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ARTICLE

# Evaluating the Ethical Responsibility of Environmental Planning Law in Perpetuating Settler Colonialism Using a Transnational Legal Lens

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**Abstract**

This article investigates whether environmental planning law can demonstrate ethical responsibility for its role in settler colonialism. Planning law contributes to settler colonialism by diminishing, excluding, and eliminating alternative views of land that are fundamental to First Nations culture, philosophy, and law/lore. The article adopts a transnational legal frame that recognizes and promotes First Nations as sovereign. The investigation is focused primarily on the planning law system in New South Wales (NSW), Australia, while being guided by interpretations and applications of the rights of First Nations peoples by courts in Canada. It is argued that state planning law in NSW fails to give effect to ethical responsibility because its operation continues to dominate and marginalize Aboriginal legal culture by eroding the necessary ontological and epistemic relationships with land. However, there is potential for change. Opportunities to disrupt settler colonialism have emerged through bottom-up litigation, which has promoted interpretations, applications, and implementation of law that can be performed in ways that resonate with Canadian case law. While the absence of treaty or constitution-based rights protection in NSW and Australia means that the transplant is not seamless, the article argues that laws should not be interpreted and applied in ways that perpetuate settler colonialism where alternative interpretations can lead to a different outcome.

**Keywords:** Environmental planning law; Settler colonialism; Ethics; Ethical responsibility; First Nations; Relationality

## 1. Introduction

Explicit linkages between planning law and settler colonialism have received limited attention in both legal scholarship and practice.[1] Some scholarship that emphasizes

[1] See the following examples of scholarship that discusses links between land-use planning, law and settler colonialism: E. Wensing, 'Planning Laws and Aboriginal and Torres Strait Islander Peoples' Rights and Interests' (2023) 59(1) *Australian Planner*, pp. 1–13; E. Wensing, 'Indigenous Rights and Interests in Statutory and Strategic Land Use Planning: Some Recent Developments' (2018) 24 *James Cook University Law Review*, pp. 169–90; L. Porter, 'Planning in (Post) Colonial Settings: Challenges for Theory and Practice' (2006) 7(4) *Planning Theory and Practice*, pp. 383–96; L. Porter, 'Possessory

this linkage has emerged from First Nations scholarship globally, including notably Cobble scholar Megan Davis and Anishinaabe scholar Heather Dorries.[2]

Planning law contributes to settler colonialism by diminishing, excluding, and eliminating alternative views of land that are fundamental to First Nations culture, philosophy, and law/lore – encapsulated in the Australian context by the concept of 'Country'.[3] Country refers to a land-based notion of a homeland that exists as a living sentient thing in and of itself, a 'nourishing terrain … with a yesterday, today and tomorrow, with a consciousness, and a will toward life'.[4]

Lee Godden maintains that 'law has direct and practical outcomes that shape experience, and which give effect to "choices" about how we wish to occupy this country and about what is to be protected as "heritage" and as "environment"'.[5] This article is concerned with the ethical responsibility of planning law in how these choices are presented and pursued. The investigation of the article is two-fold: establishing how planning law perpetuates settler colonialism, and investigating how planning law might be interpreted and applied in ways that disrupt settler colonialism. The inspiration for this article is derived partly from the scholarship of Sue Jackson and co-authors, who investigate the history of land-use planning in establishing the colonial foundations of the state of New South Wales (NSW) and other states in Australia. The authors describe the imperative for responsibility as follows:

> The most obvious responsibility is to reflect on planning's history and legacy, and accept that spatial systems, practices, and technologies have been central to the dispossession and marginalisation of Aboriginal peoples for more than two centuries.
>
> Understanding how to respect cultural differences and redress the power imbalances between Indigenous and non-Indigenous people demands that practitioners pay attention to and have regard for characteristics of Indigenous life.[6]

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Politics and the Conceit of Procedure: Exposing the Cost of Rights under Conditions of Dispossession' (2014) 13(4) *Planning Theory*, pp. 387–406.

2 See H. Dorries, 'What is Planning Without Property? Relational Practices of Being and Belonging' (2022) 40(2) *Environment and Planning D: Society and Space*, pp. 306–18; M. Davis, 'The Land and Environment Court of New South Wales and the Recognition of Indigenous Peoples' Environmental Rights', in B.J. Preston & E.C. Fisher (eds), *An Environmental Court in Action* (Hart, 2022), pp. 175–94.

3 See Bawaka Country et al., 'Caring as Country: Towards an Ontology of Co-Becoming in Natural Resource Management' (2013) 54(2) *Asia Pacific Viewpoint*, pp. 185–97.

4 D.B. Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996), p. 7; D. Smyth, *Understanding Country: The Importance of Land and Sea in Aboriginal and Torres Strait Islander Societies* (Council for Aboriginal Reconciliation, 1994); E. Wensing, 'Aboriginal and Torres Strait Islander Peoples' Relationships to "Country"', in J. Byrne, N. Sipe & J. Dodson (eds), *Australian Environmental Planning: Challenges and Future Prospects* (Routledge, 2014), pp. 9–20.

5 L.C. Godden, 'Indigenous Heritage and the Environment: "Legal Categories Are Only One Way of Imagining the Real"' (2002) 19(4) *Environmental and Planning Law Journal*, pp. 258–66, at 259.

6 S. Jackson, L. Porter & L.C. Johnson, *Planning in Indigenous Australia: From Imperial Foundations to Postcolonial Futures* (Routledge, 2017), p. 236. Ethical responsibility in the context of land planning has been advocated by other scholars, including Wensing, n. 1 above; E. Wensing & L. Porter, 'Unsettling Planning's Paradigms: Toward a Just Accommodation of Indigenous Rights and Interests in Australian Urban Planning?' (2016) 53(2) *Australian Planner*, pp. 91–102.

The analysis undertaken for this article focuses principally on NSW (Australia).[7] Applying responsibility to land-use planning and the capacity to change to land is incredibly important. Australia lacks constitutional or rights-based protection for First Nations people. In specific reference to land and the cultural connection to land through Country, native title and land claims legislation represent positive changes since the foundations of colonization.[8] However, the cultural significance of land that lies outside successful applications under native title and/or statutory land claims remains vulnerable to destruction because of land-use development. In NSW, the protection of land, and particularly how that land is relevant to Country, relies upon the decision-making processes contained in relevant planning and national parks legislation.

This article poses the following research question: can planning law give effect to ethical responsibility and disrupt the perpetuation of settler colonialism?[9] The answer is a qualified 'no'. The article explains how and why the exercise of power under planning law to change land and land use continues to exclude and marginalize Aboriginal culture, philosophy, and law/lore in ways that preclude respect and responsibility.[10] However, the research also demonstrates the potential for change. I argue that opportunities for disrupting the perpetuation of settler colonialism have emerged through employing a transnational law frame.

This article adopts and adapts the definition of transnational law formulated by Jolene Lin as a theoretical framework that 'recognises that the state is but one of the many actors that ought to be involved in governing human actions vis-à-vis the environment'.[11] Transnational law, therefore, helps to illuminate the 'multi-actor, multi-level and normatively plural system of environmental law and governance' that can apply to planning law.[12] This application of transnational law is reflected in litigation

[7] Planning law in Australia is almost exclusively a domain for subnational governments and jurisdictions, such as NSW.

[8] In Australia and NSW, the continued existence of native title and dismissal of *terra nullius* was upheld in the case of *Mabo* v. *Queensland* (No. 2) (1992) 175 CLR 1 (*Mabo (No. 2)*). Native title is not a grant by government; it is recognition of the pre-existing rights under First Nations laws and customs that are capable of being recognized by the common law of Australia. Land claims under subnational jurisdictions predate the *Mabo (No. 2)* decision and include, in NSW, the Aboriginal Lands Right Act 1983 (NSW). Statutory land rights schemes rely upon the grace of the state.

[9] In this article the term 'Aboriginal' refers to the original and rightful owners of the land that constitutes NSW and Australia except for the Torres Strait Islands.

[10] This application of power is reminiscent of the description provided by Glen Sean Coulthard in the Canadian context: 'Canadian settler-colonialism remains structurally oriented around achieving the same power effect … the dispossession of Indigenous peoples of their lands and self-determining authority': G.S. Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014), p. 25. Coulthard's insight resonates with the scholarship of Frantz Fanon. Fanon explains that the maintenance of colonial rule depends upon the ability to entice Indigenous peoples to align their identity with the characteristically asymmetrical and non-reciprocal forms of recognition imposed by the state: F. Fanon, *Black Skin, White Masks* (Pluto Press, 1986).

[11] J. Lin, 'The Emergence of Transnational Environmental Law', in L. Kotzé (ed.), *Environmental Law and Governance for the Anthropocene* (Hart, 2017), pp. 329–52, at 331. See also E. Webster & L. Mai, 'Transnational Environmental Law in the Anthropocene' (2020) 11 (1–2) *Transnational Legal Theory*, pp. 1–15.

[12] Lin, ibid., p. 331. See also J. Peel & J. Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) *American Journal of International Law*, pp. 679–726.

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that has promoted interpretations and applications of planning law that can halt the minimization of First Nations culture, philosophy, and law/lore to the extent that this has been driven by land-use change. Litigation that reflects this application of transnational law can help to afford respect for First Nations' ongoing connections with and responsibilities for Country under their law/lore and custom.

This article maintains that the interpretation and application of planning law can disrupt the perpetuation of settler colonialism in the following ways. Firstly, decision makers under planning law must embrace a 'landscape approach' to understand and account for the significance of land to the cultural heritage of First Nations.[13] The landscape approach places the connection between land and First Nations culture, philosophy, and law/lore in a broader physical and temporal context. This influences how the significance of change to land is understood, and how change affects the relationship of land with Country. Secondly, this landscape approach necessitates a cumulative harm assessment of the impacts on the cultural heritage of all land-use developments.

The article examines the capacity of state planning law to respect the plural First Nations legal systems in the context of Aboriginal culture under NSW planning law. However, it also draws on legal interpretations and interpretive approaches in Canadian case law that have promoted the conditions necessary to continue to operate First Nations law/lore.[14] The article demonstrates that the Canadian experience can be translated to decision making under NSW planning law and assist in disrupting the settler colonial discourse.

Following this introduction, the substance of the article is divided into three sections. Section 2 explains how transnational law is imperative in helping to guide ethically responsible interpretations and applications of NSW planning law, and how cultural differences have been translated into a legal power imbalance. Central to this inquiry is how laws based on abstracted, property-centric valuations of land are inimical to the material relationality with land that is central to First Nations culture, philosophy, and law/lore.[15] Overall, the article highlights that state planning law is unrepresentative of how *all* people that inhabit the area known as NSW manage relationships with land and space.[16]

[13] See Davis, n. 2 above; A. Packham, 'Between a Rock and a Hard Place: Legislative Shortcomings Hindering Aboriginal Cultural Heritage Protection' (2014) 31 *Environmental and Planning Law Journal*, pp. 75–91.

[14] Through the article I use the term 'Aboriginal culture' as representative and reflective of the following explanation of culture as explained by Mary Graham, a Kombumerri scholar: 'Aboriginal people's culture is ancient, and certain observations have been made over many millennia about the nature of nature, spirit and being human. The most basic questions for any human group, despite advances in technology, have not changed much over time; they include: How do we live together? How do we live without substantially damaging the environment? Why do we live?': M. Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review*, pp. 181–94, at 185.

[15] See L. Crabtree, 'Decolonising Property: Exploring Ethics, Land, and Time, Through Housing Interventions in Contemporary Australia' (2013) 31 *Environment and Planning D: Society and Space*, pp. 99–115.

[16] For a broader discussion of representation of First Nations ontologies in settler colonial law see M. Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' (2020) 9(3) *Transnational Environmental Law*, pp. 429–53.

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Section 3 explains how the roots of planning law are found in the establishment of settler colonialism and that planning law perpetuates this effect through the distribution and imposition of land-use categories that undermine First Nations culture and the connection with law/lore while perpetuating the myth of *terra nullius* and *tabula rasa*. The overall effect disempowers First Nations people and undermines the capacity to exercise custodianship over land and space.[17]

Section 4 focuses on developments in case law which demonstrate that planning law can be receptive to holistic understandings of Aboriginal cultures, philosophies, and law/lore in the context of land-use decision making. While the article is grounded in planning law experiences in NSW, the evaluation of law is enhanced through analysis and transplantation of interpretation found in Canadian case law. The section explains how these judgments not only embrace understandings of Aboriginal culture that are informed by Aboriginal philosophy and law/lore, but also highlight the systemic and structural limits in planning law that preclude embracing respect and ethical responsibility. The section also details how interpretations and applications of planning law that promote the landscape approach and cumulative harm can provide the basis for a narrative of planning law that gives effect to responsibility and disrupts the perpetuation of settler colonialism. Section 5 concludes by reflecting on the potential, and the inherent limits, of affording respect to First Nations philosophy, culture, and law/lore in planning law decision making.

## 2. Transnational Law, Cultural Differences and Legal Power Imbalances

### *2.1. First Nations and Transnationalism*

Transnational law is an appropriate frame for exploring the complexity of legal regimes in the settler colonial context because it highlights the existence of multiple legal systems operating over the same land and spatial area that usually represent divergent and, at times, conflicting interests between state law and First Nations law/lore regarding land use.[18] The transnational law frame operates on two levels in this article. Firstly, the recognition of First Nations sovereignty means that the interaction between First Nations and settler colonial legal systems is transnational.[19] Secondly, the article also engages with a more common use of transnational law in looking at the relative experiences of First Nations and settler colonial legal systems in different parts of the globe – specifically subnational planning law in Australia and Canada. This allows the analysis

[17] See S. Larson et al., 'Piecemeal Stewardship Activities Miss Numerous Social and Environmental Benefits Associated with Culturally Appropriate Ways of Caring for Country' (2023) 326 *Journal of Environmental Management*, pp. 1–11.

[18] For a broader discussion of First Nations peoples and nations in the transnational context see M. McMillan & S. Rigney, 'The Place of the First Peoples in the International Sphere: A Logical Starting Point for the Demand for Justice by Indigenous Peoples' (2016) 39(3) *Melbourne University Law Review*, pp. 981–1002; see also M. McMillan, 'Koowarta and the Rival Indigenous International: Our Place as Indigenous Peoples in the International' (2014) 23 *Griffith Law Review*, pp. 110–26, at 110.

[19] See A. Moreton-Robinson, 'Incommensurable Sovereignties: Indigenous Ontology Matters', in B. Hokowhitu et al. (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge, 2021), pp. 257–68, at 259.

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to emphasize the intersection of First Nations legal systems with settler colonial legal systems in domestic contexts in ways that also resonate globally. Within the transnational frame, the issue of responsibility is guided by an inquiry regarding the extent to which the state planning law regime gives effect to the 'normatively plural system of environmental law and governance' as articulated by Lin.[20]

As stated, a transnational law frame highlights how the operation of planning law can perpetuate settler colonialism across different nations. The significance emerges through the similar history of settler colonial legal systems and the dispossession of First Nations peoples. There has always been a global quality to First Nations' legal struggles, and this has been enhanced somewhat by the operation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[21] UNDRIP is the primary international law framework relating to the rights of Indigenous peoples, offering a strong basis for rights of First Nations peoples that are reflected in land, culture and, by extension, law/lore (in Articles 11, 12, 25, 31). However, as the legal status of UNDRIP is soft law, its influence is limited to its normative value, and potentially in guiding and influencing the interpretation and operation of First Nations rights in the context of national and subnational legal systems. In nations that lack dedicated rights – be they treaty, constitutional or statutory rights – the connection with UNDRIP is virtually absent. Australia is one such nation.

Article 5 UNDRIP states that Indigenous peoples have the right to maintain and strengthen their distinct legal institutions. As Marcia Langton notes, 'law is culture, and culture is law'.[22] Maintaining legal institutions therefore means maintaining the land-based culture that informs it. Land-use change and accompanying environmental destruction can diminish First Nations legal systems and threaten to fill the void with the imposition of settler colonial law, but these negative impacts can be clearly identified and problematized through transnational law.

Applying a transnational legal frame can identify leverage points for change and demonstrate how change can be sustained in ways that disrupt settler colonial discourse. This effect is generated through the interaction of domestic legal systems – including both First Nations and settler colonial legal systems. Mark McMillan and Sophie Rigney maintain:

> Indigenous sovereignties are … not bounded by either the domestic or the international as traditionally conceptualised … it is a form of transnational interaction between nations that exist separate from the nation-state. Indeed, Indigenous transnationalism is more appropriately seen as the activities of Indigenous people outside the nations state.[23]

In the legal context, Indigenous transnationalism is premised on the sovereign jurisdiction and governance of First Nations as explained by Ravi de Costa: 'When we consider

[20] Lin, n. 11 above, p. 331.

[21] New York, NY (United States (US)), 13 Sept. 2007, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/01/UNDRIP_E_web.pdf.

[22] See M. Langton & A. Corn, *First Knowledges: Law – The Way of the Ancestors* (Thames and Hudson, 2023).

[23] McMillan & Rigney, n. 18, p. 992.

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Indigenous transnationalism … these are borders within borders; internal borders are present within nation states … Indigenous jurisdictions are not dependent upon the jurisdiction of the nation state to exist'.[24] It provides a context to discuss and analyze the intersection between the legal systems of First Nations and settler colonial states and evaluate how the marginalization and extinguishing of First Nations law gives effect to settler colonialism – and how this effect might be disrupted.

The influence of the UNDRIP norms is demonstrated in the bottom-up litigation in various jurisdictions. Planning law and its central role of managing land-use change means it is a key point of intersection and tension between First Nations and settler colonial legal systems. While the legal systems of settler colonial states were imposed on First Nations, the power to change land and land use is disproportionately concentrated in the state. The change required to afford and demonstrate respect for First Nations law/lore must come from within state planning law systems.

I argue that a catalyst for change is how state planning laws are interpreted in situations where land-use development threatens First Nations culture, philosophy, and law/lore. Canada is a stand-out example of a settler colonial society where the interpretation and application of laws regulating land use have promoted First Nations interests – at least relative to Australia. This is partly on account of the treaty- and constitution-based forms of protection of First Nations rights throughout Canada at the national and subnational levels, which provide fundamental legal standards against which land-use development is evaluated. The case of *Yahey* v. *British Columbia* is a recent example of this interpretive approach.[25] Justice Burke maintained that the 'way of life' of First Nations people is not restricted to hunting, trapping, and fishing as an economic livelihood.[26] This interpretation was rejected because it would promote a presumption that First Nations people were willing to substitute the settler way of life for their own.

This conclusion reiterated the broad, less restrictive approach to interpretation in the context of First Nations rights since *R* v. *Sparrow* in 1990.[27] Central to the case was the interpretation of section 35 of the Constitution Act 1982.[28] *Sparrow* remains a seminal case. The Supreme Court held that the Canadian government has a fiduciary relationship with First Nations peoples and emphasized that the rights of First Nations peoples must be interpreted in a flexible manner that is 'sensitive to the Aboriginal perspective'.[29]

[24] R. de Costa, *A Higher Authority: Indigenous Transnationalism and Australia* (University of New South Wales Press, 2000), p. 165.

[25] *Marvin Yahey on his own behalf and on behalf of all other Blueberry River First Nations beneficiaries of Treaty No. 8 and the Blueberry River First Nations* v. *Her Majesty the Queen in Right of the Province of British Columbia*, 2021 BCSC 1287 (*Yahey*).

[26] Ibid., para 3.

[27] [1990] 1 SCR 1075 (SCC) (*Sparrow*).

[28] Constitution Act 1982, s. 35 of which states: '(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons'.

[29] *Sparrow*, n. 27 above, p. 1112.

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As mentioned earlier, the treaty- and constitution-based forms of protection afforded to First Nations peoples in Canada are central to facilitating this approach to interpretation that is based upon preventing a 'meaningful diminution' of rights, as laid down in *Sparrow* and then refined in later cases. As is detailed further in Section 4 of this article, assessing land use in ways that prevent a 'meaningful diminution' of rights challenges applications of planning laws that promote the settler valuation of land at the risk of destroying First Nations' ontologies and epistemologies.

Can this interpretative approach be translated into other planning regimes such as that of NSW? Taking into account the differing legal basis, it is important to note that the rights-based approach in Canada is grounded in 'the honour of the Crown', a 'constitutional principle requiring that treaties be interpreted in a liberal, purposive manner and presuming that the Crown fulfills its promises'.[30] While the absence of treaty- or constitution-based rights protection in NSW and Australia means that the transplant is not seamless, the key to broader interpretation is whether, on the evidence, 'meaningful exercise' of rights remains feasible. Regardless of the presence of rights, the assessment of meaningful exercise is based on the assessment of how land-use change can impact and destroy the land and environment in ways that are integral and critical to First Nations culture. The residual message is that laws should not be interpreted and applied to produce this outcome where alternative interpretations are available.

I propose to compensate for the absence of relevant rights under NSW law through the interpretation and application of laws based on ethical responsibility.[31] The application of ethical responsibility, as described, contains two interrelated elements: cultural difference and power. The exercise of power is a key site of ethical responsibility as it focuses attention on the capacity of law and decision makers to

[30] R. Hamilton & N. Ettinger, '*Yahey* v. *British Columbia* and the Clarification of the Standard for a Treaty Infringement', *ABlawg*, 24 Sept. 2021, available at: https://ablawg.ca/2021/09/24/yahey-v-british-columbia-and-the-clarification-of-the-standard-for-a-treaty-infringement.

[31] Another subnational jurisdiction of Australia, the state of Queensland, refers to ethics in the context of planning law. The relevant planning legislation, the Planning Act 2016 (Qld), states at s. 5 that advancing the purpose of the Act includes 'following ethical decision-making processes', which include, inter alia, 'valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition': Planning Act 2016 (Qld), s 5:

> 'Advancing purpose of Act
>
> (1) An entity that performs a function under this Act must perform the function in a way that advances the purpose of this Act.
> (2) Advancing the purpose of this Act includes—
> following ethical decision-making processes that—
> (i) take account of short and long-term environmental effects of development at local, regional, State and wider levels; and
> (ii) apply the precautionary principle, namely that the lack of full scientific certainty is not a reason for delaying taking a measure to prevent degradation of the environment if there are threats of serious or irreversible environmental damage; and
> (iii) seek to provide for equity between present and future generations; and
> …..
> (d) valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition.'

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remake the world in alignment with certain values.[32] Land-use planning includes a 'wide range of design, legal, regulative economic, ethnic, and political decisions that together "produce" societal space'.[33] Planning law regulates changes to land and spatial use and the impacts on the built environment. Power, in the context of planning law, refers to the management, approval, and performance of changes to land use in the pursuit of objectives set by the state. Key to this analysis is whether planning law in the exercise of power, as described, can afford *respect* for the differences between Western and First Nations culture – particularly legal culture and First Nations law/lore. Respect, for the purposes of this article, is equated to a *horizontal dialogue*.[34] In contrast to a vertical dialogue, a horizontal dialogue can take place only in the absence of structural hierarchies that marginalize and disempower First Nations people.[35]

Historically, NSW planning laws sought to integrate Aboriginal culture, philosophy, and critically law/lore within its parameters rather than afford respect for the differences between legal systems in a manner consistent with the way in which respect is described above. The formulation and implementation of NSW planning laws risk subjugating Aboriginal legal systems within a unitary legal regime. This resonates strongly with what Tanganekald, Meintangk and Boandik scholar Irene Watson terms 'recognition': 'The politics of recognition, as it is currently framed and rolled out by states, is a process of assimilation, that is, to become the same in order to be "included"'.[36]

The interface between First Nations culture and law/lore and Western legal systems creates conditions that are complex and must be navigated with care and respect. The adoption of Aboriginal culture and law into state planning law is reminiscent of 'refraction', as explained by Métis scholar Zoe Todd: refraction describes the 'complex and dynamic interface between Indigenous legal orders and the State'.[37] In the context of planning law, circumstances of refraction arise when First Nations legal systems use laws that are grounded in relationality to land to bend state law to assert local knowledge and praxis in defiance of the incursions of state-based land change.

Recognition of cultural difference must not be equated with respect and, by extension, responsibility. Mary Graham maintains that giving respect to Aboriginal cultures

[32] See H. Jonas, *The Imperative of Responsibility* (University of Chicago Press, 1980); P.D. Burdon, 'Obligations in the Anthropocene' (2020) 31 *Law and Critique*, pp. 309–28.

[33] O. Yiftachel, '"Terra Nullius" and Planning: Land, Law and Identity in Israel/Palestine', in G. Bhan, S. Srinivas & V. Watson (eds), *The Routledge Companion to Planning in the Global South* (Routledge, 2017), pp. 243–54, at 244.

[34] Irene Watson has noted that state legal systems must allow space for a horizontal dialogue with Indigenous people and culture: I. Watson, 'What is the Mainstream? The Laws of First Nations Peoples', in R. Levy et al. (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017), pp. 213–20, at 217.

[35] This conception of respect resonates with McMillan & Rigney, n. 18 above, p. 992.

[36] I. Watson, 'Aboriginal Laws and Colonial Foundation' (2017) 26(4) *Griffith Law Review*, pp. 469–79, at 473.

[37] Z. Todd, 'Refracting the State Through Human-Fish Relations: Fishing, Indigenous Legal Orders and Colonialism in North/Western Canada' (2018) 7(1) *Decolonization: Indigeneity, Education & Society*, pp. 60–75, at 67. For a description of a similar effect in the Australian context see I. Watson, 'Aboriginality and the Violence of Colonialism' (2009) 8(1) *Borderlands* (e-journal), pp. 1–8.

and Country in NSW and Australia cannot be translated through individualistic decision making because the ethical component of culture that is underpinned by relations with land 'encompasses more than simply applying principles of right action in order to know how to act'.[38] The remainder of this section critically examines how cultural and legal difference translates into the disproportionate concentration and exercise of power to influence land-use change in the settler colonial context.

### 2.2. Land at the Centre of Culture, Philosophy and Law

First Nations people across the world continue to exercise sovereignty within and against the confines of state-led sovereignty.[39] As noted earlier in the article, sovereignty is reflected in culture, especially the relational connection with land. Quandamooka scholar Aileen Moreton-Robinson provides the following insight, which is largely common to First Nations people globally: 'As resilient existents, our sovereignties continue ontologically and materially … This is an inherent sovereignty not temporally constrained'.[40]

The reasons why First Nations lifeways have not penetrated the settler colonial narrative on law are multiple and varied.[41] Arguably the most critical factor remains the incongruence of metaphysical qualities, represented by the branches of ontology and epistemology in Western philosophy with positivist law.[42] Anishinaabe and Haudenosaunee scholar Vanessa Watts writes:

> Habitats and ecosystems are better understood as societies from an Indigenous point of view; meaning that they have ethical structures, inter-species treaties and agreements, and further their ability to interpret, understand and implement. Non-human beings are active members of society. Not only are they active, they also directly influence how humans organize themselves into that society.[43]

In so far as First Nations law has a central legal subject like the Western legal model, this role is performed by land and relationships with land. Entanglement with the material qualities of land and space underpins existence, lifeways, and all relationships.[44] Moreton-Robinson maintains that the ontological relationship with land that is fundamental to First Nations culture and law/lore 'marks a radical, indeed incommensurable,

[38] M. Graham, 'The Law of Obligation, Aboriginal Ethics: Australia Becoming, Australia Dreaming' (2023) 37 *Parrhesia*, pp. 1–21, at 3.

[39] Moreton-Robinson, n. 19 above, p. 258.

[40] Ibid., p. 259.

[41] E. Boulot & J. Sterlin, 'Steps Towards a Legal Ontological Turn: Proposals for Law's Place beyond the Human' (2022) 11(1) *Transnational Environmental Law*, pp. 13–38, at 24.

[42] Ibid.

[43] V. Watts, 'Indigenous Place-thought & Agency Amongst Humans and Non Humans (First Woman and Sky Woman Go on a European World Tour!)' (2013) 2(1) *Decolonization: Indigeneity, Education & Society*, pp. 20–34, at 23.

[44] See A. Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015); Martuwarra River of Life et al., 'Recognizing the Martuwarra's First Law Right to Life as a Living Ancestral Being' (2020) 9(3) *Transnational Environmental Law*, pp. 541–68.

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difference between us and the non-Indigenous. This ontological relation to land constitutes a subject position that we do not share, that cannot be shared, with the post-colonial subject'.[45]

Graham states that 'the two most important kinds of relationship in life are, firstly, those between land and people and, secondly, those amongst people themselves, the second being always contingent upon the first'.[46] It is necessary to acknowledge that Aboriginal society does not feature an equivalent term for ethics as understood in Western culture and philosophy.[47] The entanglement of ethics with the immutable connection between people and land means that ethics becomes habituated. Entering into a relationship with land is part of socialization that views land as a sacred, moral entity.[48] Graham explains that this 'involves a physical, emotional and spiritual caring for and about the life force in all its variations (e.g., flora, fauna, insects, Landscape and the elements), all of which are accompanied by their own stories'.[49]

Land is a 'moral entity'. Human beings pattern themselves 'into Land via the Law', which instills the ethic that '[t]he Land is the Law'.[50] Graham explains that this gives the basis for a 'custodial ethic' and involves an obligation to look after the 'Land that nurtures us, the ancient reciprocal relationship with nature, an ethic of looking after, stewardship, caring for, rather than a survivalist ethos with its rivalry and competition over resources and structural conflicts enveloped in hierarchies of power'.[51]

Law is not human-centred; 'it is not only something that humans know or feel. The beings of Country are alive with agency and knowing'.[52] Country is constituted by strong and resilient relationships when realized within a philosophy of 'ethics, empathy and equity'.[53] Aboriginal culture is highly ethical, as it relies on an ethic of stewardship towards the land and, by extension, throughout society. This ethic of stewardship is central to a culture that contains its own logic, philosophy, values, and social development.[54] A powerful quality is relationality. Trawlwulwuy scholar Lauren Tynan explains:

> A relational reality creates relationships between ideas or entities, it is an affective force that compels us to not just understand the world as relational, but feel the world as kin. I can tell you that the world is relational and you may believe me, but beyond understanding the concept of relationality, to feel the world as kin is to enact a relational ethos and the responsibilities and accountabilities that accompany it.[55]

[45] Moreton-Robinson, n. 44 above, p. 11.
[46] M. Graham, 'Understanding Human Agency in Terms of Place: A Proposed Aboriginal Research Methodology' (2009) 6 *Philosophy Activism Nature*, pp. 71–8.
[47] Ibid.
[48] Ibid., p. 78.
[49] Ibid.
[50] Graham, n. 38 above, p. 5.
[51] Ibid.
[52] See Bawaka Country et al., 'Caring as Country – Singing up Sovereignties' in N. Graham, M. Davies & L. Godden (eds), *The Routledge Handbook of Property, Law, and Society* (Routledge, 2023), pp. 16–27, at 22.
[53] Martuwarra River of Life et al., n. 44 above, p. 544; see Rose, n. 4 above.
[54] Graham, n. 38 above, p. 7.
[55] L. Tynan, 'What is Relationality? Indigenous Knowledges, Practices and Responsibilities with Kin' (2021) 28(4) *Cultural Geographies*, pp. 597–610, at 600.

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The concept of place, together with maintaining a relationality with land, form the limbs of the custodial ethic, as specified by Graham in the following:

1. the ethical principle of maintaining a respectful, nurturing relationship with Land, Place, and community, and
2. the organizing governance principle based on autonomy and identity of Place.[56]

Bawaka Country has revealed that the emergence of place is a continual relational experience. Activities undertaken with land help to explain and perform 'an emplaced and distinctive place/space which incorporates the past, the present and the future'.[57] As Watson explains, Aboriginal legal systems are 'embedded in our relationships to the natural world … a natural system of obligations and benefits, flowing from an Aboriginal ontology'.[58] By contrast, Western law, including state planning law, is characteristically anthropocentric and positions the disembodied human at its centre while framing land as a resource to be allocated, commodified, and exploited. Power to change land is aligned with the interests of this central legal subject through the primacy of property, as detailed in the following subsection.

### 2.3. The Central Legal Subject under State Planning Law

Western law, including planning law, is constructed around a central legal subject, characterized as the white, male property owner who is disembodied and separated from his material surrounds. Under the Western legal model, land is relegated to the status of an instrument or a resource that is designated a role of service in the interests of the central legal subject. The absence of any material relationship with land under Western law represents one of the most marked differences from Aboriginal or First Nations values of land.[59]

Western law operates based on a fundamental subject/object binary – positioning the individual person in the role of *subject*, and nature (or more relevantly, land for the purposes of this article) as *object*. The dichotomy between humanity and nature is an expression of Cartesian separation.[60] The central legal subject is a constructed form of the person. As Anna Grear explains, the 'human subject stands at the centre of the juridical order as its only true agent and beneficiary'.[61] As is detailed further, the different aspects that compose the constructed human represent a critical departure from Aboriginal culture and law/lore.[62]

[56] Graham, n. 38 above, p. 7

[57] Bawaka Country et al., 'Co-becoming Bawaka: Towards a Relational Understanding of Place/Space' (2016) 40(4) *Progress in Human Geography*, pp. 455–75, at 468.

[58] I. Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015), p. 3.

[59] See Boulot & Sterlin, n. 41 above.

[60] M. Davies, *Law Unlimited: Materialism, Pluralism and Legal Theory* (Routledge, 2017), p. 8. Graham maintains: 'There is no Aboriginal equivalent to the Cartesian notion of "I think therefore I am" but, if there were, it would be – "I am located therefore I am"': Graham, n. 38 above, p. 8.

[61] A. Grear, 'Deconstructing *Anthropos*: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocentric "Humanity"' (2015) *Law and Critique*, pp. 225–49, at 228.

[62] See J. Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations*, pp. 162–89. Val Plumwood maintains that '[a] universalised concept of "humanity" can be used also to deflect political

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Rationality is promoted as a fundamental quality that separates the central legal subject from objects under law. The content of rationality is 'thoroughly loaded with hierarchical assumptions and implications'.[63] This form of separation prompted pretensions of superiority among certain members of humanity over all other people and entities in nature to maintain and preserve the pre-eminence of this abstracted, disembodied legal subject.[64] The disembodied quality of rationality underpins legal positivism. Positivism conceptualizes and describes law as a science and proclaims that no element that is external to the strict parameters of the lawmaking process influences the definition or meaning of law.[65] The substance of law is rational and conceptual, and ultimately concerned with exclusively managing the relationships between people.[66]

The connection between rationality and hierarchy guides views and values towards land. The following from Margaret Davies explains the metaphysical implications of establishing and implementing the subject/object binary under Western legal models:

> A system that divides the world into subjects and objects is intrinsically hierarchical, meaning that all of the things classified as objects are ontologically debased can be treated as mere commodities for exchange, and treated as equals in economic exchanges. Land, for example, becomes abstract in real estate transactions so that it can participate fully in capitalist circulation.[67]

The significant differences between cultures and, by extension, laws mean that an Aboriginal connection with the land is incongruous with Western views of the instrumentality of land. As such, these differences have been perceived to be a threat and the response from law has led to the exclusion and marginalization of Country and how it encapsulates Aboriginal culture, philosophy, and law/lore.[68]

## 3. The Role of Planning Law in Establishing and Perpetuating Settler Colonialism

### *3.1. Colonial Roots of Land-Use Planning*

Planning law operates on the assumption that First Nations legal systems did not exist, and the land was not subject to a system of management. The effect is summarized as follows by Watson:

critique and to obscure the fact that the forces directing the destruction of nature and the wealth produced from it are owned and controlled overwhelmingly by an unaccountable, mainly white, mainly male elite': V. Plumwood, *Feminism and the Mastery of Nature* (Routledge, 1993), p. 5.

63 Grear, n. 61 above, p. 234.

64 See A. Pottage, 'Holocene Jurisprudence' (2019) 10(2) *Journal of Human Rights and the Environment*, pp. 153–75; D. Chakrabarty, 'The Climate of History: Four Theses' (2009) 35(2) *Critical Inquiry*, pp. 197–222; C. Bonneuil, 'The Geological Turn: Narratives of the Anthropocene', in C. Hamilton, C. Bonneuil & F. Gemenne (eds), *The Anthropocene and the Global Environmental Crisis: Rethinking Modernity in a New Epoch* (Routledge, 2015), pp. 17–31.

65 P.D. Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2015), p. 6.

66 Ibid., pp. 5–6; Peter Burdon also discusses how property is focused on regulating relations between people: P.D. Burdon, 'What is Good Land Use? From Rights to Relationship' (2010) 34 *Melbourne University Law Review*, pp. 708–35; see also Davies, n. 60 above, pp. 10–1.

67 Davies, n. 60 above, pp. 27–8; Nicole Graham notes that the Aboriginal Land Rights Act 1983 (NSW) viewed lands and waters as passive 'things', which can be owned and utilized, without any reparation to Country considered: N. Graham, *Lawscape: Property, Environment, Law* (Routledge, 2011).

68 Davies, n. 60 above, p. 29.

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> The colonial nations have closed the book a multitude of times, ignoring Aboriginal ontologies and with that have ignored the possibility of there being other ways of knowing the world beyond theirs – a hegemonic, positivist and raced view of the world, with the planet as a commodity.[69]

The commitment of planning law to the primacy of property necessarily casts light on the importance of the planning system to colonialism.[70] The story of planning shadows that of property. This section is guided by the following insight from Dorries: 'Planning's commitment to property accounts for planning's entanglements with colonialism … and explains how settler colonialism … and racial capitalism are spatialized'.[71]

As explained above, the subject/object hierarchy that is central to Western law preaches that land is an object that is passive, mechanical, and bereft of agency.[72] Casting nature as passive initiated and fostered the myth of *terra nullius* that provided the basis for the construction of racial property regimes.[73] *Terra nullius*, when applied to land, relegates that land to the status of 'a resource empty of its own purposes or meanings, and hence available to be annexed for the purposes of those supposedly identified with reason or intellect, and to be conceived and moulded in relation to these purposes'.[74]

While the *terra nullius* myth is grounded in notions of property ownership, planning law has been instrumental in its ongoing implementation. It is a legacy of the default position adopted by land-use planning and planning law that land which is not perceived as having been put to a productive use is necessarily vacant and therefore a legitimate site for change.[75] The consequences of *terra nullius* extend beyond law, 'stripping [I]ndigenous peoples of their culture, histories, and codes of governance. The concept endows the invading or expanding entity with the power and legitimacy to define when and where land is considered "empty", and hence who is a "rightful" owner'.[76] Watson explains how state law in Australia is grounded in exclusion and marginalization:

> Colonial power was legitimized by the principle of terra nullius, the creation of 'western' lawyers who enacted their contempt for other worlds. The racist construction of

[69] Watson, n. 58 above, p. 1.

[70] Dorries, n. 2 above, p. 310. See also N. Blatman-Thomas & L. Porter, 'Placing Property: Theorizing the Urban from Settler Colonial Cities' (2019) 43 *International Journal of Urban and Regional Research*, pp. 30–45; P. Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research*, pp. 387–409.

[71] Dorries, n. 2 above, p. 310.

[72] Plumwood, n. 62 above, p. 4.

[73] See Crabtree, n. 15 above; R. Howitt & G. James Lunkapis, 'Coexistence: Planning and the Challenge of Indigenous Rights', in P. Healy & J. Hillier (eds), *The Ashgate Research Companion to Planning Theory: Conceptual Challenges for Spatial Planning* (Routledge, 2016), pp. 109–34.

[74] Plumwood, n. 62 above, p. 4 (maintaining further that '[t]he category of nature is a field of multiple exclusion and control, not only of non-humans, but of various groups of humans and aspects of human life which are cast as nature. Thus racism, colonialism and sexism have drawn their conceptual strength from casting sexual, racial and ethnic difference as closer to the animal and the body construed as a sphere of inferiority, as a lesser form of humanity lacking the full measure of rationality or culture').

[75] Godden, n. 5 above, p. 263. See D.R. Byrne, 'Nervous Landscapes: Race and Space in Australia' (2003) 3(2) *Journal of Social Archaeology*, pp. 169–93.

[76] Yiftachel, n. 33 above, p. 244.

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> Aboriginality which derives from the principle of terra nullius has led to a common 'deficit' characterization and cultural profiling of First Nations Peoples.[77]

The emergence and proliferation of values in planning law were most evident in colonial contexts as property-centric notions of land were violently imposed through demarcating boundaries and allocating uses to land.[78] Through regulating land use, planning law has perpetuated the racialization of property regimes and remains complicit in the destruction of people and culture.[79] Driving planning were values of so-called rational land use that equated ownership with cultivation and declared uncultivated land to be waste. If land was not cultivated, it signified a lack of ownership, and a person would not have the benefits of property bestowed upon them.[80]

Affirmation of *terra nullius* is a devastating but necessary assessment of planning law. This assessment provides a basis to re-evaluate the limits and constraints of law to promote the types of change that might express an embrace of responsibility.[81] As further explained in the next subsection, planning law in NSW has helped to establish a hierarchy of land uses premised upon the primacy of property and the marginalization of Aboriginal culture. The following explanation of this effect provided by Watson underlines the consequences for Aboriginal legal culture:

> The colonial project posits and constructs rules which overlay the laws of the land. It rejects First Nations' laws as law, and instead sees them as being no more than oral stories, mere myths, and fables. Our laws are dismissed as childlike or primitive, and hence remain unexamined for their ancient, coded knowledge of the interdependence between humans and our environments.[82]

### 3.2. The Contemporary Planning Legislative Regime

Issues of power and respect inform the interaction between the different legal systems that apply to land. Watson highlights the connection between recognition and preserving hegemony: 'The illusion of recognition works its power so as to conceal the ongoing character and intent of the colonial project – that is, to maintain hegemony and do nothing about returning balance and power to the colonised'.[83] Interpretations and applications of planning law that give recognition to First Nations culture ensure that the hegemony

[77] I. Watson, 'Aboriginal Relationships to the Natural World: Colonial "Protection" of Human Rights and the Environment' (2018) 9(2) *Journal of Human Rights and the Environment*, pp. 119–40, at 129.

[78] See R. Howitt & S. Suchet-Pearson, 'Rethinking the Building Blocks: Ontological Pluralism and the Idea of "Management"' (2006) 88(3) *Geografiska Annaler*, pp. 323–35.

[79] See Wensing & Porter, n. 6 above; Dorries, n. 2 above.

[80] S. Dorsett, 'Sovereignty as Governance in the Early New Zealand Crown Colony Period', in S. Dorsett & I. Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave MacMillan, 2010), pp. 209–228, at 222.

[81] Dorries, n. 2 above, p, 310; see also H. Dorries, D. Hugill & J. Tomiak, 'Racial Capitalism and the Production of Settler Colonial Cities' (2022) 132 *Geoforum*, pp. 263–70; Wensing, n. 1 above.

[82] Watson, n. 77 above, p. 138.

[83] Watson, n. 58, above, p. 2; see also I. Watson, 'Aboriginal Laws and Colonial Foundation' (2017) 26(4) *Griffith Law Review*, pp. 469–79, at 479. Watson's explanation of recognition is provided earlier in the article (Section 2.1 above, text at n. 36).

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of planning law is not threatened. In the context of NSW planning law, recognition is grounded in heritage protection provisions under both the National Parks and Wildlife Act 1974 (NSW) (NPW Act)[84] and Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act).[85] Overall, this section demonstrates that the inclusion of Aboriginal culture under NSW planning law, albeit limited to the Western perception of culture, is marginal in terms of influencing the form and direction of land planning regulation. In redressing the power imbalance as part of applying responsibility to planning law, this article adopts Watson's assertion that ultimately the objective is to 're-centre Aboriginal ways of being. The enabling of a dialogue between states and First Nations should include First Nations' perspectives on authority and power'.[86]

The myths of *terra nullius* and *tabula rasa* allowed land planning systems to exclude First Nations relationships with land that were forged prior to colonization, and instead superimpose a system of categorization based upon viewing land only as a resource to be commodified and exploited.[87] Categorization is characteristic of 'Western orderings of nature' and the cultural context within which recognition takes place.[88] Demarcation and allocation accompanying categorization are inimical to and incongruent with Aboriginal and First Nations relationality with land, which informs culture, philosophy, and law/lore.[89] Recognizing Country within this system is based on an assumption that it can be segmented into portions under planning instruments, rather than understanding that 'the land itself maps the laws of Aboriginal peoples'.[90] Modern property is constructed on the basis of dephysicalization – this means it is abstracted and detached from the physical and material qualities of land. Property can transcend the material and 'mask the dynamic and relational nature of landscapes'.[91] In the NSW and Australian context, the Bawaka Country collective asserts that the 'attempt to remake Indigenous lands and Country as property is a powerful tool of colonial possession and extractivism'.[92]

Davis explains that the translation of Country into the environmental planning law context 'involves land rights recognition as well as the many manifestations of being Aboriginal including Aboriginal connection to land and community'.[93] Culture represents the entry point for giving effect to the recognition of Aboriginal legal systems under state planning law.[94] Cultural protection manifests as a consideration that

[84] National Parks and Wildlife Act 1974 (NSW) (NPW Act).
[85] Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act).
[86] Watson, n. 77 above, p. 138. See also I. Watson, 'Re-centering First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *AlterNative: An International Journal of Indigenous People*, pp. 445–539.
[87] Godden, n. 5 above, p. 260.
[88] Ibid.
[89] See Moreton-Robinson, n. 19 above.
[90] Watson, n. 58 above, p. 511; Godden, n. 5 above, p. 258.
[91] N. Graham, 'Dephysicalised Property and Shadow Lands', in R. Bartel & J. Carter (eds), *Handbook on Space, Place and Law* (Edward Elgar, 2021), pp. 281–91, at 284.
[92] Bawaka Country, n. 52 above, p. 17.
[93] Davis, n. 2 above, p. 177.
[94] An observation that can be applied also to NSW and other jurisdictions within Australia, 'Aboriginal and Torres Strait Islander peoples are "invisible" in land use planning and that they need to be made legally

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might need to be taken into account when assessing whether to grant legal approval for a proposed land use. Equating cultural protection with all other land categories and relevant considerations of land use means that it is afforded no privilege or precedence at the strategic planning stage and when determining land change.

Translating Aboriginal culture into planning law carries an inherent risk that relationality with land, as understood through Country, becomes rationalized.[95] It exacerbates the problems that exist under legislative regimes, such as the NPW Act, which empowers the state, rather than Aboriginal peoples, to declare how sites of land and space are to be understood in terms of manifesting culture and law/lore.[96] Country is effectively reduced to an abstracted form of land use in terms of state law. The finding resonates with the following observation from Watson: 'The idea of "cultural recognition" is shrunk back to whatever it fits with and is accommodated by the proposed development. In denying Indigenous relations to land, the state denies the authenticity of these relationships'.[97] How knowledge of Country should be represented in planning law and practised through, inter alia, practices of custodianship and law/lore is negated.[98] In this sense, affording recognition under planning law is potentially inimical, even hostile, to the protection of Aboriginal culture and law/lore, precluding respect and responsibility while the 'ongoing exclusion by the state of Aboriginal laws, knowledges and philosophies maintains a colonial terra nullius'.[99]

## 4. Evaluating Cultural Protection and the Dangers of Recognition through Transnational Law

The experiences of different First Nations and their interactions with settler colonial legal systems have elements in common. The notions of meaningful diminishment or exercise of rights under Canadian case law could influence the application of planning law in NSW in several ways, including how litigants frame and strategize arguments and how decision makers, primarily the judiciary, interpret and apply law. Following *Sparrow*,[100] the case of *R* v. *Van der Peet* specified several steps to assist in assessing and evaluating whether there has been a meaningful diminishment or exercise of rights.[101] For the purposes of this article the relevant steps include: (i) courts must

visible': S. Harwood, Submission No 13 to Infrastructure, Planning and Natural Resources Committee, Parliament of Queensland, Queensland Planning Reform, 5 Aug. 2015, Table 4.1 item 10 (cited in Wensing (2018), n.1 above, p. 174).

95 For an explanation of the role of relationality in First Nations culture, philosophy, and lore/law see Tynan, n. 55 above.

96 The category/pathway of integrated development requires an applicant to receive an Aboriginal heritage permit pursuant to s. 90 of the NPW Act. The operation of s. 90 places the obligation upon the development applicant to obtain an Aboriginal Heritage Impact Permit (AHIP) if the proposed land-use development will damage or destroy Aboriginal objects. Specifying the location of an Aboriginal place is assigned to the Minister under s. 84 of the NPW Act.

97 Watson, n. 58 above, p. 3.

98 Watson, n. 58 above, p. 473 : 'Our capacity to care for country remains a struggle'. See also Larson et al., n. 17 above.

99 Watson, n. 58 above, p. 513.

100 *Sparrow*, n. 27 above.

101 *R* v. *Van der Peet* [1996] 2 SCR 507.

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take into account the perspective of Aboriginal peoples themselves; (ii) courts must approach the rules of evidence in the light of the evidentiary difficulties inherent in adjudicating Aboriginal claims; (iii) the influence of European culture will be relevant to the inquiry only if it is demonstrated that the practice, custom or tradition is integral because of that influence; (iv) courts must take into account both the relationship of Aboriginal peoples with the land and the distinctive societies and cultures of Aboriginal peoples.[102]

The *Yahey* case once again focused on the interpretation of 'meaningful' in the context of land-use change. Justice Burke held that 'the focus of the infringement analysis – and consideration of whether "no meaningful right remains" – should be on whether the treaty rights can be meaningfully exercised, not on whether the rights can be exercised at all'.[103] The meaningful exercise of rights would be lost if the rights had been significantly or meaningfully diminished.

This final substantive section of this article examines how culture and, by extension, Aboriginal law/lore can be interpreted in ways that align with First Nations cultural heritage, specifically Country in the Australian context, and disrupt the perpetuation of settler colonial discourse in planning law. Giving effect to this in the context of decision making relies upon the knowledge and testimony of Aboriginal people. In principle, this does provide an opportunity for greater input and influence of Country into land-use decision making in ways that redress the power imbalance – at least relative to the disconnection from power that we saw in the previous section.[104]

Part of this analysis investigates whether ecologically sustainable development (ESD) can leverage the application of responsibility in planning law. Under NSW law, ESD is one of the legislative objects under section 1.3 of the EP&A Act and has been described as a 'touchstone' and 'central element' in planning law.[105] Under the EP&A Act, ESD is composed of four pillars: (i) the precautionary principle, (ii) intergenerational equity, (iii) internalization of environmental costs (polluter pays), and (iv) the conservation of biodiversity. ESD has been added to the list of legislative objects of the NPW Act (section 2A) and is, where relevant, a mandatory consideration under section 4.15, an assessment process under the EP&A Act, thereby providing two opportunities to apply ESD in the context of protection of Aboriginal culture.[106]

[102] Ibid., paras 48–74.
[103] *Yahey*, n. 25 above.
[104] See Packham, n. 13 above.
[105] See Preston J in *Bentley* v. *BGP Properties Pty Ltd* (2006) 145 LGERA 234.
[106] Pursuant to the EP&A Act, s. 1.4, ESD has the same meaning as s. 6(2) of the Protection of the Environment Administration Act (1991) (NSW), which reads:

> '(2) For the purposes of subsection (1)(a), ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs—
>
> (a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
>
> In the application of the precautionary principle, public and private decisions should be guided by—

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### 4.1. Darkinjung Local Aboriginal Land Council *v.* Minister for Planning and Infrastructure

This case (*Darkinjung*) is seminal in integrating Country into the assessment of a development application.[107]

The applicant, the Darkinjung Local Aboriginal Land Council, sought review of a development consent issued by the Minister for Planning and Infrastructure for an extension of an existing sand quarry. The basis of the application for merits review focused upon the irreparable harm that the expansion of the quarry would have on sacred sites and the surrounding areas that constitutes the cultural and spiritual landscape.

The decision is renowned for how it embraced a 'whole of landscape'[108] approach to the recognition and understanding of Aboriginal culture.[109] A rock engraving site, referred to as 'the Women's site', was in proximity to an excavation area that was part of the development application. The site was central to the case. The applicant submitted that the excavation would have the effect of isolating the Women's site from the surrounding area and other physical sacred sites. The Land and Environment Court (LEC) accepted that the significance of the Women's site was appropriately understood in the broader physical and spiritual landscapes. Removal of land surrounding the Women's site would necessarily degrade the 'spiritual and cultural connection that Aboriginal people have to the land or the site'.[110]

The LEC concluded that the collective evidence suggested that 'the local and immediate area has characteristics of an integrated cultural landscape'.[111] While connection with Country exists irrespective of physical sites, such sites do act as a 'tangible aspect of this connection' and help to '"map" people physically onto Country'.[112] In relation to the Women's site, expert evidence maintained that it is through the existence and recognition of the site that 'women's existing knowledge about the country is reified and

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
(ii) an assessment of the risk-weighted consequences of various options,
(b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
(c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
(d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services.'

[107] For a deeper exploration of this aspect of the judgment see L. Butterly & R. Pepper, 'Are Courts Colourblind to Country? Indigenous Cultural Heritage, Environmental Law and the Australian Judicial System' (2017) 40(4) *University of New South Wales Law Journal*, pp. 1313–335.
[108] Davis, n. 2 above, pp. 177–8. This approach was taken in subsequent cases, such as *Hunter Environment Lobby Inc.* v. *Minister for Planning and Infrastructure (No. 2)* [2014] NSWLEC 129.
[109] Ibid.
[110] *Darkinjung Local Aboriginal Land Council* v. *Minister for Planning and Infrastructure* [2015] NSWLEC 1465 (*Darkinjung*), para. 36.
[111] Ibid., para. 205.
[112] Ibid., para. 167.

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gives a specific point of connection to place' that is used as a 'place of teaching and learning'.[113]

The source of the teaching and learning of knowledge is the connection with place. One expert witness, Dr Ross, shared the finding that the women she had consulted felt a 'a strong sense of responsibility for the site' as a place of knowledge, highlighting the connection between relationality with and responsibility for land and Country. The LEC maintained that there was 'convincing evidence' that indicated the 'interrelatedness of the elements of the cultural landscape' within and around the land that was the subject of the development application.[114]

The challenge posed by abstraction of land to Aboriginal culture imbues some of the respondent's submission. The respondent attempted to downplay the cultural significance of the intervening land between the different sites, arguing that it lacked a traditional connection, thereby rendering these areas 'free land' and suitable for use as part of the quarry development.[115] The term 'free land' carries weight. The significance of erasing this land of its meaning and allowing abstraction goes deeper and is reminiscent of *terra nullius*. The LEC rejected this line of reasoning, instead maintaining that '[t]here is convincing evidence which indicates interrelatedness of the elements of the cultural landscape'.[116]

The respondent assumed that culture can be protected and maintained on the basis that it is site-specific. The site-specific understanding of culture is limiting. It isolates sites from the interrelatedness of the elements of the cultural landscape. It also tends to undermine the significance of particularity, suggesting that land outside the immediate proximity of sites is devoid of meaning other than fulfilling the physical purpose of linking the sites. This does not align with the vast evidence provided in the case that explains the significance of the area in alignment with *Darkinjung* philosophy.

In the context of the *Darkinjung* case, the precautionary principle was raised in relation to a proposed buffer zone. The applicant submitted that the precautionary principle was engaged because the respondent had failed to obtain a full understanding of the heritage values of the site and, as a result, there was 'likely to be further Aboriginal cultural heritage that is likely to be destroyed by the Project'.[117] The need for precaution was clear because 'the site will be stripped incrementally in segments under the approval, if it emerges that the Aboriginal landscape extends into that area it will be too late'.[118]

Judicial consideration of ESD has been concentrated largely on the precautionary principle.[119] This principle is segmented into two interrelating conditions, as articulated in the seminal case of *Telstra* v. *Hornsby Shire Council*:

[113] Ibid., paras 160, 167.
[114] Ibid., para. 205.
[115] Ibid., paras 202–3.
[116] Ibid., para. 205.
[117] Ibid., para. 455.
[118] Ibid., para. 461.
[119] B.J. Preston, 'The Judicial Development of the Precautionary Principle' (2018) 35 *Environment and Planning Law Journal*, pp. 123–41, at 128.

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> The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage.[120]

Science is central to the operation of the precautionary principle. Chief Justice Preston explains that the purpose of the principle is 'the removal of scientific uncertainty as a reason for postponing or not taking measures to prevent environmental damage'.[121] The precautionary principle has been afforded a normative status to assist in decision making.[122]

This section of the article argues that the necessary *scientific* quality that animates and guides the inquiry of the precautionary principle, and uncertainty especially, could be unsuitable and ill-equipped to represent threats to Aboriginal culture and law/lore under state planning law. The term 'scientific' is taken to a imply 'a grounding in the methods and procedures of science' that gives rise to a 'reasonable scientific plausibility' relating to the assessment of the relevant threat of potential environmental damage.[123] David Resnick characterizes it as a practical principle, maintaining that 'the [precautionary principle] PP tells us how we ought to act on the basis of empirical evidence (or lack thereof). Thus, our question about the PP can be reframed as follows: "is the PP a rational method for making practical decisions?"'.[124]

In reviewing the seminal *Telstra* decision, Jacqueline Peel maintains that the test of scientific uncertainty appeared to be fulfilled only in situations where 'a threat or risk of environmental damage is considered scientifically likely'.[125] Peel foreshadowed that 'the greatest challenge for judicial application of the precautionary principle, however, is transforming legal culture so as to be more receptive to forms of knowledge and understandings of risk that are not only based in science'.[126]

As outlined by the LEC in alignment with legislation and policy guidelines, this task of applying the precautionary principle was based upon archaeological evidence and Aboriginal knowledge, which is conveyed through testimony. Analysis of the reasoning suggests that the two aspects, archaeological evidence and Aboriginal knowledge, must operate in conjunction and align to produce a shared conclusion. The relevance of Aboriginal testimony, which can be a gateway to Aboriginal knowledge of Country, is assessed by the decision maker upon finding consistency with archaeological findings, arguably grounding the process of considering Aboriginal knowledge in scientific practices, epistemology, and worldviews. Assessing the relevance of Aboriginal

[120] *Telstra Corp Ltd* v. *Hornsby Shire Council* (2006) 67 NSWLR 256, p. 269 (*Telstra*).
[121] Preston, n. 119 above, p. 128.
[122] See T. O'Riordan & J. Cameron (eds), *Interpreting the Precautionary Principle* (Earthscan, 2009).
[123] See *Telstra*, n. 120 above, paras 135, 148. See also Preston n. 119 above.
[124] D.B. Resnick, 'Is the Precautionary Principle Unscientific?' (2003) 34 *Studies in History and Philosophy of Biological and Biomedical Sciences*, pp. 329–44, at 331–2.
[125] J. Peel, 'When (Scientific) Rationality Rules: (Mis)Application of the Precautionary Principle in Australian Mobile Phone Tower Cases' (2007) 19(1) *Journal of Environmental Law*, pp. 103–20, at 111; see *Telstra*, n. 120 above, paras 135, 148.
[126] Peel, n. 125 above, p. 119.

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knowledge in accordance with the same standards applied to scientific knowledge is complex because of the practical and cultural aspects of obtaining such knowledge.

The respondent challenged the inclusion of Aboriginal knowledge on the basis that it was accepted 'without synthesis' and the 'intellectual and evidentiary rigour' of the testimony was not tested.[127] Aboriginal knowledge is, for a multitude of reasons, fragile. Knowledge that guides the understanding of cultural meaning and significance of sites is tied to the land that is subject to development and change – threatening at each turn to undermine and sever links between knowledge and culture and law/lore.

In alignment with the Office of Environment and Heritage Guidelines, the LEC relied upon the testimony of Aboriginal witnesses as the determinants of Aboriginal culture.[128] The LEC disagreed with the respondent's submission that the evidence provided through Aboriginal testimony was inconsistent, stating that '[c]onsidering the inherent complexity of the concept of cultural landscapes, and the fact that this is an area in which Aboriginal culture is being revived after loss and fragmentation, the Court considers that Aboriginal evidence is remarkably consistent'.[129] Given that this was a response by the LEC to an attempt to undermine the credibility of the evidence, it could be interpreted that the LEC concluded that Aboriginal evidence has sufficient rigour to satisfy the scientific quality of the uncertainty limb under the precautionary principle.

When confirming that the precautionary principle had been correctly applied, the LEC highlighted that evidence needed to be backed up by scientific data.[130] The *Telstra* case is cited to underline that the scope of the risk of damage must be 'adequately backed up by scientific data'.[131] The evidentiary challenges that beset the applicant, and are likely to apply to similar cases concerning the application of the precautionary principle to Aboriginal cultural heritage, are foreshadowed in the following statement:

> The Court also considers that information available at present about the details of some of the elements of this cultural landscape, about the connectedness between sites, the relationship between sites, and about the existence of further sites within the landscape and of activities conducted there, is in some cases sketchy or incomplete. The nature and extent of the cultural landscape has not been fully defined.[132]

In certain respects, ESD relies on Western scientific knowledge.[133] Aboriginal culture and knowledge do not conform to the Western model of scientific knowledge.[134] For Mary Graham the world produced by scientific and economic thinking is 'devoid of

[127] *Darkinjung*, n. 110, above, para. 222.
[128] Ibid., para. 199.
[129] Ibid.
[130] Ibid., para. 457.
[131] Ibid., para. 456.
[132] Ibid., para. 218.
[133] For a critical analysis of scientific research methods as practices that can align with or against colonialism see M. Liboiron, *Pollution Is Colonialism* (Duke University Press, 2021).
[134] See G. Gillet, 'Indigenous Knowledges: Circumspection, Metaphysics, and Scientific Ontologies' (2009) 6(1) *Sites: A Journal of Social Anthropology and Cultural Studies*, pp. 97–115.

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value, meaning and spirit'.[135] While the application of the precautionary principle in the *Darkinjung* case does not necessarily preclude Aboriginal metaphysics from the realm of considerations, it confirms the inherent bias in planning law in favour of rationality over metaphysical qualities that inform and animate Aboriginal culture and law/lore and the capacity of Aboriginal law/lore to fulfill the primary role in assessing risks to culture.

### 4.2. Gloucester Resources Ltd *v.* Minister for Planning

The case of *Gloucester Resources Ltd* v. *Minister for Planning* helped to further substantiate and integrate the role of Country in land-use decision making.[136] The case was a merits review hearing in the LEC with Chief Justice Preston presiding. The development application sought approval for the establishment and operation of a coal mine in the Gloucester Valley of NSW. The application was rejected by the Minister; the company, Gloucester Resources Ltd, appealed against the decision.

Chief Justice Preston held that the mining project would have an adverse impact on Aboriginal culture and connection with Country, and therefore have a negative effect on culture as understood under the EP&A Act. The case adopts a whole-landscape view of how Aboriginal culture connects with and relates to land, building upon the pioneering work of the LEC in the *Darkinjung* case. The LEC held that impacts would be felt on identified sites, unidentified sites and, more broadly, 'on the landscape that is of high spiritual significance to the Aboriginal people'.[137] Critically, the Chief Justice outlined the future consequences of harm, stating that '[t]he negative social impacts will endure, not only for the duration of the Project, but long afterwards. The rehabilitation of the mine will not heal the harm to Country and culture'.[138] Aboriginal people were identified as a group who would suffer disproportionate harm that would extend to future generations. In this sense, destruction of Country engaged the ESD principles of both intra and intergenerational equity. With reference to intergenerational equity specifically, the Chief Justice concluded that the 'social impacts on culture and community, especially for the Aboriginal people whose Country has been mined, will persist. A sacred cultural land created by the Ancestors of the Aboriginal people cannot be recreated by mine rehabilitation'.[139] Davis notes how recognition of the links between intergenerational equity and culture underlined responsibility and 'an obligation of stewardship' held by Aboriginal people to ensure the survival of culture and law/lore.[140] The future orientation of intergenerational equity underlines the importance of Country enduring. The connection between landscape and culture extends beyond the oral tradition and teaching of elders.

[135] Graham, n. 14, above, p. 186.
[136] *Gloucester Resources Ltd* v. *Minister for Planning* (2019) 234 LGERA 257, para. 351 (*Gloucester Resources*).
[137] Ibid.
[138] Ibid.
[139] Ibid., para. 415.
[140] Davis, n. 2 above, p. 191. See also B.J. Preston, 'What's Equity Got to Do with the Environment?' (2018) 92 *Australian Law Journal*, pp. 257–72.

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The dispossession and expulsion of Aboriginal people from land resulted in disconnection from Country. Knowledge and the use of knowledge in the process of learning remains incomplete. Michael Manikas, who gave expert evidence, explained that knowledge about Country and culture in the Gloucester area is incomplete. Manikas stated further:

> [K]nowledge has been retained by many of our elders and we are in the early phases of capturing and collating that knowledge … If the mine goes ahead, the connection with each other and this place as the land will be destroyed. The culture and connection we have been rebuilding will be once again lost.[141]

The interpretation and application of intergenerational equity is to ensure that the cultural significance of the sites endure for the benefit of future generations.[142] These benefits of connection for children and young people are part of an education culture associated with sites that are significant in terms of transmission of knowledge and a basis for this learning. Intergenerational equity entails that future generations must have access to this form of learning and must also benefit from the capacity to learn from the land as previous generations have done since time immemorial.[143]

### 4.3. The Application of Cumulative Harm to Loss of First Nations Culture

This article maintains that a means of securing the landscape approach and overcoming the limitations of planning law is to apply cumulative harm to the assessment of impacts regarding First Nations cultural heritage. Alison Packham's critical analysis of the judgment in *Chief Executive of the Office of Environment and Heritage* v. *Ausgrid* [144] astutely observes the linkage between the landscape approach and the concept of cumulative harm:

> A further issue with Pepper J's finding was that she failed to consider the cumulative effect of the destruction of Aboriginal cultural heritage. The destruction of one of many rock engravings, viewed in isolation, may be considered to have 'moderate' environmental harm. However, viewed cumulatively, there is a danger that the overall landscape value made up of these individual objects will be lost to 'death by a thousand cuts'. Aboriginal perspective involves looking at an individual object as forming part of a greater whole, from a 'landscape perspective'.[145]

[141] *Gloucester Resources Ltd*, n. 136 above, para. 348.
[142] Davis, n. 2 above, p. 190.
[143] For a deeper discussion of the connection between Country and education see Gamilaroi scholar M. Bishop, 'Humility. Listen. Respect: Three Values Underpinning Indigenous (Environmental) Education Sovereignty' (2023) 2(3) *Progress in Environmental Geography*, pp. 191–201.
[144] *Chief Executive of the Office of Environment and Heritage* v. *Ausgrid* (2013) 199 LGERA 1. Davis comments that if '*Darkinjung* is a high watermark, then *Chief Executive of the Office of Environment and Heritage* v. *Ausgrid* may be a low-watermark decision in terms of recognition of Aboriginal cultural heritage': Davis, n. 2 above, p. 185.
[145] Packham, n. 13 above, p. 83.

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Integrating the landscape approach and the cumulative harm assessment of impacts is a critical step in bringing together the conceptual elements and practical implementation. The case of *Yahey* is an example of how to bring these elements together.[146] The case was initiated by the Blueberry River First Nations (BRFN) on the basis that land-use change, including insert mining and power generation, which was either undertaken or approved by the British Columbia (BC) government, infringed rights under Treaty 8. The BRFN argued that 'the Treaty includes a promise that the Indigenous signatories and adherents shall have a right to continue their mode of life based on hunting, fishing and trapping throughout their territory'.[147] The Supreme Court of British Columbia (SCBC) held:

> Treaty 8 guarantees the Indigenous signatories and adherents the right to continue a way of life … and promises that this way of life will not be forcibly interfered with. Inherent in the promise that there will be no forced interference with this way of life is that the Crown will not significantly affect or destroy the basic elements or features needed for that way of life to continue.[148]

The decision framed the present and historic land use undertaken and approved by the BC government as constituting cumulative harm. The case upheld that the aggregation and intersection of different consequences of land-use change were quantitatively and qualitatively destructive of the rights held by the BRFN under Treaty 8. The situation in this case is different from the Australian cases discussed earlier in that there was an applicable treaty and rights derived thereunder. However, the content of the relevant rights in *Yahey* includes cultural heritage, highlighting a linkage between the NSW and BC experiences of planning law and settler colonialism.

The SCBC held that for rights under the Treaty to be meaningful, protection must include rights to maintain a culture and identity.[149] The loss of certain aspects of culture was an important factor behind the SCBC's finding that the right had been infringed. The centrality of land to culture was explained through the evidence and testimony provided by several expert witnesses, including members of the BRFN and others. Expert evidence helped the SCBC to establish that 'way of life' of the BRFN includes:

> [T]ravelling as family groups throughout their territory to access resources from a variety of environments; practicing seasonality and scheduling their resource use (such as by not returning to the same places every year, but letting areas rejuvenate); hunting, trapping and fishing for the wildlife species that have sustained them for generations; passing

[146] See *Yahey*, n. 25, above.
[147] Ibid., para. 174.
[148] Ibid., para. 175. For an explanation of how this interpretation sits with earlier decisions in BC see S. Duncanson et al., 'The Regulation and Litigation of Cumulative Effects on Indigenous Rights Following the Yahey Decision and Blueberry River First Nation Settlement and the Potential Effects on the Energy Industry' (2023) 61(2) *Alberta Law Review*, pp. 279–306.
[149] *Yahey*, n. 25 above, para. 215.

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> down knowledge generation to generation while on the land engaged in various activities; and engaging in spiritual practices that reflect the connection to the land and wildlife.[150]

The SCBC concluded that the way of life is a 'core aspect of Blueberry's identity and impairing it significantly harms their well-being'.[151]

The significance of certain sites or areas of land transcended the perspective that land is a resource. Review of the BRFN members' testimony highlights the significance of intangible qualities that the land represented. Various witnesses affirmed that the significance of certain sites cannot be replicated by simply relocating an activity to a different physical location regardless of whether it offered the same or similar resources. This effectively distinguished First Nations relationality with land from a Western system of allocation and commodification of land where the same resource-orientated use of land can be transplanted elsewhere.

The transcendental quality associated with land was important for the interpretation and application of cumulative harm. Cumulative harm was assessed in relation to these qualities that were drawn from the entire landscape – not only specific sites. Mr Yahey, during his testimony, stated:

> I say, well, can't you just look somewhere else? It took 100 years in evolution just for us to find it, and then another place, it's – it wouldn't happen. Not going to happen … All these areas have a significant value. Buick Creek, not far from our community, there's a lake, there's a lake that produces certain – it's a certain plant, an herb. Throughout our whole territory there's the only lake in the northeast that produces that herb.[152]

While a cumulative harm frame does underline the site-specific nature of relationships with the land, the significance of these sites cannot be seen in isolation; they are constituent components of a broader landscape, like in the NSW cases of *Darkinjung* and *Gloucester Resources*. The importance of trails represents this. Mr Yahey explained that the presence and use of the trails were 'imbued with history' and acted as the 'gateway' to all facets of life.[153] The SCBC concluded, upon the evidence provided by the members of the Blueberry nation, that 'way of life … requires a relatively stable environment so that the knowledge held by Blueberry members about the places to hunt, fish and trap stays relevant and applicable'.[154] There are individual sites, but the way of life depends upon the health of the landscape more broadly and holistically.

The SCBC concluded that the current and historical land-use change, including 'industrial development, including forestry, oil and gas, mining, hydro-electric infrastructure, land clearing, roads' has 'increasingly disturbed' the rights of the BRFN over the landscape. The dominance of the BC planning system was demonstrated

[150] Ibid., para. 429.
[151] Ibid., para. 436. For an in-depth discussion of this aspect of the judgment see Hamilton & Ettinger, n. 30 above.
[152] Ibid., para. 414.
[153] Ibid., para. 416.
[154] Ibid., para. 1119.

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through laws and policies that zoned the core of the BRFN claim area as a resource development. The 2018 disturbance datasets of Regional Strategic Environmental Assessment (RSEA) showed that:

> a) 85% of the Blueberry Claim Area is disturbed when a 250-metre buffer is applied; and,
> b) 91% of the Blueberry Claim Area is disturbed when a 500-metre buffer is applied.[155]

The RSEA referred to by Justice Burke was undertaken in the Northeast region of British Columbia through the Environmental Stewardship Initiative (ESI). The RSEA is a collaboration between seven Treaty 8 nations, including the BRFN and the BC government. The driving purpose of the RSEA is to produce reliable and verifiable information about the cumulative impacts of resource-based development in the Treaty 8 territory, which is then used to inform assessment and recommendations for appropriate management of potentially adverse impacts on the exercise of First Nations treaty rights. The availability of this instrument encourages the promotion of the landscape approach and cumulative harm to the assessment of individual land-use development. However, Justice Burke concluded that the decision maker did not effectively apply the instrument. Despite the RSEA providing evidence of cumulative impacts, this information was not used appropriately in the decision-making process to recognize these cumulative impacts.

The quantification of the disturbance on land, taken together with evidence from BRFN members, formed the basis of the SCBC's conclusion that:

> [the] time has come that Blueberry can no longer meaningfully exercise its treaty rights in the Blueberry Claim Area. Their rights to hunt, fish, and trap within the Blueberry Claim Area have been significantly and meaningfully diminished when viewed within the context of the way of life in which these rights are grounded.[156]

## 5. Conclusions

Responsibility can be demonstrated through executive and judicial decision making under planning law where the interpretation and application of law disrupt the settler colonial narrative. The approach to interpretation available in a legal system premised on treaty- and constitution-based rights, such as Canada, can highlight the importance of responsibility for how planning law continues to diminish First Nations culture, philosophy, and law/lore. The analysis of NSW planning law has shown how adopting the landscape approach in assessing cultural sites within the context of Country can prioritize the perspective of Aboriginal peoples to evaluate the significance of Aboriginal culture on land. This represents a departure from the Western settler colonial

[155] Ibid., para. 1117. For a discussion of this in the context of environmental assessment specifically see B. Muir, 'Consequences and Implications of British Columbia's Failed Cumulative Effects Assessment Management Framework for Indigenous People' (2022) 95 *Environmental Impact Assessment Review*, pp. 10676–85.

[156] *Yahey*, n. 25 above, para. 1129.

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perspective that seeks to allocate and demarcate land into different pockets for discrete purposes.

While the experience of BC and Canada shows the importance of the interpretation and application of law in demonstrating ethical responsibility, the experience of NSW and Australia is particularly pertinent to those nations, especially settler colonial societies, that do not feature the same level of rights protection to enable translation of UNDRIP into the domestic context.

The following insight from Godden characterizes the current approach under NSW law of connecting land planning and First Nations peoples: 'The attempt to separately categorise, and then to find points of commonality, has been the basis for most legislative schemes that deal with environmental protection and indigenous cultural heritage'.[157]

Differences should remain recognizable and respected. I submit that any attempts to further this relationship between Country and the plurality of legal systems that exist in settler colonial contexts must do so in a way that recognizes the historical and current forces that make Aboriginal culture increasingly vulnerable to loss, especially cumulative loss. As recognized by the LEC in the *Gloucester Resources* case, cultural loss and rediscovery are associated with ongoing land-use development and a background of potential ongoing loss. The association of land-use change and loss of culture will influence the form and preservation of cultural knowledge and practice, and how it might be included in land-use decisions. The consequent degradation of Country does not diminish the existence of sovereign rights of First Nations people that were never ceded; however, it does make the operation of First Nations culture and law/lore more difficult.[158]

This article has shown that approaches to interpretation can be vital to using existing planning laws in ways that do not diminish First Nations culture, philosophy, and law, and that the effects can resonate transnationally across jurisdictions. There are limits, though, as the example of applying ESD in the *Darkinjung* case shows. Embedding Indigenous knowledge into environmental assessment highlights the epistemic challenges explained earlier with reference to ESD. Lauren Eckert and co-authors observe that integrating Indigenous knowledge into environmental assessment techniques and processes can risk subsuming it 'within the cultural assumptions of Western science and the management structures that support these systems'.[159] This necessarily results in the decontextualization of First Nations knowledge and expectations that it can be utilized in ways that conform with the norms of the settler colonial system. The effect is to disempower the knowledge holder and the First Nations group while bolstering the credibility of the task performed by the decision maker. Indigenous knowledge and views are effectively diminished, reflecting a narrative of token inclusion of First Nations people rather than genuine engagement. This scenario is typical of NSW and Australian

[157] Godden, n. 5 above, p. 264.
[158] See Moreton-Robinson, n. 19 above.
[159] L.E. Eckert et al., 'Indigenous Knowledge and Federal Environmental Assessment in Canada: Applying Past Lessons to the 2019 Impact Assessment Act' (2020) 5(1) *FACETS*, pp. 67–90.

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laws that lack the mechanisms to mandate explicit consideration of Indigenous knowledge in planning and environmental decisions.[160]

The Environmental Assessment Act 2018 (BC) establishes that one of the purposes of the Environmental Assessment Office is to utilize the best available Indigenous knowledge, science, and local knowledge in decision making under the legislation (section 2(2)(b)(i)(C)).[161] A principal reason is to provide decision makers with knowledge of the significance of any impacts of development on Indigenous communities. This is considered beneficial for 'identifying links between seemingly unrelated components of the environment and providing a more holistic understanding of the environment and relationships among all beings, their habitats, and their spiritual and cultural contexts'.[162]

First Nations knowledge and culture are vulnerable to being subordinated to Western science or other branches of knowledge in the application of law. There is no overarching rule of interpretation that must give flexibility or be sensitive to First Nations perspectives, as stated in the *Sparrow* case. As Wensing has argued continually, the absence of Aboriginal and Torres Strait Islander presence and participation in land-use planning and planning law will not be adequately remedied until UNDRIP is implemented through legislation and a form of treaty is achieved between the various governments and First Nations.[163] It is fitting to recall Wensing's observation:

> It is a sad indictment of our planning system that more than 30 years after the High Court of Australia's landmark decision in Mabo (No. 2), that most of the planning statutes around Australia still do not require prior consultation with or the direct involvement of registered native title holders or claimants during plan formulation or decision-making about land uses for an area of land or waters.[164]

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[160] See G. Samuel, *Final Report of the Independent Review of the EPBC Act* (Commonwealth Government of Australia, 2020).

[161] Environmental Assessment Act 2018 (BC).

[162] Government of British Columbia, Environmental Assessment Office, 'Guide to Indigenous Knowledge in Environmental Assessments', Sept. 2022, p. 6, available at: https://www..gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/indigenous-nation-guidance/guide_to_indigenous_knowledge_in_environmental_assessments.pdf.

[163] See E. Wensing, 'Indigenous Peoples' Human Rights, Self-determination and Local Governance – Part 2' (2021) 25 *Commonwealth Journal of Local Governance*, pp. 133–60.

[164] Wensing (2023), n. 1 above, p. 6.

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