

## The Battle for Goonininup

by Gary Foley  
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### Introduction

From January to October in 1989 Indigenous groups from the Perth area occupied the site of the Old Swan Brewery in protest at what they said was desecration of the home of the Waugal serpent. These groups, led by Robert Bropho and collectively dubbed the "Aboriginal Fringe Dwellers of the Swan Valley", waged a valiant campaign through political protest, demonstrations, a petition to the Queen, and a protracted court battle through to the WA Supreme Court and ultimately the High Court. Whilst Bropho and his group may have succeeded in setting some amazing legal and political precedents, they eventually lost their battle to prevent redevelopment of the site. This exposed a weakness not in the Indigenous peoples claims to the area, but rather a range of inconsistencies and contradictions in Australian law and the notions it regards as sacred.

In this essay I will explore some of the legal, political and moral questions raised by the Old Swan Brewery battle, and show how both the Federal heritage protection legislation and the Native Title Act do not really serve the interests of Indigenous people in any substantial way. The fact that by 1996 there had only been a single successful declaration for long term protection under the legislation (at Junction Waterhole near Alice Springs in 1992) should loudly proclaim that the act is all but useless to Aboriginal groups seeking to protect their interests.

### Early History

The earliest recorded contact between The Indigenous peoples of south west Western Australia was when the Dutch ship *Batavia* was wrecked west of Geraldton in 1629 stranded 200 people. Aborigines who saw the group avoided contact. In 1791 two British ships, *Discovery* and *Chatham*, under the command of George Vancouver explored and named King George Sound and spent two weeks in the area. The next visitor was Matthew Flinders in 1801 who reported that the area was well populated with Indigenous people who were remarkably friendly, curious and hospitable.

Subsequent French and English explorers were to have similar experiences with the Nyungar people and would be true to say that most of the early, pre-settlement contact between the Nyungar and the Europeans was cordial.<sup>92</sup>

On 9th October 1826 a detachment of garrison troops and convict labour left Sydney to set up a convict colony and secure King George Sound, and on the 25th December arrived at their destination and weighed anchor. The group comprised of its leader, Major Lockyer, 20 soldiers and 20 convicts, and they quickly established a settlement at King George Sound to 'assert British sovereignty'.<sup>93</sup> Between 1826 and 1852 there were 178 recorded violent encounters between Aboriginal groups and the invaders, with 108 Indigenous and 27 colonists killed.<sup>94</sup> On 12th August 1829, the site for Perth was ceremonially marked when the Lieutenant-Governor of the colony, James Stirling led a group to the high ground chosen for the city site.

In 1833, on the site the Indigenous inhabitants called 'Goonininup', and which would later become the Old Swan Brewery, the colonial government set up a 'feeding depot' for Aboriginal people of the Perth area with the aim that greater success could be achieved in containing and controlling the remnants and survivors of first contact with the invaders.<sup>95</sup> The place was called Mount Eliza Depot for Aborigines and it was hoped that the Aborigines would settle permanently, but the Aborigines had other ideas and this early attempt at segregation failed. Neville Green observed,

The number of Aborigines resident near Perth was quite small and these, living close to the most intensive area of European settlement, must have been severely affected by disease and interference to their traditional lifestyle. When the first tribal census was conducted in 1837 Yellagonga's Mooro group had only 28 men, women and children. The early attempts to ban the Nyungar from the towns had failed and during 1835 the members of the Mooro were regularly seen in Perth.<sup>96</sup>

So the Nyungar were reduced from an independent, sovereign people, to a marginalised fringe minority in their own land. In 1829 they had (without

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<sup>92</sup>Neville Green, Broken Spears: Aborigines and Europeans in Southwest of Australia, Perth: Focus Education Services, 1984, pp 23-39.

<sup>93</sup>Ibid. P. 40.

<sup>94</sup>Ibid. pp. 203-208.

<sup>95</sup>P. Vinnicombe, Goonininup: An Historical Perspective of Land Use and Associations in the Old Swan Brewery Area, Perth: Department of Aboriginal Sites, Western Australian Museum, 1989, p.22.

<sup>96</sup>Green, 1984. p. 107.

consultation) been proclaimed as British subjects and thus in the stroke of a pen had their sovereignty, along and their law, religion and culture dismissed and effectively erased. As Bourke and Cox noted, 'European settlement produced a conflict between two systems of law and two cultures. This was not officially acknowledged for nearly two hundred years...The existence of traditional laws has been ignored.'<sup>97</sup>

### Origins of the Dispute over the Old Swan Brewery Site

By the early twentieth century, memory and acknowledgment of the prior occupation of Perth by Aboriginal people had diminished dramatically. Jacobs notes that, 'the Aboriginal name for the Old Swan Brewery site, "Goonininup", survived on a 1909 plan of the city but only in parenthesis'.<sup>98</sup> The parenthesis were symbolic of the 'disappearance' of the Nyungar who had now become 'fringe dwellers' after having been initially been subject to 'protection' and segregation policies and then several decades of imposed 'assimilation' measures. Of the latter it has been said, 'Assimilation was intent on orchestrating the "disappearance" of Aborigines through their absorption or integration into "mainstream" Australia...The conditions under which Aborigines could "dwell" in the city of Perth forced them, by exclusion or assimilation, to become an "invisible", but menacingly present citizenry'.<sup>99</sup>

Fast forward to the 1980s where, on the federal political scene a newly elected Hawke Labor government had come to power promising Indigenous groups that 'national Land Rights legislation' would provide Aboriginal people with the justice they had fought so long for. But in the interim a range of disputes between Aboriginal groups and state governments, saw a hapless ALP decide to create a temporary legislative means by which they could protect Indigenous 'sacred sites' from desecration or development. This act was called the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, and it was intended as a 'last resort to protect Aboriginal heritage where State and Territory laws are ineffective, or there is an unwillingness to

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<sup>97</sup>Colin Bourke and Helen Cox, "Two Laws: One Land", in Bourke, C., Bourke, E., Edwards, B., Aboriginal Australia, UQP, 1994, p. 62.

<sup>98</sup>Jane M. Jacobs, "Urban Dreamings: The Aboriginal Sacred in the City", edge of empire: postcolonialism and the city, Routledge, 1996, p. 108.

<sup>99</sup>Jacobs. 1996, Pp. 108-109.

enforce them'.<sup>100</sup> The purpose of the act was to protect from harm or desecration, any areas or objects that were of 'particular significance to Aboriginals in accordance with Aboriginal tradition', and that this was to be achieved by enabling the federal Minister for Aboriginal Affairs to make short and long term declarations to protect any sites or objects under threat.

During the 1980s Perth was a 'boom town' as entrepreneurs such as Alan Bond seemed to represent what Jacobs described as 'the speculative investment and conspicuous consumption' that overwhelmed Western Australia in that period. The euphoria of Bond's successful 1983 victory in the America's Cup yacht race led the 'new' Labor State Government of Brian Bourke to create what later became known as *WA Inc*, and a political and economic climate where public/private entrepreneurial bodies such as the Western Australia Development Corporation were created and allowed to operate outside of established parliamentary and planning procedures.<sup>101</sup> Earlier, in 1978 the site of the Old Swan Brewery came onto the market and was purchased by a private developer for \$4 million, but due to an public outcry about 'insensitive' foreshore development, in 1985 the state government purchased the land for \$5 million declared the site a Reserve for the purpose of government requirements, meaning the land was removed from the jurisdiction of normal town planning regulations.<sup>102</sup>

In 1986 the Western Australia Development Corporation declared the site would be developed with 'office space, a 450-vehicle car park, a 500-seat theatre, a museum display, a boutique brewery, various "multicultural" food outlets and a "genuine Aussie pub"'.<sup>103</sup> Soon after, the National Trust of Western Australia conducted an assessment of the site and declared the brewery and the surrounding area as a Historic site, marking the 'Australian ethos' of 'beer, work, tourism and sport'.<sup>104</sup> As Jacobs

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<sup>100</sup>Hon. Elizabeth Evatt, Review of the Aboriginal and Torres Strait Islander Heritage Act 1984, AC, 1996, pp. 4-5.

<sup>101</sup> Jacobs, 1996, p. 109. Also see I. Alexander, "City centre planning for public and private interest", in D. Hedgecock and O. Yiftachel (eds) Urban and Regional Planning in Western Australia: Historical and Critical Perspectives, Paradigm Press, 1992.

<sup>102</sup> Jacobs, , 1996, p. 110.

<sup>103</sup> Jacobs, 1996, p.110.

<sup>104</sup>Heritage Council of Western Australia, Swan Brewery, Perth: Conservation Analysis, Draft report by Clive Lucas, Stapleton and Partners, Pty Ltd, 1991, section 4.8.2.

observed, 'The Old Swan Brewery was imaginatively reinvented as the heritage marker for a city that historically had had little time for the past'.<sup>105</sup>

### The Protracted Battle for Goonininup

When Robert Bropho and his group, the Swan Valley 'fringedwellers', heard of the plans for the home of the Waugal serpent, they organised a protest by fringe dwellers in the Perth area. Then in June 1988, the WA Government announced that the site would be handed over to Aboriginal people as a Bicentennial Aboriginal Commemorative Centre to house a NT Aboriginal Art Exhibition, a proposal which was immediately condemned by Bropho as his group wanted all buildings on the site demolished. But the following day, after a private meeting with State Government Ministers, another Perth Aboriginal man, Ken Colbung, broke ranks and now stated that the redevelopment could take place without harm to significant Aboriginal sites.<sup>106</sup> Three weeks, on the 14<sup>th</sup> July 1988, in a meeting with 58 of the 'traditional keeper's of the area, Mr Colbung was told that 'they did not want development on or near the Brewery land'.<sup>107</sup>

Following a range of disputes between the now divided Nyungar groups, on 12<sup>th</sup> December 1988, The Fringe Dwellers of the Swan Valley and eleven other major Aboriginal organisations issued a public proclamation stating that 'no one or two Aboriginal person or persons are allowed or authorised by the Aboriginal community to make decisions where sacred sites and tribal laws and land are concerned'.<sup>108</sup> Then, on 19<sup>th</sup> December 1988, Robert Bropho and 23 others applied to Federal Minister for Aboriginal Affairs, Gerry Hand, seeking federal intervention under section 9 of the federal Aboriginal Heritage Protection Act, but Hand (after discussing the matter with his state Labor colleagues) declined the application.

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<sup>105</sup>Jacobs, 1996, p. 118.

<sup>106</sup>Cathie Clement, Swan Brewery Precinct: A Summary of Existing Reports on the Cultural Heritage Significance to the Aboriginal Community, Report prepared for National Heritage Council of W.A., 1992,

p. 92.

<sup>107</sup>Ibid.

<sup>108</sup>Clement, 1992, p.93.

This led Bropho and the fringe dwellers to set up their protest camp on the site on the 3<sup>rd</sup> January 1989, and one month later the WA Development Corporation moved before the WA Supreme Court to strike out Bropho's court action under the WA Aboriginal Heritage Act. On 24<sup>th</sup> February the Supreme Court found in the Corporation's favour arguing that the state Aboriginal heritage legislation was not binding on the Crown, and the same day Bropho and 13 others lodged a further application with Federal Minister Hand to stop all work and protect the site under section 9 and section 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act. On 12<sup>th</sup> April the Federal Government duly issued a 30 day protection order on the site, under which the parties in dispute were obliged to consult.

After a specially commissioned report, Mr Hand extended the protection order for a further 30 days, and after a further report, on 21<sup>st</sup> June Hand declared the whole of the Brewery site of significance and under section 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, issued a permanent protection order which stated there was to be no 'ground disturbance' of the site.<sup>109</sup> This still enabled the state to carry out renovations on above ground buildings which led to protests and arrests when Nyungar groups tried to stop renovation work on the site just two days later.

A further blow came on 19<sup>th</sup> July 1989 when Federal Minister hand revoked his 'permanent protection order' on the grounds that 'the State Government had given guarantees that it would act as if bound by its own Aboriginal Heritage Legislation'<sup>110</sup> This highlights one of the major weaknesses of the Federal act to the extent that too much relies on the discretion of the Minister, and where a Federal Minister is dealing with state politicians of the same political party, then Aboriginal interests are very likely to be subservient to party political interests. Nevertheless the battle was not over yet.

Over the next five years the struggle over the site continued through a series of complex legal and political manoeuvres which saw, among other things, the High Court of Australia decided in June 1990 that the State government was indeed subject

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<sup>109</sup> Diana Callander, "Canberra takes over Swan brewery site" *The West Australian*, Perth, 21 June 1989, p. 8.

<sup>110</sup> Clement, 1992, p. 101.

to its own legislation and was wrong to ignore the provisions of its own Aboriginal Heritage Protection Act when it had authorised work on the Gooniniup site; a further application to the Federal Minister for a section 10 permanent protection order, which was declined on 7<sup>th</sup> January 1993; subsequent Federal Court action in 1993 which saw the Federal Minister's decision overruled; and following yet another report commissioned by him, the Federal Minister finally declined yet again to issue a permanent protection order.

### Conclusion

In the final analysis it has to be said that the federal *Aboriginal and Torres Strait Islander Heritage Act 1984* failed the Nyungar people miserably, as indeed it has on a national level. The fact that the Federal Minister was so prepared to 'soft peddle' when forced to confront state politicians of the same party illustrates the problem identified by Evatt when she pointed to the power to make a declaration under the act as 'discretionary', and said, 'In its present state the Act has lost the confidence of many Aboriginal people, who see it as unable to meet the aspirations of Aboriginal and Torres Strait Islander people concerning the protection of their cultural heritage in the post-*Mabo* era'.<sup>111</sup> Furthermore, the simple fact that in its first 12 years of operation the Act was able to produce a single permanent protection order is, in itself, the most dramatic evidence that the Act has been a complete failure from an Indigenous person's perspective.

It remains yet another example of the results of the politics and political expediency which personified the Hawke/Keating ALP governments of the 1980s and 90s, and shows yet again those white politicians who come professing to be our best friends are often ultimately revealed through their track record to have been our greatest enemies in terms of results. The Hawke/Keating years have yet to be impartially politically analysed in terms of Indigenous affairs, but when it does happen, then the 'temporary measure' that was created only until 'more comprehensive legislation dealing with Aboriginal Land Rights and heritage protection'<sup>112</sup> was enacted, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* will stand as a monument to the

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<sup>111</sup> Evatt, 1996, p. 15.

<sup>112</sup> Hansard, Repts 9 may 1984, 2130.

duplicity and deceit of the ALP Federal Government in their policies on Aboriginal issues.

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