which are not, are mentioned in Aliza Taubman, 'Protecting Aboriginal Sacred Sites: The Aftermath of the Hindmarsh Island Dispute' (2002) 19(2) *Environment and Planning Law Journal* 140; Wootten, 'Alice Springs Dam', above n 1218.

[1436] Resource Assessment Commission, above n 217.

Confidentiality and Late or Non-disclosure

Restrictions on knowledge can frequently be a cause for reluctance to disclose information.[1437] This issue is generally well known and is sometimes catered for, at least in a limited way, by various confidentiality provisions found in some Indigenous heritage statutory contexts.[1438] It has been recognised as possibly giving rise to public interest immunity or more general public interests in non-disclosure.[1439] This too affects the assessment of credibility. The refusal to disclose information tends to give rise to a reduced weight being accorded to that which is asserted but not able to be tested

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[1437] Apart from information being restricted, sometimes information is also not disclosed because it is only to be discussed at certain seasons of the year: see example mentioned in Sarah Palmer, Cherie Shanteau and Deborah Osborne, 'Strategies for Addressing Native Traditional Cultural Properties' (2005–6) 20 *National Resources and Environment* 46.

[1438] Such as, in Australia, in the *Aboriginal Heritage Act 1988* (SA) s 35, making it an offence to divulge information without the Minister's authorisation. The limitations of this section came to the fore in cases such as *Chapman v Luminis P/L (No 2)* [2000] FCA 1010, *Aboriginal Legal Rights Movement Inc v South Australia and Stevens (No 2)* (1995) 64 SASR 558, *Aboriginal Legal Rights Movement v South Australia (No 3)* (1995) 64 SASR 566. Other sections dealing with some restrictions on disclosure include *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 29; *Northern Territory Aboriginal Sacred Sites Act 1989* s 38; *Heritage Act 2004* (ACT) ss 22, 55.

The New Zealand *Fisheries Act 1996* s 121 gives the Commissioner power to restrict information that can be disclosed to the public.

In the USA, the *NHPA* 16 USC § 470w-3 allows the head of the federal agency or other relevant public official to withhold disclosure for invasion of privacy or risking harm or impeding the use of a traditional religious site. Californian provisions provide for confidentiality of Native American sacred places, for example in CAL GOVERNMENT CODE §§ 6254(r) and 6254.10 (2009); IOWA CODE § 7-263B.10 (2009). Confidentiality provisions are more common for archaeological locations, eg, NH REV STAT ANN § 19-227-C-11 (2009); 9 NYCRR reg 427.8 (2009); A*rchaeological Resources Protection Act of 1981*, NC GEN STAT § 70-10 (2009); VT STAT ANN § 22-14-761(b) (2009); *Antiquities and Cultural Properties Act of 1998*, Virgin Islands Code 29-17-961(2009).

In Canada, provisions to allow refusal of disclosure when it comes to cultural or historic heritage include BC *Heritage Conservation Act,* RSBC 1996, c 187, s 3 and the BC *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, at s 16, under which government refusal to disclose sites was sanctioned in the case of *Re City of Vancouver: Order of Loukedlis, Information and Privacy Commissioner* [2001] CanLII 21,565. See also similar provisions in Manitoba's *Freedom of Information and Protection of Privacy Act*, CCSM c F-175, s 31; Newfoundland *Access to Information and Protection of Privacy Act,* SNL 2002, c A-1.1, s 25; NWT *Access to Information and Protection of Privacy Act*, SNWT 1994, c 2, s 19; NS *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s 19; PEI *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, s 26; Saskatchewan *Heritage Property Act,* SS 1979–80, c H-2.2, s 3.1; Yukon *Historic Resources Act*, RSY 2002, c 109, s 54; Yukon *Access to Information and Protection from Privacy Act*, RSY 2002, c 1, s 21. The Yukon *Access to Information and Protection from Privacy Act*, RSY 2002, c 1, s 20(1)(a)(iii) also allows a public body to refuse to disclose information if it could reasonably be expected to harm the conduct of relations between the Yukon government and the government of a Yukon First Nation or a government established under a lands claim settlement.

Limited provisions respecting confidentiality have also been recommended in reviews of the Australian legislative schemes: see Evatt, *Review*, above n 963 at Recommendations 6.7, 7.1, 7.3–7.5; Minter Ellison, *Senior Review,* above n 1090; Amor, *Australian Addendum*, above n 258, at [93]–[96], [122]. The use of secret files has been recommended in New Zealand: Manatu Maori, above n 38. Various US federal bills, which have not been enacted, also had limited confidentiality provisions, see, for example, S 1979 (*Native American Religious Freedom Act of 1978*) at § 7; S 1021 (*Native American Free Exercise of Religion Act 1993*) at § 104; S 2269 (*Native American Cultural Protection and Free Exercise of Religion Act 1993*) §§ 104, 108; 401; HR 5155 (*Native American Sacred Lands Act 2002*) § 4; HR 2419 (*Native American Sacred Lands Act 2003*) § 4.

[1439] *Aboriginal Sacred Sites Protection Authority v Maurice and Ors* (1986) 65 ALR 247. The damage to the Indigenous groups for disclosure of their restricted information was also recognised in the decision in *Foster v Mountford* (1976) 14 ALR 71 as a basis for the court restraining publication of such material as a breach of confidentiality. See also *WA Museum v Information Commissioner* (1994) 12 WAR 417 where White J refused disclosure sought under Freedom of Information legislation as the material sought was restricted and there was no good reason for disclosure that would override the public interest in keeping this confidential.

fully.[1440] When the effective burden is on the Indigenous group seeking protection to prove why this should be given, there is no right to silence or privilege. The effect of requiring disclosure of confidential information has meant that in some cases people are required to act against the tenets of their religion in order to protect their sacred places. It is another example of how the rules of the public heritage system override the religious concerns and defeat the purpose of religious freedom.[1441] The most obvious illustrations came in the Hindmarsh Island[1442] and Broome Crocodile farm[1443] cases in Australia in which disclosure contrary to the wishes of the relevant applicant groups was required.

A similar attitude has been shown in some US cases.

[1440] Stephen Pritchard, above n 1418, has pointed to the instance of the Hindmarsh Island Royal Commission's treatment of Betty Fisher's refusal to produce her notebooks for inspection as a refusal to accept as legitimate that which was not inspected or tested. Andrews, 'Dissenting in Paradise', above n 1240, notes that the failure to give evidence was used by the Royal Commission to draw an inference that the evidence would not have helped a particular position.

[1441] There are many other critiques which have pointed out the shortcomings of heritage processes which require conformity to rules of disclosure and thus to damage the sacredness of an area in order to obtain protection for it, eg, Andrews, 'Illegal and Pernicious Practices', above n 1299; Andrews, 'Dissenting in Paradise', above n 1240; Stephen Pritchard, above n 1418; Tehan, above n 926; Thavaseelan, above n 1418; Gray, above n 210; Mark Harris, above n 1418; Nathan Hancock, 'Is this the Spanish Inquisition? Legal Procedure, Traditional Secrets and the Public Interest' in Julie Finlayson and Ann Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (1996); Hancock, 'Disclosure in the Public Interest', above n 1399. Ernst Willhelm, *Australian Legal Procedures and the Protection of Secret Aboriginal Spiritual Beliefs: A Fundamental Conflict* (2006); Deborah Bird Rose, 'The Public, the Private and the Secret across Cultural Difference' in Julie Finlayson and Ann Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (1996).
In Canada, Ross has questioned the extent to which courts need details of sacred sites: Ross, above n 24. For the need for restrictions in Indigenous beliefs, see discussion in 3.3 above.
The Waitangi Tribunal in their Te Roroa report also noted that exposure may "take the tapu out of wahi tapu": Waitangi Tribunal, *Te Roroa*, above n 31. In USA, see Barsh, 'Illusion', above n 9; Tsosie, 'Indigenous Rights and Archaeology', above n 932; T J Ferguson, Leigh Jenkins and Kurt E Dongoske, 'Managing Hopi Sacred Sites to Protect Religious Freedom' (1996) 19(4) *Cultural Survival*.
This has led to calls for a reverse onus of proof for legislation in Western Australia in that the state or a developer should be required to prove that the legislation does not apply where there is a claim of Aboriginal heritage: Chalconer, above n 963.

[1442] In Hindmarsh, the courts held that under the requirements of the *ATSIHPA*, restricted women's information had to be read by the Minister personally if it was to be relied on and it was not sufficient if a women adviser to the Minister read it: *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 133 ALR 74 and, on appeal, in *Norvill v Chapman* (1995) 133 ALR 226. Justice Mathews followed the previous authorities in requiring information to be provided to the Minister: Mathews, above n 1177. In the civil action that arose from the reports put to the Minister, von Doussa J in the Federal Court allowed questions to be led, witness statements to be filed and subpoenas to be issued covering such restricted women's knowledge on balance in the public interest: *Chapman v Luminis P/L (No 2)* [2000] FCA 1010; *Chapman v Luminis (No 3)* [2000] FCA 1120; *Chapman v Luminis (No 4)* [2000] FCA 1121. The Full Court also held that a witness could be subject to a contempt motion for refusing to make disclosure in breach of such orders: *Chapman v Saunders* [2001] FCA 4.

[1443] The Broome Crocodile Farm cases concerned claims of restrictions of parts of anthropological reports which dealt with male initiation. The state had sought disclosure to their counsel and solicitors who were women. In *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 54 FCR 144, Carr J allowed at least one of the female counsel to have access to the information but that access was otherwise restricted. He balanced the interest in sources of information drying up against those of proper case preparation and non-discrimination against women lawyers. The judgment does not reveal much weight being given to the religious concerns of the applicants. A similar view was taken by Carr J in another decision on a crocodile farm in *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 37 ALD 633 and by the Full Court on appeal in *Minister for Aboriginal Affairs v Western Australia* (1996) 149 ALR 78.

In *Havasupai Tribe v US*,[1444] where the Tribe sought review of an approval of a uranium mine by the Forest Service, it was alleged, inter alia, that the Environmental Impact Statement was deficient for failing to give adequate consideration to the religious concerns. The Forest Service claimed that despite its best efforts no information beyond what was only general[1445] was forthcoming. The Tribe said that it could not disclose the further information sought without risk of sacrilege and interference with present and future practice of their religion.[1446] The Court concluded that the Forest Service's conduct was reasonable as the only experts would not speak of their religion directly nor reveal details concerning the manner in which the proposed mining activity would interfere with their religious beliefs and or practices.[1447]

This goes back to the issue of proof and objective determination discussed above. The explanation by the Navajo in the case of *New Mexico Navajo Ranchers v Interstate Commerce Commission*[1448] that their religion permitted certain sites to be talked about only in winter was responded to with the Court's comment that "the reason why the evidentiary cupboard is bare does not change the fact that it is".[1449]

One contrasting decision was that of the *Pueblo of Sandia v US*[1450] where an injunction was granted for the failure of the Forest Service to make reasonable efforts to identify eligible properties for the National Register. The Forest Service had sent letters requesting detailed information on the location of sites, activities conducted there and their frequency, as well as maps of sites and documentation of historic nature of the property. They did not pursue the matter when responses were not forthcoming. The Pueblo had written to say that they did not want to disclose specific details of site locations and activities and a report had confirmed that secrecy was crucial to Pueblo religious and cultural practices. The Court held that the Forest Service should have known of such restrictions and taken alternative efforts to identify eligible properties. Cases like *Pueblo of Sandia*, however, appear to be in the minority and it was only concerned with whether there were sufficient efforts or diligence. The case did not suggest that no weighing up or testing or proof would be required, so non-disclosure might still have resulted in the lack of proof in those circumstances.

[1444] 752 F Supp 1471(D Ariz, 1990).
[1445] The court noted that it had been disclosed that the mine lay in the path of the Coconino Kachina who was sacred to the Supai and was the guardian of the Canyon for the Hopi. It was also said to lie across the Red Paint and Salt trails which are sacred to the Supai. This was regarded as too general.
[1446] *Havasupai Tribe v US,* 752 F Supp 1471(D Ariz, 1990) at 1498–1499.
[1447] Ibid, at 1499.
[1448] 850 F 2d 729 (DC Cir, 1988).
[1449] Ibid, at 734.
[1450] 50 F 3d 856 (10th Cir, 1995).

Disclosures of confidential information to protect sites have from time to time been given late, often not until a project is about to damage them, and as a last resort. Other approaches have been to rely on different causes of action or grounds for objections to developments first. Laches and delay are often huge bars to relief[1451] and have often resulted in claims of sacredness being painted as having been made at the last moment just to prevent development.

The problem was recognised by Hal Wootten reporting on the Junction Waterhole case in the Northern Territory where disclosure of the major sites to be affected by the dam came late, compounded by a limited consultation by the government. Wootten in his report pointed out that this was a difference between Aboriginal and European perspectives as the fact that so much had to be disclosed was itself perceived as threat and there was no tradition of people necessarily having a right to know.[1452]

Judicial recognition of this issue of confidentiality was given in von Doussa J's judgment in *Chapman v Luminis.*[1453] He concluded that the late emergence of the information could not lessen the significance and the threat of injury and desecration and recognised that not all information is well known but could be highly secret and known by only a few people. He found that, from the Aboriginal perspective, the late emergence of tradition would not be an indication of fabrication but it would be expected in the case of genuine sacred information of importance.[1454]

Nevertheless, the lateness of disclosure has given rise to allegations of a recent invention in many cases, such as the Junction Waterhole protection application mentioned above. The Royal Commission in the Hindmarsh Island fabrication

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[1451] This has been illustrated in a number of reported decisions. In *Havasupai Tribe v US,* 752 F Supp 1471, 1493–8 (D Ariz, 1990) referred to above in relation to confidentiality, the court noted that mining exploration had occurred for eight years without comment or expressed opposition by the Tribe on the grounds of religious concerns, despite numerous letters inviting mitigation suggestions.
In *Apache Survival Coalition v US,* 21 F 3d 895 (9th Cir, 1994), members of the San Carlos Apache Tribe sought to stop construction of telescopes on Mount Graham, said to be a sacred mountain in Arizona. The court held that, as the religious concerns were first raised two years after the environmental impact statement process had concluded and the Tribe had been given an opportunity to comment, the actions to stop development were barred by laches. The problem in this case could have been related to the factional nature of the San Carlos Apache Tribe and the lack of knowledge or belief in the sacredness of the mountain on the part of the tribal leaders: see discussion in Robert Williams, 'Essays on Environmental Justice: Large Binocular Telescopes, Red Squirrel Pinatas and Apache Sacred Mountains: Decolonising Environmental Law in a Multicultural World' (1994) 96 *West Virginia Law Review* 1133 and Elizabeth Brandt, 'The Fight for Dzil Nchaa Si An, Mt Graham: Apaches and Astrophysical Development in Arizona' (1996) 19(4) *Cultural Survival* (1996). A later attempt by the Apache Survival Coalition to obtain an injunction when some telescopes were re-located also failed on the same basis of laches, in *Apache Survival Coalition v US,* 118 F 3d 663 (9th Cir, 1997).
[1452] Wootten, *Junction Waterhole Dam*, above n 1218.
[1453] *Chapman v Luminis (No 5)* [2001] FCA 1106. This was the decision on the action by the Chapmans who had commissioned the Hindmarsh Island Bridge against anthropologists and others for, inter alia, misleading and deceptive action in their reports on the Hindmarsh Island.
[1454] Ibid, at [198], [333]–[354].

allegations also used the raising of claims of sacredness for the first time to support a conclusion of fabrication.[1455]

The lateness of raising claims of sacredness has also weighed against Canadian Indigenous groups in injunction applications when there had been an opportunity to raise this earlier before much work had been carried out.[1456]

Trivialisation of Beliefs

In addition to all these problems, there is also the danger of simple prejudice and trivialisation of Indigenous beliefs that are not treated by the dominant society as legitimate.[1457] This was one reason why Wootten in his report on the Junction Waterhole was unwilling to provide detail of the beliefs.[1458]

Mere prejudice against the credibility of Indigenous beliefs may lie beneath the surface but on rare occasions it also comes through explicitly. In one New Zealand Environment Court decision, the Court responded to a statement by a witness that death could occur as a consequence of developers going into forbidden places by

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[1455] A point also made by Andrews, 'Dissenting in Paradise', above n 1240.

[1456] Such as in the attempts to stop logging in the Lower Siska Valley in *Tlowitis-Mumtaglia and Smith v MacMillan-Bloendel* [1990] CanLII 1662 and, on appeal, in *Tlowitis-Mumtaglia and Smith v MacMillan-Bloendel* [1990] CanLII 2335. The claims had been based initially on Aboriginal rights which failed, but later a claim based on the sacredness of the area was raised. This was despite the witnesses saying that their residential school upbringing had made them afraid of speaking of traditional religious beliefs. It could be argued that the comments, about the lateness of the decision and the lack of an adequate explanation for such delay, were really about issues of laches and prejudice, but there were certainly hints of scepticism about the sacredness claims because they were raised late. In *Hill v Minister for Forests (British Columbia)* (1998) 162 DLR (4th) 568, the BC Court of Appeal said that the judge was not in error in concluding that there would not be irreparable harm to archaeological features and culturally modified trees, as claims of religious significance of the forests generally had not been emphasised until the appeal.

[1457] See comments to this effect by Marcia Langton, 'How Aboriginal Religion has become an Administrable Subject' (1996) *Australian Humanities Review* at Latrobe University <http://www.australianhumanitiesreview.org/archive/Issue-July-1996/langton.html>; Christine Nicholls, 'Misrepresenting Hindmarsh' (Dec 1995–Jan 96) 20 *Arena Magazine* 24; Christine Nicholls, 'Language, Ideology and the Hindmarsh Island Bridge Affair' (1995) 32 *Education Australia* 33. Tatz too described a similar argument by Sir Charles Court, Premier of Western Australia, during Noonkanbah drilling dispute as seeking to defy and decry any conceptions that Aborigines have a belief system worthy of respect: Colin Tatz, 'Sacralising the Profane and Profaning the Sacred' in Elizabeth Burns Coleman and Kevin White (eds), *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society* (2006). See also Kwaymullina, above n 1341.

Of course, there are many who might dismiss all beliefs in sacredness tied to a particular place as something belonging to the past and an outdated mode of thinking. Retherford, above n 14, at 976, speaks of the sacred in Euro-American culture being seen as an "idea whose time has passed with saints and miracles". Marion Maddox refers to the exotic or irrational image of religion, in Maddox, *For God and Country*, above n 12, at 255.

[1458] Wootten, *Junction Waterhole Dam*, above n 1218, at [7.1.8]–[7.1.13]. He said that he did not want his report to be a "vehicle for public trivialisation and ridicule of Aboriginal beliefs in the media by uncomprehending people", which had been a feature of Coronation Hill. The information was not titillating or shocking by Western standards but simply lacked significance in Western culture. The issue, as he saw it, was not whether we could understand and share the beliefs but whether, knowing they are genuinely held, we could respect them.

labelling it as a "superstitious prediction".[1459] At the heart of this problem is that the assessment is by people who do not themselves believe or respect the beliefs.

There is also the simple failure to understand and interpret the role of myth in Indigenous religions. This can be seen in the first instance decision in *Delgamuukw v British Columbia*[1460] where certain oral histories encompassing sacred litanies were given no weight because they were not literally true, confounded fact and belief, and consisted of mythology and a romantic view of history. Lamer CJC for the majority in the Supreme Court in *Delgamuukw* [1461] at least noted that this approach was incorrect and if followed would result in a systematic undervaluing of such oral histories by the legal system. Lamer CJC also cited the report of the Royal Commission on Aboriginal Peoples[1462] noting that the oral histories were less focussed on establishing objective truth or recounting factual events but were about how people see themselves and define their identity.

17.4.5 Assessment Based on Indigenous Values

It may be argued that these problems are mitigated by making it obvious that assessment is based on what is significant to Indigenous people and evidence can be provided and assessed as for any other issues requiring evidence from Indigenous people and relevant experts.[1463] In other words, the assessment is objective, based on the evidence, but the relevant evidence is entirely that of the Indigenous beliefs. There is an explicit recognition, particularly in the more recent statutes, to the effect that Indigenous people are the primary source of information on the value of their heritage and that active participation of Indigenous peoples is necessary in identification, assessment and management of such heritage.[1464] In USA where it is not explicitly

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[1459] *Canterbury Regional Council v Waimakariri District Council* [2002] NZRMA 208, at [73]. The Court also perceived the reference to possibility of death as a veiled threat and said that such evidence was totally unacceptable when made in the course of evidence in the decision making process, at [73].

[1460] (1991) 79 DLR (4th) 185. This case was also used as an example by Michael Ross of the fact that almost all judges and lawyers are likely to be sceptical about religious underpinnings or theological or cosmological significance of the sacred places, Ross, above n 24.

[1461] (1997) 153 DLR (4th) 193, 230–-239.

[1462] Canada, Royal Commission on Aboriginal Peoples, above n 8, at 33.

[1463] For example, it has been said that Maori law is analogous to foreign law and is a matter of fact to be proved by appropriately qualified experts: *Land Air Water Association v Waikato Regional Council* (Unreported, Environment Court, A110/2001, 23 October 2001), at [394].

[1464] See *EPBC Regulations 2000,* Schedule 5B, Reg 10.01E relating to national heritage management principles at clause 6 and Schedule 7B Reg 10.03D relating to Commonwealth heritage management principles at clause 6. The Qld and Vic legislation recognise Aboriginal people as the primary holders of knowledge of their cultural heritage: *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) ss 5(a) and (b), 6(g); *Aboriginal Heritage Act 2006* (Vic) s 3(a)-(c). See above in relation to the requirements in the Qld and Vic legislation to consult the relevant Indigenous peoples. The Evatt report noted the importance of these perspectives, in Evatt, *Review*, above n 963, at [3.66], [8.3].

stated in the legislation, it has been set out in the National Park Service Guidelines[1465] and has also become accepted as a principle by heritage professionals.[1466] Even where the statutes are not explicit, there appears to be no controversy over the principle that significance is to be judged according to the values of the relevant Indigenous peoples.[1467]

However, as suggested by the New Zealand cases referred to above, this may still not be a straightforward matter of simply accepting what the relevant Indigenous people assert, as can be seen by the next section.

17.5 Objective Assessments of what is Sacred or Desecrating in Indigenous Beliefs

17.5.1 Testing Objective Truth: Rhetoric vs Reality

In most cases, for the relevant Indigenous heritage legislation to provide protection for a place, there needs to be a finding that the place is of significance to Indigenous people. No one has claimed that the legislation expects proof that a perceived basis of spiritual significance or sacredness is in fact true. It does appear necessary, however, to establish objectively that the place is sacred or at least significant[1468] *for Indigenous peoples*, even if the reasons for that significance may lie in subjective beliefs which do not themselves have to be true. Similarly, one would not expect that it would be necessary to prove that an activity *did* desecrate or spiritually damage a place but it may be necessary to show objectively that this is what is believed would happen. Most assessors would say that they are not determining sacredness or the validity of the belief but only the objective truth as to the existence of a belief. This was certainly the distinction that was made by the South Australian government and supporters of the Hindmarsh Island Bridge in justifying the Royal Commission investigating allegations that beliefs were fabricated. There was never any denial of the inappropriateness of investigating the objective truth of the sacredness itself.

[1465] National Park Service, *Bulletin 38*, above n 1028, says that significance has to be based on the point of view of those who ascribe significance. It was said that this does not mean that they cannot be questioned or subjected to critical analysis, but cannot be rejected on the basis that their beliefs are inferior to one's own.

[1466] See, for example, National Heritage Convention 1998, above n 1394, Principles 3 and 4.

[1467] Asserted in Wootten, *Junction Waterhole Dam*, above n 1218, and see more of his comments in 17.5.2 below.

[1468] Significance is a less specific and thus less onerous test. It could be said that, even if a place turns out to be not actually sacred, it could still be significant because people believe it to be sacred. For example, Hal Wootten has suggested that the Indigenous legislation avoided the problems of proving sacredness by using terms like "significance" thus only requiring proof of this broader meaning: Wootten, 'Resolving Disputes', above n 1118. However, it does suggest that the legislation requires objective proof of significance.

In practice, however, the distinction can often be a fine and difficult line to draw. This is seen when sincerity is tested and judged by the reasoning and standards of the Western tradition. There can also be confusion as to whether the task is just a determination of sincerity or whether it requires something more. For example, in the World Heritage listing guidelines, one test posed is "authenticity", that is, whether the sources of the value are regarded as credible or truthful.[1469] However, proof of authenticity may also require more than just proof of genuineness of feeling or belief on the part of a group of people, but objective facts like continuity of cultural tradition.[1470]

The cases discussed below make it clear that in many cases the test applied is not merely one of the standard religious freedom test of sincerity[1471] but requires some kind of religious orthodoxy, rationality or objective credibility.

There appear to be at least two main scenarios that could face a court when deciding whether places are sacred or of spiritual significance to Indigenous peoples. One is where the sacredness or the desecration is premised on what is believed to be a historical[1472] or a scientific[1473] fact ("the extrapolation category"). The approach in most cases has been for the decision maker to make findings on evidence as to whether the historical or scientific fact was able to be proven and, if the facts upon which beliefs of sacredness or desecration are based are erroneous or not established, then the sacredness or desecration would be found not to exist. Hence, this first category of sacredness has tended to be treated as a typical fact-finding exercise of a kind with which the Western legal system is familiar.

A second category is recognised as more difficult for objective decision making. This is when a place is believed to be sacred simply because the tenets of the religion say so, usually stemming from mythical, but not physically provable, beings or events, rather

[1469] UNESCO, '*Operational Guidelines*', above n 955, at [80]–[83].

[1470] The UNESCO Operational Guidelines noted that, while authenticity must be judged primarily within the cultural contexts to which it belongs, attributes such as "spirit" and "feeling" do not lend themselves easily to practical applications of the conditions of authenticity or a sense of place which tend to require proof of communities maintaining tradition and cultural continuity: ibid.

[1471] See 4.2.3 above and, in particular, such comments in *Thomas v Review Board,* 450 US 707 (1981) at 714–6 by the US Supreme Court, that religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection. Similarly, in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 24 the Canadian Supreme Court said that the *Charter* stresses the subjective aspect of the believer's personal sincerity rather than the objective aspect of the conformity of the beliefs with established doctrine and what must be proven is the sincerity of a belief, not that the belief is valid.

[1472] Such as, on the basis of the area containing burial sites or being a battle ground where such burial sites or battle grounds are regarded as sacred. Examples are discussed in 17.5.2 below. The analysis of factual evidence though is not itself a straightforward matter, as the *Takamore Trustees* cases discussed in 17.4.4 above illustrate.

[1473] Such as, whether waters will be physically polluted or affected by certain works when it is a tenet that such a physical effect would desecrate the waters. See also cases discussed in 17.5.2 below.

than as an extrapolation from alleged historical events ("the mythical category"). The requirement of objective proof based on evidence has spawned a range of difficulties discussed below, ranging from excluding such beliefs from the protection provided by the legislation to making any findings based on an assessment of what is more likely to be an "authentic religious belief" to an approach that defers substantially to asserted sincere beliefs.

While the two categories outlined above are theoretically different, it may be that they are not qualitatively distinct and, as will be seen, many of the same issues arise in the examples discussed below.

17.5.2 The Use of Objective Tests for the Sacred in the Cases and Reports

Most of the clearest examples of objective analyses have come from the many New Zealand cases under the *RMA* where the decision makers have made findings as to whether areas are in fact wahi tapu, based largely on a factual assessment. The examples from Australia, mainly from writers of reports under *ATSIHPA,* have, however, been varied in their treatment of assertions of belief, with a greater willingness to accept beliefs that are not challenged. Examples from the USA are scarce but a few comments are referred to which suggest a similar approach to that in New Zealand, though perhaps the much smaller sample makes it harder to discern an approach. Examples from Canada are hard to find so not referred to, mainly because most of the actions taken under heritage legislation have concerned such objects as culturally modified trees or archaeological sites, which deal with observable features rather than areas whose significance is based on spiritual or metaphysical elements only.

New Zealand

As noted above, in New Zealand there is a clear requirement for assessment of the evidence: mere assertions by believers or Maori elders, no matter how sincere, are insufficient to establish that a place is wahi tapu.

In relation to the extrapolation category, the courts have found against areas being wahi tapu where the belief was based on the area being a burial area but where the balance of the evidence suggested that there were not likely to have been actual

burials there.[1474] The logic is that if the premise upon which the sacredness is based is not established, then the sacredness cannot exist.[1475]

An example of this scientific approach has also been adopted in deciding on whether there will be a desecration. In *Rural Management Ltd v Banks Peninsula District Council*[1476] the local Maori group opposed a licence to discharge effluent into the sea as a discharge of any contaminant offends the mana of the water. It was held, that due to the conditions placed on the licence, the effluent would be treated and would not affect the food from the sea nor contaminate it and this would thus not affect the Maori duty of guardianship as they had ensured that the treatment level was brought up to a high level.[1477] The matter was treated as a scientific one about the degree of contamination. However, the evidence was that the offence to the mana of the water would occur regardless of whether the discharge had been treated to reduce contamination. This takes the matter further than the burial cases as it assumes that the relevant contamination that desecrates is what would be polluting in scientific terms, not on Maori religious terms. In the later contrasting case of *Te Runanga O Taumarere v Northland Regional Council*,[1478] however, the Maori witnesses also said

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[1474] For example, in *Te Toka Tu Moana O Irakewa v Bay of Plenty Regional Council and Whakatane Regional Council* (Unreported, Environment Court, A93/2000, 1 August 2000). This case concerned the question of whether a 100-acre block was wahi tapu as a burial area. There was conflicting Maori evidence about beliefs as to whether it was or not. The Court held that the evidence that the wahi tapu area extended to the block was genuine and sincere but there was no archaeological evidence of burials in the area and the court preferred the evidence of the elders who said that it was not and never regarded as such by the old people: see [14]–[16] and [28].
See also *Shayron Lee Beadle and Ronald Wihongi and Riana Wihongi v Minister of Corrections* (Unreported, Environment Court, A 74/02, 8 April 2002) at [473]–[474], where the area was not proven to be a historic battle site, so the alleged sacredness on that ground was not found by the Environment Court to have been proven, Similarly, in *Winstone Aggregates & Heartbeat Charitable Trust v Franklin District Council* (Unreported, Environment Court, A80/02, 17 April 2002), the court held that there was insufficient evidence from surveys and the like of pa sites and burial sites in the relevant area and that it was more likely than not to be outside the area in question.
Another such case was *Arrigato Investments Ltd v Rodney District Council* [2000] NZRMA 241. The Environment Court relied on archaeological evidence of the location of various burial and battle areas. It preferred evidence that said that there were no burials there. The issues of swamp burials in the area of the link road in the Takamore Trustees line of cases has already been discussed in the previous section: *Takamore Trustees v Kapiti District Council* [2003] 3 NZLR 496; *Te Runanga o Ati Awa ki Whakarongotai and Takamore Trustees and Waikanae Christian Holiday Park v Kapiti District Council* (Unreported, Environment Court, W50/2003, 30 July, 2003); *Waikanae Christian Holiday Park v Kapiti District Council* (Unreported, High Court, McKenzie J, CIV-2003-485-1764, 27 October 2004).
[1475] The appropriateness of the imputed logic is discussed at 17.5.3 below.
[1476] [1994] NZRMA 412.
[1477] Another similar case was *Purnell v Waikato Regional Council (*Unreported, Environment Court, A85/96, 7 October 1996) where the Maori objectors were concerned about a discharge of effluents from a piggery and the resulting effect on waterways. The Environment Court held that there was no significant risk of environmental detriment to local waterways and that the iwi's concerns, including spiritual affinity with the Stream, could be met by appropriate conditions. While this recognised concerns, it seemed to base the response to them on the scientific effect of the discharge rather than spiritual concerns of what constitutes polluting.
See also *Land Air Water Association v Waikato Regional Council*, (Unreported, Environment Court, A110/2001, 23 October 2001) at [399]–[401] where there was a concern that discharge of contaminants would result in disturbance of the mauri of the waters of the Waikato River and the wetlands and have flow-on effects on flora and fauna. The Court decided that the design of landfill and conditions were found to ensure that contamination of the Waikato River would be most unlikely.
[1478] [1996] NZRMA 77, a decision of the Environment Court. This case also concerned discharges into the sea, ie of sewage.

that the effluent would be spiritually insensitive, in this case an affront to the mana of the Ngapuhi tribe, if it was discharged into the sea and this too would apply even if the discharge had been treated. It was held in that case that, although it was not likely that there would be any actual physical effects on shellfish or their habitats or the physical environment, it would have an adverse effect on tangata whenua and the cultural and spiritual values of the bay and the appeal against the resource consents was upheld.

In the mythical category of cases, the purely metaphysical and unprovable nature of the sacredness has been troublesome for New Zealand courts in their task of assessment based on evidence. This came out clearly in the series of cases in 2002 dealing with the prison at Ngawha.[1479] There were some Maori objectors[1480] to proposals to develop the prison on the basis that this would interfere with, inter alia, the domain of the taniwha Takauere, an ancestral creature. The Regional Council had found, based on the evidence put forward by the objectors, that the whole area was part of the domain of the taniwha. On the first appeal, the Environment Court[1481] accepted that there were people who believed in the existence of the taniwha and their beliefs had to be respected.[1482] However, the Court noted that the taniwha was not a human person, nor a physical creature, and described it as "mythical, spiritual, symbolic and metaphysical".[1483] It decided that the *RMA* and its reference to "the environment" did not extend to the protecting of the domain of the taniwha or other such mythical beings and that issues involving such beings or beliefs were simply not justiciable as they were not susceptible to proof or judicial findings based on evidence.[1484] When it came to psychological effects on people who believed that the prison would have a desecrating effect, the Court said that attitudes and fears had to be assessed objectively and if unsubstantiated by probative evidence, they were not relevant.[1485] Sincerity of the belief was thus deemed irrelevant.[1486]

On a further appeal to the High Court, however,[1487] Wild J took a different approach to metaphysical questions and held that they did have to be taken into account.[1488] However, Wild J was generous to the Environment Court in interpreting its decision as

[1479] See also discussion of some aspects of these cases at Chapter 15.
[1480] There were also local Maori who supported the prison development.
[1481] In *Shayron Lee Beadle and Ronald Wihongi and Riana Wihongi v Minister of Corrections* (Unreported, Environment Court, A 74/02, 8 April 2002).
[1482] Ibid at [436]–[438].
[1483] Ibid at [436].
[1484] Ibid at [439]–[446].
[1485] Ibid at [723]–[724].
[1486] Ibid at [727].
[1487] In *Friends and Community of Ngawha v Minister for Corrections* [2002] NZRMA 401 dismissing the appeal. Leave to appeal from this decision was later refused by the Court of Appeal in *Friends and Community of Ngawha v Ronald Wihongi* [2002] NZCA 322.
[1488] Ibid at [41].

a finding on the facts that the taniwha would not be likely to be interfered with, especially in the light of conflicting Maori evidence about the taniwha, and such a finding was open on the evidence.[1489]

The High Court's decision appears to accept that there was a Maori belief in the taniwha and perhaps if the Maori evidence had been consistent about the taniwha being affected by the particular works, this would have justified a finding to that effect. The mythical nature of the taniwha did not stop the area from being sacred to Maori people.[1490] The implication is that there does not have to be conclusive evidence that the object of the belief is true, as that is a matter that would simply not be able to be proven by evidence. The inconsistency implicit, however, is that the court and any first instance decision maker still have to decide on the basis of the evidence whether the taniwha was in the precise area and whether the activity would interfere with it. In that case, the appeal was dismissed because such a finding had been made against the objectors and was open on the evidence. This is not qualitatively different from requiring a finding of whether a taniwha and any other metaphysical being exists at all. The difference was that the fact that a taniwha existed (at least as a matter of Maori tradition) was able to be accepted because the weight of the evidence of witnesses said that it did, but, because there was a conflict of evidence on the extent of the taniwha's domain and what would interfere with it, the court could decide to prefer one set of evidence to the other.

In the face of conflicting evidence on metaphysical or spiritual issues, the New Zealand courts have regularly decided which is more credible and to be preferred. The assessment of credibility has also raised questions of logic, that is, something that is illogical has been deemed to be less credible. The New Zealand approach has also involved the courts making decisions about which type of definition of wahi tapu is to be preferred, as illustrated below.

In the *Land Air Water Association* case in the Environment Court in 2001,[1491] there was conflicting evidence from different Maori people about whether a place was wahi tapu

[1489] Ibid at [39]–[46].

[1490] A similar acceptance of metaphysical concerns by the High Court can be found in the much earlier case of *Huakina Development Trust v Waikato Valley Authority* [1988] 2 NZLR 188 under the earlier Planning Act. There Chilwell J in the High Court found that provisions that directed consideration of the relationship of the Maori people and their culture and traditions with their ancestral land and general public interest considerations required the evidence of Maori cultural and spiritual values to be taken into account. Nevertheless, there had to be evidence of this. At 83 it was said that spiritual elements of culture and practices were cognisable in a court of law *provided that they are properly established*. At 113, it noted that such spiritual and cultural relationships with the natural water had to be considered *if the evidence establishes the existence of such relationships held by a particular and significant group of Maori people*.

[1491] *Land Air Water Association v Waikato Regional Council* (Unreported, Environment Court, A110/2001, 23 October 2001). This case concerned the issue of whether the Waikato River and its surrounding areas,

and the reach of that term, in particular, whether it could cover such areas as old pa sites, fortifications, locations where Maori artefacts had been found, cultivation areas, Maori earthworks and the like. The Court made it clear that issues of Maori cultural matters require weighing and an objective determination in the context of the circumstances of each case.[1492] After considering the evidence, the Court adopted a narrow view of the meaning of wahi tapu and ruled that in traditional Maori society a wahi tapu was a specific place, usually very small, within a tribal rohe or boundary, and these were places strictly set aside from daily life because the tapu or spiritual restriction contained in such places posed dangers to all. The types of places in question in that case were associated with secular activities like food gathering and gardening rather than religious activities and were found to be an anathema to wahi tapu because such activities would be breaches of the sacredness of those places. Such places were said to be more appropriately described as sites of cultural significance rather than wahi tapu.[1493] A similar process of assessing the evidence to analyse whether something is in fact wahi tapu has been adopted in many other Environment Court decisions in New Zealand.[1494]

In *Ngati Hokupu Ki Hokowhitu v Whakatane District Council*[1495] the question arose as to whether the land where subdivision and building projects[1496] were proposed was wahi tapu. Judge Jackson for the Environment Court, following a discussion of some differences between Maori and other values and the difficulty of taking an complete

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which were recognised to be culturally significant, would be desecrated by a proposed landfill and whether these areas were not only culturally important but were wahi tapu.

[1492] Ibid at [407]–[408].

[1493] Ibid at [416]–[417].

[1494] Such as in *Winstone Aggregates & Heartbeat Charitable Trust v Franklin District Council* (Unreported, Environment Court, A80/02, 17 April 2002) where there was a long analysis from dictionaries and other sources of the meaning of wahi tapu. That Court too adopted the narrower view taken in the *Land Air Water Association* case.

In *Berkett v Minister of Local Government* (Unreported, Environment Court, A6/97, 23 January 1997) where the Court decided that the objector was sincere but wrong in saying that the whole Motiti Island was wahi tapu as the court found that only a few discrete pa sites and burial areas were.

In *Tangiora* v *Wairoa District Council Mahia Boating and Fishing Club Inc* (Unreported, Environment Court, A006/98, 22 January 1998), the Environment Court rejected beliefs that the area between two hills was wahi tapu but did accept that the beachfront area was of particular significance to Maori because of historical and cultural background as an ancestral landing place and food gathering area. The evidence of the witness who said the wider area was not wahi tapu was preferred.

In *Te Ohu O Nga Taoga Ngati Manu v Stratford District Council and Marabella Enterprises Ltd* (Unreported, Environment Court, W 74/97, 24 February 1997), the Court rejected the evidence of a minority objector on the basis that most others did not agree and that his evidence suggested that his real concern was sovereignty and a right of veto. It hinted strongly also that logic played a part in the credibility testing when it said, at 7, that the "rule of reason approach must prevail as to whether the particular kind of activity is intrinsically offensive to an established wahi tapu".

Many of the above decisions turned on the wider areas being used for secular activities like food gathering and thus being most unlikely to be wahi tapu under a narrow definition of the term.

[1495] Unreported, Environment Court, C168/2002, 13 December 2002, per Judge Jackson.

[1496] These projects were proposed by a Maori organisation, TRONA, on what was a 100-acre block located immediately west of an area known as Opihi Whanaunga Kore (Opihi) which was a urupa (burial area) and accepted as a very significant wahi tapu. They did not believe the land for the projects was part of the wahi tapu area and wanted to build there to care for the urupa which was. The appellants who were challenging the consents were a sub-hapu of the Ngati Awa and a group of individuals who believed that the wahi tapu area extended to the relevant block.

relativist position that simply accepted Maori values,[1497] noted that the New Zealand legal system works on the assumption that within most cultures there are branches of scientific and rational knowledge and concluded that while it was not the Court's function to decide on the truth or falsity of belief systems, individual factual propositions about those systems could be assessed for truth and that it was the court's task to do so. The Court could decide issues raising beliefs and values by hearing and examining evidence, amongst other things, about whether the values correlate with physical features of the world, people's explanations of their values and traditions, whether there is external evidence corroborating information about the values, the internal consistency of people's explanations, the coherence of those values with others and how widely the beliefs are expressed and held. The values were to be ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions.[1498] After analysing the evidence, the Court decided that it preferred the evidence that suggested that the relevant land was not wahi tapu.[1499]

In this way, it was clear that sincerity was not enough and the tests of credibility or authenticity turned very much on the sorts of typical features of Western legal reasoning discussed before,[1500] such as corroboration, widespread knowledge and the like. It also required an internal logic and consistency of practice.

What is also occurring in these cases is that the courts are making decisions on the basis of what it decides is more theologically credible or authentic, based on such things as the credibility and authoritativeness of the witnesses advocating a particular view. However, this choice is still the result of a battle between religious interpretations and involves a decision as to what is considered orthodox. There may have been preferences for the views of senior Maori elders, but this does not detract from the fact that it still requires the courts to make a decision based on its perception as to orthodoxy or who is entitled to speak for a religion.

[1497] Judge Jackson in the Environment Court had a long discussion in his decision about how the Maori perspective often did not distinguish between things physical and spiritual, whereas the culture of the majority tended to take a more dualistic view that separated the two. It was accepted that the meaning and sense of a Maori value should primarily be given by the Maori and, in the case of an alleged wahi tapu, the Maori definition as to what that is should be accepted, unless there were differences between Maori about this: above n 1501 at [42]–[43]. However, the Court wrestled with arguments of cultural relativism which recognised all interpretations as valid and in effect decided that courts just had to make decisions and could not work with such pure relativist arguments: at [47]–[52].
[1498] Ibid at [49], [52]–[53].
[1499] This was done as a court would normally do by weighing such matters as evidence as to usual size of wahi tapu, inferences from the behaviour of ancestors, consistency and credibility of witnesses, lack of corroborating evidence that the land was wahi tapu and the like.
[1500] See 17.4.4 above.

The above cases show that the courts and governments have preferred a narrow definition of a wahi tapu. In some ways, although evidence is led in each case, the system of precedent has favoured the development of a definition accepted in the courts. The narrow view was also expressed by the relevant government department, Manatu Maori, in a 1991 paper on wahi tapu which distinguished between these and "every day sites".[1501] The courts have therefore opted for what may be the predominant, orthodox view. It is also the case that the preferred definition is one that emphasises small discrete areas of land, especially with material remains,[1502] and this may coincide with minimising the threat of sacredness to development. One wonders if the courts would have been so ready to accept a far more expansive reading of wahi tapu as a proper definition.

Australia

Most of the court or tribunal cases in Australia relating to Indigenous heritage legislation have turned on procedural issues rather than substantive findings as to sacredness or otherwise. The native title expedited procedure cases on particular significance[1503] have not generally involved conflicting evidence as to sacredness, so the tribunals and courts have accepted the sincere assertions of the relevant Indigenous people as sufficient prima facie evidence of sacredness. The problems have arisen where there has been a challenge to the veracity of claims of sacredness. Such challenges to sacredness to a wider area of influence were ventilated in political and social spheres in the Noonkanbah situation discussed earlier, but these did not result in a publicly available reasoned assessment.[1504] One of the most notable instances in Australia which did related to the application under the *ATSIHPA* to protect Hindmarsh Island from a bridge being built from the mainland.

The Hindmarsh Island application provided instances of both the extrapolation and mythical categories of claims of sacredness. Unlike the New Zealand cases, Justice Mathews treated the test in the *ATSIHPA* for whether a place was of significance as subjective, but drew a distinction between that and the test for desecration, which was at least partly objective as it required findings that the activities would affect

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[1501] Manatu Maori, above n 38.
[1502] A point noted in Mosley, above n 204, and by Stephenson, above n 31.
[1503] See discussion at 17.2 above.
[1504] See especially Chapter 15 on the sphere of influence debate. The assessment of sacredness was made by the Trustees of the Museum who in fact accepted the claims of sacredness in their recommendation that the area be protected, but they were directed by the Minister to consent to drilling in the area. For accounts of the Noonkanbah story, see citations at n 1235 above.

significance or treat it in a manner inconsistent with the tradition.[1505] In relation to the extrapolation category, as to whether the relevant area was of significance as a burial place (which should not be disturbed), Mathews concluded that, for the question of whether a place was of particular significance in accordance with Aboriginal tradition, the only assessment needed was subjective, that is, that the relevant Aboriginal people believed it to be of significance.[1506] This was the case even if its significance was simply in their belief that it was a burial site for their ancestors; no objective proof had to be given to prove that it was in fact such a site.[1507] However, when it came to the test of desecration, she decided it was necessary to show that there was in fact a threat of activities that would (objectively) adversely affect the significance of the place in accordance with tradition or would (objectively) result in the place being treated in a manner inconsistent with tradition.[1508] If, for instance, there was no evidence of an actual burial site, then the use of the area could not be found to be inconsistent with a tradition that said burial sites were not to be disturbed, nor could it adversely affect the significance of burial sites, because there were no burial sites to be disturbed or affected.[1509] In effect, this finding implied that, regardless of what the Aboriginal people believed about the place, it was not in fact a burial ground so could not be desecrated, and these were objective facts to be ascertained in the normal way. This, like the New Zealand cases, assumes a logic that if the perceived basis of sacredness is unproved or even proved untrue, then the sacredness cannot exist. There are other instances of reports under the *ATSIHPA* in relation to the existence of burial sites that have been treated in this way.[1510]

[1505] Under s 10(1)(b) of the *ATSIHPA*, the Minister could make a declaration if satisfied that the area was a significant Aboriginal area *and* if also satisfied that it was under threat of injury or desecration. Under s 3(2), an area is under threat of injury or desecration, inter alia, if it is used or treated in a manner inconsistent with Aboriginal tradition or the significance of the area in accordance with Aboriginal tradition is adversely affected. Viewed literally, the questions of whether a matter is used or treated in an inconsistent manner or if the significance is adversely affected are worded as facts to be established and not governed by the perceptions of Aboriginal people.

[1506] This could still have been a major issue if there had been dissent on this topic as there would be the questions as to who the relevant Aboriginal people were and whether it was sufficient for some to regard it as significant. The main disputes as to sacredness, however, related to the other issues descried below.

[1507] Mathews, above n 1177, at 159. She also said it did not cease to be of particular significance even if the belief was found to be wrong.

[1508] Ibid at 185–6.

[1509] As there was no tradition about “merely perceived” burial sites. The conclusion was that on the evidence it was unlikely that there would have been any burials on the bridge corridor area: ibid, at 195–9. The same conclusion was reached by Mathews in relation to the claims about disturbance of ngatji breeding grounds, Mathews, above n 1177, at 200.

[1510] Such as Graeme Neate’s analysis of the golf course development at Murray Downs in NSW where he accepted that burial places were of particular significance and needed to be preserved but an area where there was no evidence of burials was considered not of particular significance: Neate, *Murray Downs Golf Club Report*, above n 1358. See also the analysis by the Minister under the *ATSIHPA*, which was not set aside by the Federal Court in *Anderson v Minister for the Environment, Heritage and the Arts* [2010] FCA 57. The Minister was not satisfied that a place was the site of a massacre and thus was not satisfied that it was of particular significance.

This issue of logic is exacerbated in Justice Mathews' analysis of the mythical category in her report on whether the Hindmarsh Island bridge would desecrate the area. The bridge was asserted to be contrary to a rule that nothing must come between the water and the sky in that area; thus building it would be a treatment of the area in breach of the Indigenous tradition. She said that this was not part of the content of the tradition itself,[1511] but a rule said to be derived from it, and there was no logical link or connection between the tradition as handed down and the said rule.[1512] There was speculation, but no actual evidence, about such a link and Mathews was of the view that a finding of desecration required connections both between the tradition about the importance of the Hindmarsh area and the rule that nothing must come between waters and the sky, as well as between the said rule and the claimed consequence that Ngarrindjeri would get sick. The precise connections were required despite the fact that Mathews acknowledged that the anthropologist Professor Sutton had said that holders of traditions rarely, if ever, propose specific causal connections between sacred details of a place and the specific taboos that surround it and that there was no reason within Aboriginal tradition why a logical link would need to be specified as traditions could be handed down without such links being articulated.[1513] This was described as a "rich context for traditions and beliefs" but the conclusion was that such a context was not enough and that sufficient information of the contents of the traditions and the link had to be revealed for the Minister to be able to assess whether there was likely to be desecration.[1514] While Justice Mathews appeared to understand the problems in the search for such a causal connection, she nevertheless appeared to feel constrained by the legislative task to make objective assessments.[1515]

Justice Mathews' analysis of the distinctive requirements in the *ATSIHPA* for significance and desecration, suggests that the existence of a tradition about the area could be established simply by way of statements about what was handed down. As far as the objective ascertainment of desecration was concerned, however, the process of deciding whether there would be an adverse effect had imported into it a requirement for causation or reasonableness of religious rules. The legislation itself does not mention any such requirement, but it was imported through an assumption that there had to be a logical connection in order to find as an objective fact that there would be

[1511] Some witnesses pointed to this as part of the Seven Sisters dreaming story: Mathews, above n 1177, at 41, 46. She said that the limited disclosures of what the tradition was, suggested that the tradition would not have contemplated anything coming between the water and the sky nor prescribed what the effects of such an event would be.
[1512] Ibid at 203.
[1513] Ibid at 204. Sutton said that it could also be because the link was restricted and could not be disclosed.
[1514] Ibid at 206.
[1515] See also Hilary Charlesworth, 'Little Boxes: A Review of the Commonwealth Hindmarsh Island Report' (1997) 90(3) *Aboriginal Law Bulletin* 19, who noted that Mathews juxtaposed the legal rules and the Indigenous reality that the legal rules could not take into account.

an adverse effect or a treatment inconsistent with a tradition. While there was no suggestion that the truth of the belief was in issue, mere sincerity of belief that there was such a rule in the tradition and that this rule applied to the facts appeared insufficient.

Professor Cheryl Saunders who wrote the earlier report under the *ATSIHPA* in relation to Hindmarsh Island faced the same issues but decided that the Minister could be satisfied that there would be desecration. The difference was that she did not dissect the logic in the same way but simply set out all the arguments and postulations and left it to the Minister for decision.[1516] She did, however, highlight the difficulties that the rationalist mind would raise, such as the history of other disturbances in the area and the lack of any illustrations from other Aboriginal cultures to support the type of hypothetical rationales put forward for the rule.

The Royal Commission concerning Hindmarsh Island, in its investigation of claims about women's knowledge in relation to Hindmarsh Island, provided the least sympathetic view. It found not only that there was no adequate rationale for the belief that nothing should come between the island and the mainland to exclude the bridge[1517] but also used this as a key factor to support the conclusion that the claimed beliefs must have been fabricated. The underlying assumption was that if a belief is totally irrational, then it cannot be sincerely held. However, it has been noted that this test would disqualify many religions and is simply an inappropriate way of treating the sincerity of religious beliefs which are not necessarily about logical or provable facts.[1518] Other commentators have criticised the way in which the Hindmarsh Island Royal Commission drew inferences of fabrication based on the typical issues of lack of rationality, dissenting views, late disclosure and the like without considering the arguments and the context.[1519]

[1516] Saunders, above n 1263.

[1517] Stevens, above n 1177, at 241–250, found that the beliefs about the construction and threat of injury or desecration were not supported by any form of logic or by what was already known of Ngarrindjeri culture. She relied heavily on such matters as the change to the landscape of the area where 17,000 years before the island was joined to the mainland and the existence of barrages between the island and mainland that were constructed and the resulting changes to the shape of the island and water levels, all of which were used to show that there was already a link between the mainland and island and it was not logical for there to be a tradition against it.

[1518] See Marion Maddox, 'What is a "Fabrication"?', above n 615; Marion Maddox, 'Religious Belief in the Hindmarsh Island Controversy' in George Couvalis, Helen MacDonald and Cheryl Simpson, *Cultural Heritage, Values and Rights* (1998). Maddox points out that religious belief is often not about assenting to a set of propositions or facts, which the Hindmarsh Royal Commission failed to recognise. She argues that religious views and spiritual significance have to be accepted on their own terms. In Maddox, *For God and Country* above n 12, she suggested that beliefs do not start out being true or false but become true in the lives of the people who live the meaning.

[1519] Such as Andrews, 'Dissenting in Paradise', above n 1240, who noted the failure of the Commission to consider alternative interpretations; Mead, above n 1434; Tehan, above n 926.

A different approach was taken by Hal Wootten in his report on the Junction Waterhole Dam. He seemed only to apply a test of sincerity in accepting the evidence of the sacredness of the area and commented that the issue was not whether we can understand and share beliefs but whether, knowing they are genuinely held, we can respect them.[1520] This process may have been made simpler for Wootten as there was no Indigenous denial of the beliefs in the sacredness of the area.[1521] It is not clear as to how he would have dealt with conflicting Indigenous beliefs about the area.

A similar view was adopted by Von Doussa J in the Federal Court in another case in the Hindmarsh Island saga, *Chapman v Luminis* when he cited those comments of Wootten[1522] and also concluded that spiritual beliefs do not lend themselves to proof in strictly formal terms because their acceptance by true believers involves a leap of faith. To pose rationality as a test was said to be neither appropriate nor helpful.[1523]

As outlined previously[1524] the application to protect Coronation Hill also created a controversy over the extent of the area covered by the Bula tradition and hence the area of significance. Stewart in his report to the Minister under s 10 of the *ATSIHPA* also found a basis whereby the Minister could accept that the area was of particular significance and that mining and increased tourism would cause desecration.[1525] In doing so, he accepted the evidence of the senior Jawoyn custodians, despite some earlier inconsistencies in their position, and adopted what was the majority view to find that there was significance. He accepted that they believed that disturbance of the site would lead to apocalyptic retribution. He noted that there were differing degrees of intensity about consequences of disturbance and that these views may continue to evolve, but the great majority deferred to the senior custodians.[1526] In reaching this conclusion, Stewart did not seem to have the same difficulties as Mathews in Hindmarsh, nor did he question why physical impacts would damage sacredness, but accepted the beliefs and the logic at their face value. However, his analysis does go beyond mere issues of sincerity as he also applied tests as to whether there was such

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[1520] Wootten, *Junction Waterhole Dam*, above n 1218, at [7.1.13]. Wootten has subsequently maintained that the task under Indigenous heritage legislation is not about judging whether an area is sacred or beliefs are right or wrong: Wootten, 'Resolving Disputes', above n 1118.

[1521] Past inconsistencies were noted by Wootten but these were said to be based on confusion as to the location in question and the unsatisfactory nature of the consultation: Wootten, *Junction Waterhole Dam*, above n 1218, at [7.7.2]–[7.7.4]. Tickner, the Minister in question, said that he had not met one Aboriginal person supporting the dam: Tickner, above n 1408, at 262.

[1522] *Chapman v Luminis (No 5)* [2001] FCA 1106 at [392].

[1523] *Chapman v Luminis (No 5)* [2001] FCA 1106 at [391].

[1524] In Chapter 16.

[1525] Stewart, *Kakadu Conservation Zone Report*, above n 1358, chapters 3 and 4. See also Resource Assessment Commission, above n 217.

[1526] Stewart, *Kakadu Conservation Zone Report*, above n 1358, at [3.22] and [4.17].

a "tradition" and took into account matters such as historical records and the fact that the majority viewpoint was supportive of the custodians or deferred to them.

Questioning logic has extended to challenging beliefs about the adverse consequences of desecration by using evidence where there has been past desecration or damage with no resulting disaster. The arguments have been that if no one was struck down by past damage, then there is no basis for believing it will happen in future if a development proceeds. Hal Wootten in his report under the *ATSIHPA* on the Junction Waterhole application noted that the applicants believed that destruction of sites would lead to devastating social consequences especially to all women. He warned, however, against the tendency of Europeans to trivialise Aboriginal beliefs by treating such fear of consequences as their essence.[1527]

The above cases illustrate differences between assessors of significance and desecration in Australia, even under the same *ATSIHPA* legislation. Perhaps many cases accepted significance simply on the basis of sincerity because that has been the orthodox position put by senior elders who are easily considered the most authoritative and there has been no real conflict. Where that was missing, as in the Hindmarsh situation, some assessors have been more critical and have sought to introduce tests of logic, corroboration or weight of authority in assessment of the sacredness of an area or threats to it. The legitimacy of such tests for the subject matter is discussed in the next sub-section.

USA

Examples from the USA are limited because the legislation is largely procedural and litigation has tended to turn on issues of failure to take certain steps or consider certain issues rather than requiring a determination of whether something is in fact of significance.

One illustration for the extrapolation category though can be found in *Narragansett Indian Tribe v Warwick Sewer Authority*.[1528] The case concerned a sewer construction project which the Tribe said would desecrate ancestral burial areas. The sewer authority sought to proceed without paying for monitoring in an area where they

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[1527] Wootten, *Junction Waterhole Dam*, above n 1218. See also Wootten, 'Resolving Disputes', above n 1118, where he criticised the view that a belief is in some sense disproved by showing that people have flouted beliefs in the past with no consequences.

[1528] 334 F 3d 161 (1st Cir, 2003).

believed archaeological remains and objects were unlikely to exist.[1529] On appeal from the District Court which refused the injunction to stop the works, the Court of Appeals found that the evidence for burials in that area was "gossamer thin" and there was no compelling reason to believe they existed but only vague and uncorroborated testimony. The conclusion was that there were no relevant eligible historic properties for the purposes of the *NHPA*. There was no discussion in that case that the belief about the area containing burials was a belief that could make the area of historical significance, even if there were no actual burials.

The guidelines issued by the National Park Service[1530] have said that the Euro-American society tends to emphasise objective observation for evaluation but that this does not apply to traditional cultural properties. An example given was that the belief that ancestors emerged from the earth at a place may contradict Euro-American science as to where their ancestors came from. Such cases needed to be assessed from the point of view of those who ascribe significance to those places. The guidelines said that this does not mean beliefs cannot be questioned or subjected to critical analysis, but they cannot be rejected on the basis of being inferior to one's own. This suggests that such matters should not be treated in the same way as other matters in the extrapolation category based on historical facts which can be disproved. The extent to which beliefs are able to be subjected to critical analysis, however, is unclear. Obviously there are places which have been determined at agency level to be a place of significance because of religious beliefs about the place.[1531] The case law discussed above about the need for evidence and disclosure of information,[1532] however, has suggested that mere assertions, no mater how sincere, are not sufficient in the USA either.

Another example of the use of scientific fact to reject assertions of desecration in the extrapolation category is the 1987 geothermal energy permit case of *Dedman v Board of Land and Natural Resources*,[1533] a religious freedom case. The allegation was that the project would desecrate the body of the goddess Pele present in the Kilauea Volcano. The Board had made a finding, approved of by the Supreme Court of Hawaii, to the effect that there was no evidence that the tapping of the geothermal heat source would diminish the eruptive nature of the Volcano and therefore there was no objective

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[1529] This was after re-routing the project to avoid some areas where archaeological objects had been found.

[1530] National Park Service, *Bulletin 38*, above n 1028.

[1531] The National Park Service, *Bulletin 38*, above n 1028 also gave examples of such places associated with spirits and gods which were significant for factors that were religious (as long as there was secular significance like cultural significance as well.)

[1532] See in 17.4.4 above under confidentiality.

[1533] 740 P 2d 28 (1987). This was referred to in Part B at Chapters 6 and 9. The opinion of the Court was delivered by Lum CJ.

danger to the free exercise of religion. In this way, the Court rejected mere assertions of belief that the sacredness of the area would be desecrated and applied an objective test based on what was said to be the effects of tapping the geothermal energy.[1534] A similar approach was taken in another case by the Federal Energy Regulatory Commission which made a finding that a hydroelectric project would enhance water flow in the area said to be sacred and would thus increase the amount of mist which the Snoqualmie people said was essential for their religious experience. This potential improvement in conditions for religious practice was used as a factor favouring the project in balancing that against claimed religious burdens. The 9th Circuit Court of Appeals would not criticise this analysis and found it was a proper weighing process and not arbitrary nor capricious.[1535]

17.5.3 The Dangers of Using Rationality and Orthodoxy in Objective Tests of Sacredness

The previous section suggested that assessments of spiritual significance when dealing with metaphysical issues often raise issues of sincerity or genuineness of the beliefs but frequently also raise additional issues of logic, rationality and orthodoxy.

Logic

As illustrated above, some cases have in effect required that beliefs be logical according to Western secular thinking or legal reasoning. This approach has been less controversial in the case of what I have termed the "extrapolation category". In such cases, assessors have assumed that, if the burials or other historical bases for the sacredness cannot be proven, the area cannot be of the perceived significance. This assumes a logic that is not necessarily required by religious belief. In the Indigenous sphere, the US National Park Service's Guidelines referred to above[1536] show that, although beliefs about the place of emergence of a tribe could be disproved by showing historical records of where they really came from, that was not relevant to the significance ascribed to the places by the tribe. There are also, for example, numerous Christian examples of relics or places said to be sacred and of significance to adherents on the basis of the tradition of the relevant saint or reputed event.[1537] The fact that these cannot be proven to be the actual relics of the relevant saint or the

[1534] Ibid at 33.
[1535] *Snoqualmie Indian Tribe v Federal Energy Regulatory Commission,* 545 F 3d 1207 (9th Cir, 2008) at 1219.
[1536] See 17.5.2 under USA.
[1537] Such as places said to be the birthplace or burial place of Jesus Christ or of various saints.

actual place where the event took place, or are even most unlikely to be so, appears to be irrelevant to the significance of the place or its perceived sacredness to those who believe in it.[1538] Perhaps the recognition of such places, including such Indigenous places, by the public heritage system is based on a kind of historical significance arising from what are obviously only legends[1539] but are nevertheless valued for the social or cultural impact of those legends. In such cases, the significance is not, and is not assessed as, a matter of religious significance to a particular community.

The use of tests of logic or other forms of Western empirical or analytical reasoning for the “mythical category” would seem even more tenuous. The inappropriateness of such an approach to assess religious belief is obvious and has been noted by commentators,[1540] some of whose criticisms in relation to Indigenous sacred places are discussed below. In particular, the concern has been voiced that rejecting religious beliefs of Indigenous peoples after putting them through the scrutiny of Western logic is to de-legitimise such beliefs.[1541]

Hal Wootten in his Junction Waterhole report[1542] made a point of taking to task the application of a Western form of analysis to Indigenous sacred places. He noted that Western civilisations have long been accustomed to the notion of traditions as recorded and authenticated in written texts and, more recently, to their being interpreted and their correctness tested in a rationalist manner in the light of results of historic and scientific inquiry. This was due to Western notions of knowledge as objective and scientific, rather than Aboriginal notions of knowledge deriving from authoritative statements by a person with traditional authority to define the knowledge. He commented that it was not easy for those who have grown up in this Western culture to understand and empathise with traditions communicated by oral narrative, song, art and dance and having an authority quite independent of historical scientific and

[1538] This is not to say that there are likely to be differences of viewpoints within the Christian tradition, with perhaps the official “line” being those set by the leaders of the churches which may differ markedly from various expressions of popular piety.

[1539] Some examples that spring to mind include the many places in the United Kingdom associated with Arthurian legends or legends associated with the arrival in England of the Biblical Joseph of Arimathaea. Places like Mount Olympus in Greece, reputed to be the home of Greek gods, may have a similar heritage value.

[1540] Some comments on these issues in relation to a non-Indigenous but minority religious context include those by Bradney, above n 103, who gave some examples of how British courts have treated various unfamiliar religious beliefs as irrational due to a failure to understand or give legitimacy to the believers’ world-views. Similarly, Malik, ‘Faith and the State of Jurisprudence’, above n 80, has discussed the fact that faith has its own reasons internal to the tradition which are not amenable to standards of proof and evidence in reason-based analyses used by the legal system. See also the Introduction in Peter Oliver, Sionaidh Douglas Scott and Victor Tadros (eds), *Faith In Law: Essays in Legal Theory*, (2000), where the editors note that faith has its own source of explanation and justification and provides its own structure to action and belief.

[1541] See Irene Watson, *Indigenous Peoples Law-ways: Survival Against the Colonial State,* Queers for Reconciliation <http://www.queers4reconciliation.wild.net.au/law-ways.htm>.

[1542] Wootten, *Junction Waterhole Dam*, above n 1218, at [7.1.10]–[7.1.13].

rationalist scrutiny. He stressed that the issues should not be whether sites were important judged by the norms and values of our secular culture or our religions, but whether they were important to Aboriginals in terms of their norms and values of their traditional culture and beliefs. The task as he saw it was to respect beliefs that were genuinely held.

Michael Ross in Canada gave the example of the trial judge's discounting of mythological evidence in *Delgamuukw*[1543] and the tendency to think that if the First Nations got the grounds of the sacredness wrong, then they must be wrong about the sacredness of the place. He recognised this as a problem with assuming, as one would in normal Western legal reasoning, that the sacredness is based on the ground for its sacredness.[1544]

Rod Lucas has pointed out that the Hindmarsh Island dispute and the resulting Royal Commission showed up the two different forms of anthropology, highlighting the different forms of interpreting and assessing significance. The contrasts were between the museum's values of collection and textual analysis of material, which was amenable to legal inquiry, with the academy's contrasting view of epistemology based on social relations and negotiated disclosure of sensitive information.[1545] He noted that under the first approach, what was more important was the empirical testing of the truth of a belief rather than what it means to those who hold it. Hemming too saw this as favouring a "traditionalist understanding of culture".[1546]

Neil Andrews was highly critical of the approach used by the South Australian government and the Hindmarsh Island Royal Commission for finding fabrication about sacred places in circumstances when such an inquiry into beliefs would usually be regarded as an infringement of freedom of religion. He saw this approach as threatening the principle of freedom of religion by placing rational ideologies ahead of spiritual beliefs.[1547] He has pointed to the fact that the *ATSIHPA*,[1548] however, does not speak in terms of spiritual beliefs or religions, even though this is what is commonly understood to be in issue, but uses the more neutral terms like "tradition".[1549] His analysis suggests that the heritage legislation is treated as "secular" even when it deals

[1543] See discussion in 17.4.4 above. As mentioned, the Supreme Court in *Delgamuukw* noted that oral histories were not primarily about objective facts but how people see themselves.
[1544] Ross, above n 24 at 21–23.
[1545] Rod Lucas, 'The Failure of Anthropology in the Hindmarsh Island Bridge Case' (1996) 19(48) *Journal of Australian Studies* 40.
[1546] Steve Hemming, 'Oral History, Native Title and Hindmarsh Island' (1998) 20 *Oral History Association of Australia Journal* 26.
[1547] Andrews, 'Dissenting in Paradise', above n 1240.
[1548] As outlined in Chapters 13 and 14 the same would apply to most Indigenous heritage legislation.
[1549] In Andrews, 'Illegal and Pernicious Practices', above n 1299.

with religious beliefs and that such a secular approach of the public heritage model is inappropriate for religious belief. One of his conclusions is that the threat to religious freedom in a secular society is often not intolerance but "indifference or hostility bred of ignorance and absence of religious knowledge or experience".[1550] Ross too has suggested that the problem is that Canadian judges are "functionally secular" and tend to take a sceptical stance on religious claims.[1551]

A different slant on secularity, however, has been put by Hal Wootten in posing that it was easier for a secular system to make decisions as to the sacred, and to negotiate these, than for a system committed to a particular view of the sacred, because the former does not require a judgment of the beliefs but respects beliefs as part of human identity.[1552] This presupposes though that the secular system is not itself committed to particular beliefs on an empirical or rational view of the world, which is in fact the problem noted by the approaches in the Hindmarsh situation and other case studies referred to above.

Thavaseelan[1553] has seen a problem with assessment methods that lie within the empiricist model and are thus unable to handle religious concepts. Such a method equates the unprovable with the inauthentic and examines truth rather than the meaning of a tradition. She saw the need for a separation of law and religion so as to accept the validity of the beliefs and argued that law and rational dialogue should not be privileged over other ways of knowing. Others have noted examples of truth in religious thought not being about objective facts but in the meaning of stories.[1554]

Maddox too[1555] has pointed to the naivety or religious ignorance of courts and commissions in applying a narrow Western Protestant view of what constitutes religious belief.[1556] She has pointed to the fact that religious belief in something is not the same as assenting to the factual or objective truth of something and is thus not dependent on its factual existence for its authenticity. Maddox noted that religious beliefs have their own internal logic which connects them to a system of thought, but they do not gain support from any form of logic and cannot be logically explained.[1557] In

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[1550] Ibid.
[1551] Ross, above n 24, at 156.
[1552] Wootten, 'Resolving Disputes', above n 1118.
[1553] Thavaseelan, above n 1418.
[1554] This was said of the Yarralin in Rose, 'Ned Kelly', above n 1273. These issues have also been raised in Christian religious contexts too, see, for example, Marcus Borg, *The Heart of Christianity* (2003) chapter 2 discussing the different Christian concepts of faith and belief.
[1555] Maddox, 'What is a "Fabrication"?', above n 615; Maddox, 'Religious Belief' above n 1518; Maddox, *For God and Country*, above n 12.
[1556] She described the Protestant approach which valued doctrine and belief as an activity of the mind, which has led people in the West to assume that this is what religion is about.
[1557] Maddox, 'Religious Belief', above n 1518.

her view, if the subject matter of the legislation is to include spiritual significance, decision makers need to understand how such religious beliefs operate and, in effect, deal with them as such.[1558]

The reference in Maddox to an internal logic of religions may raise the question of appropriateness in at least applying that logic, otherwise one might be writing a blank cheque for any crazy and idiosyncratic beliefs to be protected. It could be said, for example, that the test of objectivity under the *ATSIHPA* as found by Justice Mathews was only to be based on what the tradition prescribed.[1559] The argument for applying an internal logic had been put particularly in relation to the debates thrown up by Hindmarsh Island and Coronation Hill applications for protection, that is, the need for some kind of rigour and consistency to analyse the cultural logic of a statement rather than blindly accepting all that is asserted.[1560] James Weiner, for example, has suggested that it is not necessary to examine the rationality or truth of a belief but assess it empirically by observable external factors such as ritual practice or behaviour.[1561] It could be said, though, that this assumes the beliefs do in fact involve observable practices or behaviour, because if they do not, it would be unfair to create any such presumption that had to be disproved.[1562]

Yet even the argument for some consistency of logic is a dangerous road to take when it comes to religious beliefs as it could have the same effect as a requirement to protect only beliefs that are internally consistent or else judged to be orthodox. The “blank cheque” can be assessed at the stage of balancing interests and whether protection should be granted or overridden. Such a decision could balance respecting the religious feelings of a small minority against other interests. This would not require testing the validity or consistency of the beliefs in order to determine whether a place or thing is of significance in the first place.

[1558] Ibid, but put more colourfully as assessors needing to deal with the spiritual significance and with theological meaning or “get out of the game”.

[1559] That is, it did not require proof of actual sacredness and actual adverse effect.

[1560] See, for example, Brunton, *Blocking Business*, above n 1270; Brunton, ‘Credibility of Australian Anthropology’, above n 1416; Brunton, ‘Hindmarsh Island and the Hoaxing of Australian Anthropology’ (1999) 43(5) *Quadrant* 11; Brunton, ‘Mining Credibility’, above n 1236. Tonkinson has suggested that all good anthropology is creative, but must rest in an interpretation that “reads back from data-base” and permits its validity to be tested, by such methods as cross-checking and applying criteria for assessment: Tonkinson, ‘Anthropology and Aboriginal Tradition’, above n 1270. Similar views have also been put by journalist Chris Kenny in relation to Hindmarsh Island, see, for example, Chris Kenny, ‘Empowerment’ (June 1995) *Adelaide Review* 3. See also Austin Gough, ‘Hindmarsh Island and the Politics of the Future’ (June 1995) *Adelaide Review* 8.

[1561] Weiner, ‘Religion, Belief and Action’, above n 615. This was also picked up by Michael Brown, above n 25.

[1562] This is reminiscent of the requirement in the religious freedom jurisprudence for religious activities rather than merely a belief in sacredness, discussed in Chapter 6.

Orthodoxy

Similar issues are raised by the requirement of religious orthodoxy. This limits the significance to what is significant to the majority who ascribe to a particular religion. The risk is that external assessors are the ones who decide what is orthodox. Such an approach has at least in theory been eschewed by the courts in religious freedom cases.[1563]

Orthodoxy based on the authority of religious leaders is not in itself contradictory to Indigenous beliefs. It has often been pointed out that in Indigenous traditions the authority and legitimacy of the belief comes from the authority of the elder recounting the tradition.[1564] Chalconer has argued that Aboriginal owners and custodians should be given the same respect and dignity to speak for their religion as other spiritual leaders like rabbis, Moslem clerics, bishops and the like.[1565] However, there may be a lack of a clear leadership structure and the need for an external assessor to determine who is an elder or entitled to speak for a religion.[1566] As the religious freedom cases show, this is in itself a difficult matter which courts are ill-equipped to judge.

[1563] See 4.2.3 and discussion above in n 261.

[1564] Stephen Pritchard, above n 1418; Woo, above n 360; Wootten, *Junction Waterhole Dam*, above n 1218. The people with the knowledge are the final authorities on matters within their expertise: see Ronald and Catherine Berndt, *World of the First Australians,* above n 146. See also the evidence mentioned in *Greensill v Waikato Regional Council,* (Unreported, Planning Tribunal, W17/95, 6 March 1995) above at 17.4.3. This was also the position taken by the tangata whenua in the link road case (referred to above at 17.4.4) of *Takamore Trustees v Kapiti District Council* [2003] 3 NZLR 496, 509 where Young J noted that the tangata whenua believed that the assertion of wahi tapu status by those with authority is the end of the matter and must not be further questioned.

[1565] Chalconer, above n 963.

[1566] There are, of course, recognised spiritual leaders in some Indigenous traditions. Deward Walker, in his discussion of core features of traditional Native American religions, identified one feature as leadership by shamans who guide people in the conduct of ritual life: Deward Walker, above n 169. New Zealand Maoris have been said to have tohunga who are equivalent to priests and usually have gifts in a particular area: Best, above n 151. Australian Aboriginal groups have law men for certain purposes and others with healing or other gifts. However, there is often no prescribed method of accreditation of such leaders and sometimes no clear lines of authority: Australian Law Reform Commission, above n 149; David Turner, 'Aboriginal Development in Theoretical Perspective: From the Heavens Down or the Ground Up' in Robert Tonkinson and Michael Howard (eds), *Going It Alone* (1990). Vine Deloria has commented that the authorisation comes from higher powers, not through certification by a formal organisation: Deloria, 'Sacred Places and Moral Responsibility', above n 182. While this is also the view of the calling of Christian religious leaders, the fact is that in the latter case, but not in most Indigenous situations, there is a formal institution which represents the religious community and formally authorises the leaders. Some traditions may have ceremonies to mark the passage to a certain status, but sometimes it is a matter to be determined by clans and family traditions: Swan, *Sacred Places*, above n 9. Indigenous exceptions may include the Pueblo tribes with their defined clans and system of attaining priesthood: Swan, *Sacred Places*, above n 9.

It has also been suggested by Bolt and Long that, at least for Canadian First Nations, traditional values emphasised consensus and non-hierarchical decision making and that elders or chiefs did not rule by coercive authority but provided advice and information: Menno Boldt and Anthony Long, 'Tribal Traditions and European-Western Political Ideologies' (1984) 17(3) *Canadian Journal of Political Science* 537. In this viewpoint, sanctions and enforcement were spiritual rather than having the equivalent to a sovereign coercive power. This would be consistent with a lack of clear institutions establishing lines of accredited or sovereign leadership.

17.6 The Public and the Private in Assessments of Significance

In past chapters, there have been arguments that the heritage legislation should only protect long standing traditions and discrete areas rather than whatever is believed to be sacred. In this chapter, we have seen arguments which go further to require beliefs to be reasonable, publicly known, empirically observable or provable in order to merit protection, rather than assertions of beliefs based on subjective feelings or experiences, even of the sacred. All of this points to a system which protects and uses criteria pertaining to public or "nationalised" heritage rather than to beliefs about sacredness. As Horwitz has argued in a general religious freedom context, subjective beliefs seem to be acceptable in the private sphere, but once they enter the public sphere, they are subject to claims of objectivity and must use the language of secularism and rationalism.[1567]

This can be seen in the clear contrast with the religious freedom jurisprudence developed for the private sphere, particularly in the US and Canada. In that situation, the courts have been clear about the inappropriateness of deciding issues of orthodoxy or the validity of religious beliefs. Part B has already highlighted the problem stemming from a highly privatised view of religious beliefs, but one consequence is that they are recognised as necessarily subjective and their content is not able to be assessed or determined by objective or empirical means nor by application of logic.

The problems of treating Indigenous sacred places as public and in the same way as secular heritage, rather than as matters of religious beliefs, have been briefly flagged by a few commentators as well. Joanna Bourke in her analysis of the Hindmarsh Island situation[1568] has been critical of the way in which Aboriginal religious knowledge, something which she said is normally regarded as highly private, is treated as public property. She said that the question of whether such matters are a suitable object of legal scrutiny or should be public property remained unasked. Bourke linked this approach to Aboriginal religious issues with the pervasive state intervention in every sphere of Aboriginal life. The issues she has raised go beyond paternalistic management of or discrimination against Aboriginal people, but also get to the heart of the problem of the public heritage model which is premised on such information being *for* the public.

[1567] Horwitz, above n 249.
[1568] Bourke, above n 415. Bourke's comments have been referred to favourably by Taubman, above n 1435.

Deborah Bird Rose[1569] has noted that struggles against oppression have often found their expression in redefining what had previously been thought of as private matters into matters of public concern. However, she too concludes that this has not overcome the separation of the public, private and secret domains. In the public domain, the presumption is in favour of transparency and testing. These are contrasted in the private sphere with rights to privacy, including freedom of religious expression, where the presumption is that these should not be invaded. In the public sphere, she said that there is an implied sense that the worth of sacred mysteries can be tested or recognised without cultural knowledge, which leads to degrading debates about the meaning of Aboriginal culture. She also pointed out that this is a problem of bipolarity whereby what is not secret is assumed to be public, whereas in fact there are places that are restricted but neither public nor private.[1570]

This all highlights the problem with a tight separation of spheres and the need to transcend the divisions and move beyond heritage significance being necessarily treated as secular and objective and religious beliefs being private. The possibility of such a synthesis is discussed in the next part.

[1569] In her article Rose, 'The Public, the Private and the Secret', above n 1441.
[1570] Her examples include defence installations and the tabernacle in a Catholic church, closed to all but initiates.

PART D – CONCLUSION

Chapter 18 – Beyond Private Religion and Nationalised Public Religious Heritage: Synthesis?

18.1 Summary

Part B explored the ways in which the dominant religious freedom models were predicated on religion being a private matter and were thus ineffective in protecting Indigenous sacred places. The private sphere assumptions were seen in the way the model protects the individual's autonomy to believe and act but not the places or objects of belief which give meaning to the actions.[1571] The private nature assumed for religion was seen further in the way protection was limited to typical private sphere activities like worship but not economic activities,[1572] or further still, especially in the USA, to only protecting against coercion of the conscience.[1573] In USA and Australia the religious freedom model is even more ineffective in protecting Indigenous sacred places because it does not extend to neutral and generally applicable or other "public sphere" legislation that is not intended to intrude into the private religious sphere.[1574] Within the private sphere, religious beliefs are allowed to be irrational, idiosyncratic and non-justiciable, but the sphere has been construed narrowly.[1575] The underlying rationale is to avoid intruding into the property rights of government or other individuals.[1576]

Part C examined the other side of the coin, where religious significance of places is protected only where it conforms to principles of heritage designed for the public sphere. Indigenous heritage in such cases is often protected for the benefit of the wider public rather than specifically for Indigenous peoples.[1577] This has led to pressure to protect discrete and small sites[1578] or to protect places for their antiquity,[1579] like museum pieces for the collection, rather than what is significant for living faith today. The assessment processes, in which representatives of the wider public external to the

[1571] In Chapter 6.
[1572] In Chapter 7.
[1573] In Chapter 9.
[1574] In Chapter 10.
[1575] As seen in the fate of the centrality doctrine in Chapter 8.
[1576] In Chapter 11.
[1577] See Chapter 14.
[1578] See Chapter 15.
[1579] See Chapter 16.

Indigenous belief system "objectively" decide on significance and damage to it,[1580] further entrench the model of neutral and generally applicable (and hence secular) public heritage.

In both Parts, there were some possible ways forward, perhaps in a new legislative form, to mitigate each effect of the public–private dichotomy, some of which are mentioned below.[1581] However, all of these would be piecemeal measures if the underlying philosophies remained entrenched in the public-private dualism in ways summarised in Chapters 4 and 12. This concluding chapter looks beyond the symptoms of the dichotomy to seek a more holistic model.

The introductions to Parts B and C hinted at philosophical developments to concepts of human rights and heritage in the context of Indigenous cultures. In the post-modern culture, the walls between public and private have been highly discredited, even though this thesis demonstrates that the existing legislation and case law has not caught up with such changes. Indigenous groups have moved human rights concepts beyond private autonomy to rights to cultural survival and have moved beyond notions of "the heritage of all" to rights to control heritage in accordance with the beliefs and traditions of the people whose heritage it is. The re-framed "universal" right is to cultural survival in its diversity, and cultural diversity itself is heritage to be protected. This potential synthesis may be one way of overcoming the conceptual dualism that pervades the dominant legal models. The next two sections of this chapter canvass these developments and the various alternatives which have been suggested as means to overcome the problems of public and private assumptions.

As foreshadowed, due to the narrowness of this thesis, no comprehensive legal paradigms or drafts of legislative solutions can be outlined. Most of the specific difficulties from the public–private dualism, and some ways to overcome those, have already been discussed in Parts B and C. This concluding chapter is limited to summarising some of the proposed changes to the conceptual framework and some conditions highlighted in Parts B and C that need to be satisfied in any legislative change.

[1580] See Chapter 17.
[1581] In 18.4 below.

18.2 Beyond Private Autonomy in Human Rights to the Right to Cultural Survival and Diversity

Part B has outlined the problems of a limited interpretation of human rights shaped by the protection of individual autonomy and narrow views of religion as private. The individual rights model has had many critics who have decried its unsuitability for Indigenous values.[1582] One might extend this criticism to its unsuitability for the many Western religions which also see faith as being about relationship of the community and the world with the sacred rather than private and individual rights.[1583] Discussed below are some alternatives to the individual rights model of religious freedom that have been suggested.

Collective Rights

Commentators, such as Richard Herz[1584] and Robert Clinton,[1585] have referred to collective or group rights as more appropriate for Indigenous communities than individual rights, and this is the basis of the international Indigenous rights understandings.[1586] In a general religious context, others have argued that religious

[1582] Many of these have already been referred to in Part B and others are set out below. In addition, Robert Ward, above n 152, suggested that the individual rights model is only suitable for portable proselytising religions, and Paul Havemann in a different context has also pointed to the difficulty that Indigenous groups have when they have been forced to used the language of rights, describing this as the "interpretive straight jacket for the imposed political–juridical system", in Havemann (ed), above n 11. The anthropologist Theodoratus in the *Lyng* case, as cited by Beezer J dissenting in the 9th Circuit Court of Appeal judgment at 795 F 2d 688 (1986), at 699 and Brennan J in the Supreme Court at 485 US 439 (1988) at 459, described the task of framing the religious freedom claims as an exercise in forcing Indigenous concepts into non-Indigenous categories. Beaman, above n 29 also criticises the formal equality implicit in a rights-based model and notes that there are boundaries beyond which rights language will not offer protection.

[1583] For instance, the individual rights model has been said to be unsuitable for the communal nature of religion and identified as a secular concept: see von Heyking, above n 76. The unsuitability of the private autonomy model for religions generally is the theme of the thesis by Sinacore-Guinn, above n 17 discussed further below.

[1584] In Herz, above n 661. Herz has pointed to the failure of the US individual rights jurisprudence to protect Indigenous sacred places as they are given little weight and countervailing interests prevail over them. He has placed the blame on the individualistic and utilitarian nature of the Free Exercise Clause jurisprudence and argues rightly that the protection of individual rights is not an end in itself but to promote the welfare and dignity of individuals. Herz points to the failure of the judiciary to value a communal perspective or to see this as a qualitatively different assertion of a right. As far as religious freedom claims are concerned, his view is that a group rights perspective may give at least a competing consideration and a quantitative weight to the Indigenous group's rights. This might have the effect of bolstering one side of the equation by pointing to the rights of a community rather than a single individual, but may only be a difference of quantity and discretion rather than something that addresses the concerns of Part B conceptual issues. At the end of the day, Herz sees the remedy coming from specific legislation providing group-based exemptions to generally applicable laws.

[1585] Robert Clinton, 'Indigenous Rights as Group Rights' (1990) 32 *Arizona Law Review* 739 has also pointed to the need for the law to recognise group or collective rights which are held by the social or religious group rather than the present jurisprudence that sees rights as belonging only to individuals. This is on the basis that Indigenous people see legal rights as deriving from tribal associations and traditions.

[1586] Such as in the *Declaration on the Rights of Indigenous Peoples*, above n 437, in outlining the (collective) rights of Indigenous peoples. See Hartley, above n 252 who argues that the Declaration overcomes some of the problems inherent in the individual human rights models in the Australian bills of

freedom needs to protect autonomy for religious *groups*.[1587] This is undoubtedly the case. However, it requires more than the substitution of group autonomy for individual autonomy to address the conceptual problems identified in Part B,[1588] so long as the community continues to be seen as part of the private domain.[1589]

Cultural Diversity Models

A more significant alternative is to link collective rights to the survival of diverse cultures,[1590] which may extend protection to whatever is essential to such survival, such as sacred places. Differences have emerged, however, in how to frame a cultural diversity model.

Howard Vogel in his analysis of the *Lyng* decision has been critical of the use of the individual rights model and has pointed to the root of the problem being a clash of cultures. He saw the remedy as embracing different master stories and finding ways to accommodate the conflict rather than choosing between the competing stories.[1591] On the one hand was the master story of the dominant culture, which in the *Lyng* case was treated as one about property rights, and on the other was the Native American story of the deep cultural significance of a place to their community. Vogel criticised the courts for choosing the dominant, property-based master story implicit in the rights model over the Native American one.[1592] The solution proposed by Vogel was to honour and

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rights legislation. Megan Davis, 'Declaration on the Rights of Indigenous Peoples', above n 252 also notes that the rights discourse does not readily extend to the communal nature of Indigenous society and that the Declaration is a challenge to this discourse. See also Dalee Sambo Dorough, 'Human Rights', in UN Permanent Forum of Indigenous Issues, *State of the World's Indigenous Peoples*, above n 11, 190–191.

[1587] See Friedman, above n 253; Gedicks, 'Religious Group Rights', above n 109.

[1588] For example, group rights to carry out collective activities will still not overcome problems of lack of protection of the place, issues of centrality, classification of activities as religious or neutral laws. A similar point is made by Turpel, above n 248, who, in relation to the argument that the *Canadian Charter* recognises some collective rights, notes that these still fall within the same individualistic paradigm. Gordon Christie, 'Law, Theory and Aboriginal Peoples' (2003) 2 *Indigenous Law Journal of University of Toronto* 67, speaking of Aboriginal native title rights, also notes the problems caused by the law treating Aboriginal communities as if they were individual rights holders.

[1589] See 2.2.1 and 2.2.3 above concerning religious organisations as part of the voluntary private sphere. Sinacore-Guinn, above n 17, has described how communities and their membership are seen under liberal philosophies as a part of the private domain. Malik, 'Minority Protection', above n 248, also notes how the liberal cultural contract assumes that the public sphere is a neutral space which makes no reference to issues of identity or culture. In Malik, 'Faith and the State of Jurisprudence', above n 80, she notes that, under the Rawlsian liberal view of procedural justice, communal attachments are relevant to the private rather than public sphere.

[1590] See, for instance, Darlene Johnston, above n 20 who argues that collective rights theory sees the right to self preservation as a foundational right. Turpel, above n 248, notes that while this is often couched in the traditional language of rights, what is at stake is larger than rights and is essentially a demand for cultural difference. Carpenter has put the argument that sacred sites need to be analysed in the language of "peoplehood" which in effect seems to be an argument for cultural survival of the sub-nations of peoples: Kirsten A Carpenter, 'The Interests of "Peoples" in the Cooperative Management of Sacred Sites' (2006–7) 42 *Tulsa Law Review* 37. For an overview of the history of minority group rights, see Sigler, above n 253.

[1591] Vogel, above n 253.

[1592] Vogel, above n 253, has even levelled this criticism at sympathetic judges and commentators, such as Brennan J and Brian Brown and Robert Michaelsen, for relying on the dominant model and only seeking to

respect the competing stories rather than choose between them. He saw the resulting diversity as a healthy scenario. The problem is that Vogel did not identify how the courts can honour both stories in all circumstances or a legal principle that can accomplish this.

David Sinacore-Guinn has sought to use Charles Taylor's idea of deep diversity[1593] to take religious freedom out of the individual rights model and out of a segregated private domain.[1594] He re-framed religion as "culture" in a model that sees the preservation of cultures and cultural diversity as a public good rather than a private quirk to be tolerated as long as it stays in its own private domain. In doing so, he saw religious communal values being balanced against values of the dominant culture as competing public goods. This approach has the effect of not masking the dominant views as neutral values for a public sphere in which minority religious views have no place.[1595] This "religion as culture" model presented an alternative philosophical framework for dealing with religious issues arising from the conceptual problems identified in Parts B and C, though it did not purport to set out a new legal framework.

Legal pluralism, in various forms, has been suggested as a solution.[1596] Burton and Ruppert[1597] have advocated trust-based arguments for Indigenous sacred places rather than simply perceiving spiritual interests in exclusive religious freedom terms. In doing so, they have also pointed to the failure of the courts to recognise a constitutional legal pluralism based on different understandings and interpretations of the same constitutional documents.[1598] Others, such as Mary Ellen Turpel, have argued that it is necessary for Aboriginal peoples to be seen as having a different culture and legal system and to abandon the approach of universality of rights.[1599] Turpel too has pointed to the inadequacy of the individual rights model, as one dominated by a Westernised discourse with its property-based categories, thus unsuited to Indigenous

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make exceptions or accommodations within such a model but not challenging the whole approach. This is said to give victory to the Native Americans but only on Euro-American terms.

[1593] This was developed in the context of multiculturalism in Quebec rather than anything specifically Indigenous: see, for example, Charles Taylor, *Multiculturalism and the Politics of Recognition* (1992).

[1594] In Sinacore-Guinn, above n 17. See also Guinn, *Faith on Trial*, above n 16. Guinn does not address the issue of Indigenous sacred places but religious freedom generally, especially for minorities. Malik, 'Minority Protection', above n 248, also argues for a common public sphere where different cultures enter into a process of negotiation. She too notes how politics of identity such as that espoused by Taylor takes that debate into the public sphere: in Malik, 'Faith and the State of Jurisprudence', above n 80.

[1595] Perhaps this is also what Vogel is seeking to achieve by the notion of competing master stories.

[1596] In addition to the examples following, see also Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003).

[1597] The trust-based solution is beyond the scope of this thesis which concentrates on protection of places on the grounds of their religious significance as opposed to special duties to Indigenous peoples arising from fiduciary obligations: see 1.4 above.

[1598] Lloyd Burton and David Rupert, 'Bear Lodge or Devils Tower: Intercultural Relations, Legal Pluralism and the Management of Sacred Sites on Public Lands' (1998–9) 8 *Cornell Journal of Law and Public Policy* 201.

[1599] Turpel, above n 248.

values. Others have called for recognition of pluralist systems in the context of Canadian Aboriginal title, whereby Indigenous legal orders are seen as the source of rights rather than having just the one official (Western governmental) source of law.[1600] None of these have clearly articulated how a different pluralistic model would work in practice as a legal method of recognising such things as sacred places. It is one thing to talk about legal pluralism when dealing with groups governing their own affairs and internal issues, but far more difficult when there needs to be an interface between the different systems in a context involving competing discourses and rights of different groups. The latter raises jurisprudential difficulties as to which system should apply and in what contexts.[1601]

Responsibilities

Kapashesit and Klippenstein, also in a Canadian context, have cavassed the need for a group rights theory which is framed in terms of responsibilities and duties rather than individual rights; they have pointed to this as being far more consistent with the Indigenous concepts of their role in relation to the sacredness of life, nature and the environment.[1602] They too argue for a pluralistic system that recognises such different systems of law. Many others have also highlighted Indigenous notions of responsibilities rather than rights.[1603] Such a notion of responsibility has been said to be the basis of an Indigenous understanding of sacred places. Such places are distinguished from the rest of the land by the *duties* that apply to them.[1604] While this “responsibilities-based” approach may not deal with the issues of *which* legal system applies in direct conflicts between the dominant culture and its values, on the one hand, and Indigenous groups on the other, there may be scope for developing a universal paradigm that moves away from individual (or even group) rights altogether to

[1600] Such as Natalie Oman, ‘The Role of Recognition in the *Delgamuukw* Case’ in Jill Oakes (ed), *Sacred Lands: Aboriginal World Views, Claims and Conflicts* (1998); Christie, ‘Aboriginal Rights’, above n 29.

[1601] In a different context, Darlene Johnston raises a similar question about the lack of a mechanism to adjudicate competing claims arising from group rights and suggests postponement of the development of an overarching mechanism: Darlene Johnston, above n 20.

[1602] Kapashesit and Klippenstein, above n 11.

[1603] See Christie, ‘Aboriginal Rights’, above n 29, who has pointed to the Indigenous visions of responsibilities to family, clan and community as antithetical to the liberal individualist model of rights. Darlene Johnston, above n 20, speaks of the communitarian view which sees one’s identity as defined by attachments and commitments. Turpel, above n 248, has noted that First Nations’ social life is based on responsibilities to creation and to the creator. See also Dorough, above n 1586, at 190; Coombe, above n 31.

[1604] For example, Rodney Bobiwash has said that all land is sacred but what are sometimes referred to as sacred places are distinguished by the use to which they can or must be put. These reflect the responsibilities that must be carried out there and the duties that people assume when they come to occupy them, in Bobiwash, above n 29.

responsibilities and duties for all,[1605] in a way that protects the interests of the Indigenous peoples.

Human Dignity as Public Good

It may not be necessary to go as far as a recognition of legal pluralisms or even a new collective rights theory in order to deal with the more modest questions raised by this thesis. The present concern is the inability even to recognise the significance of sacred places within a principle of religious freedom, by defining the latter in a manner that confines it to the private sphere. This could be overcome by framing the human right as not being limited to individual autonomy to believe and act and not being only about private conscience but also as including all the elements that make the religious belief meaningful. As outlined in Chapter 1,[1606] the need to protect sacred places could be framed as part of a broader view of (even individual) human rights, as part of the respect for human dignity, including at least the survival (if not also the thriving) of any religious identity which is vital to such a sense of dignity. Cultural diversity has been said to be inseparable from respect for human dignity.[1607] The reasons for such protection could draw from the philosophical concepts outlined above, such as, seeing not only the human right to dignity but also the survival of diverse Indigenous cultures, including their religious beliefs about sacred places, as public goods in themselves. Such matters could be seen as more than rights of human beings (individual or collective) but also responsibilities on the whole society to respect and preserve such dignity, subject only to the need to balance public goods in a way which honours as much as possible the values of each of them.

Balancing Public Interests

Many of the paradigmatic issues raised above are also useful to address the competing value systems and thus the type of balancing process required in attempts to protect sacred places in the face of development and property rights. References to alternative legal systems, master stories and preservation of communities and cultures all add

[1605] This also fits with one original basis for a general policy of religious freedom which stems from the individual's perceived higher duty owed to God. James Madison and others, for instance, saw religious freedom as accepting that people had to obey a higher law and the duty owed to God took precedence over the claims of civil society, as outlined in McConnell, 'Origins' above n 68; Gianella, above n 253, 1386; Sandoz, above n 229.
[1606] At 1.3 above.
[1607] See United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/21 (20 November 2009). The linking of human rights and cultural diversity has been clearly made at an international level in various other instruments, including the Declaration on the Rights of Indigenous Peoples, discussed in the next section. See also Dorough, above n 1586, at 194–195.

weight to the Indigenous side of the balance in a way that framing something as an individual idiosyncrasy does not. It also highlights the fact that the dominant Western values are just one side of the ledger. Such recognitions will not in themselves overcome the current political priority of property in any analysis of competing public goods. Dominant value systems of the legislators and judges will inevitably play a role. The advantage, however, of trying to give effect to the various public goods is that the property bias will at least be exposed and discussed as a competing value rather than something that insidiously infects the definition of religious freedom, as demonstrated in Part B.

Statutory Reform

There still may be problems with the legal formulation of “freedom of religion” or, a fortiori, “free exercise” of religion as this language reinforces the cause of action as one of individual autonomy. There will probably need to be a legislative or constitutional redefining of the right unless judges are prepared to read the concepts in a less literal and more purposive way, as for instance the newer international readings discussed in Chapter 6 suggest.

The most direct and obvious solution within the existing Western legal framework in the four countries would be for specific statutes to frame a new form of protection for Indigenous sacred places and other Indigenous religious concerns and for new legal duties and responsibilities.[1608] This was the solution attempted by the later US Bills designed to address Indigenous sacred places.[1609] Such specific legislative protections for Indigenous religions avoid the concerns about the uncertain reach of an all-inclusive religious freedom right that might protect objects of belief in a way discussed in Chapter 6. An argument for special measures for Indigenous religions could be based on the priority principle, that is, that their religions and religious practices were in existence in the relevant countries before the arrival of the dominant culture and its legal system, and, Indigenous peoples, unlike mere ethnic minorities, did not choose to migrate to and accept the prevailing legal status quo.

Most statutory attempts to protect Indigenous sacred places have instead followed the “heritage model” discussed in Part C, which is addressed now before returning to an alternative approach.

[1608] This has been suggested by many such as in Herz, above n 661, and others such as Robert Ward, above n 152; John Gillingham, ‘Native American First Amendment Sacred Lands Defense: An Exercise in Judicial Abandonment’ (1989) 54 *Missouri Law Review* 777.

[1609] See overview in 5.2.2 and especially 6.4.3 above.

18.3 Beyond Public Heritage to Heritage of Relevant Peoples

Reclaiming Heritage: Cultural Diversity as the Universal Value

Part C discussed the prevalence of the universal or at least national view of heritage in defining what qualifies as significant. Here too there have been philosophical movements in relation to the heritage of minority communities or sectors within the wider community. These have taken the thinking beyond merely expanding the concept of “our” heritage to include minorities and beyond merely celebrating communal diversity as part of the national identities. Instead, there has been a growing recognition of the importance of heritage to the particular communities from which it originated and an acknowledgement of their claims to ownership of it. At the international level there has certainly been a cultural nationalist move to assert national or communal ownership of heritage items which had been removed from their country of origin, a removal often justified on the basis that they belong to the common heritage of humankind rather than just that of one nation or group.[1610] In this movement, there is a reclaiming of the heritage as the property of a nation or community. The 2001 UNESCO *Universal Declaration on Cultural Diversity*[1611] is typical of some of the philosophical shifts that have occurred. Rather than particular heritage items being seen as belonging to the “common heritage of humanity”, it is cultural diversity itself that is the common heritage of humankind.[1612] The concept of “cultural diversity” recognises the rights of the cultures from which the heritage originated and the special cultural rules and relationships governing that heritage. There is no requirement for heritage to satisfy common values or universal criteria of significance in order to be protected.[1613] While at the global level the tussles may be between overseas collectors of heritage and the nations from whence the items of heritage came, this translates at a national level to a struggle between the government or wider society and the particular groups or nations within it. The language of universal versus national heritage is thus mirrored in the language of national heritage versus Indigenous or other group

[1610] Patty Gerstenblith, ‘The Public Interest in the Restitution of Cultural Objects’ (2000–1) 16 *Connecticut Journal of International Law* 198 refers to the use of this notion of a common heritage as an excuse for looting, though that is not a correct reflection of the international law principles intended to prevent destruction and plunder. See discussion of some of these cultural nationalist versus cultural internationalist issues in John H Merryman, ‘Two Ways of Thinking about Cultural Property’ (1986) 80 *American Journal of International Law* 831; Derek Gillman, *The Idea of Cultural Heritage* (2006); Cleere, above n 1148.

[1611] UNESCO, *Universal Declaration on Cultural Diversity*, Resolution adopted by the General Conference of UNESCO, 31st sess (2001), being Annexure to Doc 31C/44 Rev.2 (2001) at <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

[1612] In Article 1 of the *Declaration on Cultural Diversity*, ibid, cultural diversity is said to be part of the “common heritage of humanity” to be “recognised and affirmed for the benefit of present and future generations”.

[1613] Though the fact of cultural diversity may itself be universal: see Cleere, above n 1148.

heritage. At the national level, through the concept of cultural diversity, links have been drawn between the protection of cultural heritage and human rights of cultural groups, especially minority and Indigenous groups, to control and own their own heritage.[1614] The earlier discussion of Article 27 of the *ICCPR*[1615] referred to the right to enjoy one's own culture and religion as a recognised part of the human rights of people belonging to minority groups.

The persistent assertions by Indigenous peoples of the right to retain control over their own heritage is encapsulated in such instruments as the UN *Declaration on the Rights of Indigenous Peoples*, a declaration that also affirms in its preamble that cultural diversity constitutes the common heritage of humankind.[1616] The principles behind this notion have been summarised at an international level by UN Special Rapporteur, Erica-Irene Daes, in various reports in which she has highlighted such needs for Indigenous control, stating the principle that heritage belongs to the distinct identity of a people, which is theirs to share, if they wish, with other peoples.[1617] Daes in her reports clearly places the protection of Indigenous heritage in the same field as protection of Indigenous human rights and links control of heritage and the ability to share some aspects of it from time to time as a source of human dignity and value.[1618] It is the preservation of this cultural diversity by maintaining the heritage of Indigenous peoples that benefits all humanity.[1619] Here too is a move to characterise Indigenous heritage as, in essence, more akin to their private rather than public property, to be controlled and disseminated in accordance with their beliefs and traditions, although recognising all the time that Indigenous heritage is more about relationships, responsibilities and identity rather than about anything equivalent to property in the form of a

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[1614] The *Declaration on Cultural Diversity*, above n 1611, for instance, linked cultural diversity with respect for human dignity, implying "a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of Indigenous peoples" (Article 4). See also discussion in Boer and Wiffen, above n 924. This has been described as culture becoming an object of rights claims: Jane K Cowan, Marie-Benedicte Dembour and Richard A. Wilson (eds), *Culture and Rights* (2001), Introduction.

[1615] See 6.2.2 above.

[1616] *UN Declaration on the Rights of Indigenous Peoples* (2007), above n 437. The preamble says that the General Assembly affirms "that all peoples contribute to the diversity and richness of civilisations and cultures which constitutes the common heritage of humankind". See also critique of world heritage by Indigenous voices such as Kim Lawson in Canada, cited in Clavir, above n 931. The repatriation debates highlight many of the clashes between the universalist and the Indigenous ownership approaches: see, for instance, such discussions in Nina Swidler et al (eds), *Native Americans and Archaeologists: Stepping Stones to Common Ground* (1997); Angela R Riley, 'Indian Remains, Human Rights: Reconsidering Entitlement under the *Native American Graves Protection and Repatriation Act* (2002) 34 *Columbia Human Rights Law Review* 49.

[1617] Daes, *Cultural and Intellectual Property of Indigenous Peoples* (1993), above n 31, especially at [24]; Daes, *Protection of the Heritage Preliminary Report* (1994), above n 31; Daes, *Protection of Heritage* (1995), above n 165. Similar themes are explored in works like Guruswamy, Roberts and Drywater, above n 940.

[1618] Daes, *Cultural and Intellectual Property of Indigenous Peoples* (1993), above n 31, especially at [25], [30]; Daes, *Protection of Heritage* (1995), above n 165, especially Principle 4; Daes, *Protection of the Heritage Preliminary Report* (1994), above n 31.

[1619] Daes, *Protection of Heritage* (1995), above n 165, especially Principle 1. See also preamble to UN, *Declaration on Rights of Indigenous Peoples* (2007), above n 437.

commodity.[1620] In this regard, much work has been done in relation to ownership of Indigenous moveable and intangible cultural heritage, which is outside the scope of this thesis.

The philosophical developments in heritage thinking have come to a position similar to the concept of religious freedom covered in the previous section. Cultural diversity, and thus the survival of such cultures, is seen as the universal principle (governing both rights and responsibilities). Putting aside questions of property ownership of items and repatriation debates, this formulation recognises, at least, that as a matter of maintaining the culture and the diversity, the heritage of each group of people needs to be defined according to the culture of each. To some extent this requires judging the significance of the place not from a universalised secular heritage value system but from the norms and values of the Indigenous culture and beliefs.[1621]

As in the previous section's discussion of competing values, legal solutions for reclaiming control over immoveable heritage (Indigenous and non-Indigenous) found in land now vested in third party or government hands are still difficult in the light of the competing property ownership.[1622] None of the four countries provide any recognition of ownership of sacred places by Indigenous people, except through discretionary powers for government bodies to acquire such land and vest it in Indigenous ownership.[1623]

[1620] Daes, *Cultural and Intellectual Property of Indigenous Peoples* (1993), above n 31, makes this point at [26]. See also Guruswamy, Roberts and Drywater, above n 940. A Lockean argument about ownership by the group of the product of its labour, however, has been put in Gerstenblith, 'Identity and Cultural Property', above n 934, while recognising that it is not the same at all as our concepts of individual legal rights.

[1621] As was suggested by Wootten, *Junction Waterhole Dam*, above n 1218 and also in Wootten, 'Alice Springs Dam', above n 1218.

[1622] Daes, in her reports referred to above, clearly includes heritage in the form of sacred places as part of the cultural heritage covered and is equally clear about the vital need for Indigenous control over their traditional territories in order to protect their heritage. The solutions in relation to land in the ownership of other parties were not spelt out clearly in the earlier reports on heritage. In her preliminary report, one recommendation in Principle 31 was that governments should take immediate steps in cooperation with Indigenous peoples concerned to identify sacred and ceremonial sites, including burial sites, and protect them from unauthorised entry or use: Daes, *Protection of the Heritage Preliminary Report* (1994), above n 31. In her final report this no longer appeared as a principle and in her supplementary report there was mention of UNESCO's concern about compilation of a confidential list of sites: Erica-Irene Daes, Special Rapporteur, *Protection of the Heritage of Indigenous People: Supplementary Report Submitted Pursuant to Sub-commission Resolution 1995/40 and Commission on Human Rights Resolution 1996/63*, UN Doc E/CN.4/Sub 2/1996/22 (24 June 1996), at [21] where the issue was deferred pending a conference to be held in 1996 in Manitoba, Canada. Such issues were naturally covered more generally in reports on the relationship between Indigenous peoples and their traditional lands: Daes, *Indigenous Peoples Relationship to Land* (1993), above n 165, which recommended legislation and special measures to recognise, demarcate and protect the lands of Indigenous peoples in a manner that accords rights at least equal to those for other lands, territories and resources in that country and establishs processes for corrective actions where land had been taken through past processes that are unfair or discriminatory. Such comments were not specific to sacred places.

[1623] In most cases, though, it will be held by the government body itself. When talking about an ordinary purchase or acquisition of property under the normal property acquisition systems, the heritage is protected by virtue of being private property, not by reason of its sacredness or even the heritage protection regime.

Stewardship Ethic

There have also been calls for paradigm shifts in general heritage jurisprudence away from conservation being seen as an exceptional constraint on property rights and development to a philosophy of sustainability and an ethic of stewardship.[1624] This has been said to require advancing sustainability principles to the greatest degree rather than working within a paradigm of balancing competing interests.[1625] Resolutions between competing interests is, again, beyond the scope of this thesis, but it is better too for such issues to be decided at the point of balancing public interests rather than in defining sacred places to be protected and their significance.

Heritage as Private and Particular

The main problems outlined in Part C were about requiring Indigenous sacred places to conform to secular and "universal" (but really Western) principles about public heritage. The philosophical developments recognise that heritage is also in a sense private and particular in that it arises from and should be protected for the beliefs and values of the peoples whose heritage it is. In some ways, this could be seen as a re-privatisation of what had become public space. Joanna Bourke[1626] has argued that self-determination may involve taking back and privatising knowledge and beliefs hitherto regarded as public, though she does not expand on how such a model would look in practice. Frank Brennan has noted that if freedom of religion is taken seriously, Indigenous people holding the beliefs would also be holding the power to determine the outcome.[1627] It is precisely this fear of loss of control that has caused governments and others to cling to a public-based heritage model.[1628]

A recognition of the private and particular aspects of heritage will require, at least, that heritage laws reflect the fact that matters, such as what amounts to the identification, nature and significance of such sacred places and what would be infringement and the proper treatment of them, should be determined according to the particular religious beliefs, not by some Western or "objective" standard. It will require acknowledgement that sacred places are protected because of their value to the relevant Indigenous

[1624] See Maurice Evans, above n 924.
[1625] Ibid. This may have parallels with the arguments for honouring of differing legal systems and master stories discussed in the previous section.
[1626] In Bourke, above n 415.
[1627] Brennan, 'Land Rights' above n 908.
[1628] In the USA, Marcia Yablon, 'Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Freedom Claims on Public Land' (2003-4) 113 *Yale Law Journal* 1623 has argued for a model which maintains agency management and decision-making to avoid a handing of control to Indigenous peoples.

peoples and as protection of their human dignity. This too will be assisted by legislative drafting that clarifies this.

18.4 Requirements of a New Model for Sacred Places

Beyond Dualism of Spheres

As outlined above, the “cultural diversity” thinking could overcome the divisions between dualisms that see religion as private and public heritage as secular and universal. Indigenous sacred places could be classified as belonging to both realms, but it is better to do away with the duality of spheres altogether. There is no reason why religion and its significant places cannot be both private and public, personal and political, sacred and secular.[1629] A respect and responsibility to protect and sustain human dignity and the survival of cultural identity, could be the conceptual foundation of both human rights, like religious freedom, and the preservation of heritage, including religious heritage. If it is too difficult to formulate an overarching legal principle for all religions and cultures, one could at least create one narrowed specifically to Indigenous heritage and beliefs.

As suggested in the various chapters in Parts B and C, other elements could also be improved, in the ways outlined below which would flow from the removal of the division of spheres to a more unified concept of human dignity in cultural diversity.

Legal Duties and Enforceable Indigenous Rights

If Indigenous peoples, or religious sub-groups within such nations, have rights to their own cultural (including religious) survival, then any legal protection should be for the benefit of such groups and they should be afforded causes of action to enforce these rights.[1630] Corresponding to such rights would be duties on others, perhaps through the creation of offences for a breach of duties.

Part B Issues

The protection needs to cover what is required for human dignity and cultural survival, which could be the direct protection of places rather than just individual action or

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[1629] As is commonly found in the Indigenous viewpoints canvassed in 3.1.1 above and the more integrated Judeo-Christian views mentioned in 2.3 above.

[1630] Thus overcoming some of the problems in Chapter 14.

belief.[1631] There would be no basis for limiting this to private religious and not cultural, subsistence or economic concerns,[1632] or to situations where one is forced to act against one's conscience,[1633] or to central or indispensable places.[1634] There would also be no basis for drawing distinctions between neutral, generally applicable laws and laws targeting religions as both could have an equally detrimental effect on cultural survival, identity and human dignity.

Part C Issues

A recognition of the values of each culture would require protection of what is valued in that culture. Legal duties should be framed accordingly. Instead of protecting only specific discrete sacred or significant areas or only old traditions, one might use something like the environmental style of legislation as suggested in Chapter 15; that is, where the offence would include carrying out activities which desecrate any lands or waters. This would protect all the area that is now considered sacred.[1635] To protect the survival of diverse cultures and beliefs, the assessments should not be external and objective but desecration or damage should be judged by the beliefs of the relevant Indigenous peoples (which may include the beliefs of people who may not be the majority or a representative of the "orthodox" position).[1636] In other words, while sincerity could be a test, as in the religious freedom jurisprudence, it would not be the place of outside bodies to determine the truth or reasonableness of the beliefs.[1637] These may be able to be clarified in definitions in the legislation.

Beyond This Thesis

Comprehensive reviews of all aspects of the existing laws need to be considered and policy decisions need to be made as to whether reforms should be restricted initially to Indigenous groups or should encompass all religions and cultures. There remains the constant shadow of competing public interests, which have been alluded to throughout this thesis, but have not been able to be discussed in any depth. Obviously, legislative standards need to be formulated to limit the political ability of property and economic development to keep trumping protection of Indigenous sacred places. All interests need to be considered in formulating any new legislative regime.

[1631] Being the limitation discussed in Chapter 6.
[1632] Of the kind in Chapter 7.
[1633] As in the cases outlined in Chapter 9.
[1634] As discussed in Chapter 8.
[1635] So as not to fall into the difficulties in Chapter 16.
[1636] To avoid the difficulties discussed in Chapter 17.
[1637] See discussion in Chapters 4 and 17.

This thesis has sought to contribute to the process of reform by highlighting one set of problems to be addressed in our legal models and by exploring some of the potential new paradigms required. The solutions, which require the wisdom and guidance of Indigenous peoples whose cultures are the subject of those relevant legal systems, await further discussion at another time and place.

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