Property Rights in Human Remains and Artefacts and the Question of Repatriation

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I Introduction

Rights for Aboriginal people in Australia are relatively new. Even some of the most basic social and democratic rights, such as being able to vote and to be counted on the census rolls, were not obtained until the 1960s. Property rights were not acquired even in a limited form until the 1970s, with the major breakthrough not occurring until the early 1990s. It is suggested that there are still unresolved property right issues in relation to Australia's Aborigines with these being in regard to the ownership and possible repatriation of human remains and artefacts.

This paper will, therefore, explore the issues relating to the possible return of both human remains and artefacts. It will look at what laws are already in place, what has been proposed, and will make some preliminary conclusions as to their effectiveness and what might be done in the future in regard to indigenous rights in this area. This involves weighing up the desire of indigenous groups for the return of what they consider to be rightfully theirs, and the desire by museums and other institutions around the world to retain their collections. First, however, it will examine the question of property rights in relation to land and how, after 200 years, the Australian courts finally came to recognize such rights.

II The Concept of Property and Indigenous Australians

When Europeans arrived in Australia in 1788, despite the obvious presence of Aborigines living in Australia, the doctrine of *terra nullius* was enforced.

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The land belonged to no-one, and thus it all could be used by the new settlers for whatever purpose they required. In *Cooper v Stuart*,[1] for instance, it was held by the Privy Council that the Colony of New South Wales 'consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time it was peacefully annexed to the British dominions'.[2]

In 1970, exactly 200 years after Captain Cook had discovered the east coast of Australia, the issue of proprietary rights in relation to Australia's Aborigines was heard in the Federal Court before Justice Blackburn. *Millirrpum v Nabalco*[3] involved a claim by the Aboriginal people of the Gove Peninsula that they had an interest in the land and could, therefore, prohibit the Commonwealth and Nabalco from mining bauxite on their land.

It was Justice Blackburn's view, however, that:

> I think that property in its many forms generally implies the right to use or enjoy, the right to exclude others, or to alienate. I do not say that all these rights must co-exist before there can be a proprietary interest, or deny that each of them may be subject to qualifications. But by this standard I do not think that I can characterise the relationship of the clan to the land as proprietary... The evidence shows a recognisable system of law which did not provide for any proprietary interest in any part of the subject land.[4]

Thus, while Justice Blackburn was willing to recognize that the Aboriginal people had both a system of law and a relationship with the land, he was not prepared to take the next step and state that these gave rise to a proprietary interest in the land that was recognized by the common law. The judgment also made it clear that his Honour was only willing to examine the issue of proprietary rights purely from a western perspective, and not consider an Aboriginal point of view as to what constituted property in relation to land.

Later in the 1970s this question of Aboriginal proprietary interests in the land was again the centre of litigation, this time before the High Court in *Coe v Commonwealth*.[5] The plaintiff, Paul Coe, argued that there had been a wrongful proclamation of sovereignty by Captain Cook in 1770, and then the wrongful assertion of possession and occupation by Captain Phillip. The relief sought included a declaration that all lands and waterways in Australia should remain free from interference, and the

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1 (1889) 14 AC 286.
2 Ibid 291.
3 (1970) 17 FLR 141.
4 *Millirrpum v Nabalco* (1970) 17 FLR 141, 272–3. For a critical analysis of the judgment see *Mabo v Qld* (1992) 175 CLR 1 at 101–2 (Deane and Gaudron JJ). Although the case was unsuccessful it was the catalyst for the introduction of land rights legislation in the Northern Territory in the form of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
5 (1979) 53 ALJR 403.

restraining of any authorisation of mining or other activity that interfered with the rights of Aboriginal people. Justice Gibbs (with whom Aitkins J agreed), however, upheld the near century old decision of *Cooper v Stuart* stating that:[6]

> It is fundamental to our legal system that the Australian colonies became British possessions by settlements and not by conquest... For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilized inhabitants or settled law. Australia has always been regarded as belonging to the latter class.

However, by re-affirming judicial opinion that the enlarged notion of terra nullius applied to Australia the judgments of Gibbs and Aitkins JJ were contrary to international opinion on the subject.[7] Different views also prevailed on the High Court, with both Murphy and Jacobs JJ supporting the idea that Aboriginals from the Gove Peninsula did have an arguable case, with Murphy J stating that:[8]

> The plaintiff was entitled to endeavour to prove that the concept of terra nullius had no application to Australia and that the lands concerned were acquired by conquest. He might, in the alternative, rely on common law rights which would arise if there had been a peaceful settlement. In either event he was entitled to argue that the sovereignty acquired by the British Crown, whether by conquest or by settlement, did not extinguish 'ownership' rights in Aborigines and that they had certain proprietary rights, at least in some lands, and were entitled to a declaration and enjoyment of their rights or to compensation.

The overall decision was a 2–2 statutory majority against the plaintiff, but in the statutory minority judgments there was the recognition that the Aborigines had a proprietary interest in the land, a view that was to find majority support some 14 years later when the issue of Aboriginal proprietary rights in their ancestral lands was again presented to the High Court.

Eddie Mabo was a gardener at the James Cook University, who despite having left his ancestral home on the Murray Islands as a teenager, still talked about the family garden plot as belonging to his family. When informed by academics, such as acclaimed historian Professor Henry Reynolds, that this was not the case, Eddie Mabo began the legal challenge

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6 *Coe v Commonwealth* (1979) 53 ALJR 403, 408.

7 For instance it was held in the *Advisory Opinion on Western Sahara* [1975] ICJR 39 that the Western Sahara, at the time of colonization by Spain in 1884, was not terra nullius, and that the concept of terra nullius to justify conquest and colonisation stood condemned.

8 (1979) 53 ALJR 407, 412.

that was to be resolved more than 10 years later in the High Court. In a 6–1 decision it was held that terra nullius did not apply to Australia, and that a native title survived the Crown's acquisition of sovereignty and radical title. Thus, the common law in Australia finally recognised that Aboriginal people did have an interest in the land, and that this native title could be 'classified by the common law as proprietary, usufructuary or otherwise'.[9] Such a native title was ascertained according to the laws and customs of the indigenous people who, by those laws and customs, had a connexion with the land.[10]

While *Mabo v Queensland* can be seen a major step forward for Aboriginal proprietary rights by allowing them a claim to their traditional tribal lands, it was not a case that had to address the question of other property rights in regard to Aboriginal people. This includes the many thousands of human remains and artefacts that, by one means or another, have, over the two hundred years of European occupation in Australia, ended up in numerous institutions, both in Australia and overseas. It raises the issue of what rights the relevant statues provide in relation to this cultural heritage, and if it is insufficient, what are the other possibilities to protect Aboriginal rights to their culture.

III Human Remains

The question of the repatriation of human remains is one that involves both the legal question as to whether there can be ownership of human remains, and the moral question as to whether human remains should be kept in places like museums, particularly when they can be placed on public display.

Underlying both these issues is the concept of property as applied to the human body.

A *The Concept of Property and the Human Body*

Proprietary rights in the human body firstly involves the question as to what is the status of the human body in regard to the definition of property. Rao[11] suggests that the human body can sometimes be characterised as property, sometimes as quasi- property and sometimes not as property, but rather as simply the subject of privacy rights. Legal philosopher John Locke's view of property in the human body is that '[t]hrough the earth and all inferior creatures be common to all men, yet every man has a

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[9] (1992) 175 CLR 1, 70 (Brennan J).
[10] Ibid.
[11] Radhika Rao, 'Property, Privacy and the Human Body', (2000) 80 *Boston University Law Review* 359, 363.

property in his own person. This no body has any right to but himself.'[12] According to Locke, individual ownership of the physical body entailed ownership of those external things that are the product of the body's labour, and he viewed individuals as stewards over their own bodies possessing themselves in trust rather than as outright owners.[13]

Ownership rights in what is produced by the body have been held to exist. In *Green v Commissioner*[14] Margaret Green, who had the rare blood type AB negative, was considered to produce an income from the repeated selling of her blood and was therefore liable to pay income tax and also claim genuine business expenses. Her blood, it was held, was just as much a commodity as eggs, milk and honey. However, no such proprietary interest has been held to exist in regard to actual organs of the body, such as the spleen, as was held in *Moore v Regents of University of California*.[15]

Of more relevance to the question of repatriation, however, is the question of the ownership of dead bodies. In *Doodeward v Spence*[16], the High Court had to address the question of ownership of a still born baby that had been preserved in spirits in a bottle for forty years. The baby had been still born in New Zealand in 1868 and a Dr Donahoe, the doctor on hand at the time, had kept the baby in the jar because it had the distinctive feature of having two heads. On his death in 1870 it was sold at auction with his other personal effects, and later came into the possession of Doodeward as his father had purchased the item at the auction. When Doodeward later exhibited it in public the body was confiscated by the police.

It was held by the High Court that there was no law forbidding the mere possession of a human body, whether it had been born alive, or dead, for purposes other than immediate burial. Such possession is not unlawful if the body possesses attributes of such a nature that its preservation may afford valuable or interesting information or instruction.[17] Higgins J (dissenting) held that the common law is that there is no property in a dead body,[18] though suggested that in the case of a mummy there may be property because the skill of the embalmer has turned it into something else.[19] Thus the case confirms that while under the common law there is no general ownership in a corpse, proprietary interests can be established in certain situations.

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[12] John Locke, *Two Treatises of Government* (1690), Peter Laslett (ed) (1967), cited in Rao, above n 11, 367.
[13] Rao, above n 11, 367–8.
[14] 74 TC 1229 (1980).
[15] 793 P2d 479 (1990).
[16] (1908) 6 CLR 406.
[17] Ibid 413–4 (Griffith CJ).
[18] Ibid 419. See also *Smith v Tamworth City Council* (1997) 41 NSWLR 680 where Young J discusses Higgins J's judgment and other cases in relation to the possible ownership of a human body. The case involved a dispute between the biological and adoptive parents as to the burial rights of their son.
[19] Ibid 422.

In relation to the remains of Aboriginal people and the question of ownership, it is suggested that this decision has potentially major implications. Because arguably, any Aboriginal body of any significant age has distinct attributes and, purely from the fact that it is of significant age, it may well have high anthropological importance because of the information that it provides. However, as Watt points out,[20] a clear distinction must be made between relatively recent remains that are identifiable, which can be claimed by living descendents, and those bodies that are more ancient in origin, with the principle from *Doodeward* much more likely to apply in the latter situation.

B *The Materials*

The remains of Aborigines have been taken into museums and other institutions both within Australia, and overseas, and it is estimated that around 5000 remains and sacred objects relating to Australia's Aborigines are presently being housed in 150 institutions around the world.[21] There has been some success in the calls for the return of such materials from overseas institutions, such as the head of the Western Australian Aborigine, Yapan, that was taken to Britain as a war trophy in the early 19th century, and was returned to Perth in 1997 for reburial. Likewise the remains of Truganini, a famous Aborigine from the early colonial period of Australia, has been returned from the British Royal College of Surgeons.[22]

Within Australia, the Melbourne Museum has recently returned the body of an Aboriginal girl, together with the artefacts that were found with it; a move that has created division within the archaeological and museum community. While there was little dispute in regard to the return of the human remains, some, such as Alan West — the honorary associate curator of the Museum, have described the reburial of the 130 objects found with the infant as amounting to 'unashamed vandalism'.[23] In South Australia, meanwhile, hundreds of remains of the Ngarrindjen people are waiting repatriation from the South Australian Museum.[24] Elsewhere in the world, the conflict over the treatment of the 9 300 year-old skeleton of the so called 'Kennewick Man' in the US, led to claims by the Native Americans to have the body and the objects found with it reburied.[25]

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[20] R J Watt, 'Museums Can Never Own the Remains of Other People But They Can Care for Them', (1995) 29 *University of British Columbia Law Review* 77, 78.

[21] Peter Fray and Alexa Moses, 'Sorry They're Our Bones — Top Museums Unite to Fight Aboriginal Claims', *The Sydney Morning Herald*, (Sydney) 11 December 2002, 3.

[22] Ibid.

[23] J Buckell, 'Tiny Baby Carries Some Heavy Baggage', *The Australian*, 10 September 2003, 19.

[24] J Buckell, 'Return of Artefacts Disputed,' *The Australian* 10 September 2003, 19.

[25] 'Not all Tomb and Gloom', *The Australian* , 17 April 2002, 30.

It is clear that the question of repatriation is one that concerns numerous collections, both in Australia and overseas, for which the relevant legislation needs to be examined.

C *Relevant Legislation*

In Australia the Commonwealth Government has enacted the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the purpose of which is 'to preserve and protect places, areas and objects of particular significance to Aboriginals and for related purposes'. Under s 20 the discovery of human remains that are Aboriginal must be reported to the Minister, who, under s 21 must return them to an appropriate Aboriginal, or if no such person transfer the remains to a prescribed authority for safekeeping.[26]

Thus, in Australia there are now mandatory requirements made to the Minister in relation to any Aboriginal remains that are found. However, the legislation does not cover the human remains already in museums and private collections, and therefore falls short of providing for repatriation unless the museum is willing to instigate such action.[27] The repatriation of remains presently in British institutions, however, maybe more likely given the recent news that a British Government report has recommended the enactment of new laws to aid in the repatriation of remains to Australia. The inquiry that produced the report has recommended that the laws should be changed to 'empower national museums to relinquish human remains.'[28] This does indicate a changing attitude towards the repatriation of the human remains of indigenous people by a former imperial power, a point noted by Watt.[29]

IV Artefacts

A *The Materials*

While the repatriation of human remains has seen some success stories over the last few years, requests by indigenous populations around the world for the return of artefacts, particularly when they are not found with

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[26] Law Book Company, *Laws of Australia*, 'Aboriginals: Cultural Heritage' [8].

[27] It should be noted that under the *Museums (Aboriginal Remains) Act 1984* (Cth) there is the partial recognition of traditional rights in relation to Aboriginal remains. The act declares that all Aboriginal remains in the possession of the Tasmanian Museum and Queen Victoria Museum were the property of the Crown, and this enabled the Minister to serve notices on the trustees requiring them to deliver the remains of the elders of the Tasmanian Aboriginal community. See Law Book Company, above n 26, [26].

[28] Dennis Shanahan, 'Britain to Give Back Remains' *The Australian* 6 November 2003, 3.

[29] Watt, above n 20, 77.

human remains, have not been anywhere near as successful. For example, 700 bronze plagues were taken from the kingdom of Benin, Nigeria, in 1897 and despite calls from the Nigerian Government, the English have refused repatriation. The Ghost Dance Shirt that belonged to the Lakota Sioux people has, meanwhile, been held in the Glasgow Museum since the battle at Wounded Knee.[30] However, in Canada the Potlatch collection has been repatriated, though one of the conditions was that it was to be housed in a purpose built museum.[31]

This issue has not been limited to just indigenous groups either, with the Greeks having made a recent claim for the Elgin Marbles, consisting of 253 statues built 2500 years ago, that were removed from the Parthenon by Lord Elgin in the late 18th century, and are now housed in the British Museum.[32] The Greeks claim they were removed from the Parthenon illegally, while the English claim that they were legally acquired by Lord Elgin and that legal title was then passed onto the British Museum. Despite numerous attempts by the Greek Government to have them returned in time for the 2004 Athens Olympic Games, they still remain in the British Museum. One of the Crown Jewels, meanwhile, is the 700 year old Koh-l-Noor diamond that was removed from the treasury in Lahore in 1849, an object that the English have also refused to return.[33]

While Australia may not seem to be a country that would be affected by other countries obtaining and holding non-indigenous material, there has been a great increase in the interest and finding of the human remains and personal artefacts of World War I soldiers, including Australians. These finds can also raise issues of ownership and how the materials should be dealt with.[34] Where the question of ownership and repatriation of artefacts is most relevant to Australia, however, is in regard to Aboriginal artefacts held by various institutions.

B *Legislation*

In Australia, the *Australian Heritage Commission Act 1975* (Cth) is the primary national heritage legislation, and many aspects of Aboriginal and Torres Strait Islander cultural heritage can fall within the criteria set out in the legislation.[35] It does not, however, impact on the artefacts that

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30 Fray and Moses, above n 21.

31 Gloria Cranmer-Webster, 'The Potlatch Collection Repatriation,' (1995) 29 *University of Columbia Law Review* 137.

32 Fray and Moses, above n 21.

33 Ibid. It should also be noted that in 2000 the Taliban demanded the diamond back claiming it had belonged to the Afghan royal family for two centuries. This does illustrate how complicated the question of ownership can be with a number of different groups claiming they had a claim to ownership.

34 Nicholas Saunders, 'Excavating Memories: Archaeology and the Great War, 1914–2001' (2002) 76 *Antiquity* 101, 101–2.

35 Law Book Company, above n 26, [9].

are already in museums. The *Protection of Moveable Cultural Heritage Act 1986* (Cth) protects objects by preventing the export of heritage objects except under permit. While this may now provide protection it obviously has not impact on the artefacts that have already been taken overseas.

Also of relevance is Part 11 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). Section 9 of this Act states that the Minister may make an emergency declaration in relation to such an area if it is under serious and immediate threat of injury or desecration. Under s 12(1) the Minister may again make a declaration in relation to an object of significance that is under threat, with s 2 providing the Minister with the discretion to specify an appropriate time period in the declaration. Section 3 then defines, for the purposes of the Act, a significant Aboriginal object to be one that is of particular significance to Aboriginals in accordance with Aboriginal tradition.

Thus there are powers given to the Minster in relation to Aboriginal objects, but these are discretionary, and before making such a declaration the Minister must be satisfied the objects are under threat of injury or desecration, with the later including the sale and exhibition of sacred objects contrary to Aboriginal tradition. Applications to the Minister have been successful in regard to s 12, for instance, when objects where offered for sale by Sotheby's in 1986. A declaration was made for four weeks with the objects being acquired by the NSW Aboriginal Land Council. Similarly between 1993 and 1995 a number of short term declarations were made in regard to objects held by the South Australian Government while ultimately successful negotiations took place with the Central Land Council.[36]

The Act is not intended to exclude or limit state or territory laws that are capable of operating concurrently with it, and so the states have various pieces of legislation that impact on the protection of indigenous heritage.[37] As with the Commonwealth legislation already mentioned, the problem in relation to the topic of this paper is that it does not effect the artefacts already in institutions, though it can now provide protection, and it is worth noting that archaeologists from the La Trobe University were forced to hand back artefacts obtained by means of a permit issued under the *Aboriginal Relics Act 1975* (Tas).[38]

Thus present legislation can provide for the potential return of artefacts when they come up for sale, or when it is obtained or treated by archaeologists in a way that is not keeping with their permit. What it

[36] Ultimately the Commonwealth Government funded the purchase which amounted to $900 000. See Chapter 12.05-12.08 of the *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act*, <http://www.worldlii.org/cgi-worldlii>.

[37] See *National Park and Wildlife Act 1974* (NSW), *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (Qld)*, *Aboriginal Heritage Act 1988* (SA), *Archaeological Relics Preservation Act 1972* (Vic), *Aboriginal Heritage Act 1972* (WA).

[38] *Tasmanian Aboriginal Land Council Aboriginal Corp v Allen* [1995] VG643 (Unreported, Federal Court of Australia, Olney J 28 July 1995).

leaves open is the issue of ownership, and indeed a review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) expressly stated that the review was making no recommendations in regard to the ownership and return of cultural material.[39] The review, however, did note that Aboriginal people are dissatisfied with the present situation and want material which is part of their cultural heritage to be identified and returned to traditional owners.[40] In *R v Issacs,*[41] Madgwick J noted the injustice that this lack of control can create:

> There is apparently no legal power of acquisition at a fair price by the government of old Aboriginal artifacts which are in private hands. There is apparently no legal requirement that they are to be controlled by Aborigines, nor even for effective consultation with them over the conditions in which they are to be kept, and by whom, and on what terms they maybe displayed. Thus at the heart of the case it seems to me there lies an injustice.

It is suggested that this issue of ownership is a matter that still has to be addressed, just as property rights in land needed to be addressed at the end of the twentieth century.

V Discussion

This ownership of artefacts raises a variety of issues. For instance, as Saunders points out in relation to materials on the Western Front,[42] the battlefields provide archaeologists with the unique opportunity to perform investigations that incorporate historical documents such as personal letters, diaries and military records, but such a scenario raises issues as to who has, or should have, ownerships of any artefacts that have or will be found. Should it be the local people on whose land the artefacts were found, the descendents of the original owners, or the discoverers of the material, such as archaeologists or museums?

Museums have obviously spent centuries adding interesting material to their collections, and now claim the 'value of universal museums' to justify their belief that collections already in existence should not be broken up. In December, 2002, the Louvre, Paris, the Hermitage, St Petersburg, the Prado, Madrid, the State Museums, Berlin, the Rijksmuseum in Amsterdam, the Metropolitan, Guttenheim Whitney and Museum of Modern Art in New York, were all signaturies to a declaration opposing

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[39] Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act,* Chapter 12.3, <http://www.worldlii.org/cgi-worldlii>.

[40] Ibid Chapter 12.10.

[41] *R v Isaacs* (Unreported, District Court of NSW, Madgwick J 8 December 1987). The case involved an Aboriginal person convicted of receiving stolen goods, the goods in question being Aboriginal artefacts he was trying to protect.

[42] Saunders, above n 34.

the wholesale repatriation of cultural artefacts.[43] While not a signatory, the British Museum supported the declaration, stating that museums serve not just the citizens of one nation, but the people of every nation.[44] Museums have also argued that what often is found by archaeologists has in fact been discarded, and is therefore of little or no significance to the indigenous people, and so the ownership should now be held by those who found the material.

Note that from the perspective of indigenous groups, international law can at times be of assistance as the right to cultural protection and preservation is expressed in article 27 of the *International Covenant on Civil and Political Rights*.[45] This has been invoked by indigenous complainants on several occasions, and may be regarded as expressing a norm of customary international law.[46] However, it does not fully solve the conflict between the needs of museums and indigenous groups, particularly when the limits of the jurisdiction of international law are kept in mind. It is also suggested that the question of legal ownership has a number of problems. The main one being that it is frequently difficult to identify how the museums actually acquired the material and often it was legitimately acquired. Even when the acquisition of the material is a little more suspect there is still the problem of the limitation periods putting any claim out of reach because of the lapse of time. However, it is worth noting that in the US, it is accepted that any limitation period is waived when dealing with indigenous cultural heritage.[47]

This, it is suggested, is a possible solution that could be adopted in Australia to provide a greater opportunity for indigenous people to regain control over their cultural heritage.

What could also be effective is a change in the attitude by the people who now deal with this material. In regard to human remains there appears a world wide change of attitude that it is not always proper for museums to hold onto the remains of humans, and as previously mentioned, there are examples both in Australia and overseas repatriations of such material. In the US, meanwhile, this new regime for repatriating indigenous cultural heritage has seen a profound alteration in the application of the fiduciary duty owed by museums and other institutions.[48] This has been achieved by extending the definition of the fiduciary duty with the result that such

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[43] Fray and Moses, above, n 21.

[44] Ibid.

[45] Opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

[46] Andrew Lokan, 'From Recognition to Reconciliation', (1999) 23 *Melbourne University Law Review* 65, 87. Also of potential relevance is the United Nations *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* GA res 47/135, annex, 47 UN GAOR Supp (No 49) at 210, UN Doc A/47/49 (1993).

[47] Catherine Bell, 'Limitations, Legislation and Domestic Repatriation' (1995) 29 *University of British Columbia Law Review* 149, 152.

[48] James Nafziger, 'The New Fiduciary Duty of United States Museums to Repatriate Cultural Heritage: The Oregon Experience' (1995) 29 *University of British Columbia Law Review* 37, 37.

institutions must take into account not only the interests of the visitors and other users of the museums, but also the interest of the tribes.[49] Thus fiduciary duties may be a means to impose legal requirements on museums and other institutions.

Also of importance is to create a suitable attitude within institutions by providing ethical guidelines. For instance, within archaeology the study of ethics has been integrated into archaeological training, and has become a standard part of many degree courses.[50] The application of ethics to museums is equally important, and in Canada, for instance, the essence of a 1996 Report on the Royal Commission on Aboriginal Peoples was the restructuring of the relationship between Aboriginal and non-Aboriginal people, with a Chapter being devoted to Arts and Heritage and included a section on Ethical Guidelines for Museums and Cultural Institutions. These guidelines suggest that objects sacred or integral to the continuity of the communities be repatriated on request, and that Aboriginal people have a say in how artefacts are displayed.

Such a right to determine how objects should be displayed in museums and other institutions fall into the category of moral rights, that is, the right to have a say in what is done with objects even when a person or group no longer has the legal right that provides for possession. In Australia, for instance, there was a push for an amendment to the *Copyright Act* 1968 (Cth) for moral rights for the creators of works and films, who usually do not have the legal right to the film or work of art as normally it is held by the producers. Although these amendments were abandoned, it has been suggested that the government remains committed to introducing a workable moral rights regime within the creative arts.[51] In relation to historical material, the direct descendents of the main agitators in the Eureka Stockade, have unsuccessfully argued a moral right to have a say in where the original flag is stored and displayed.

It is suggested that moral rights may be the solution for Aborigines and Torres Strait Islanders in regard to artefacts that are already in the collections of museums and other institutions, given the chances of obtaining legal rights maybe minimal and the fact that museums seem to be reluctant to give up even a part of their collections, and legal problems, such as limitation periods. Even with moral rights there is the problem that only individuals can claim moral rights.[52] However, it may be possible to argue that an individual can claim the right on the behalf of the tribe, or, in that in the situation involving artefacts and human remains, the concept of individual should be extended to include indigenous community groups.

What the application of moral rights can also cover is situations

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[49] Ibid 41.
[50] Above, n 25.
[51] Marie-Louise Symons, 'News from the Attorney-general's Department' (1998) 9 *Australian Intellectual Property Journal* 144, 145.
[52] Australian Copyright Council, *Architects: Copyright and Moral Rights* (2003).

where there is no real suitable place to house the artefacts, and so, from an Aboriginal perspective the museum can, in some instances, be the best place for them to be kept.[53] What moral rights can provide in such a situation is to provide an indigenous community with at least some ongoing control over what is done with the artefacts and retaining, or reclaiming, a sense of ownership that control, if not actual possession, can provide. While there is some argument that s 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) gives the Minister the discretion to make a declaration in regard to the exhibition of objects, it is suggested that moral rights provides indigenous groups with far more control than the mere ability to make an application to the discretionary power of a Minister.

VI Conclusion

Property rights for Australia's indigenous people in regard to land has only been established for a little over a decade. In regard to rights to human remains, legislation has created rights in certain circumstances and does provide a means for artefact material to be purchased should it ever come up for sale, and also provided the means of preventing Aboriginal cultural heritage from leaving Australia without a permit. It is suggested, however, that the legislation does little to provide Aborigines with rights in regard to human remains and artefacts that have previously found their way into the collections of various institutions. The attitude of some institutions, however, has been favourable to the return of human remains, even when a legal requirement has not been established, and in some instances this return of the human remains has included the artefacts that were buried with them.

The return of artefacts to indigenous communities, however, not only has presently little or no legal foundation to it, but museums also appear far less interested in co-operating. The 'benefit of all mankind' argument has been repeatedly presented by museums as justification for the retention of such materials, and an institution such as the British Museum can claim that it contains one of the great archaeological and anthropological collections in the world. However, given the often dubious way in which these materials were acquired, another, equally valid perspective is that it contains the greatest collection of stolen goods in the world. A willingness to repatriate at least some of their vast collection, it is suggested, would certainly help to rectify this perspective.

It is also suggested that repatriation should be seen in the broader issue of proprietary interests for indigenous people. Native title has provided a means of obtaining proprietary rights in ancestral lands, rights in relation to human remains and artefacts will give the Aboriginal people in

[53] See Watt, above n 20.

Australia greater recognition and control of their cultural heritage.

If the museums around the world continue to display an unwillingness to return material then a possible solution, it is suggested, could be the application of moral rights. This would allow the legal possession to be retained by museums and other institutions, but give indigenous communities at least the moral right to have a say in what is done with the objects.