

Chapter 1—Issues in the legal protection of Australian archaeological heritage

1.1 Defining the problem

This thesis examines the legal and policy regimes for protecting archaeological heritage in Australia. Its aim is twofold, the first being to situate archaeological heritage law within an environmental law framework, based in a notion of ‘public good conservation’. Public good conservation is a philosophical position derived from the environmental movement, which holds that conservation should not merely be an end unto itself but should provide wider benefits to society. The second aim of the thesis is to identify and argue for practical reforms in both the legal protections for archaeological heritage and the practices of archaeologists or heritage managers who operate within those frameworks, to implement ‘public good’ conservation outcomes for archaeological heritage in Australia. This approach considers archaeological heritage from a heritage management perspective and endeavours to link the legal protection of archaeological heritage to a broad ‘public good’ outcome, which may include but is not restricted to archaeological research outcomes.

Laws protecting and controlling archaeological heritage have existed in one form or another for thirty or more years in most Australian jurisdictions, with the very first domestic legislation introduced in 1955, to protect Aboriginal heritage places in the Northern Territory.¹ These regimes were established with the good intention of protecting Australia’s archaeological past, primarily at the instigation of archaeologists. However they now reflect an understanding of Australian archaeology which seems simplistic and anachronistic. This is partly due to the fact that the archaeologists who lobbied for the initial legislation were based in a particular academic tradition.² A law, when made, captures a moment in time and should be revisited as society changes.³ In the case of the Australian law for the protection of archaeological heritage, that moment was principally the 1960s and 1970s and the academic traditions of that time.⁴ Few fundamental changes have occurred in the body of Australian archaeological heritage law since the laws were initially enacted.

However, since the enactment of archaeological protection laws in Australia, there have been substantial changes in archaeological practice as well as in heritage and environmental conservation philosophy. Undoubtedly the

¹ *Native and Historic Objects Heritage Protection Ordinance* (1955) Northern Territory. Repealed 1991.

² Colley, S. (1996). "Caught in the web: Cultural policy, cultural places and Australian archaeology." *Culture and Policy* 7 (2): 141-154.

³ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. 109-112.

A highly pertinent example for this thesis of the revisiting of a legal construction in Australian law is the legal concept of *terra nullius*, which held that the Australian continent was an ‘empty land’ not owned by indigenous peoples and therefore the taking of that land by British settlers was justified. This concept held from the 18th century until it was overturned in the *Mabo High Court case* of 1992. *Mabo and Others v. Queensland (No. 2)* (1992) 175 CLR 1 F.C. 92/014.

For a discussion of this issue see, for example:

Bennett, S. (1999). *White politics and black Australians*. St Leonards, N.S.W., Allen & Unwin. Pp 154-174.

Cordell, J. (1993). *Who owns the land? Indigenous involvement in Australian protected areas*. *The law of mother: protecting indigenous peoples in protected areas*. E. Kempf. San Francisco, Sierra Club Books: 104-113.

Reynolds, H. (1982). *European justification for taking the land*. *Black Australians: the prospects for change*. E. Olbrei. Townsville, James Cook University of North Queensland: 2-6.

⁴ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 87-95.

individuals involved in the establishment of the earliest heritage legislation did not envisage the shape of Australian archaeology as it stands today. Changes have come from a number of directions, including changes in archaeological theoretical positions (discussed in Chapter 2) and in archaeological practice. The other aspect of these changes has been the influence protective legislation has had on the discipline, which has driven archaeological practice in particular directions.⁵ In some instances, archaeological practice has been fundamentally modified by the legal framework. One simple example of this is in the selection of which sites to investigate archaeologically: prior to the existence of heritage legislation, the selection of archaeological sites for investigation could be based on a theoretical position or research question which an archaeologist wished to investigate. Now sites are more commonly investigated solely because of the legislative requirements which stipulate investigation or excavation prior to impact by development or other work,⁶ with little or no reference to any wider theoretical position, research aim or broader understanding of heritage significance.

It appears that lawyers who drafted the early legislation had an inadequate understanding of the archaeological issues and the archaeologists an inadequate understanding of the legal ramifications of some of the choices made in their efforts to protect archaeological heritage. Analysis such as that undertaken here can attempt to reconcile the problems which have arisen in archaeological heritage law. It is argued here that changes in emphasis and interpretation of heritage legislation have had significant consequences for the discipline of archaeology in Australia.⁷ Perhaps unintentionally, the discipline of archaeology in Australia has been very much shaped by the legislation which governs it. In some instances there has been a naive assumption by archaeologists that having legislation alone would “fix” the problem of destruction of archaeological heritage from development pressures, unintentional damage or deliberate destruction.⁸ Unforeseen changes have arisen over the last thirty years in the wider body of Australian law, public policy and community values which necessitate a reconsideration of the underlying legal principles which relate to the protection of the archaeological heritage. Similar changes have occurred within the discipline of archaeology itself.⁹ By examining early decisions in the drafting of legislation, viewed against the evolution in thinking in the areas of heritage and environmental conservation and public policy, it is clear that archaeological heritage protection has diverged significantly from its original intent, and often does not

⁵ Colley, S. M. (2002). Uncovering Australia: archaeology, indigenous people and the public. Crows Nest, N.S.W., Allen & Unwin. Pp 45-50.

Smith, L. (2004). Archaeological theory and the politics of cultural heritage. London, Routledge. Pp 125-155.

⁶ See particularly the discussion in Chapters 6 and 7 of this thesis.

⁷ Ward, G. K. (1983). Archaeology and legislation in Australia. Australian Field Archaeology: A Guide to Techniques. G. Connah. Canberra, Australian Institute of Aboriginal Studies: 18-42. Pg 18.

⁸ Flood, J. (1993). Cultural resource management in Australia: the last three decades. A Community of Culture: The People and Prehistory of the Pacific. M. Spriggs, D. E. Yen, W. Ambrose et al. Canberra, Australian National University. 21: 259-265. Flood observes that “legislation was of varying quality and scope, but at least it helped curtail illegal collection or excavation of artefacts or destruction of sites by developers”, however she provides no evidence that the legislation has in fact been successful in this regard. Like comments by some other archaeologists throughout the literature, Flood comes across as dismissive of there being any other legitimate interest in archaeological sites outside of the discipline of archaeology.

⁹ E.g. Hodder, I. (1999). The Archaeological Process: An Introduction. Oxford, Blackwell Publishers.

Johnson, M. (1999). Archaeological theory: an introduction. Oxford, Blackwell Publishers.

Dark, K. R. (1995). Theoretical archaeology. London, Duckworth.

reflect the needs of the legal, public policy and conservation landscape of today. This divergence is part of the problem investigated by this thesis.

1.2 Shifting power structures

The establishment of a regulatory framework for archaeology redirected the discipline from a primarily academic one and transformed archaeology into a matter of broad public interest, which had unintended consequences. One major consequence was the loss by archaeologists of being the sole arbiters of what aspects of the past or type of materials were worthy of investigation or protection and, to a large extent, even ownership of the notion of what was “archaeological” has been lost.¹⁰ Prior to legislation, what constituted the “archaeological past” or what was an “archaeological site” or “archaeological object” and whether such was worthy of attention was a consideration principally based on the research interests of one or more archaeologists.¹¹ The legislative approach has however largely been to define a boundary around aspects of the archaeological past in order to protect it. The development and application of such legal definitions has not rested solely with archaeologists, although the discipline has had influence in their development. This approach has required the establishment of criteria based around the significance, physical nature or location of materials to allow them to be deemed “archaeological” and therefore be protected under legislation. The consequence of this has been that materials now protected under strict legal definitions of what is “archaeological” may bear little resemblance to the types of materials which may have been of interest to archaeologists and others (such as amateur collectors) prior to the enactment of legislation.

The other significant consequence of the establishment of legislation was that many more parties have become involved in the practice of archaeology, due to the need to comply with or administer heritage legislation. This has included legislators, lawyers, planners, architects, developers, landowners, public servants and the public, to name but a selection. Different laws have been designed to include or exclude certain groups. In some instances legislation has been directed to primarily include archaeologists¹² and, in other circumstances, to include indigenous people.¹³ In almost all circumstances, the general public has been excluded from archaeological places, except as passive observers. The law now requires archaeological work to be undertaken in instances where, prior to the enactment of legislation, such work may not have been done, even by archaeologists. A particular locale or site may not have been investigated under a research-oriented archaeological paradigm, but it may be protected by the law nevertheless, under the guise of protecting “research significance”. This situation has been reinforced through legalistic interpretations of the archaeological statutes and the nature of

¹⁰ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 72-74.

¹¹ Hodder, I. (1999). *The Archaeological Process: An Introduction*. Oxford, Blackwell Publishers. Pp 9-19.

Trigger, B. (1989). *A History of Archaeological Thought*. Cambridge, Cambridge University Press. Pp 275-279.

Watson, P. J., S. A. LeBlanc, et al. (1984). *Archeological explanation: the scientific method in archeology*. New York, Columbia University Press. Pp 155-186.

¹² E.g. the excavation permit requirements of the NSW *Heritage Act* 1977, discussed in Chapter 7.

¹³ E.g. the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth), discussed in Chapter 5. As will be shown later in the thesis, much indigenous heritage legislation has been designed to include those indigenous people who can demonstrate a past cultural affiliation with a place, at the exclusion of other indigenous groups.

“research significance”¹⁴ is often reduced to “research potential”, a matter which is explored at some length in Chapter 2.

The end result of these changes over the last thirty or more years is that the profession of archaeology in Australia (and overseas) has fragmented into different strands, including university- and museum-based academics, government heritage managers and commercially operating archaeological consultants. This last group, the archaeological consultant, represents the largest of the groups and owes its rise directly to the fact that a range of parties other than archaeologists must comply with heritage legislation. Meeting the needs of this growing body of ‘archaeological consumers’ has seen the numbers of consulting archaeologists dramatically expand, while the population of archaeologists based in Australian educational institutions has stayed steady or declined.¹⁵ Heritage managers responsible for archaeological sites have generally been based within government agencies with responsibility for implementing heritage legislation or for agencies acting as custodians of public heritage assets, including archaeological sites. This change in the demographic of Australian archaeologists has been strongly driven by the nature of archaeological heritage protection legislation.¹⁶ While there has been some re-convergence of these groups, particularly in the field of “public archaeology”,¹⁷ they continue to have different goals and priorities.

1.3 Considering the law related to archaeology

The Australian archaeological community, particularly the archaeological consulting community, has taken few opportunities to challenge or debate the legal regimes for archaeological heritage protection since their establishment. While there has been limited discussion within the discipline itself,¹⁸ this has

¹⁴ Bowdler, S. (1986). "Recent directions in Tasmanian prehistory and the role of cultural resource management." *Australian Archaeology* 23: 11-24.

¹⁵ Ulm, S., S. Nichols, et al. (2005). "Mapping the shape of contemporary Australian archaeology: implications for archaeology teaching and learning." *Australian Archaeology* 61: 11-23.

¹⁶ Statistics on the exact demographics of practicing Australian archaeologists cannot be precisely established as there is no licensing or registration procedure required to work as an archaeologist in Australia. The Australian Association of Consulting Archaeologists Incorporated (AACAI - <http://www.aacai.com.au/>) provides a Code of Ethics and establishes certain minimum criteria for membership. However there is no requirement that an archaeologist be a member of AACAI in order to work in Australia. As of June 2006, AACAI had 30 Full Members and 56 Associate Members across Australia, but this is by no means a comprehensive accounting of all professional archaeologists operating in Australia. AACAI Consultants Register - <http://www.aacai.com.au/register/index.html>. Accessed 30 June 2006.

A competing group was established briefly in the late 1990s, the Australian Institute of Professional Archaeologists Incorporated (AIPA), but it appears this group is now defunct. Chapter 7 of this thesis contains statistical analysis of permits issued under the NSW *Heritage Act* and the Victorian *Heritage Act* which analyses the relative number of permits issued for academic versus consulting archaeological purposes, with the number of academic permits representing a very minor portion of total approvals issued. It is clear anecdotally that there are hundreds of consulting archaeologists operating across Australia, although even the best-resourced academic department has no more than 5 or 6 archaeological staff. See also *Ibid*.

¹⁷ Smith, G. S. and J. E. Ehrenhard (2002). *Protecting the Past to Benefit the Public. Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: 121-129. See also discussion of several specific “public archaeology” projects in Australia, including:

Casey, M. (2005). *The road to controversy. Object lessons: archaeology & heritage in Australia*. J. Lydon and T. Ireland. Melbourne, Australian Scholarly Publishing: 148-166.

Murray, T. and A. J. C. Mayne (2003). "(Re) Constructing a Lost Community: "Little Lon," Melbourne, Australia." *Historical Archaeology* 37 (1): 87-101.

¹⁸ For example, the *Bibliography of Historical Archaeology in Australia*, published in four parts in the *Australian Journal of Historical Archaeology* between 1983 and 1987 identifies only 20 references related to archaeological heritage legislation in Australia pre-1987. Approximately half of these relate to legislation for protecting historic shipwrecks and a quarter are ‘how to’ overviews of legislative protections and their administration aimed at practicing archaeologists. Less than half a dozen references are related to any substantial discussion of the interface between archaeology and law. More recent Australian journals have debated issues such as ‘heritage’

rarely translated into a deep analysis of the underlying legal issues which have changed the discipline. This thesis seeks to draw the strands of law and archaeology together, by analysing issues arising from the current situation to establish a basis for reform in both archaeological practice and archaeological heritage law. Future legal and heritage management frameworks must keep better pace with the changing purposes of archaeology¹⁹ and the needs and expectations of Australian society, if archaeology is to remain relevant and worthy of the significant investment required through heritage management and legislative compliance processes. One important element of this is what these protective efforts are providing to the non-archaeological community—the notion of ‘public good conservation’.²⁰ This is linked to ‘sustainability’—the balancing of economic, environmental and social factors—a concept which is coming to the fore in the areas of environmental protection and heritage conservation and is discussed in Chapter 4.

The notion of the ‘public good’ has been in existence for quite some time, generally tied to economic concepts or broad public projects which benefit society widely. The elimination of a disease such as smallpox²¹ or the establishment of much of our public infrastructure²² represents a benefit to the public which is not exclusive to a particular group or interest. These are often described as ‘public good’ undertakings. The entire concept of heritage conservation carries within it the ‘public good’ concept as, in general, the goal of heritage conservation is to retain significant aspects of the past for present and future generations, without restriction to a particular period or interest group and to make those protected remains accessible to all. The UNESCO,²³ Unidroit²⁴ and World Heritage²⁵ Conventions all support this concept, as do domestic instruments such as the Australia ICOMOS Burra Charter.²⁶ With archaeological heritage conservation in Australia however the main beneficiaries of protective legislation over much of the last thirty years have been the archaeological community, particularly the archaeological consulting community, which has seen enormous growth in the number of projects and

(i.e. cultural resource management) archaeology versus academic archaeology in Australia (for pro and anti positions, see Mackay and Karskens 1999 and Murray 2002) or the place of archaeology within the planning system (Iacono 2002).

¹⁹ Connah, G. (1997). "The purpose of archaeology." *Australian Archaeology* 45: 48-53.
 Little, B. J. (2002). Archaeology as a Shared Vision. *Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: 3-19. , Smith, G. S. and J. E. Ehrenhard (2002). Protecting the Past to Benefit the Public. *Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: 121-129.

²⁰ For different, but related conceptions of ‘public good’ considerations, see for example:
 Kaul, I. (2000). "What is a public good?" *Le Monde Diplomatique* Online. from <http://mondediplo.com/2000/06/16riviere>.
 Allas, M. (2001). "Federal inquiry into public good conservation: farmers push for compensation?" *National Environmental Law Review* (2): 40-43.
 Standing Committee on Environment and Heritage House of Representatives. Parliament. Australia (2001). Public Good Conservation: Our Challenge for the 21st Century: Interim report of the inquiry into the Effects upon Landholders and Farmers of Public Good Conservation Measures Imposed by Australian Governments. Canberra, Australian Government Publishing Service.

²¹ Kaul, I. (2000). "What is a public good?" *Le Monde Diplomatique* Online. from <http://mondediplo.com/2000/06/16riviere>.

²² Wilkenfeld, G. and P. Spearritt (2004). *Electrifying Sydney*. Sydney, EnergyAustralia. Pg 4.

²³ UNESCO (1970). Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. *UNESCO Convention*.

²⁴ Unidroit (1995). Convention on Stolen or Illegally Exported Cultural Objects. *Unidroit Convention*.

²⁵ UNESCO (1972). Convention for the Protection of the World Cultural and Natural Heritage. *World Heritage Convention*.

²⁶ Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. *Burra Charter*.

people involved in it.²⁷ Much of the legislation and policy remains embedded in a strict scientific/research conception of the value of the physical remains of the past, making little consideration of other values of archaeological heritage, beyond knowledge of the past, to the broader community. This is examined in greater detail in Chapters 2 and 3 and reconciliation of this issue is central to the conclusions of the thesis.

The concept of 'public good conservation' argues that, given the high level of societal resources invested in conservation and the impacts and burdens this can place on the community, there needs to be some definable benefit back to the community, beyond mere conservation for its own sake. The 'public good' concept holds that, if societal resources are directed to an undertaking, particularly where that undertaking is mandated in law, any benefit derived from that process should flow to society at large. Kaul described the essence of 'public good' undertakings as "once they exist, they are there for all to enjoy."²⁸ Some of this thinking is already inherent in the area of 'public archaeology'²⁹ and heritage interpretation generally, which seek engagement and dialogue between heritage sites, practitioners and the public. But the present legal and policy regimes do not support strong efforts in this direction for archaeological heritage, and rarely are community or public values considered, other than the provision of a short-term 'public benefit'. The importance of considering broader 'public good conservation' issues for archaeological heritage is examined in detail in Chapters 3 and 4.

The main criticisms of existing Australian legal regimes for protecting archaeological heritage can thus be summarised in two points:

- The aims and practices of the discipline of archaeology, and the societal expectations for archaeology, have developed considerably from the position of thirty years ago, while the law and its implementation has not; and
- Much of the body of Australian heritage law as it presently stands does not in fact protect what is most important about the archaeological heritage or facilitate conservation on a 'public good' basis, as the majority of current laws are based in misconceived or outdated legal definitions of what is significant about the archaeological past.

These contentions form the backbone of the critique of Australian heritage legislation in the following chapters.

²⁷ See for example the statistical analysis of heritage approvals in NSW and Victoria in Chapter 7. See also Ulm, S., S. Nichols, et al. (2005). "Mapping the shape of contemporary Australian archaeology: implications for archaeology teaching and learning." *Australian Archaeology* 61: 11-23.

Australian Archaeological Association (2005). *Australian Archaeology in Profile: A Survey of Working Archaeologists 2005*, Australian Archaeological Association.

²⁸ Kaul, I. (2000). "What is a public good?" *Le Monde Diplomatique* Online. from <http://mondediplo.com/2000/06/16riviere>.

²⁹ 'Public archaeology' being defined here as archaeological work which deliberately attempts to engage with the public. See general discussion on this matter in Little, B. J., Ed. (2002). *Public Benefits of Archaeology*. Gainesville, University Press of Florida.

1.4 From lecture rooms to board rooms

Since the 1970s, Australian archaeology—historical and Aboriginal—has largely moved from an academically-funded, university-based exercise, to a principally client-funded, commercially-based consulting archaeology.³⁰ This has been, in part, due to the huge expansion in Australia's urban centres and rural heavy industries over the last thirty years. Developers, miners and other proponents of major projects are subject to complex and often inflexible legal regimes for environmental and heritage protection set up by the Commonwealth, States, Territories and, in some circumstances, local government. These regimes require archaeological investigation in the form of survey, assessment and/or excavation well beyond the capacity of the pool of academic or government archaeologists to undertake the work. This demand for skills, fuelled strongly by development and construction, has given rise to a class of consulting archaeologists who have turned archaeology into as legitimate and necessary a business as any other field of environmental consulting.³¹

But in doing so, the nature of Australian archaeological practice has changed. Prior to the late 1960s, Australian archaeologists were principally operating within an academic tradition and seeking to advance particular research interests while government archaeologists were managing or excavating prominent government-owned sites. Legislation was initially drafted to protect the raw material of archaeological scientific analysis, generally referred to as "relics". This protective regime was strongly influenced by the dominant disciplinary paradigm of the period.³² Demands on the discipline have substantially changed since that initial period and, by contrast, consulting archaeologists must, by their very nature, be focused on client needs, cost-effective work practices and compliance with legislation,³³ limiting the analysis undertaken of the archaeological record. As they are working on behalf of a paying client, they must ensure that they are helping that client meet their legal obligations under heritage legislation while remaining commercially competitive. Thus few, if any, consulting archaeologists can or do undertake comprehensive research into the aspects of the archaeological past they investigate for commercial clients, in circumstances where the main concerns of the client are compliance with the technical legal requirements of the heritage legislation rather than a desire to better understand some aspect of the past.³⁴ Rather, consultant archaeologists gather data³⁵ to prevent its loss or destruction (often described as 'research potential' or 'research

³⁰ Colley, S. M. (2002). Uncovering Australia: archaeology, indigenous people and the public. Crows Nest, N.S.W., Allen & Unwin. Pp 39-44.

³¹ Mackay, R. and G. Karskens (1999). "Historical archaeology in Australia: historical or hysterical? Crisis or creative awakening?" Australasian Historical Archaeology 17: 110-115.

Iacono, N. Z. (2002). "Beyond the breach: advancing strategies for archaeological management plans." Australasian Historical Archaeology 20: 39-47.

Murray, T. (2002). "But that was long ago: theory in Australian historical archaeology 2002." Australasian Historical Archaeology 20: 8-14.

³² Ellis, B. (1994). "Rethinking the paradigm: cultural heritage management in Queensland." Ngulraig 10. Pp 7-9.

³³ Hodder, I. (1999). The Archaeological Process: An Introduction. Oxford, Blackwell Publishers. Pg 17.

³⁴ There are of course occasional exceptions to this, as some consulting archaeologists do publish papers on specific projects in peer-reviewed forums such as the *Australasian Journal of Historical Archaeology* or *Australian Archaeology*, but very few could be said to have an ongoing research program, particularly as the selection of sites for investigation is based upon client requirements.

³⁵ Connah, G. (1998). "Pattern and purpose in historical archaeology." Australasian Historical Archaeology 16: 3-7.

significance³⁶), as required under the law, in the hope that at some future date it may be further analysed, researched and understood.

Over the period which heritage legislation has been operating in Australia, a divide has grown between the academic archaeologists with research-oriented goals and the consultant archaeologists, who have of necessity been compliance-focused. In the initial period of the legislation's operation, archaeological work was often undertaken by academic archaeologists working on projects through the university or museum system, particularly on prominent government-owned sites. As archaeological work became increasingly undertaken by the private sector, this situation changed. Furthermore, pressure on university departments has meant that archaeology departments have been tending to shrink rather than grow, even as student numbers increase.³⁷ Australian university archaeology departments are increasingly becoming partners with private sector consulting archaeologists, which bring a research focus into projects which are fundamentally driven by legislative compliance.³⁸ This in fact may lead to a more in-depth consideration of archaeological issues in commercially-based projects. But such projects are still being driven by the requirements of the client and the legislation, rather than any academically-based research agenda. Similarly, those archaeologists employed by the public sector in Australia do not generally undertake site-based work and are increasingly moved into the role of administering or project managing consulting archaeologists working on behalf of government.³⁹

The lack of research undertaken by those involved in consulting archaeology should not be taken as an inherent criticism of this area *per se*. A number of Australian authors have demonstrated that archaeology can and does have value outside of the academic arena.⁴⁰ Rather, there must be an

³⁶ NSW Heritage Office and Department of Urban Affairs and Planning (1996). Archaeological Assessments. Sydney, NSW Government.

Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. Burra Charter.

³⁷ For a general discussion of the state of archaeological education in Australia, see: Colley, S. (2000). "Archaeology and education in Australia." Antiquity 74: 171-177.

Balme, J. and M. Wilson (2004). "Perceptions of archaeology in Australia amongst educated young Australians." Australian Archaeology 58: 19-24.

Colley, S. (2004). "University-based archaeology teaching and learning and professionalism in Australia." World Archaeology 36 (2): 189-202.

Ulm, S., S. Nichols, et al. (2005). "Mapping the shape of contemporary Australian archaeology: implications for archaeology teaching and learning." Australian Archaeology 61: 11-23.

³⁸ For example, the present phase of the 'Little Lon' project in Little Lonsdale Street, Melbourne. The La Trobe university staff and students effectively operate as research consultants to the consulting archaeologists. Op cit Murray 2002; Murray, T. and A. J. C. Mayne (2001). Imaginary landscapes: reading Melbourne's "Little Lon". The Archaeology of Urban Landscapes: Explorations in Slumland. A. J. C. Mayne and T. Murray. Cambridge, Cambridge University Press: 89-105. Murray, T. and A. J. C. Mayne (2003). "(Re) Constructing a Lost Community: "Little Lon," Melbourne, Australia." Historical Archaeology 37 (1): 87-101.

³⁹ There are of course occasional exceptions to this, as some government agencies which employ archaeologists will undertake field projects, although these tend to be small in scale and are generally run by agencies with archaeological assets and a cultural heritage brief (e.g. in New South Wales the Department of Environment and Conservation or the Sydney Harbour Foreshore Authority, which manages The Rocks in Sydney). Crossover exists in the other direction as well, with both the New South Wales and the South Australian public service maintaining heritage consulting groups which work on a commercial basis.

⁴⁰ Ireland, T. (1996). Excavating national identity. Sites: nailing the debate: archaeology and interpretation in museums. C. Paine. Sydney, Historic Houses Trust of NSW: 85-106.

Ireland, T. (2001). An Artefact of Nation: Historical archaeology, heritage and nationalism in Australia. Prehistoric and Historical Archaeology. Sydney, University of Sydney: 346.

Ireland, T. (2002). "Giving value to the Australian historic past: historical archaeology, heritage and nationalism." Australasian Historical Archaeology 20: 15-25. Pp 126-153.

acknowledgement that contemporary archaeological practice in Australia has shifted considerably away from its academic roots, particularly those founded in the “scientific” or processual archaeology of the 1960s and 1970s. This change should not be unexpected and Murray noted that, for the discipline of archaeology in Australia, “survival depends on being relevant and having a clear understanding of goals and purposes”.⁴¹ This question of relevance, Murray was aware, extends beyond just being relevant to other members of the archaeological discipline, but being relevant to the wider society in which archaeology is practiced. And while Orser is sceptical of there being a clear “public” use for archaeologists, it is still necessary for archaeologists to consider the wider impacts of their research and the relationship and interaction of the discipline with modern society.⁴² The criticism then lies with the nature of the outcomes required by archaeological heritage legislation. As a body of law it inadequately reflects what Australian heritage protection advocates set out to achieve (discussed in detail in Chapter 3) and has driven contemporary practice into an unsustainable corner by enshrining in legislation antiquated notions of archaeological practice. This has created a tension between the needs and goals of academic and consulting archaeologists, government heritage administrators, indigenous people, property owners and the wider community.

In examining this tension, this thesis considers the genesis of archaeological protection in Australia. It argues that many of the problems which have arisen for contemporary archaeological practice stem from the manner in which the protective legislation has been constructed. The changing nature of Australian archaeology and the imperatives of the legislation have shifted much of Australian archaeology from a ‘culture of research’ to a ‘culture of compliance’, with significant implications for Australian society and its expectations for heritage protection. Cuts to academic grants programs have been a significant factor in this shift,⁴³ with an unspoken assumption that compliance-based archaeology funded from the private sector may be able to fill the gap in the absence of academic funding. Newer concepts, such as ‘public good conservation’ are unable to be adequately achieved within the existing legal frameworks due to the inflexibility of those frameworks. This thesis identifies areas necessary for reform and makes concrete suggestions as to how both archaeological heritage legislation and archaeological practice need to change to ensure that archaeological heritage is adequately dealt with according to the significance and broad public value of individual sites.

Colley, S. M. (2002). *Uncovering Australia: archaeology, indigenous people and the public*. Crows Nest, N.S.W., Allen & Unwin.

Du Cros, H. (2002). *Much more than stones and bones: Australian archaeology in the late twentieth century*. Carlton, Vic., Melbourne University Press. Pp 41-68.

⁴¹ Murray, T. (1993). Communication and the importance of disciplinary communities: who owns the past? *Archaeological theory - who sets the agenda?* N. Yoffee and A. Sherratt. Cambridge, Cambridge University Press: 105-116. Pg 114.

⁴² Orser, C. E. (1996). *A historical archaeology of the modern world*. New York, Plenum Press. Pp 201-204.

⁴³ Colley, S. (2004). "University-based archaeology teaching and learning and professionalism in Australia." *World Archaeology* 36 (2): 189–202.

1.5 Methodology of this thesis

In this thesis, the material and evidence used for analysis includes the laws, charters, policies and court judgments which relate to archaeological heritage protection. This involves a process of historical research and literature review, philosophical discussion and textual analysis. To achieve its aims—an enumeration of the types of changes to archaeological law and practice which are required to implement ‘public good conservation’—the thesis takes the methodological path set out below.

Historical analysis

Documentary research has been undertaken into the historical development of archaeological heritage management principles in Australia and internationally, to track the change in perceptions and aims over time. This has included analysis of documents such as international treaties and charters, government reports, parliamentary debates and published literature. This research has identified a range of underlying legal protective principles for archaeological heritage, which are manifested in Australian heritage legislation in varying ways. Evans is in favour of an historical approach such as this when interpreting legislation, particularly noting the importance of understanding the “historical setting” and the “previous state of the law”. He further notes that parliamentary history⁴⁴ must be used with care, due to the subtle distinction between the *intent* of the legislature in making the Act and the *words* used in its actual drafting.⁴⁵ Levin cautions against an “originalist” approach to both jurisprudential and heritage interpretation, as reconstructing the original intent of lawmakers is as much an exercise in historical recreation as interpreting an historical place or event. He feels that social progress made since an historical event or the passing of a piece of legislation should not be denied, in a quest to determine an historical or legal original truth.⁴⁶

Butt and Castle observe that in the interpretation of laws there are both internal and external factors to consider. Internal factors relate to the interpretation of the content of the legal document itself; external factors may be considerably broader and include consideration of the intent of the document,⁴⁷ though not necessarily the intent of the parties bound by the document.⁴⁸ Both are relevant to the interpretation of the document by those bound by it and the courts. They further note that lawyers drafting documents such as legislation are inherently conservative and tend to favour the familiar, borrowing from what has been used in the past.⁴⁹ It should therefore be unsurprising that many Australian heritage statutes are similarly framed and

⁴⁴ Based principally in parliamentary documentary sources such as records of debates (Hansard), parliamentary papers and supporting documentation.

⁴⁵ Evans, J. (1988). *Statutory Interpretation: Problems of Communication*. Melbourne, Oxford University Press. pp 274-289.

⁴⁶ Levin, D. (2004). "Federalists in the attic: original intent, the heritage movement and democratic theory." *Law and Social Inquiry* 29 (1): 105-126.

⁴⁷ Butt, P. and R. Castle (2001). *Modern legal drafting: a guide to using clearer language*. Cambridge, Cambridge University Press. Pp 38-39.

⁴⁸ Aitken, J. K. and P. Butt (2004). *Piesse. The elements of drafting (10th edition)*. Pyrmont, NSW, Lawbook Co. Pp 10-14.

⁴⁹ Butt, P. and R. Castle (2001). *Modern legal drafting: a guide to using clearer language*. Cambridge, Cambridge University Press. Pp 6-12.

worded. Acts have drawn on previous laws in other jurisdictions, sharing key concepts and terminology, as well as drawing upon common sources of inspiration or principle, such as international charters or influential domestic documents, such as the Hope Report⁵⁰ and the Burra Charter. What this also means is that flawed premises can be passed from Act to Act, as will be shown through the detailed legislative analysis in Chapters 5 to 7. By examining the origins and foundations of the Acts, the aim is not to chronicle the development of heritage legislation in Australia or around the world; this has been well established elsewhere.⁵¹ Rather, the aim is to track the change in thinking about what aspects of archaeological heritage should or need to be protected and why. This is linked to changing visions of protections for the environment and heritage more generally.

Philosophical discussion

This thesis is a work of heritage management and it falls broadly within the realm of postprocessualist archaeological discourse.⁵² It is postprocessualist insofar as it rejects the “rigid scientism” of processual archaeology,⁵³ which as will be shown, underpins much of Australian archaeological heritage law. But it does not attempt to situate the discussion more broadly within post-modern theory or discourse, rather choosing to rely upon environmental philosophy, and takes the view that, for the purposes of its discussion in a legal context, archaeology is an environmental matter. Environmental law is generally concerned with controlling impacts to “the environment” in the broadest sense, or driving environmental conservation or improvement. From a protective and conservation perspective, environmental law provides the basis for preventing what may be termed “unacceptable” impacts to archaeological resources in the form of unauthorised, deliberate or accidental destruction as well as providing a framework for active conservation⁵⁴. This allows archaeology to be discussed comfortably within the context of environmental law more generally. Analysis in this thesis is carried out using principles of environmental philosophy from key texts and draws inferences and connections with the archaeological and heritage management principles drawn out in the historical analysis. This concludes with the establishment of the framework for ‘public good conservation’, which forms the basis against which existing frameworks are tested.

Textual analysis

The primary source materials used for this thesis are domestic and international charters, treaties and documents of principle (which indicate what should be protected and why), the laws which protect archaeological

⁵⁰ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service.

⁵¹ For example, see O’Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. or Davison, G. (1984). A brief history of the Australian heritage movement. *A Heritage Handbook*. G. Davison and C. McConville. North Sydney, Allen & Unwin: 14-27.

⁵² Although perhaps not precisely in the manner in which Smith refers to postprocessualism. Smith, L. (1994). “Heritage management as postprocessual archaeology?” *Antiquity* 68: 300-309. , Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 6-15 & 33-57.

⁵³ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 43-47.

⁵⁴ Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 12-15.

heritage, policy and guidelines which flow from those laws (which set out how archaeological heritage is to be protected) and the judgments of the courts regarding archaeological issues or related principles (where the protections are tested). These documents all act as the ‘texts’ which require analysis and build the total framework for archaeological heritage management in Australia. This is supported by literature review of key texts in the areas of archaeology, cultural resource management and law, which provide a framework for analysing the primary source documents. Each of these types of text is examined to determine what position, if any, is taken on archaeological heritage protection and what the primary goals or intent was with respect to archaeological heritage protection. The steps of this analysis allow the existing legal frameworks for archaeological heritage protection to be related back to and tested against the notion of public good conservation.

1.6 Key issues in the legal protection of the archaeological heritage

In a broad sense, the “archaeological heritage” consists of those largely hidden traces of past activities and societies which can be uncovered through archaeological techniques. In Australia, this heritage falls into two general categories: historical archaeological heritage and indigenous archaeological heritage.

Historical archaeology

Historical archaeology is defined here as the study of the material evidence of the recent past through the use of archaeological techniques.⁵⁵ In Australia, it refers to the archaeology of the colonial and post-colonial period. It is typically a text-aided method, allowing analysis of both documentary and archaeological evidence, which Anders described as the “interplay between artefact and text”.⁵⁶ This implies that the archaeological record should be able to add depth and meaning to the historical record through the analysis of material culture. Too great an emphasis on artefacts or documents alone can belie the influence of individuals, society and the environment in the motivations behind past activities.⁵⁷ To achieve a balanced understanding involves the interpretation and re-interpretation of the past, through archaeological materials, documentary records and human memory, or as Orser puts it “the creation and constant re-creation of the modern world”⁵⁸, a sentiment echoed by Little.⁵⁹ Through this process, the past remains

⁵⁵ For various perspectives see, for example:
Walker, I. C. (1978). *Historic archaeology - methods and principles*. Historical archaeology: a guide to substantive and theoretical contributions. R. L. Schuyler. Farmingdale, Baywood Publishing Company: 208-215.
Connah, G. (1988). The Archaeology of Australia's History. Melbourne, Cambridge University Press.
Trigger, B. (1989). A History of Archaeological Thought. Cambridge, Cambridge University Press.
Orser, C. E. and B. M. Fagan (1995). Historical archaeology. New York, HarperCollins College Publishers.
Orser, C. E. (1996). A historical archaeology of the modern world. New York, Plenum Press.
Colley, S. M. (2002). Uncovering Australia: archaeology, indigenous people and the public. Crows Nest, N.S.W., Allen & Unwin.

⁵⁶ Anders, A. (1998). Between artefacts and texts: historical archaeology in global perspective. New York, Plenum Press. Pp 179-183.

⁵⁷ Jones, A. (2002). Archaeological theory and scientific practice. Cambridge, Cambridge University Press. Pp 170-171.

⁵⁸ Orser, C. E. (1996). A historical archaeology of the modern world. New York, Plenum Press. Pg 183.

⁵⁹ Little, B. J. (2004). Is the medium the message? The art of interpreting archaeology in US National Parks. Marketing Heritage: archaeology and the consumption of the past. Y. Rowan and U. Baran. Walnut Creek, CA, AltaMira Press: 269-286.

changeable in order to remain relevant to contemporary society, even though the objects in the archaeological record themselves are static.⁶⁰

The 'historical' period varies from place to place but in general the starting point for historical archaeology is around the end of the medieval period in Europe⁶¹, or, in Australia, from the arrival of the first European settlers in 1788. Pascoe notes that European Australia is one of the most heavily documented societies in the world, as the First Fleet arrived with a readymade bureaucracy and recordkeeping system,⁶² hence even the earliest days of Australian settlement are accompanied by at least some documentary material to supplement the archaeological record. The archaeological record is however ideally suited to providing information on those undocumented or unofficial aspects of Australian life. The few centuries preceding the arrival of the First Fleet include isolated instances of landings by Europeans and Indonesians on islands or coastal areas particularly on the western and northern coasts of Australia and, while these can be considered historical in nature, they are anomalies as far as the main body of historical archaeological knowledge is concerned in Australia. The end of the historical period is also somewhat open to debate and, in law, tends to be arbitrarily defined through a specific date or floating date range—e.g. everything before January 1st 1901⁶³ or everything older than 50 years.⁶⁴ The use of a particular cut-off date for the 'historical' period has its own problems, however, as noted by Orser:

the precise date [when historical archaeology begins] does not much matter. Setting an arbitrary starting point says more about its creator and what he or she thinks about the past than about the past itself...⁶⁵

This issue of legally defining the dates or ages for the prehistoric and historical archaeological period will be discussed in greater detail later in the text.

Historical archaeological sites as a class of site are significantly under threat from present day activities, such as urban development and redevelopment, agricultural activity, industrial expansion and infrastructure creation, hence the need to consider their protection. Colonial and post-colonial⁶⁶ settlement in Australia has been concentrated in a relatively small portion of the Australian landmass for the last two hundred years,⁶⁷ the same areas of land are being

⁶⁰ Jones, A. (2002). *Archaeological theory and scientific practice*. Cambridge, Cambridge University Press. Pp15-16.

⁶¹ Where it is sometimes referred to as 'early modern' or 'post-medieval' archaeology.

⁶² Pascoe, R. (1979). *The manufacture of Australian History*. Melbourne, Oxford University Press. Pg 163.

⁶³ NSW *Heritage Act 1977*, Section 4 (repealed). Prior to 1987, an archaeological 'relic' was defined as "any object deposit or material evidence, of or related to the settlement of New South Wales, not being Aboriginal settlement, and created before 1 January 1901."

⁶⁴ NSW *Heritage Act 1977*, Section 4. Following substantial amendments to the NSW Heritage Act in 1987, the definition of a 'relic' was amended to "any deposit, object or material evidence...which is 50 or more years old." This 'floating' date is generally referred to as the "50-year rule" and is the definition which is still in use at present in NSW.

⁶⁵ Orser, C. E. (1996). *A historical archaeology of the modern world*. New York, Plenum Press. Pg 87.

⁶⁶ The Australian continent constituted series of British colonies under military governance until the 1850s. Following the introduction of civilian authority, the various colonies on the continent were self-governing, until Federation in 1901. Docherty, J. C. (1993). *Historical Dictionary of Australia*. Sydney, Franklin Watts Australia. Pg 66.

⁶⁷ Approximately 64% of the Australian population lives in the capital cities of the States and Territories, with up to 85% of the population living in urban centres. Australian Bureau of Statistics (2006). 4102.0 - Australian Social

affected again and again by human activity, which has the potential to impact on sites of past activities in urban locations. Similarly, the increase in scale and intensity of agricultural and industrial activities in the rural areas are seeing larger and larger areas being affected by farming, forestry or mining, which are often overlaid on the earlier remains of such activities.⁶⁸ Finally, the increased construction of infrastructure to support, service and connect the growing urban centres has seen greater impacts through the construction of roads, water infrastructure, power and telecommunications lines, than ever before. Given the prevalence, broad potential significance and substantial threats facing historical archaeological sites, they form a central focus of this thesis.

Indigenous archaeology

Non-indigenous conceptions of the nature of indigenous⁶⁹ archaeology and heritage have changed substantially over the last thirty years, and continue to evolve. Initially, the indigenous past was typically viewed by non-indigenous people as of interest to academics studying the 'stones and bones' of a culture which was perceived as dead or dying.⁷⁰ The social and political stature of indigenous people has grown over past decades, characterised by an increasing push for cultural self-determination and recognition of the contemporary links to past cultural practices.⁷¹ This has led to a general recognition that the archaeological materials of past indigenous activities are part of a continuum of activity extending from circa 60,000 years ago into the present day,⁷² but this has not necessarily translated into legal recognition of cultural continuity for indigenous people.⁷³ Similarly, the value of these remains is perceived as no longer the sole preserve of academics, but rather something which should largely be under the control of indigenous people,

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- Trends, 2006. Australian Bureau of Statistics, Australian Government. Pp 179-180. Similar statistics are noted in the 1974 Hope Report as a major impact factor on Australia's heritage places. Hope, R. M. (1974). Report of the Committee of Inquiry into the National Estate. Canberra, Australian Government Publishing Service. Pg 21.
- ⁶⁸ For the purposes of this thesis "industrial archaeology", which is focused on conserving the material remains of past industrial activities, will not be included within the larger notion of "historical archaeology". While the methodologies for investigating industrial and historical archaeology have some overlap, in general, within Australia industrial sites have been managed within the frameworks associated with built heritage. Thus the legal issues associated with Australian industrial sites can be significantly different from those with historical archaeological sites.
- ⁶⁹ Indigenous is used here in the generic sense, for pre-European Australian peoples and their descendents. This includes mainland and Tasmanian Australian Aborigines as well as Torres Strait Islanders, who consider themselves separate cultural groups.
- ⁷⁰ See, for example discussion in Mulvaney, D. J. (1968). Field research in Australia. Archaeology: A Guide to Field and Laboratory Techniques. D. J. Mulvaney. Canberra, Australian Institute of Aboriginal Studies. ; Allen, J. (1970). Early colonial archaeology. Aboriginal Antiquities in Australia. F. D. McCarthy. Canberra, Australian Institute of Aboriginal Studies. Pg 99ff.
- ⁷¹ For example, Brown discusses this in terms of the relationship between traditional stories and art and the realities of copyright and the contemporary art market: Brown, M. F. (2003). Who owns native culture? Cambridge, Mass., Harvard University Press. Pp 43-68. See also Janke, T. (1998). Our Culture Our Future : a Report on Australian Indigenous Cultural and Intellectual Property Rights. Sydney, Michael Frankel & Co for the Australian Institute of Aboriginal and Torres Strait Islander Studies. Pp 80-82.
- ⁷² Sullivan, S. (1985). The Custodianship of Aboriginal Sites in Southeastern Australia. Who Owns the Past? I. McBryde. Melbourne, Oxford University Press: 139-156.
Horton, D. (1991). Recovering the tracks : the story of Australian archaeology. Canberra, Aboriginal Studies Press.
Colley, S. M. (2002). Uncovering Australia: archaeology, indigenous people and the public. Crows Nest, N.S.W., Allen & Unwin. Pp 71-75.
- ⁷³ Perhaps the most famous example of this being the denial of the Yorta Yorta land claim in Victoria, under the Native Title Act 1993 (Cth). Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 (12 December 2002, unreported). For commentary, see Lilliey, I. (2005). Archaeology and the politics of change in a decolonizing Australia. Object lessons: archaeology & heritage in Australia. J. Lydon and T. Ireland. Melbourne, Australian Scholarly Publishing: 89-106. Pp 90-92.

who have used this newfound authority in some instances to control who should have access to what aspects of indigenous culture and cultural material.⁷⁴ Other aspects of indigenous heritage, particularly places of contemporary significance, are being progressively recognised⁷⁵ and in some cases are the subject of statutory protection.

The conflict between conceptualisations of the past is no starker than with respect to indigenous archaeology. At present, there remains considerable divergence between what indigenous people perceive as important remains of their past and what archaeologists consider important.⁷⁶ The material culture of the indigenous past, in the form of archaeological remains, may not necessarily have the same value to archaeologists as for indigenous people.⁷⁷ Originally, legislation designed to protect the indigenous past was created at the behest of non-indigenous archaeologists, including the 1955 *Native and Historic Objects Heritage Protection Ordinance* (Northern Territory), the 1965 *Aboriginal and Historic Relics Preservation Act* (South Australia) and the 1972 *Aboriginal and Archaeological Relics Preservation Act* (Victoria). However the balance has been shifting over the last thirty years and, at present, very little work can be done on remains of the indigenous past without, at a minimum, consultation with the indigenous community and often their direct input and/or explicit permission. This has principally been through changes in government policy rather than through specific enfranchisement of the indigenous community through legislation.

Debate has ranged widely as to what constitutes the “indigenous past” and this has reflected other social changes within indigenous communities, the archaeological profession and wider society.⁷⁸ For much of the nineteenth and twentieth centuries, the view was that it was critical to protect the physical remains of the past. The cultural and spiritual aspects of indigenous culture were seen as either absent, already lost or very soon to be lost. This was underlaid by a perception that indigenous people as a group would cease to exist, either having died out or having been fully assimilated into white culture. The protections posed in early heritage legislation reflect this view, as did comments made by parliamentarians during the debate on these early acts, as will be seen in Chapters 5 to 7. This attitude has largely shifted however, with recognition that while the physical remains of the past have value, they

⁷⁴ Colley, S. M. (2002). *Uncovering Australia: archaeology, indigenous people and the public*. Crows Nest, N.S.W., Allen & Unwin. Pp 59-91.

⁷⁵ Hinkson, M. (2001). *Aboriginal Sydney: a guide to important places of the past and present*. Canberra, Aboriginal Studies Press. As an example, Hinkson identifies a range of significant places to Aboriginal people in the greater Sydney area, some of which would be considered archaeological in the usual sense, as well as others which would not traditionally be viewed as Aboriginal heritage places. Notable amongst these is Australia Hall, an otherwise unremarkable late 19th century commercial building in Sydney, but which is highly significant to Aboriginal people as the birthplace of the Australian land rights movement in 1938. Now listed on the NSW State Heritage Register, the site was purchased by the Metropolitan Local Aboriginal Land Council and is used as that organisation's head office. See Hinkson Pp 22-24 for further details, as well as the NSW State Heritage Register listing for the site: http://www.heritage.nsw.gov.au/07_subnav_02_2.cfm?itemid=5045005. Accessed 15 June 2006.

⁷⁶ McIntosh, R. J., S. K. McIntosh, et al. (1996). People without history. *Archaeological Ethics*. K. Vitelli. Walnut Creek, CA, AltaMira Press: 185-197.

Mulvaney, D. J. and J. Kamminga (1999). *Prehistory of Australia*. St Leonards, N.S.W., Allen & Unwin. Pp 6-10.

Du Cros, H. (2002). *Much more than stones and bones: Australian archaeology in the late twentieth century*. Carlton, Vic., Melbourne University Press. Pp 117-141.

⁷⁷ Langford, R. F. (1983). "Our heritage - your playground." *Australian Archaeology* 16: 1-6.

⁷⁸ Sullivan, S. (1985). The Custodianship of Aboriginal Sites in Southeastern Australia. *Who Owns the Past?* I. McBryde. Melbourne, Oxford University Press: 139-156.

do not represent the sum total of the indigenous past. This is slowly being reflected in the bulk of heritage legislation and there remain certain difficulties as to the practical implementation of protection for spiritual or intangible values of places. This problem is not however confined to indigenous sites and the importance and protection of intangible values is only just starting to be understood and discussed by heritage professionals, the community and governments.⁷⁹

The complexities over ‘ownership’ of the indigenous past aside, indigenous sites continue to be impacted by many of the same forces as historical sites and it is becoming clear that more of the archaeological remains of the indigenous past survive in the urban centres than previously suspected.⁸⁰ The principal difference here is that indigenous sites are becoming more difficult to deal with, given competing values and perceptions of their ‘value’. With complex and overlapping legal regimes for both historical and indigenous archaeology it is necessary to consider them in conjunction.

1.8 Related issues considered by this thesis

Legal issues for movable heritage protection

Movable heritage refers to anything of heritage significance which can be relocated.⁸¹ At various times, it has been used to describe artworks, machinery, vehicles, portable buildings, parts of buildings, personal effects, papers, human remains and collections of objects, including archaeological collections. Protections for movable heritage have existed for some time at the Commonwealth level, through the *Protection of Movable Cultural Heritage Act* 1986 and have been progressively filtering down to the State and Territory level.⁸² The Commonwealth Act is principally concerned with the restriction of the export of certain types of objects where their removal from Australia is seen as potentially diminishing the cultural heritage of the Australian nation. This typically relates to classes of objects or collections of objects which may be offered for sale and thus may permanently leave Australia.⁸³

Movable heritage and archaeology generally intersect in Australia once an archaeological object has been removed from its original location or context, typically through excavation. Such objects tend to take the form of collections

⁷⁹ For example, Article 24 of the 1999 Australia ICOMOS Burra Charter, which includes consideration of “spiritual values” or the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. See also Truscott, M. (2000). “Intangible values’ as heritage in Australia.” *Historic Environment* 14 (5): 22-30.

⁸⁰ E.g. developments in Angel Place in the Sydney CBD, or the Quadrant site in Ultimo near central Sydney contained physical remains of pre-European Aboriginal activities in highly urbanised contexts. See Godden Mackay (1996). *Angel Place Archaeological Investigations Report*. Sydney. and Mider, D. (2002). *Quadrant Site Archaeological Report*, Broadway Ultimo.

Attenbrow, V. (2002). *Sydney’s Aboriginal Past*. Sydney, UNSW Press.

⁸¹ Winkworth, K. (1997). *Movable heritage in NSW: A report commissioned by the NSW Heritage Office*. Sydney, NSW Heritage Office.

NSW Heritage Office (1999). *Moveable Heritage Principles*. Parramatta, NSW Government.

Russ, R. and K. Winkworth (2001). *Significance : a guide to assessing the significance of cultural heritage objects and collections*. Heritage Collections Council. Canberra, Commonwealth of Australia.

⁸² For example, NSW incorporated protections for movable heritage into the 1998 amendments to the *NSW Heritage Act* (section 4). Similarly, the Victorian *Heritage Act* provides some mechanisms for controlling the sale and movement of registered objects and archaeological relics (Sections 52-53 and 134).

⁸³ See the Schedule to the *Protection of Movable Cultural Heritage Regulations* 1987 (Cth) for the National Cultural Heritage Control List, which sets out the protected classes of movable heritage.

of archaeological artefacts from a specific site or location or individual artefacts of particular note which may be separated from a collection. Scholars such as Renfrew assert that looting of movable artefacts is “the primary threat to the archaeological heritage”⁸⁴, however there is no evidence this is the case in Australia. In general, the philosophical underpinnings of movable heritage protection in Australia are focused on a belief that movable heritage should, wherever possible, remain in its original location, as it is the context provided by the original location which provides some, if not all, of the object’s significance.⁸⁵ That said, this is rarely possible with archaeological materials as the process of discovery through excavation destroys the original location of the objects. This is further exacerbated where the land is excavated in a development context. The process of systematic relocation of archaeological material is generally required for in-depth research and study, and may also be a management decision based on the inability to protect archaeological materials in their original location. In certain instances relating to indigenous archaeological materials, ‘keeping places’⁸⁶ have been established at or near the site of excavation (e.g. at Lake Mungo in NSW⁸⁷) however this is not always practical, appropriate or necessary.

In Australia, major state-run museums typically have their own enabling legislation which broadly defines their brief and powers, as well as establishing a governance structure for the institution. Examples of this include the *Australian Museum Trust Act 1975* (NSW), the *National Museum of Australia Act 1980* (Cth) or the *Museum Act 1969* (WA). The focus of museum-enabling legislation is generally to establish the museum as a place of collection and display of materials, with an expectation that these collections will be used for research and public education.⁸⁸ Australian museums have been quite active in conducting research-based archaeological programs in the past, however these are considerably outnumbered by commercially-driven archaeological works.⁸⁹ Even within the context of these research excavations, museum archaeologists are still required to comply with the requirements of heritage legislation; museum affiliation gives no special exemption from these requirements. As repositories for ‘movable heritage’ in the broadest sense, Australian museums have been responsible for the collection and, in some circumstances, the discovery of aspects of Australia’s archaeological heritage. That said, they rarely serve as an integral part of the heritage management process, save as repositories for

⁸⁴ Renfrew, C. (2000). *Loot, legitimacy, and ownership: the ethical crisis in archaeology*. London, Duckworth. Pg 21

⁸⁵ NSW Heritage Office (1999). *Moveable Heritage Principles*. Parramatta, NSW Government. Pg 3.

Russ, R. and K. Winkworth (2001). *Significance: a guide to assessing the significance of cultural heritage objects and collections*. Heritage Collections Council. Canberra, Commonwealth of Australia.

⁸⁶ A ‘keeping place’ is a repository where archaeological materials which have been transferred back to the Aboriginal community can be kept in the custodianship of Aboriginal people. Legitimate researchers can, notionally, negotiate with the Aboriginal community for access to that material for study, however the facility is not a museum and stored material is not generally open to the public.

⁸⁷ NSW National Parks and Wildlife Service (1997). *Mungo National Park Guidebook*. Yarralumla, Beaten Track Press.

⁸⁸ See for example Section 9 of the *Museum Act 1969* (WA), Section 6 of the *National Museum of Australia Act 1980* (Cth) or Sections 7 and 8 of the *Australian Museum Trust Act 1975* (NSW), which each set out the focus and key functions of the institutions they enable. In some cases, such as the *Museum Act* (WA), the brief explicitly includes archaeology, whereas the focus of other institutions, such as the Australian Museum (NSW) is on the ‘natural sciences’.

⁸⁹ It should be noted that some museums have set up their own commercial consulting businesses in response to the demand for archaeological compliance services, e.g. Australian Museum Business Services (<http://www.ambs.com.au>).

excavated archaeological material. The specific issues arising from the management of archaeological heritage within museums are however beyond the scope of this thesis to investigate.

The frameworks for movable heritage may provide mechanisms for managing archaeological objects once they are divorced from their original context, or may allow control over their import or export, however these are not perceived as the same issues as those relating to the protection of archaeological sites 'on the ground' or which are as yet undiscovered. Australian archaeological objects have not attracted the same level of attention on the international market for antiquities and thus an illicit trade in such objects does not seem to exist at the same scale as the trade in, for example, Greek, Mayan or Asian antiquities.⁹⁰ Similarly Australia lacks the pressures of acute poverty which drive the poor to loot archaeological sites in developing countries in order to survive.⁹¹ As these issues are only tangentially related to the underlying concerns of this thesis, legal controls for movable heritage will not be substantially considered here.

Related areas of 'hidden heritage'

Archaeological heritage in Australia differs from other types of heritage, such as buildings or artwork, as it is often not visible nor inherently understandable without some level of translation or interpretation by those with specialised skills. It requires the application of specific, in some cases scientific, techniques of archaeological investigation to assign meaning. In these respects it is 'hidden heritage'—it is not readily observable when one walks around a city or a landscape, nor is it inherently comprehensible without assistance. Those more observable manifestations of the archaeological record—rock art sites, middens or ruins—are still likely to be overlooked, or not valued, by those who do not have some specific knowledge of their significance. Furthermore, being 'hidden', archaeological heritage is more subject to threat, damage or destruction, particularly through accidental disturbance. Such threats may themselves be difficult to perceive or anticipate until an archaeological place has been at least partially disturbed.

Australia lacks the grand ruins of Europe or Asia, as indigenous peoples did not typically build lasting structures. Those that were built, such as fish traps or modified cultural landscapes,⁹² were often overlooked by later settlers as they were not perceived as representing construction and settlement in a traditional European sense. The romantic "ruin" of European experience never existed within Australia yet was a strong influence on the development of the

⁹⁰ However a substantial domestic trade in Aboriginal objects, particularly stone tools, existed in the late 19th and early 20th centuries. See Griffiths, T. (1996). *Hunters and Collectors: The antiquarian imagination in Australia*. Melbourne, Cambridge University Press.

⁹¹ O'Keefe, P. J. (1997). *Trade in antiquities : reducing destruction and theft*. Paris, UNESCO Pub.
Renfrew, C. (2000). *Loot, legitimacy, and ownership : the ethical crisis in archaeology*. London, Duckworth.
Renfrew, C., N. Brodie, et al. (2001). *Trade in illicit antiquities : the destruction of the world's archaeological heritage*. Cambridge, McDonald Institute for Archaeological Research.

⁹² Beech, H. (2003). Spirited Away. *Time*: 52-60.
Mulvaney, D. J. and J. Kamminga (1999). *Prehistory of Australia*. St Leonards, N.S.W., Allen & Unwin. Pp 34-35; 59-62.
Attenbrow, V. (2002). *Sydney's Aboriginal Past*. Sydney, UNSW Press. Pp 85-88.

discipline of archaeology,⁹³ from the antiquarian tradition. Initially, therefore, Australia was not perceived as an archaeologically rich nation. Similarly, most early Colonial era structures have been replaced and subsumed by later changes to cities and landscapes, meaning that much of Australia's earliest and most significant heritage is archaeological in nature. Substantial work has been undertaken in Australia about the "archaeological" natures of entire landscapes,⁹⁴ on the basis that the patterns within the landscape can be uncovered using archaeological techniques and can reveal considerable information regarding the past use of the landscape. Cultural landscapes are as likely to in urban areas as rural areas,⁹⁵ but will have different management issues requiring different responses. Overseas, some heritage sites straddle the border between 'built' and 'archaeological' heritage—the Pyramids in Egypt or Angkor Wat in Cambodia, for example. Part of this is certainly perception; as these sites were first investigated by archaeologists, they are perceived as 'archaeological' and archaeological techniques do play a substantial role in investigating the history and significance of such sites. From a heritage management point of view however, such sites are substantially managed as built heritage and many of the immediate threats to such sites (e.g. pollution, development, visitation) are as likely to impinge on the built fabric of the site as upon their archaeological resources.

Related areas—intangible cultural heritage

The newest emerging area in heritage conservation internationally is the protection of intangible cultural heritage. Like many cultural heritage revolutions before it, this is being driven through the establishment of the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*.⁹⁶ The main aims of this Convention are to safeguard intangible cultural heritage, through the fostering of respect, awareness and cooperation for its protection.⁹⁷ The Convention sees intangible cultural heritage as important in the maintaining of "cultural diversity and a guarantee of sustainable development".⁹⁸ The intangible heritage has been defined by the Convention to include oral tradition, language, performing arts, social practices, knowledge and traditional craftsmanship,⁹⁹ though it is unclear how the Convention will facilitate the retention or restrict trade in intangible cultural heritage.¹⁰⁰ Furthermore, it has been noted that if an aspect of intangible cultural heritage is maintained (through, say, recorded media) but the people and culture which produced that intangible practice are gone, then the conservation exercise has been a failed one.¹⁰¹

⁹³ Sweet, R. (2004). *Antiquaries: The discovery of the past in eighteenth-century Britain*. London, Hambledon and London. Pp 285-286.

⁹⁴ Lennon, J. (2001). Identifying and assessing cultural landscapes: Australian practice in a global context. *Heritage landscapes: understanding place and communities*. M. Cotter, B. Boyd and J. Gardiner. Lismore, NSW, Southern Cross University Press: 11-24.

⁹⁵ Hayden, D. (1995). *The power of place: urban landscapes as public history*. Cambridge, MIT Press. Pp 44-81.

⁹⁶ UNESCO (2003). *Convention for the Safeguarding of the Intangible Cultural Heritage*. Hereafter *Intangible Convention*. Adopted by the UNESCO General Conference on 17 October 2003.

⁹⁷ *Intangible Convention*, Article 1.

⁹⁸ *Intangible Convention*, Preamble.

⁹⁹ *Intangible Convention*, Article 2.

¹⁰⁰ Merryman, J. H. (2005). "Cultural heritage internationalism." *International Journal of Cultural Property* 12: 11-39. Pp 25-26.

¹⁰¹ Brown, M. F. (2005). "Heritage trouble: recent work on the protection of intangible cultural property." *International Journal of Cultural Property* 12: 40-61. Pp 53-54.

The *Intangible Convention* makes no specific mention of archaeology or archaeological issues, although it is possible to see how archaeological places could be relevant to certain cultural practices which fall within the Convention's definitions. Some work has been undertaken in Australia on the protection of indigenous intangible heritage,¹⁰² although these issues are by no means resolved.¹⁰³ Intangible values have formed part of the basis for the listing of places on the World Heritage List, but this does not presently apply to any Australian places.¹⁰⁴ Australia is not a signatory to this Convention, nor has the Convention received significant attention domestically.¹⁰⁵ As of mid-2006, the Convention has only just received sufficient signatories to be ratified and thus it is too early to observe its application.¹⁰⁶ Amendments to the Australia ICOMOS Burra Charter in 1999 started to address the conservation of non fabric-based heritage values,¹⁰⁷ through the addition of 'spiritual' significance as a consideration for the Charter. Despite this, limited work has been undertaken in the protection of intangible cultural heritage generally in Australia, although there are some commonalities with work undertaken on the social value of heritage places.¹⁰⁸

The most relevant efforts have been those in the areas of indigenous heritage and social policy, which recognise that part of societal wellbeing for indigenous people is the ability to practice their culture and see it passed on to future generations. Internationally, the cultural value of biodiversity to indigenous people is receiving greater recognition,¹⁰⁹ but the same recognition lags behind for archaeological heritage. One of the limitations which indigenous people have encountered in Australia has been that heritage legislation, or other environmental legislation such as that which establishes parks and reserves, can exclude indigenous people from access to and use of culturally significant places due to the environmental and heritage protection regimes which have been put in place. Even in cases where significant places have been returned to the ownership of indigenous Australians, they have often been denied the ability to manage those places.¹¹⁰ This raises challenging questions as to whom that heritage belongs and for whom is it being protected. In New South Wales, the government has recognised this

¹⁰² Janke, T. (1998). *Our Culture Our Future : a Report on Australian Indigenous Cultural and Intellectual Property Rights*. Sydney, Michael Frankel & Co for the Australian Institute of Aboriginal and Torres Strait Islander Studies. Brown's article cited above provides a more general commentary on the issue of appropriation of cultural knowledge from indigenous communities internationally.

¹⁰³ Diver, A. (2004). "A just war: protecting indigenous cultural property." *Indigenous Law Bulletin* 6 (4): 7-10.

¹⁰⁴ Beazley, O. (2005). "'Five feet from heaven': the World Heritage Convention, 'mountains of meaning' and inspirational landscapes. Identifying and protecting mountains' intangible heritage values." *Historic Environment* 18 (2): 3-10.

¹⁰⁵ Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 22-23.

¹⁰⁶ The Convention entered into force on 20 April 2006. As of that date there were 47 States Parties to the Convention.

¹⁰⁷ Australia ICOMOS (1999). *The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance*. *Burra Charter*. Article 24. See also comments in Allen, C. (2004). "The road from Burra: thoughts on using the Charter in the future." *Historic Environment* 18 (1): 50-53.

¹⁰⁸ Byrne, D., H. Brayshaw, et al. (2001). *Social Significance: A discussion paper*. Hurstville, NSW National Parks and Wildlife Service: 161.

Johnston, C. (1992). *What is social value? A discussion paper*. Canberra, Australian Government Publishing Service.

¹⁰⁹ Birnie, P. W. and A. E. Boyle (2002). *International Law and the Environment (2nd edition)*. Oxford, Clarendon Press. Pp 579-580. See also NSW National Parks and Wildlife Service (1999). *NSW Biodiversity Strategy*. NSW National Parks and Wildlife Service. Pp 8-9.

¹¹⁰ Cordell, J. (1993). *Who owns the land? Indigenous involvement in Australian protected areas*. *The law of mother: protecting indigenous peoples in protected areas*. E. Kemf. San Francisco, Sierra Club Books: 104-113.

and is working to develop frameworks which allow access to significant places for cultural purposes.¹¹¹ While in some cases these significant places may have archaeological values, consideration of the full scope of intangible cultural heritage issues with respect to archaeological heritage is beyond the scope of this thesis.

1.9 Issues excluded from consideration by this thesis

A full discussion of other types of 'hidden heritage' which may have some relationship to archaeology falls outside the scope of this thesis. These areas are identified below along with reasons noted for their exclusion from this discussion.

Excluded issues—Maritime archaeology

Maritime archaeology in Australia refers generally to sites under water¹¹² (which may include oceans, lakes or rivers), although more often than not it refers specifically to shipwrecks. Literally thousands of shipwrecks dot the Australian coasts, riverine and territorial waters.¹¹³ In addition, other sites of formerly land-based activities can be considered maritime in nature,¹¹⁴ such as sites of indigenous activities in areas now below sea level, but in practice such sites are rarely encountered. Terrestrial sites which are associated with maritime activities, such as whaling or shipbuilding, are often also considered "maritime" archaeological sites, however for the context of this thesis, "maritime" sites are considered to be those under water.

This thesis does not intend to engage with the issue of historic shipwrecks or of other types of maritime sites, except at the most general level, for a number of reasons. From a legal perspective, there are a range of additional complexities relating to such issues as insurance law (many shipwrecks are in fact owned by insurance companies which have paid out on the wreck), salvage law (in certain instances the salvage of cargo is permissible, which is quite different from land-based sites) and other general issues of admiralty law (the general term for the 'law of the sea', which deals with how ships and nations are to behave in international waters). Other complexities include war graves legislation for ships sunk in conflicts. The broad legal framework for maritime archaeological heritage is thus substantially different from that of land-based archaeological heritage.

The other major reason for excluding such heritage from this discussion is that, in comparison with land-based archaeological heritage, maritime heritage is under little threat from anything save the actions of the environment. While

¹¹¹ NSW Department of Aboriginal Affairs (2005). *Two Ways Together: the NSW Aboriginal Affairs Plan 2003 - 2012*. NSW Department of Aboriginal Affairs. Pg 81. <http://www.daa.nsw.gov.au/policies/twreport.html>. Accessed March 25 2006. Significantly, it should be noted that these frameworks do not seek to restrict indigenous people to "traditional" uses of significant places, but rather recognise that indigenous culture and tradition does evolve. For a general discussion of this issue see Bomford, M. and J. Caughley, Eds. (1996). *Sustainable Use of Wildlife by Aboriginal Peoples and Torres Strait Islanders*. Canberra, Australian Government Publishing Service.

¹¹² UNESCO (2002). *Convention for the Protection of Underwater Cultural Heritage*. Article 1.

¹¹³ See for example the National Shipwreck Database (<http://eied.deh.gov.au/nsd/public/welcome.cfm>) which lists more than 6000 wrecks around Australia. See also NSW Heritage Office (1996). *Shipwreck Atlas of New South Wales*. Sydney, NSW Government.

¹¹⁴ UNESCO (2002). *Convention for the Protection of Underwater Cultural Heritage*. Article 1.

there are impacts from divers seeking souvenirs, active ‘treasure hunters’, salvage companies or commercial activities (e.g. sea bed mineral exploration, drag-net fishing) these are less intense and less immediate than the impacts occurring daily upon land-based heritage. No doubt some maritime archaeologists would dispute this statement and certainly the recent release of a UNESCO Convention for Underwater Heritage¹¹⁵ and changes to the NSW *Heritage Act*¹¹⁶ with respect to maritime heritage would suggest that problems do exist. But for the reasons cited above, maritime archaeological heritage will not be specifically considered in this thesis.

Excluded issues—Palaentological remains and fossils

Palaentological remains include fossils and associated deposits as well as evidence of very early land forms and the actions of early forms of life (such as fossilised footprints, river beds or animal tracks).¹¹⁷ Palaentological remains were, for many years, primarily the preserve of the academic palaeontologist but in more recent years have attracted the attention of the serious collector. To some extent, this may be because such collecting runs in cycles of fashion; as noted above, in the late nineteenth and early twentieth centuries, indigenous stone tools were actively sought by private collectors.¹¹⁸ Fossils have certainly recently captured the public interest, generally in the form of dinosaurs and, to a lesser extent, ancient mammals, and enormous markets have opened up for such material locally and internationally.¹¹⁹ Virtually no legislation has been put in place for their protection domestically in Australia; however their export from Australia is controlled.¹²⁰ Two Australia fossil sites are listed on the World Heritage List and protected by the Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999.¹²¹

Palaentological specimens differ from archaeological remains in that, generally, they are infinitely more ancient than the archaeological remains of indigenous and non-indigenous human activities and are therefore not readily associated with any particular culture or group. In some instances, indigenous people have asserted a spiritual connection with palaeontological specimens,

¹¹⁵ Ibid.

As of June 2006, only eight countries, and not including Australia, had ratified the Convention. The Convention requires twenty States Parties in order to come into force.

<http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha>. Accessed June 25 2006.

¹¹⁶ Substantial clauses related to the protection of maritime archaeological heritage were added to the NSW *Heritage Act* in 2002. See Sections 47-50 of that Act.

¹¹⁷ Generally fossils are of pre-human remains, but there are several instances of fossilised human footprints being discovered in Australia. See for example Webb, S., M. L. Cupper, et al. (2005). "Pleistocene human footprints from the Willandra Lakes, southeastern Australia." *Journal of Human Evolution* XX: 1-9. See also the discussion in Chapter 8 on the theft of fossilised human footprints in Western Australia.

¹¹⁸ Griffiths, T. (1996). *Hunters and Collectors: The antiquarian imagination in Australia*. Melbourne, Cambridge University Press. Pp 28-54.

¹¹⁹ Long, J. (2002). *The Dinosaur Dealers* (TV documentary), SBS. Documentary screened on SBS television, November 2002. See also the book of the same name: Long, J. (2002). *The Dinosaur Dealers*. Crows Nest, N.S.W., Allen & Unwin. See also the South Australian *Heritage Places Act* 1993, which does have specific protections for palaeontological heritage (under section 25).

¹²⁰ See *Protection of Movable Cultural Heritage Act* (1986) Commonwealth. Certain types of palaeontological material appear on the National Cultural Heritage Control List.

¹²¹ Australian Fossil Mammal Sites, Naracoorte, SA and Riversleigh via Gregory Downs, QLD. World Heritage List Item # 698, declared 1994. <http://whc.unesco.org/en/list/698>. Accessed 22 March 2006.

such as dinosaur footprints.¹²² Most fossilised remains are hundreds of thousands if not many millions of years old, and thus seem to be viewed by collectors or commercial fossil hunters more as a natural resource like ore or gemstones to be won from the earth, rather than important historical material to be protected. Fossilised remains have many of the same qualities as archaeological remains and therefore also share many of the same problems—they are generally below ground, are often ‘invisible’ to the casual observer, are fragile and readily destroyed and rely on systematic excavation and an understanding of their wider context of discovery to fully appreciate their value.

Due to their status or perception as more a natural resource than a cultural artefact, they lack the same level of protection. No ‘culture of compliance’ has been created for palaeontology which would drive its commercialisation as a discipline, in the way that historical and indigenous archaeology have been driven in response to legislative regimes and the emergence of a market for archaeological compliance services. This is unlike many other natural resources, such as flora and fauna, which are often very strongly protected. Again it may largely be a matter of the lack of visibility of the fossil record and the lack of a strong advocate. Fossils are associated with no living culture, they lack an inherent advocate other than academic palaeontologists, in most instances, and are less directly relevant to contemporary Australians for anything save as curiosities or collectibles. In certain instances, areas of high palaeontological significance have been placed on heritage registers and protected through the process of heritage listing, but there are no blanket protections as tend to exist for archaeological materials.¹²³ Emerging regimes for protecting natural heritage may provide the key to that protection, or some of the ideas espoused within this thesis may suggest appropriate mechanisms for palaeontological heritage, but in the absence of any specific legal regime for their protection, they will not be further explicitly discussed in this thesis.¹²⁴

Excluded issues—Geological heritage

As with palaeontological remains, items of geological significance or rarity tend to be hidden from view and again require the intervention of a specialist to interpret their significance, save perhaps in instances where such formations are objects of natural beauty (for example the Walls of China at Lake Mungo in New South Wales¹²⁵). In some instances, geological features

¹²² Long, J. (2002). *The Dinosaur Dealers*. Crows Nest, N.S.W., Allen & Unwin. See also the “Northern Territory Dinosaur Footprints Case” - *Latham v The Queen* (2000) WASC 338. This case is discussed more fully in Chapter 7.

¹²³ E.g. the Willandra Lakes World Heritage Area listing makes reference to significant palaeontological deposits as a part of its heritage significance. See World Heritage List Item #167, <http://whc.unesco.org/en/list/167>. Accessed 16 June 2006.

¹²⁴ For a general discussion of legal issues which affect Australia’s fossil heritage, see for example Creaser, P. (1994). *The protection of Australia’s fossil heritage through the Protection of Movable Cultural Heritage Act 1986*. *Geological and landscape conservation: proceedings of the Malvern International Conference 1993*. D. O’Halloran. London, Geological Society: 69-70. and Harlow, P. G. L. (1994). *Legislation and attitudes to geological conservation in Queensland, Australia: past, present and future*. *Geological and landscape conservation: proceedings of the Malvern International Conference 1993*. D. O’Halloran. London, Geological Society: 303-308.

¹²⁵ Part of the Willandra Lakes World Heritage Area. NSW National Parks and Wildlife Service (1997). *Mungo National Park Guidebook*. Yarralumla, Beaten Track Press.

are protected through a heritage listing process,¹²⁶ but again no blanket protections exist for areas of geological significance even though such places suffer from the same lack of visibility as other nonliving aspects of the natural environment. Geological areas are however highly significant for both scientific study¹²⁷ and recreational enjoyment.¹²⁸ Both prehistorically and historically geological sites, particularly caves, have been important places for people to live, work or exploit resources.¹²⁹ The other area of conflict which arises is that places of geological significance may also be the locations of significant mineral deposits which are exploitable for industrial and commercial purposes. Thus a rare geological feature may have a dollar value which is easily perceived as mineral wealth, but which may not be perceived in terms of research value to geologists or as an item of natural beauty. This can place the same pressure on geological heritage as on other sorts of hidden heritage, to exploit the site at the expense of other values. Thus for their protection, known geological sites have been protected through heritage listing processes.

The exploitation of mineral wealth is commonly controlled at the State and Territory level through specific legislation relating to mining and extractive industries. It is worth noting that, unlike archaeological remains and palaeontological materials, mineral resources are in general owned by the government, not by the landowner.¹³⁰ Thus the government makes considerable revenue through extraction of mineral resources in a way it does not from archaeological or palaeontological materials. This may explain, in part, why strict regimes protecting geological heritage have not been established. Geological heritage also lacks a strong advocate, particularly in comparison to the interests of the resource extraction industries, although professional organisations such as the Geological Society of Australia have made representations in the past, seeking the protection of geological heritage.¹³¹ These issues are not however directly relevant to the issues investigated by this thesis and will not be further explored here.

On the bases outlined above, the main concerns of this thesis will be with the legal regimes for managing and protecting historical and indigenous archaeological heritage and not the totality of the 'hidden heritage' of Australia.

¹²⁶ The Australian Heritage Places Inventory lists 173 places as "geological sites" across Australia. These places appear on one or more heritage registers at local, State/Territory or Commonwealth level. See <http://www.heritage.gov.au/ahpi/index.html> with search term "geological" in the Place Name field. Search undertaken 17 June 2006.

¹²⁷ Reed, L. and D. Gillieson (2003). Mud and bones: cave deposits and environmental history in Australia. *Beneath the surface: a natural history of Australian caves*. B. Finlayson and E. Hamilton-Smith. Sydney, UNSW Press: 89-110. Pp 108-110.

¹²⁸ Hamilton-Smith, E. (2003). People and caves: changing perspectives. *Beneath the surface: a natural history of Australian caves*. B. Finlayson and E. Hamilton-Smith. Sydney, UNSW Press: 148-171.

¹²⁹ *Ibid.*

¹³⁰ Although this is not universally the case. Some Australian jurisdictions have asserted state ownership of entire classes of archaeological heritage as a protective mechanism, e.g. Victoria with respect to shipwrecks and Queensland and NSW with respect to Aboriginal archaeological materials.

¹³¹ For example, during the Hope Inquiry into the National Estate (1974) substantial representations were made from the Geological Society of Australia and affiliated societies. Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. See Appendix C for a list of organisations which made submissions to the Inquiry. Issues related to geological heritage were extensively discussed in the Hope Report (Pp 177-188) however this did not translate into specific protection legislation for geological heritage.

1.10 Influences—Archaeology and its place in environmental law

As a legal issue, archaeology is appropriately situated within the context of environmental law, as one of a range of important considerations about the environment we inhabit and the environment we wish to pass on. The place of archaeology within environmental considerations is dealt with in Chapter 4, through reference to environmental philosophy. It is more important however to observe at this stage how archaeology has been managed in a practical sense within the realm of the Australian regulatory framework, as well as by making a pragmatic examination as to the state of the discipline. Where an archaeologist requires no new access to the physical remains of the archaeological past, particularly no new excavation, opportunities remain for 'pure' research-driven archaeology to be undertaken without any legal restraint. Many archaeological issues are fully dealt with through a process of analysing ancient texts, or by making maps and formulating hypotheses about this or that spatial patterning, or by observing above-ground features such as rock art and formulating and testing hypotheses on their relationship to myth cycles or cultural practices. This has, in some instances, led to debate over the ownership of the intellectual property arising from the study of indigenous cultures.¹³² Such activities do not need to be regulated as, while they are important in their own right, they are intellectual exercises only. These activities do not of themselves have a direct impact on the physical remains of the archaeological past, and can be undertaken equally by academic, professional or amateur archaeologists or the general public. Hodder notes however that, at least in terms of perception, archaeology is generally viewed as synonymous with excavation.¹³³

As archaeological remains are affected by more than just intellectual processes they require a management framework which can adequately manage impacts when they do occur. It is the physical interaction with archaeological heritage which requires regulation. Environmental law provides that regulatory framework. Australian law essentially recognises heritage protection, and thereby archaeology, as an environmental protection issue.¹³⁴ This is not necessarily a widely accepted position among archaeologists, however the 'environmental' nature of Australia's heritage was recognised as early as 1974.¹³⁵ Some legislation refers to 'environmental heritage'¹³⁶ and includes archaeology in its definition. Within indigenous cultural heritage, the separation of the "natural" and "cultural" is similarly viewed as an artificial distinction.¹³⁷ Heritage management more generally, particularly at the

¹³² Colley, S. M. (2002). *Uncovering Australia: archaeology, indigenous people and the public*. Crows Nest, N.S.W., Allen & Unwin. Pp 71-76. See also Janke, T. (1998). *Our Culture Our Future : a Report on Australian Indigenous Cultural and Intellectual Property Rights*. Sydney, Michael Frankel & Co for the Australian Institute of Aboriginal and Torres Strait Islander Studies.

¹³³ Hodder, I. (1999). *The Archaeological Process: An Introduction*. Oxford, Blackwell Publishers. Pp 18-19

¹³⁴ Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 8-9.

¹³⁵ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Pp 20-31.

¹³⁶ E.g. the NSW *Heritage Act*, Section 4.

¹³⁷ Colley, S. M. (2002). *Uncovering Australia: archaeology, indigenous people and the public*. Crows Nest, N.S.W., Allen & Unwin. Pp 71-75.

Godden, L. (2002). "Indigenous heritage and the environment : "Legal categories are only one way of imagining the real"." *Environmental and Planning Law Journal* 19 (4): 258-266.

Commonwealth level, has been treated as part of the same processes as managing that natural environment. In other cases, we see archaeology taken into consideration as a factor in planning approvals, or environmental impact assessment, as is done with other environmental concerns including threatened species issues, noise, contamination, traffic or building density.

The increased commercialisation of archaeological practice in Australia has also drawn Australian archaeology into the realm of environmental law. Due to the legal frameworks which exist for heritage management, heritage and archaeology tend to be considered in the course of almost any development or project of even moderate scale, through the environmental impact assessment process. This is particularly important as archaeology tends to be concerned with place and the significance of place. Thus impacts to archaeological places often have a direct bearing on their archaeological values.

1.11 Influences—Archaeology, law and politics

The influence of politics on the enactment of heritage legislation cannot be ignored. The creation of legislation is a political act and one in which certain viewpoints or issues may prevail over others for reasons other than merit. Where this has been most obvious in Australia and where archaeologists have paid the most heed has been in the conflicts between indigenous people and the archaeological community over access to the physical remains of the indigenous past. Decisions have been made, often on political grounds, as to what level of consultation is required with indigenous people, what level of involvement they must have ‘on the ground’, and what level of access or control indigenous people can exert over the physical remains of their past. This involvement of non-archaeologists has been troubling for the discipline at different times, with some archaeologists adopting a hardline position of claiming a “right of access” to the physical remains of the past,¹³⁸ although this position has largely moderated in recent years.¹³⁹

Political considerations have seen decisions made to repatriate indigenous skeletal material, over the vocal protestations of those academic archaeologists who wish to study the remains,¹⁴⁰ as well as the return of other classes of objects. Substantial quantities of indigenous objects in Australian museums were collected by amateurs, antiquarians, anthropologists and

¹³⁸ Ward, G. K. (1983). Archaeology and legislation in Australia. Australian Field Archaeology: A Guide to Techniques. G. Connah. Canberra, Australian Institute of Aboriginal Studies: 18-42. Pg 18.

¹³⁹ Australian Archaeological Association (2004). Code of Ethics. Section 3—Principles relating to indigenous archaeology. See <http://www.australianarchaeologicalassociation.com.au/codeofethics.php>. Accessed 25 February 2006.

¹⁴⁰ See *Sainty v Allen* (Unreported, No. VG 643/1995). For commentary on the archaeological perspective see, for example: Allen, J. (1995). "A short history of the Tasmanian affair." Australian Archaeology 41: 43-48.

Murray, T. and J. Allen (1995). "The forced repatriation of cultural properties to Tasmania." Antiquity 69 (266): 871-877.

Murray, T. (1996). "Aborigines, Archaeology and Australian heritage." Meanjin 55 (4): 725-735.

Murray, T. (1996). Archaeologists, Heritage Bureaucrats, Aboriginal organisations and the Conduct of Tasmanian Archaeology. Australian Archaeology '95: Proceedings of the 1995 Australian Archaeological Association Conference, St Lucia, University of Queensland.

For an indigenous legal perspective on the case see for example:

Auty, K. (1995). "Aboriginal Cultural Heritage: Tasmania & La Trobe University." Aboriginal Law Bulletin 54 (3(76)): 20.

ethnographers well before the commencement of heritage legislation. In some cases collections date to the 19th century and may have had little or no material added to the collection in decades. These complexities however are often not fully explored when conflicts arise and the issues are grouped together. In some instances, partnerships have been reached between indigenous people and archaeologists, although often with the wishes of the archaeologists given secondary consideration.¹⁴¹ This is somewhat ironic as in many instances archaeologists were initially responsible for the discovery and protection of indigenous archaeological remains, before indigenous people had sufficient political influence to exert direct control over their past. But, as this is in the realm of the political process, by swings and roundabouts the balance may shift to a different arrangement of shared knowledge and control in the future.¹⁴²

Political considerations are not confined to indigenous heritage. With non-indigenous archaeological heritage, decisions have been made in the past to expedite matters when it was in the interests of the government, or other parties with substantial influence. Examples of this in NSW include the redevelopment of Darling Harbour in Sydney for the Bicentenary Celebrations in 1988, or the establishment of the Redfern-Waterloo Authority, which has broad powers to revitalise this area of Sydney but which is exempted from the control of the NSW *Heritage Act*.¹⁴³ Darling Harbour had been an important industrial area and shipping precinct for much of Sydney's history and, prior to redevelopment, reflected that industrial and maritime heritage. In order to facilitate the redevelopment, the government of the day passed special legislation which exempted that area of the city from normal planning control, including exempting it from the control of the NSW *Heritage Act*.¹⁴⁴ This resulted in most of the historical remains of past industry being removed, with little concern for the conservation of the area's maritime heritage¹⁴⁵ in either its built or archaeological forms. In other examples, governments have poured resources into projects seemingly beyond all reasonable sense, in order to make good on political promises, rather than modifying proposals which might

¹⁴¹ Murray, T. (1996). "Aborigines, Archaeology and Australian heritage." *Meanjin* 55 (4): 725-735.
Murray, T. (1993). *Communication and the importance of disciplinary communities: who owns the past? Archaeological theory - who sets the agenda?* N. Yoffee and A. Sherratt. Cambridge, Cambridge University Press: 105-116.

¹⁴² While some archaeologists, such as Ward (1983), have taken a strong "right of access" stance towards archaeologists and archaeological heritage, this position has largely been done away with in contemporary archaeological practice. Section 3 of the current Australian Archaeological Association Code of Ethics explicitly repudiates positions of this nature. See detailed discussion on this issue in the following chapters.

¹⁴³ Section 29 of the *Redfern-Waterloo Authority Act* 2004 (NSW) exempts the Authority from the control of the NSW *Heritage Act* within its defined operational area under section 5 and Schedule 1. See also Redfern-Waterloo Authority (2004). *Redfern-Waterloo Plan #2*. Sydney. More recently, amendments in 2005 to the *Environmental Planning and Assessment Act* 1979 (NSW), Section 3A, allow certain major projects (including critical infrastructure and projects worth more than \$50million) to be determined under this new section of the *EP&A Act*. Section 3A removes the requirement for approvals under the *Heritage Act* 1977 (NSW) or the *National Parks and Wildlife Act* 1974 (NSW) for non-indigenous and indigenous heritage respectively, though the impact of a project on these matters must still be assessed by the proponent. The heritage authorities are allowed to comment on the project and suggest conditions of consent but it is not mandatory for the Department of Planning to place these conditions on the final project approval.

¹⁴⁴ The *Darling Harbour Act* 1987. This was repealed in 2000 when the Darling Harbour Authority was amalgamated with the Sydney Harbour Foreshore Authority. Darling Harbour is once again subject to regulation under the *Heritage Act*.

¹⁴⁵ Fitzgerald, S. (1992). *Sydney 1842-1992*. Sydney, Hale & Iremonger. Pg 239.

Ashton, P. (1993). *The Accidental City: planning Sydney since 1788*. Sydney, Hale & Iremonger. Pp 112-116.

adversely impact upon archaeological heritage.¹⁴⁶ This type of action is not restricted to any one jurisdiction.

Politics can make or unmake laws, or can influence the rigour with which laws are administered. Heritage and archaeology are no different in this regard from other potentially controversial, politically sensitive environmental issues such as land clearing, infrastructure construction or mining. Conserving the archaeological heritage becomes part of the political balancing act, along with job creation, provision of service or keeping promises to the electorate. The other side of this equation is that, in instances where laws become perceived as too burdensome upon the community,¹⁴⁷ or not producing effective or valuable outcomes, such laws can be substantially modified or repealed. There are areas of archaeological heritage protection which are arguably burdensome, as they are based on outdated conceptions of archaeological values. Ensuring archaeological heritage law reflects contemporary community values (such as 'public good conservation') is necessary if the legislation is to continue to be effective and valued by the public and government.

1.12 Structure of the thesis

This thesis investigates the original basis for and intent behind the establishment of archaeological protective legislation in Australia. Through this investigation, it is possible to observe a disjunction between that original intent and the evolution of disciplinary practice over the last thirty years. Consideration of changes in social values and needs, with respect to heritage conservation, generally suggests a direction for legislative reforms which will achieve outcomes closer to the original purposes envisaged in the establishment of protective legislation. This thesis represents the first such comprehensive analysis of archaeological heritage legislation in Australia. It considers the law in all Australian jurisdictions, relevant case law and links this to archaeological practice in a way which is aimed at producing better real-world outcomes.

In this investigation, the thesis is structured as follows:

Chapter 2 contains a review of archaeological literature relevant to archaeological heritage management and the influence of the 'scientific' paradigm of archaeological practice on Australian heritage law. It considers the ramifications of bringing archaeology within the legal realm and what this means for both the discipline and its relationship to wider society. This allows consideration of the value of archaeological heritage protection to Australian

¹⁴⁶ Burgmann, M. and V. Burgmann (1998). Green bans, red union : environmental activism and the New South Wales Builders Labourers' Federation. Sydney, UNSW Press.

Goddard, J. (2004). We can't build the future without properly knowing the past. Sydney Morning Herald. Sydney: 15.

Goddard, J. (2004). "Protection? What protection?" reflections: The National Trust Quarterly (August-October): 6-8.

Casey, M. (2005). The road to controversy. Object lessons: archaeology & heritage in Australia. J. Lydon and T. Ireland. Melbourne, Australian Scholarly Publishing: 148-166.

¹⁴⁷ Productivity Commission (2006). Conservation of Australia's historic heritage places - final report. Melbourne, Australian Government.

society and establishes the notion of 'public good conservation' and its validity for future management of Australian archaeological heritage.

Chapter 3 uses aspects of environmental philosophy to situate archaeological heritage protection within the larger framework for environmental protection in Australia. It examines the issue of 'scientific significance' with respect to Australian archaeological heritage, and draws conclusions about the value and utility of existing significance frameworks and their relationship to heritage legislation. Several moral and philosophical positions relating to environmental protection and the 'public good' are explored, to lay the ground for a broader consideration of 'public good conservation' later in the thesis.

Chapter 4 examines the past and present philosophical frameworks for managing archaeological heritage both generally and in Australia, through a process of literature review of academic, legal and policy works. It then examines the various frameworks for archaeological heritage management such as the UNESCO Recommendation on International Principles for Archaeological Excavations¹⁴⁸, the World Heritage Convention¹⁴⁹ and the ICOMOS Charter for the Protection and Management of the Archaeological Heritage¹⁵⁰ as well as domestic instruments such as the Burra Charter.¹⁵¹ From this, high-level principles for archaeological heritage protection are apparent, and their treatment and application are considered in subsequent chapters.

Chapter 5 undertakes a general examination of the Australian legal framework and then specifically considers the Commonwealth legislation relating to archaeological heritage protection. **Chapter 6** reviews and analyses the state of archaeological heritage legislation in six States and Territories. In both chapters, heritage legislation forms the material for analysis, which is considered in terms of the way archaeology is defined and protected. This analysis focuses on the main pieces of heritage legislation for each jurisdiction and, where relevant, looks at the differing treatments of indigenous and historical archaeological heritage. The intent of such legislation is examined, through the analysis of the Second Reading Speeches and Parliamentary Debates delivered when the Bills were considered by legislators, as well as the implementation of these Acts through major government heritage policies and guidelines. It also considers the impact that the method of enforcement of the legislation has had in different Australian jurisdictions. This analysis identifies the key areas of disjuncture between archaeological protection legislation and archaeological practice and considers whether the existing regimes facilitate the public good conservation model.

¹⁴⁸ UNESCO (1956). Recommendation on International Principles Applicable to Archaeological Excavations. [New Delhi Recommendation](#).

¹⁴⁹ UNESCO (1972). Convention for the Protection of the World Cultural and Natural Heritage. [World Heritage Convention](#).

¹⁵⁰ International Council on Monuments and Sites (1990). Charter for the Protection and Management of the Archaeological Heritage. [ICOMOS Archaeological Charter](#).

¹⁵¹ Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. [Burra Charter](#).

Chapter 7 expands upon the analysis undertaken in Chapters 5 and 6, by looking in greater detail at the jurisdictions of NSW and Victoria. These States have been chosen as case studies for several reasons, including their long history of having consistently applied archaeological heritage legislation (from 1972 in Victoria and 1977 in NSW) and the longest traditions of archaeologists working within government to manage the States' archaeological heritage. Due to this long tradition, it has been possible to undertake a degree of quantitative analysis of the operation of the legislation in both States, which reveals the shift in the nature of archaeological work in these States as well as the dramatic increase in the number of sites investigated under the provisions of the legislation. This facilitates discussion as to how these strongly implemented regulatory frameworks have driven 'public good conservation' considerations for the States' archaeological heritage.

Chapter 8 examines the judicial treatment of archaeological heritage, in several jurisdictions, through an analysis of the case law relating to archaeological issues. Archaeology and archaeological heritage management have rarely made an appearance before Australian courts in any jurisdiction, and the archaeological provisions of most pieces of Australian heritage legislation have not been rigorously tested by the courts. Where appropriate, this chapter draws on relevant cases from related areas, including palaeontological remains and property issues. Each case is analysed to determine what effect the court's view has on the protection of archaeological heritage and whether these views support the 'public good conservation' model argued for here.

Chapter 9 concludes the thesis, drawing together the work of the previous chapters, to identify and discuss areas where reform to the legislation, administrative procedures, policy and archaeological practices will result in improved outcomes. The thesis develops an initial framework for building 'public good' considerations into conservation decisions or negotiated trade-offs, for the conservation of places of different degrees of significance. Principles for public good conservation are set out, which can help achieve meaningful protection, conservation, enjoyment and study of the Australian archaeological heritage into the future.

As legislation and policy are constantly evolving and changing, it has been necessary to establish a cut-off date for the consideration of legislation and this thesis does not deal with any changes to law after June 2006.

1.13 Conclusion

The problems which exist with current Australian regimes for the protection of archaeological heritage are twofold: existing legal frameworks do not effectively protect archaeological heritage as they contain inappropriate or outmoded conceptions of what should be protected and, secondly, the legal frameworks themselves work counter to achieving 'public good' conservation outcomes. The shift in Australian archaeological practice from a 'culture of research' to a 'culture of compliance' has had a significant and not entirely positive impact on the discipline of archaeology and Australia's archaeological

heritage. A further shift is required, to a 'culture of public good conservation'. This requires changes in both archaeological practice and in heritage protection regimes. Such a shift may allow the consideration of broader issues which come to light when addressing an archaeological issue, and may help obviate the need for special legislation which sets aside heritage legislation in future.

All of these issues can be traced back to the nature of archaeological heritage legislation in the various States and Territories. Most archaeologists working in Australia today would have to concede that, in the absence of heritage protection legislation, little if any archaeological work would be done outside of grant-funded academic work, or the occasional project on government-owned sites.¹⁵² If there is a need to protect archaeological heritage in a legal sense, the present systems are not working effectively. As Australian archaeology has moved into a predominantly client-focused consulting mode, most clients will expect to undertake the minimum level of archaeological intervention legally required, with the occasional client perhaps willing to go beyond that minimum level. Thus, by its very nature, the legal requirements for archaeological heritage will determine what a client is required to undertake and pay for, and will define the level of involvement of the archaeologist with the archaeological resource. Changing how this involvement is defined in law is necessary to achieve public good conservation outcomes, which provide more than a minimum compliance approach to managing Australia's archaeological heritage.

¹⁵² This is of course excluding illicit excavation by private collectors seeking to add objects to their collections.

Chapter 2—Expressing the importance of the archaeological past: Science vs social significance

2.1 Introduction

This chapter examines the changing philosophical frameworks for managing archaeological heritage both generally and with specific reference to Australia, through a process of literature review of academic, legal and policy works. This review reveals that the paradigm of archaeology as objective science was dominant at the time Australia was developing legal frameworks for managing archaeological heritage. During the 1960s and 1970s the protection of archaeological heritage was in its nascence and the primary focus of archaeological theory was on archaeology as “science”.¹ The strength of this scientific conception of archaeology ensured that the legal protections for the physical remains of the archaeological past were principally developed to facilitate the research interests of archaeologists, rather than for the protection of any other values. In the intervening three decades the perception as to why and for whom heritage should be protected has changed. Now the consideration of the public value of heritage has taken a more central position over the “elite” conception of heritage as being only the preserve of professionals, scientists and connoisseurs. This thesis suggests that while archaeological research can be of value to the public, heritage legislation should focus on a broader ‘public good’ conception of archaeological heritage conservation. Australian heritage legislation has however not substantially advanced the public value position with respect to archaeological heritage management. This chapter analyses the consequences of this static position in Australian heritage law, coupled with the legalistic approach which is often taken to archaeological heritage management. From this analysis, Chapter 3 investigates a moral and legal framework for managing archaeological heritage from a ‘public good’ perspective.

The notion of the research or scientific values of archaeological heritage is a concept which entered into the Australian regulatory framework during the debates which were occurring in the early and mid 1970s, particularly around the Hope Inquiry into the National Estate² and the development of the Australia ICOMOS Burra Charter,³ both of which are discussed more fully in Chapter 4. At that time, the discipline of archaeology was still in the throes of the ‘New Archaeology’, a phase driven by largely American theoretical positions which held that archaeology could be made an objective, testable science, from which laws of human behaviour could be derived.⁴ In theoretical terms, this manifested itself in the school of processualism. This period was characterised by a positivist view that cultures were observable systems where empirical study of the archaeological record (or in some cases, extant

¹ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pg 39. See also comments by prominent Australian archaeologist John Mulvaney, reflecting on his personal motivations for lobbying for archaeological protective legislation in the 1960s. Mulvaney, D. J. (2004). "The road to Burra: memories of an ancient traveller." *Historic Environment* 18 (1): 9-13.

² Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service.

³ Australia ICOMOS (1999). *The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. Burra Charter*.

⁴ Trigger, B. (1989). *A History of Archaeological Thought*. Cambridge, Cambridge University Press. Pp 293-295.

'primitive' culture) could reduce cultural behaviours to 'processes', from which generalised laws about cultural behaviours could be developed. Processualism drew upon the natural sciences as the basis for developing theoretical and testing methodologies,⁵ as a deliberate move away from the inferential methods of previous "culture history" approaches to archaeology. Whitley, reflecting on the development of processualism noted that, at the time, processualism was itself drawing on theoretical views on the nature of science which the natural sciences had developed in the 1950s and 1960s.⁶ Thus even at the time of the development of processual archaeology, aspects of its theoretical underpinning were already dated. Smith observes that while processualist theory was principally American and few Australian archaeologists explicitly adopted it, the almost complete absence of Australian archaeological theoretical development during this period led to processualism being highly influential in Australia.⁷

What intervened to challenge processualism was post-modernist theory, which Whitley notes led to a "challenge of science as our pre-eminent means of obtaining knowledge."⁸ Post-modernism as a movement sought to challenge the dominant paradigms of any number of disciplines and, in archaeology, led to the primacy of science being replaced with more human-focussed notions of the past, theoretically expressed as postprocessualism and cognitive archaeology.⁹ Key amongst these movements has been pluralistic interpretations of the archaeological record and recognition of the perspectives which researchers brought to archaeological questions.¹⁰ Concepts we now consider commonplace within archaeology, such as the notion that indigenous people may value different aspects of the past from archaeologists,¹¹ as significant to understanding of past and present culture, or the idea that indigenous people should be able to make decisions about the disposition of the remains of their ancestors, largely come out of this broader movement.¹² This evolution in the discipline is part of a valuable self-reflective exercise, which helps to situate the discipline in a contemporary and relevant social context,¹³ something that Fritz and Plog remarked as being critical decades earlier.¹⁴ Despite this, the view continues to persist that archaeology is principally a "scientific" discipline, although Stiebing quite rightly notes that "the application of scientific techniques to archaeological problems has

⁵ Whitley, D. S. (1998). New approaches to old problems: archaeology in search of an ever elusive past. Reader in Archaeological Theory: post-processual and cognitive approaches. D. S. Whitley. London, Routledge: 1-28.

⁶ Ibid. Pg 3.

⁷ Smith, L. (1995). "What is this thing called postprocessual archaeology and is it relevant for Australian archaeology?" Australian Archaeology 40: 28-32. , Smith, L. (2004). Archaeological theory and the politics of cultural heritage. London, Routledge. Pp 39-40.

⁸ Whitley, D. S. (1998). New approaches to old problems: archaeology in search of an ever elusive past. Reader in Archaeological Theory: post-processual and cognitive approaches. D. S. Whitley. London, Routledge: 1-28. Pg 18.

⁹ Whitley, D. S., Ed. (1998). Reader in Archaeological Theory: post-processual and cognitive approaches. London, Routledge.

¹⁰ Dark, K. R. (1995). Theoretical archaeology. London, Duckworth. Pp 21-24.

¹¹ Smith, L. (1995). "What is this thing called postprocessual archaeology and is it relevant for Australian archaeology?" Australian Archaeology 40: 28-32. , Smith, L. (1996). Archaeological knowledge and the governance of indigenous material culture in south-eastern Australia. Prehistorical and Historical Archaeology. Sydney, University of Sydney. Unpublished PhD thesis.

¹² For a comprehensive survey of the influence of post-modern theory in the development of postprocessualism, see Smith, L. (2004). Archaeological theory and the politics of cultural heritage. London, Routledge. Pp 45-50.

¹³ Orser, C. E. (1996). A historical archaeology of the modern world. New York, Plenum Press. Pp 199-200

¹⁴ Fritz, J. M. and F. Plog (1970). "The nature of archaeological explanation." American Antiquity 35: 405-412. quoted in Smith, L. (2004). Archaeological theory and the politics of cultural heritage. London, Routledge. Pg 35.

already produced results that not only were unknown, but in some cases were considered unknowable".¹⁵ A natural science approach to some archaeological questions remains useful, however, it is suggested here, not as the dominant approach for archaeological heritage management. Given that a strong scientific perception persists within archaeology, it is unsurprising these concepts have not changed substantially in Australian heritage law.

2.2 The background to the legal management of archaeological heritage

In Europe, the practice of managing archaeological heritage¹⁶ dates to the seventeenth century, through a combination of edicts issued by the Vatican requiring the reporting of discovered objects and, slightly later, to a Swedish law from 1666 which specified that objects of gold and silver which were excavated anywhere within the country belonged first and foremost to the king.¹⁷ This early law established the basis for what is now known as the concept of "treasure trove", where a government can take title to discovered objects should it wish and pay compensation to the discoverer.¹⁸ It also represents the first step in the legal "management" of archaeological heritage in the Western world. Wiltshire noted that the fundamental differences between the European and English/American/Australian models of heritage management were a belief in Europe that heritage represents a common patrimony, which the State protects for the benefit of all, whereas the English, American and Australian models are based on a strong notion of individual property rights and an often automatic assumption that compensation is warranted whenever the government intercedes in those rights, such as through heritage protection legislation.¹⁹ The principle that governments can regulate and control the physical remains of the past through law remains fundamentally in place however, to differing effect around the world. Most countries have laws in place to protect the physical remains of their pasts, and the scope of such legislation internationally has been examined in some detail by O'Keefe and Prott²⁰ and, more recently in Australia by Boer and Wiffen.²¹

¹⁵ Stiebing Jr, W. H. (1993). *Uncovering the past: a history of archaeology*. New York, Oxford University Press. Pp 265-280.

¹⁶ Here I have chosen to refer to any site or object that, from a contemporary perspective, could be considered a part of the archaeological heritage, despite the fact that "archaeology" as we know it now was only formulated in the mid-nineteenth century.

¹⁷ O'Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. , Carman, J. (1996). *Valuing ancient things : archaeology and law*. New York, Leicester University Press. pp34-35 Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press.

¹⁸ See for example Bonyhady, T. (1987). *The law of the countryside the rights of the public*. Abingdon, Professional Books. Pp 268-285 for a general discussion of the law of treasure trove in England.

¹⁹ Wiltshire, K. (1985). *Heritage. Federalism and the Environment*. R. L. Matthews. Canberra, Centre for Research on Federal Financial Relations, Australian National University: 47-63. Pg 48.

This attitude has recently been reinforced in Australia during the course of the Commonwealth Productivity Commission Inquiry into Historic Heritage. See for example the Commission's draft and final reports, as well as the range of anti-heritage public submissions held on the Commission's website (<http://www.pc.gov.au>). Accessed 1 April 2006. Productivity Commission (2005). *Conservation of Australia's historic heritage places - draft report*. Melbourne, Australian Government. , Productivity Commission (2006). *Conservation of Australia's historic heritage places - final report*. Melbourne, Australian Government.

²⁰ O'Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. This book is now two decades out of date, however it provides a useful overview and analysis of the development of archaeological protection legislation worldwide.

²¹ Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press.

The content and mechanisms of those laws vary, but the underlying concept, that the physical remains of the past warrant protection, is similar.²²

2.3 World practice

World practice in the legal protection of archaeological heritage varies substantially, and this thesis concentrates on the practices of Australia, which derived its legal principles initially from the United Kingdom. In England, the principle of “treasure trove” was established in the early nineteenth century,²³ and continues today albeit in a modified application. While the early focus of English law was on the securing of rare items of gold and silver for the Crown, this moved to the protection of “ancient monuments” more generally by the mid- to late-nineteenth century, through the actions of individuals such as John Ruskin and William Morris, and the Society for the Protection of Ancient Buildings,²⁴ to general protections for archaeological heritage across the country. Some have questioned whether the narrowness with which the British courts have interpreted issues of treasure trove has limited its effectiveness as a protective mechanism for archaeological heritage, particularly due to its limitations that items must be “substantially” of gold or silver and must have been originally concealed “for security.”²⁵ Items lost or abandoned, or not of gold or silver, do not fall within the purview of treasure trove.²⁶ The history of the development of English law in this area has been traced by a range of authors.²⁷

International developments in archaeological heritage management legislation were largely spurred by post-World War II actions of international bodies, principally the United Nations (UN) and its subsidiary body, the United Nations Educational Scientific and Cultural Organisation (UNESCO).²⁸ The UN and UNESCO negotiated a number of recommendations and international treaties which had direct bearing on the protection and management of archaeological heritage around the world, including the 1954 *Convention for the Protection of*

²² This thesis makes no attempt to address the totality of archaeological protective legislation which exists throughout the world. See O’Keefe, P. J. and L. V. Prott (1984). Law and the cultural heritage: Volume 1: Discovery and Excavation. Abingdon, Professional Books Ltd. Appendix I, Pp 387-418 for a comprehensive, if rather out-of-date listing of hundreds of pieces of archaeological heritage legislation throughout the world. Similarly, the National Conference of State Legislatures maintains a database of all United States heritage preservation law (including archaeological heritage law) which provides a snapshot of in-force legislation in 1999 and represents more than 100 pieces of legislation. See <http://www.ncsl.org/programs/arts/statehist.htm> (accessed 18 April 2005).

²³ Pugh-Smith, J., J. Samuels, et al. (1996). Archaeology in law. London, Sweet & Maxwell. Pg 61.

²⁴ Hall, M. (2005). Affirming community life: preservation, national identity and the State, 1900. From William Morris: Building Conservation and the Arts and Crafts Cult of Authenticity 1877-1939. C. Miele. New Haven, Yale University Press: 129-158.

Miele, C. (2005). Morris and Conservation. From William Morris: Building Conservation and the Arts and Crafts Cult of Authenticity 1877-1939. C. Miele. New Haven, Yale University Press: 30-66.

²⁵ Hill, G. (1936). Treasure Trove in law and practice from the earliest time to the present day. Oxford, Oxford University Press. , Pugh-Smith, J., J. Samuels, et al. (1996). Archaeology in law. London, Sweet & Maxwell. Pp 61-64.

Cookson, N. A. (2000). Archaeological heritage law. Chichester, Barry Rose Law Publishers. Pp 229-233.

²⁶ Bonyhady, T. (1987). The law of the countryside the rights of the public. Abingdon, Professional Books.

²⁷ Carman, J. (1996). Valuing ancient things : archaeology and law. New York, Leicester University Press. , Murray, T. (1989). The history, philosophy and sociology of archaeology: the case of the Ancient Monuments Protection Act (1882). Critical Traditions in Contemporary Archaeology. V. Pinsky and A. Wylie. Cambridge, Cambridge University Press: 55-67. , Hunter, J. and I. Ralston, Eds. (1993). Archaeological Resource management in the UK: An Introduction. Phoenix Mill, Alan Sutton. , Pugh-Smith, J., J. Samuels, et al. (1996). Archaeology in law. London, Sweet & Maxwell.

²⁸ O’Keefe, P. J. and L. V. Prott (1984). Law and the cultural heritage: Volume 1: Discovery and Excavation. Abingdon, Professional Books Ltd. Pp 74-79.

Cultural Property in the Event of Armed Conflict,²⁹ the 1956 *Recommendation on International Principles for Archaeological Excavations*,³⁰ the 1970 *UNESCO Convention*,³¹ the 1972 *World Heritage Convention*,³² and the 1995 *Unidroit Convention*.³³ The *UNESCO* and *World Heritage Conventions* have been particularly significant in that they require signatory nations to enact domestic heritage protection legislation for a range of types of heritage items, including archaeological heritage.³⁴ These conventions and instruments are critically discussed in terms of the thesis in Chapter 4.

In Australia, codified legal protection for archaeological heritage first appeared, in rudimentary form, in 1955 in the Northern Territory,³⁵ although the discipline of archaeology did not develop in Australia in an institutional and professional sense until the 1960s. Connah attributes this to a “cultural cringe”, that Australia viewed itself as not old enough to have an archaeology worthy of study.³⁶ At least one author traces the notion of heritage protection legislation back to the Tasmanian *Scenery Preservation Act 1915*³⁷ however this Act did not include archaeological heritage in its scope. Lobbying by interest groups, particularly academic archaeologists, as well as a growth in environmental consciousness amongst the general public, saw additional heritage protective legislation implemented in the 1960s and early 1970s,³⁸ but the majority of domestic Australian legislation which protected archaeological heritage did not appear until the mid-1970s, following Australia’s signing of the *World Heritage Convention* and the Commission of Inquiry into the National Estate in 1974 (the Hope Inquiry).³⁹ Since that period, heritage legislation has been established in all States and Territories and at Commonwealth level, which provides some level of protection for archaeological heritage. Detailed consideration of domestic legislation is dealt with in Chapters 5 to 7.

2.4 Genesis of archaeological thought in Australia

Archaeology as a discipline has its origins firstly in collecting and secondly in the natural sciences of the nineteenth century, particularly geology. The collecting of antiquities as art or treasure has occurred throughout the world

²⁹ United Nations (1954). *Convention for the Protection of Cultural Property in the Event of Armed Conflict*. [Hague Convention](#).

³⁰ UNESCO (1956). *Recommendation on International Principles Applicable to Archaeological Excavations*. [New Delhi Recommendation](#).

³¹ UNESCO (1970). *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. [UNESCO Convention](#).

³² UNESCO (1972). *Convention for the Protection of the World Cultural and Natural Heritage*. [World Heritage Convention](#).

³³ Unidroit (1995). *Convention on Stolen or Illegally Exported Cultural Objects*. [Unidroit Convention](#).

³⁴ World Heritage Convention Article 5(d); UNESCO Convention Article 5(a).

³⁵ *Native and Historic Objects Heritage Protection Ordinance* (1955) Northern Territory.

³⁶ Connah, G. (1997). "The purpose of archaeology." [Australian Archaeology](#) 45: 48-53.

³⁷ Wiltshire, K. (1985). *Heritage. Federalism and the Environment*. R. L. Matthews. Canberra, Centre for Research on Federal Financial Relations, Australian National University: 47-63. Pg 47.

³⁸ For a general history of Australian heritage legislation, see for example: Davison, G. (1984). *A brief history of the Australian heritage movement*. [A Heritage Handbook](#). G. Davison and C. McConville. North Sydney, Allen & Unwin: 14-27. , Smith, L. (2000). "A history of Aboriginal heritage legislation in south-eastern Australia." [Australian Archaeology](#) 50: 109-118. , Riches, L. (2002). *Legislating the past: native title and the history of Aboriginal Australia*. [After Captain Cook: The archaeology of the recent indigenous past in Australia](#). R. Harrison and C. Williamson. Sydney, Archaeological Computing Laboratory, University of Sydney. 8: 105-120.

³⁹ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service.

for thousands of years. The fashion for 'cabinets of curiosities' amongst the upper classes in Europe in the Renaissance and Enlightenment, followed by the establishment of private and public museums throughout the post-Enlightenment period allowed for the collecting to become systematised and helped create a wider audience for the relics of the past. Discoveries of geologists in the early nineteenth century related to the nature of stratigraphic soil layers and the bearing this had on the age of the earth assisted the birth of a discipline recognisable as archaeology.⁴⁰ The idea of the deep antiquity of the earth and the desire to learn more about the full range of past activities helped drive what had been a mere mania for collecting attractive or valuable objects under the banner of connoisseurship to an evolving antiquarianism. Over the course of the nineteenth century this was assisted in part through the notions of cultural evolution, based on the ideas of Charles Darwin.⁴¹ By the late nineteenth century, this had further transformed into a systematised study of sites through excavation which could recognisably be called archaeology. Private collections were progressively replaced by professional museums, which viewed themselves as the educators of the public and the stewards of the past.⁴²

Byrne records calls for protection for Aboriginal sites as early as 1889⁴³ and research into the physical remains of the Australian indigenous past had become established as an offshoot of museum-based anthropology in the 1930s.⁴⁴ Prominent Australian curator and anthropologist F D McCarthy led the call for general legal protection for archaeological 'relics' as early as 1938:

the public has shown that it cannot be trusted to regard such relics with due respect and no more important step forward for the science of anthropology could be made than the enactment of...legislation throughout Australia.⁴⁵

This was due to concerns over the widespread practice of collecting Aboriginal objects,⁴⁶ although some limited power to declare reserves due to the presence of Aboriginal sites existed as early as 1913 in NSW.⁴⁷ At that stage, archaeology did not exist as a discipline *per se* in Australia, but was practiced as one of a range of techniques used by museum staff and anthropologists to study Aboriginal culture. Other proto-archaeologists operating in this period include Norman Tindale, working out of the South Australian Museum, who is credited with driving the establishment of South

⁴⁰ Winchester, S. (2001). *The map that changed the world*. London, Viking. ; Daniel, G. (1967). *The Origins and Growth of Archaeology*. New York, Galahad Books. Pp 46-78.

⁴¹ Griffiths, T. (1996). *Hunters and Collectors: The antiquarian imagination in Australia*. Melbourne, Cambridge University Press. Pp 9-12. See also Dark, K. R. (1995). *Theoretical archaeology*. London, Duckworth. , Prentis, M. D. (1995). "From Lemuria to Kow Swamp: The rise and fall of tri-hybrid theories of Aboriginal origins." *Journal of Australian Studies* (45): 79-91. Pp 3-13.

⁴² Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 85-87.

⁴³ Byrne, D. (1996). "Deep nation: Australia's acquisition of an indigenous past." *Aboriginal History* 20: 82-107. Pg 97.

⁴⁴ Du Cros, H. (2002). *Much more than stones and bones: Australian archaeology in the late twentieth century*. Carlton, Vic., Melbourne University Press. Pg 25.

⁴⁵ McCarthy, F. D. (1938). "Aboriginal relics and their preservation." *Mankind* 2 (5): 120-126. Pg 121.

⁴⁶ Griffiths, T. (1996). *Hunters and Collectors: The antiquarian imagination in Australia*. Melbourne, Cambridge University Press. Pp 74-79.

⁴⁷ Under the NSW *Crown Lands Consolidation Act* 1913. McCarthy, F. D. (1938). "Aboriginal relics and their preservation." *Mankind* 2 (5): 120-126. Pg 121.

Australia's archaeological protective legislation in 1965.⁴⁸ The study of the archaeology of the Australian continent did not become established as a distinct academic discipline until the 1950s, and it was well into the 1960s before serious effort was being directed towards the analysis of the archaeological remains of both the Aboriginal and colonial pasts.⁴⁹ Australian archaeologists began to publish articles⁵⁰ and lobby government for the establishment of laws to protect archaeological heritage.⁵¹ Megaw, speaking in 1973, anticipated the development of archaeological heritage management and called for a greater dialogue between developers and archaeologists. Nevertheless he viewed archaeological practice as something belonging within the university, with academic archaeologists undertaking "rescue" archaeology as a form of public service.⁵² Ellis echoes this sentiment, describing the protection of archaeological material culture as akin to the "civic duty" of archaeologists of this period.⁵³

The general thrust of discussion by archaeologists during this period was that the archaeological heritage required protection to allow it to be researched by archaeologists, and there was little or no consideration of community involvement in the process⁵⁴ beyond (frowned-upon) amateur collecting and the use of public volunteers in fieldwork. Similarly, little regard was given to the views of Aboriginal people when protective regimes were established in the 1960s and 1970s.⁵⁵ Even now the ability of either an interested member of the public or an Aboriginal person to interact with the remains of the past is constrained by protective legislation which continues to favour "professionalised" understandings of the archaeological past with the archaeologists acting as interpreters or gate-keepers.⁵⁶ There are however limited examples of this process working in reverse, with indigenous people restricting the access of archaeologists to the remains of the past.⁵⁷

⁴⁸ Du Cros, H. (2002). Much more than stones and bones: Australian archaeology in the late twentieth century. Carlton, Vic., Melbourne University Press. Pg 26.

See also McBryde, I. (1986). "Australia's once and future archaeology." Archaeology in Oceania 21 (13-28).
Bowdler, S. (1993). Views of the Past in Australian Prehistory. A Community of Culture: The People and Prehistory of the Pacific. M. Spriggs, D. E. Yen, W. Ambrose et al. Canberra, Australian National University. 21: 123-138.

⁴⁹ Smith, L. (2004). Archaeological theory and the politics of cultural heritage. London, Routledge. Pp 39, 93-94.

⁵⁰ Domestically this included the founding of the journal Australian Archaeology in 1974 and Australian (now Australasian) Historical Archaeology in 1983.

⁵¹ Megaw, J. V. S. (1973). Archaeology from Down Under - A Personal View. An inaugural lecture delivered in the University of Leicester 24 February 1973. Leicester, Leicester University Press. Pg 5.; Coutts, P. J. F. (1984). A Public Archaeologist's View of Future Directions in Cultural Resource Management. Archaeology at ANZAAS, Canberra. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pg 212

⁵² Megaw, J. V. S. (1973). Archaeology from Down Under - A Personal View. An inaugural lecture delivered in the University of Leicester 24 February 1973. Leicester, Leicester University Press. Pp 25-26.

⁵³ Ellis, B. (1994). "Rethinking the paradigm: cultural heritage management in Queensland." Ngulaig 10. Pp10-11. McBryde specifically discusses John Mulvaney's contribution to this debate as a committed "public intellectual" during the formative period of the debate. See McBryde, I. (1996). Past and present indivisible? Archaeology and society, archaeology in society. Prehistory to politics: John Mulvaney, the humanities and the public intellectual. T. Bonyhady and T. Griffiths. Carlton South, Vic., Melbourne University Press: 63-84.

⁵⁴ Coutts, P. J. F. (1984). A Public Archaeologist's View of Future Directions in Cultural Resource Management. Archaeology at ANZAAS, Canberra. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pp 212-214.

⁵⁵ Byrne, D. (1996). "Deep nation: Australia's acquisition of an indigenous past." Aboriginal History 20: 82-107. Pg 98.

⁵⁶ Smith, L. (2004). Archaeological theory and the politics of cultural heritage. London, Routledge. Pp 53-54.

⁵⁷ Colley, S. M. (2002). Uncovering Australia: archaeology, indigenous people and the public. Crows Nest, N.S.W., Allen & Unwin.

Murray, T. and J. Allen (1995). "The forced repatriation of cultural properties to Tasmania." Antiquity 69 (266): 871-877.

The 1960s saw rapid development in Australian academic archaeology. Distinct programs were established in Aboriginal archaeology at a number of Australian universities⁵⁸, bodies such as the Australian Institute of Aboriginal Studies⁵⁹ were established and the number of academic staff increased. Academic interest began to be generated in Australian historical archaeology by the late 1960s, with the Australian Society for Historical Archaeology being established in 1970⁶⁰ and the Australian Archaeological Association in 1974.⁶¹ Academics working in these areas lobbied colleagues and governments for the establishment of laws to protect archaeological heritage, generally under the principle that these remains required protection to allow future academic study, to build and pass on a better understanding of the past. Such efforts led to the establishment of the first generation of early archaeological protection legislation, in 1965 in South Australia⁶², 1969 in NSW⁶³ and 1972 in Victoria⁶⁴ and Western Australia⁶⁵.

2.5 The growth from collecting to academic analysis

In Australia, the transformation from antiquarianism to archaeology took much longer to occur than in the United Kingdom and Europe, where a systematised archaeology had developed by the late nineteenth century.⁶⁶ This occurred at a similar date in the United States.⁶⁷ By contrast, collecting of Aboriginal archaeological objects began in the nineteenth century in Australia and continued well into the middle of the twentieth century, where such collecting began to overlap and conflict with the nascent Australian archaeology. Griffiths traces the history of this collecting phenomenon in Australia and noted that “collectors are driven by urgency, by the need to collect ‘before it is too late’.”⁶⁸ Similar arguments have been advanced for the rationale for protecting or excavating archaeological heritage, that it is precious and about to be lost. However what should be protected (or collected) and why is never fully articulated, except as “research potential”. This artefact- and data-collection oriented practice in Australian historical archaeology has been criticised by some as “stamp collecting”.⁶⁹ Yet Prentis noted that the initial

⁵⁸ Particularly the University of Sydney and Australian National University.

⁵⁹ Now the Australian Institute of Aboriginal and Torres Strait Islander Studies.

⁶⁰ Australian Society for Historical Archaeology (1970). *Introductory Newsletter* November 1970. Now the named the Australasian Society for Historical Archaeology.

⁶¹ Australian Archaeological Association (1974) *Australian Archaeology* 1.

⁶² *Aboriginal and Historic Relics Preservation Act* (1965) South Australia.

⁶³ *National Parks and Wildlife Act* (1974) New South Wales. The first iteration of this legislation was passed in 1969.

⁶⁴ *Archaeological and Aboriginal Relics Preservation Act* (1972) Victoria.

⁶⁵ *Aboriginal Heritage Act* (1972) Western Australia.

⁶⁶ Griffiths, T. (1996). *Hunters and Collectors: The antiquarian imagination in Australia*. Melbourne, Cambridge University Press. Pp 3-4.

Daniel, G. (1967). *The Origins and Growth of Archaeology*. New York, Galahad Books. Pp 99-131.

Trigger, B. (1989). *A History of Archaeological Thought*. Cambridge, Cambridge University Press. Pp 55-67.

See also Sweet, R. (2004). *Antiquaries: The discovery of the past in eighteenth-century Britain*. London, Hambledon and London.

⁶⁷ Murray, T. (1989). The history, philosophy and sociology of archaeology: the case of the Ancient Monuments Protection Act (1882). *Critical Traditions in Contemporary Archaeology*. V. Pinsky and A. Wylie. Cambridge, Cambridge University Press: 55-67.

McLaughlin, R. H. (1998). "The Antiquities Act of 1906: politics and the framing of an American anthropology & archaeology." *Oklahoma City Law Review* 23 (1-2): 61-91.

⁶⁸ Griffiths, T. (1996). *Hunters and Collectors: The antiquarian imagination in Australia*. Melbourne, Cambridge University Press. Pg 25. Similar sentiments are echoed, for example, in a 1989 interview with an American “relics” dealer. See Arden, H. (1989). Who owns our past? *National Geographic*. 175: 378-385. Exactly what the collectors were going to be “too late” for is never clearly articulated.

⁶⁹ Connah, G. (1983). "Stamp collecting or increasing understanding: the dilemma of historical archaeology." *Australian Journal of Historical Archaeology* 1: 15. , Bowdler, S. (1993). Views of the Past in Australian

study of Australian origins was not “motiveless curiosity”, but part of a mid-nineteenth century drive to probe the origins of humankind.⁷⁰ McCarthy was undertaking some problem-driven archaeological excavation in Australia as early as the 1930s, which brought him into direct conflict with the collectors, as did Tindale, operating in South Australia at the same time.⁷¹

Despite these identified problems, McCarthy had no success in his lobbying efforts to see Aboriginal archaeological materials legally protected. His view, at that early stage of the debate, was clearly fixed in a notion that archaeology was a science (albeit an emerging one) based within anthropology, that relics required protection for study and their proper place was in a museum; he made no concession or acknowledgement that relics could be of value to the general public, let alone the Aboriginal community.⁷² Byrne’s views on the establishment of legislation are somewhat counter to this position, and he considers that the establishment of legislation had significantly to do with the State asserting control and ownership of the Aboriginal past, as a part of its incorporation into the Australian national identity. In his view, the role of protective legislation was not about protecting the “scientific” value of sites but about asserting control over a national asset, in terms of the remains of the past.⁷³ This is reminiscent of Orser’s view that the material remains of the past are value-neutral, until transformed by archaeologists into a “created space”. This space is referred to as the “archaeological record” and is founded in a particular archaeological world view, which may not relate to any other world view,⁷⁴ such as those of indigenous people, or the public.

Moreland is suspicious that archaeology can ever uncover an “objective and unconscious” version of the past, as everything, including the act of archaeological excavation, reflects a conscious act,⁷⁵ with the accompanying inherent bias. He cautions against the adoption of a “presentist” view of the past, where contemporary motivations are ascribed to past societies,⁷⁶ an interesting point when considering the question of who “speaks” for the past when dealing with contemporary indigenous communities. This is not to say that archaeology *cannot* be used to represent these world views, just that traditionally it has not been so used. But in undertaking this “creation” or re-creation of the past, there should be acknowledgements of the interaction between places which shape that creation. Nevertheless, the language used in the protection of material culture, whether expressed in the peak extralegal documents such as the Burra Charter, or within the language of most Australian heritage legislation, is the language of science, research and

Prehistory. *A Community of Culture: The People and Prehistory of the Pacific*. M. Spriggs, D. E. Yen, W. Ambrose et al. Canberra, Australian National University. 21: 123-138. Pg 123.

⁷⁰ Prentis, M. D. (1995). "From Lemuria to Kow Swamp: The rise and fall of tri-hybrid theories of Aboriginal origins." *Journal of Australian Studies* (45): 79-91. Pg 80.

⁷¹ Griffiths, T. (1996). *Hunters and Collectors: The antiquarian imagination in Australia*. Melbourne, Cambridge University Press. Pp 79-80.

⁷² McCarthy, F. D. (1938). "Aboriginal relics and their preservation." *Mankind* 2 (5): 120-126.

⁷³ Byrne, D. (1996). "Deep nation: Australia's acquisition of an indigenous past." *Aboriginal History* 20: 82-107. Pp 93-95. This accords with Smith's views about government exercising a form of social control through controlling access to knowledge and, thereby, discourse about archaeology. Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 68-74.

⁷⁴ Orser, C. E. (1996). *A historical archaeology of the modern world*. New York, Plenum Press. Pp 137-143.

⁷⁵ Moreland, J. (2001). What is historical archaeology? *Archaeology and text*. J. Moreland. London, Duckworth: 98-120. Pg 103.

⁷⁶ *Ibid.* Pp 116-117.

archaeology, not of national identity or social attachment. Tightly defined boundaries around the “archaeological” militate against a consideration of wider relationships and interactions between archaeological places in the landscape. Despite the views of McCarthy and Byrne, the perception that archaeology is principally the domain of science remains strong and was influential in the discipline receiving legal protection in Australia.

2.6 Australian archaeology as a ‘scientific’ discipline

Since the mid-1980s, archaeological debate has explored and largely rejected the notion of archaeology as a strictly scientific discipline⁷⁷ in the highly positivist way it is now expressed in legislation. Positivism in this context refers to the practice within archaeology of basing conclusions solely on the observation of the archaeological record,⁷⁸ in the belief that such analysis can bring forth an objective truth about the past.⁷⁹ It is this positivist basis that underlay the processualist New Archaeology of the 1960s and 1970s,⁸⁰ where the sanctity of the material remains in the ground was paramount, as it was the archaeological data contained in those remains which was required for rigorous testing under the scientific method. The legal expression of what aspects of the Australian archaeological record are protected reflects the scientific positivism of this period in archaeological thought. This is further examined below, as well as in the detailed analysis of Australian legislation in Chapters 5 to 7.

The fostering of the notion of archaeology as a “science”, in the objective sense of the physical and natural sciences, was strongly assisted by the development of radiocarbon dating in the 1950s.⁸¹ Radiocarbon dating was influential in a move away from the “culture history” approach of previous archaeological practice, through the ability to date materials with a scientific precision.⁸² Prior to radiocarbon dating, archaeologists largely relied on elaborately-constructed typologies of ceramics, stone tools and other artefacts to provide a chronology and dating for sites.⁸³ These typologies were always tinged with a degree of subjectivity, and open to interpretation. Radiocarbon, and other scientific forms of dating provided a level of precision, cloaked in the authority of laboratory science, that no previous archaeological technique had provided. In Dark’s view, this scientific presentation added a degree of prestige to the discipline, thus elevating archaeology to the same status of the natural sciences and rendering it a “serious” discipline⁸⁴, based on an

⁷⁷ Smith, L. (1994). "Heritage management as postprocessual archaeology?" *Antiquity* 68: 300-309. , Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 45-57.

⁷⁸ Trigger, B. (1989). *A History of Archaeological Thought*. Cambridge, Cambridge University Press. Pp 12, 303-304. See also the general discussion of positivism in archaeological discourse in Johnson, M. (1999). *Archaeological theory: an introduction*. Oxford, Blackwell Publishers. Pp 37-42.

⁷⁹ Ellis, B. (1994). "Rethinking the paradigm: cultural heritage management in Queensland." *Nguiaiq* 10. Pp 14-15.

⁸⁰ Kohl, P. L. (1993). Limits to a post-processual archaeology (or, the dangers of a new scholasticism). *Archaeological theory - who sets the agenda?* N. Yoffee and A. Sherratt. Cambridge, Cambridge University Press: 13-19. for a contrasting viewpoint.

⁸¹ Johnson, M. (1999). *Archaeological theory: an introduction*. Oxford, Blackwell Publishers. Pp 34-36.

Trigger, B. (1989). *A History of Archaeological Thought*. Cambridge, Cambridge University Press. Pp 304-305.

Wilson, D. (1974). *The New Archaeology*. New York, New American Library. 67-92.

⁸² O'Brien, M. J. and R. L. Lyman (2000). *Applying evolutionary archaeology: a systematic approach*. New York, Kluwer Academic/Plenum Publishers. Pp 127.

⁸³ Daniel, G. (1967). *The Origins and Growth of Archaeology*. New York, Galahad Books. Pp 46-78.

Trigger, B. (1989). *A History of Archaeological Thought*. Cambridge, Cambridge University Press. Pp 73-79.

⁸⁴ Dark, K. R. (1995). *Theoretical archaeology*. London, Duckworth. Pp 21-24.

“institution of authority”.⁸⁵ But, worryingly, Jones observed that such scientific techniques are often accepted uncritically by those outside of the profession⁸⁶, creating an impression that a “correct” answer can be arrived at about the past through application of scientific techniques. But the use of scientific techniques in analysis is not the same as undertaking science in the pure sense.⁸⁷ This is what Kohl described as an “ingrained belief in the omnipotence of science” to adequately address all facts of archaeology⁸⁸, with archaeological techniques becoming a ‘black box’ which presents non-observable archaeological phenomena, such as dating, in a manner which is difficult to verify or refute.⁸⁹ Through this association with science, archaeology seemed to gain a new objectivity, legitimising its use as a tool of government and its translation into legislation.⁹⁰

Hodder traces the development of the notion of a positivist, objective and (notionally) ‘scientific’ archaeology, as driven by key figures such as Binford and Schiffer in the 1960s and 1970s.⁹¹ This was bedded in the ‘New Archaeology’ and a belief that a rigorous application of a scientific methodology would lead to an objective discovery of a ‘truth’ about the past or at least generalised rules of human behaviour.⁹² The archaeological record was viewed as system, from which clear rules of behaviour could be discerned and against which hypotheses could be tested. Such a “scientific” approach allowed access to the past through the present⁹³ and, implicitly, a perspective into the future. MacNeish noted that the application of an explicitly scientific methodology was a shift from earlier approaches to scientific analysis, where archaeologists would send non-artefactual archaeological material, such as soil samples, to specialist ‘scientists’ for analysis, then would make use of the results,⁹⁴ much as McCarthy earlier used archaeology as a ‘technique’ for doing anthropological research. Archaeology, in MacNeish’s view, was “trying to become the science of past cultures.”⁹⁵ This notion of scientific objectiveness was supported by the use of statistical and mathematical models and the use of computers for analysis, all lending an air of scientific objectivity to the work of the archaeologist, although some prominent archaeologists were sceptical of archaeology’s ability to perform in this manner even at the height of processualist ideology.⁹⁶ Carr noted a

⁸⁵ Johnson, M. (1999). *Archaeological theory: an introduction*. Oxford, Blackwell Publishers. Pg 34.

⁸⁶ Jones, A. (2002). *Archaeological theory and scientific practice*. Cambridge, Cambridge University Press. Pp 29-33.

⁸⁷ Johnson, M. (1999). *Archaeological theory: an introduction*. Oxford, Blackwell Publishers. Pp 36-37.

⁸⁸ Kohl, P. L. (1993). Limits to a post-processual archaeology (or, the dangers of a new scholasticism). *Archaeological theory - who sets the agenda?* N. Yoffee and A. Sherratt. Cambridge, Cambridge University Press: 13-19. Pg 14.

⁸⁹ Jones, A. (2002). *Archaeological theory and scientific practice*. Cambridge, Cambridge University Press. Pp 29-33.

⁹⁰ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 83-84.

⁹¹ Hodder, I. (1999). *The Archaeological Process: An Introduction*. Oxford, Blackwell Publishers. Pp 2-3. See also: Macneish, R. S. (1978). *The Science of Archaeology?* North Scituate, Duxbury Press. ; Whitley, D. S. (1998). *New approaches to old problems: archaeology in search of an ever elusive past. Reader in Archaeological Theory: post-processual and cognitive approaches*. D. S. Whitley. London, Routledge: 1-28. ; Watson, P. J., S. A. LeBlanc, et al. (1984). *Archeological explanation: the scientific method in archeology*. New York, Columbia University Press. ; Dark, K. R. (1995). *Theoretical archaeology*. London, Duckworth.

⁹² Wilson, D. (1974). *The New Archaeology*. New York, New American Library.

⁹³ O'Brien, M. J. and R. L. Lyman (2000). *Applying evolutionary archaeology: a systematic approach*. New York, Kluwer Academic/Plenum Publishers. Pp 166-179.

⁹⁴ Macneish, R. S. (1978). *The Science of Archaeology?* North Scituate, Duxbury Press. Pp 21-25.

⁹⁵ *Ibid.* Pp 59-61.

⁹⁶ See for example *Ibid.* Pp 232-233.

similar perspective existed about the study of history in the nineteenth century, when concern was only for “the facts”,⁹⁷ rather than their interpretation, or their context, although Carr viewed archaeology (writing from the perspective of the 1960s) as primarily being about providing the “raw materials” (i.e. “the facts”) for historians. In point of fact, neither history nor archaeology and the heritage disciplines can provide the tool for unearthing the “true past”, as none are truly objective, neutral or unbiased.⁹⁸

Hodder sees this focus on scientific objectivism as stemming initially from the Analytic Philosophy school of thought and, later, from further developments in logical positivism, that is, a belief that by restricting analysis to observable phenomena and using the scientific method, the researcher can isolate the analysis of observed data from personal bias, reaching an objective truth.⁹⁹ This process was fundamentally acultural, as these types of scientific analyses denied the differentiation and effect of specific cultures.¹⁰⁰ Dark noted that “the archaeological data...can be taken to represent the past but do not present us with that past in an unmodified state.”¹⁰¹ The essence of this is that the archaeological data cannot be viewed as value-neutral conduits for developing an understanding of the past. However, as will be seen later in this thesis, the way the archaeological past has been objectified and legalistically interpreted within a regulatory context has developed to a position where there is an inherent assumption in archaeological regulation that archaeological data are all equivalent. Under this assumption, archaeologists are supposed to be able to capture the totality of data about the past within a statutory context, and using this captured data, which is assumed to be value-neutral, develop any range of interpretations about the past. This tension exists most clearly in compliance-driven archaeological work undertaken by consultants, where it is debatable whether the archaeological work is furthering a “research” agenda or whether it is essentially a data-gathering exercise. Neuman and Sanford, writing about American compliance-driven archaeology are more honest in their description of how most compliance-driven archaeology works in practice, referring to “data recovery plans”¹⁰² in place of the more grandly conceived “research designs” which are required as a matter of policy in Australian compliance archaeology,¹⁰³ but whose research promise is rarely achieved.¹⁰⁴ The value-neutral view of the archaeological past embedded in much legislation belies both the limitations and biases inherent in archaeological field and research processes,¹⁰⁵ and

⁹⁷ Carr, E. H. (1987). *What is history? (Second edition)*. London, Penguin. Pp 9-11.

⁹⁸ Lowenthal, D. (1998). *The heritage crusade and the spoils of history*. Cambridge, Cambridge University Press. Pp 107-108.

⁹⁹ Hodder, I. (1999). *The Archaeological Process: An Introduction*. Oxford, Blackwell Publishers. Pp 22-29.

¹⁰⁰ Whitley, D. S. (1998). New approaches to old problems: archaeology in search of an ever elusive past. *Reader in Archaeological Theory: post-processual and cognitive approaches*. D. S. Whitley. London, Routledge: 1-28. Pg 17.

¹⁰¹ Dark, K. R. (1995). *Theoretical archaeology*. London, Duckworth. Pg 41.

¹⁰² Neuman, T. W. and R. M. Sanford (2001). *Cultural Resources Archaeology - An introduction*. Walnut Creek, CA, AltaMira Press. Pp 159-184.

¹⁰³ NSW Heritage Office and Department of Urban Affairs and Planning (1996). *Archaeological Assessments*. Sydney, NSW Government.

¹⁰⁴ Murray, T. (2002). "But that was long ago: theory in Australian historical archaeology 2002." *Australasian Historical Archaeology* 20: 8-14.

¹⁰⁵ Though as Smith notes, this is an attractive position for governments, as the veil of scientific neutrality has a tendency to depoliticise the issue. Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 90-91.

excludes any non-data based interpretation or value for the archaeological past.

Hodder reaches the conclusion that positivist notions of a scientifically unified archaeology are in fact a myth and that, while scientific and experimental techniques certainly play a part in archaeological practice, they cannot lay claim to being the essence of the discipline.¹⁰⁶ Similarly, Trigger notes that an objective understanding of the past, based in 'positivist optimism' is generally unachievable, given the biases that must inherently influence the thinking and decision-making processes when considering the archaeological record.¹⁰⁷ MacNeish couched his conception of archaeology as "science?" with a question mark, noting that while archaeology was good at the precise collection and organisation of data, its ability to test those data in controlled, repeatable conditions was limited.¹⁰⁸ He also noted that the requirements of archaeologists, as opposed to these other specialists, were quite different and it was impossible to assume that information or material collected in the field to suit one purpose would necessarily suit the purpose of another discipline.¹⁰⁹

While the debate regarding the scientific nature of archaeology has ranged back and forth across the discipline, as outlined above, one clear outcome of the argument for a scientific basis for archaeology was the regulation enacted to protect archaeological remains. Watson and others were prime advocates of a strong 'scientific' conception of archaeology, observing that "the data with which archaeologists work derives from objects of 'material culture'",¹¹⁰ which is exactly what existing legally-precise definitions of the archaeological record in heritage legislation currently protect. Colley noted that pressure from the archaeological community for the establishment of protective legislation was based on a perception that "the *scientific value* of these archaeological sites was under threat from amateur researchers, artefact collectors and development pressures".¹¹¹ Murray viewed the establishment of Aboriginal heritage legislation as a part of a process of separating a 'scientific' past from living Aboriginal culture and putting the interests of that living culture first, to the detriment of scientific study of the past.¹¹² This is consistent with Murray's views fifteen years earlier, where he argued that in order to move from meaningless conceptual relativism in the study of the past, a "science of archaeology" was required, which put archaeology into a strictly rationalist framework.¹¹³ Murray viewed legislation itself as problematic where it lacked or did not adequately articulate a conservation philosophy:

legislation is obviously important but it is insufficient if it is imposed on an unwilling and essentially mystified public. A conservation philosophy

¹⁰⁶ Hodder, I. (1999). *The Archaeological Process: An Introduction*. Oxford, Blackwell Publishers. Pp 27-29.

¹⁰⁷ Trigger, B. (1989). *A History of Archaeological Thought*. Cambridge, Cambridge University Press. Pg 381.

¹⁰⁸ Macneish, R. S. (1978). *The Science of Archaeology?* North Scituate, Duxbury Press. Pg 61.

¹⁰⁹ Ibid. Pp 25-26.

¹¹⁰ Watson, P. J., S. A. LeBlanc, et al. (1984). *Archaeological explanation: the scientific method in archeology*. New York, Columbia University Press. Pg 42.

¹¹¹ Colley, S. (1996). "Caught in the web: Cultural policy, cultural places and Australian archaeology." *Culture and Policy* 7 (2): 141-154. Pg 144, emphasis added.

¹¹² Murray, T. (1996). "Aborigines, Archaeology and Australian heritage." *Meanjin* 55 (4): 725-735. Pg 730.

¹¹³ Murray, T. (1984). Relativism, conservation philosophy and historical archaeology. *Historical archaeology and conservation philosophy. Papers from the Historical Archaeology Session of the ANZAAS Conference, Sydney 1982*. M. Pearson and H. Temple. Sydney, Heritage Council of NSW: 2-17. Pg 2.

thus has to express the values and meanings of past items and contexts and *communicate* them¹¹⁴

The 'conservation philosophy' to which Murray alludes need not be one which is solely, or primarily based on 'scientific' archaeological value.

The shift in conservation philosophy from one based in archaeological value to one based in indigenous value was part of the process of Australian archaeology becoming a post-colonial discipline, which Byrne referred to as the "de-colonising" of the physical remains of the Aboriginal past as things restricted to the domain of archaeology.¹¹⁵ But a strong scientific position¹¹⁶ denies such views, by establishing the sanctity of archaeological "data" as the primary focus of archaeological practice. Murray took a less strict view, indicating that not everything in the archaeological record need be viewed as "data" by the archaeologist.¹¹⁷ But when the definition of those data types becomes the basis for legal protective mechanisms, the legislation does not discriminate between useful and useless potential data for the archaeologist. It may be unreasonable to expect legislation to provide for such distinctions, but it is equally unreasonable that legal restrictions should be placed on society as a whole where there is no clear agreement on what aspects of the archaeological past are important to protect. In this context, Jones observed that:

while we have retained a notion of standardised or objective recording, many of the principles guiding what we deem worthy of record and publication have themselves been reproduced from an earlier vision of archaeological objectivity.¹¹⁸

This essentially means that observations made by archaeologists, while detailed, may not be making a useful or relevant contribution to archaeological questions. Furthermore, in the context of compliance-driven archaeology, these may be the questions the archaeologist is *required* to ask, due to the model of archaeological practice enshrined within the law. The scope to consider other archaeological, or non-archaeological, questions about the material remains of the past may be constrained by the legislation which is designed to protect that past. The flaw in such a model occurs when archaeological data are treated as equally significant, in a belief that this will protect the "research significance" of archaeological places, without a qualified understanding of what that research significance, if any, the place may possess. Murray noted that cultural resource management-style archaeology, undertaken in a legislative context, tended to freeze conceptual models of

¹¹⁴ Ibid. Pg 3. Emphasis added.

¹¹⁵ Byrne, D. (1996). "Deep nation: Australia's acquisition of an indigenous past." *Aboriginal History* 20: 82-107.

¹¹⁶ Such as that of Watson *et al.* Watson, P. J., S. A. LeBlanc, et al. (1984). *Archeological explanation: the scientific method in archeology*. New York, Columbia University Press.

¹¹⁷ Murray, T. (1984). Relativism, conservation philosophy and historical archaeology. *Historical archaeology and conservation philosophy. Papers from the Historical Archaeology Session of the ANZAAS Conference, Sydney 1982*. M. Pearson and H. Temple. Sydney, Heritage Council of NSW: 2-17. Pg 4.

¹¹⁸ Jones, A. (2002). *Archaeological theory and scientific practice*. Cambridge, Cambridge University Press. Pp 50-51.

archaeology in time,¹¹⁹ and reflect what heritage bureaucrats and the public thought was archaeology, based on the conceptual model which was in fashion at the time, in this instance, the scientific paradigm.

By contrast, Ritter asserts, with respect to indigenous heritage, that the definition of Aboriginal heritage in archaeological terms was just another stage in the colonisation of the Aboriginal people. The defining of Aboriginal heritage in objective, scientific language disempowered indigenous people from expressing the values of sites and objects in indigenous terms.¹²⁰ The downside of such rigid legislative definition is that it effectively mandates the one, legally correct, manner for dealing with the archaeological record. This is precisely Ritter's point—that, through legislating in scientific terms, the 'correct' manner for dealing with indigenous archaeological heritage becomes a scientific process, rather than a process which acknowledges ongoing significance to a living community. Hodder notes, in his discussion of the various methodological schools of thought for considering the archaeological record that:

we need to move towards the recognition that there is not only one right way to do archaeology. There are many right ways. This statement does not deny that there are also many wrong ways. It is the focus on singularity which is dangerous.¹²¹

The language of the legislation and of major Australian policy documents all supports this notion of a scientific archaeology: legislation generally protects 'objects' or 'relics' (data) which have 'research', 'technical' or 'scientific' significance. Archaeology can however also be a tool for uncovering other types of significance, which may outweigh the "scientific" value of a given site.¹²² That said, the earliest heritage legislation, in the Northern Territory in 1955, was not based in a scientific perspective, but rather viewed Aboriginal sites as monuments within the natural environment, which were worthy of protection.¹²³ Effective heritage legislation, then, needs to accommodate such a plurality of approaches. This accords with Renfrew's view that even "scientific" archaeology can render wrong answers¹²⁴ and is echoed by Jones' view that, given the nature of cultural practices and structures, archaeology cannot guarantee reproducible results, in the truly scientific sense.¹²⁵ The challenge is to recognise the utility of science as a tool for doing archaeology, alongside other traditional methods, rather than elevating science as the *only* way to undertake archaeology.

¹¹⁹ Murray, T. (1984). Relativism, conservation philosophy and historical archaeology. Historical archaeology and conservation philosophy. Papers from the Historical Archaeology Session of the ANZAAS Conference, Sydney 1982. M. Pearson and H. Temple. Sydney, Heritage Council of NSW: 2-17. Pp 4-5.

¹²⁰ Ritter, D. (2003). Trashing Heritage: Dilemmas of rights and power in the operation of Western Australia's heritage legislation. History and Native Title. C. Choo and S. Hollbach. Crawley, W.A., Centre for Western Australian History University of Western Australia. 23: 195-208. Pp 198; 200-202.

¹²¹ Hodder, I. (1999). The Archaeological Process: An Introduction. Oxford, Blackwell Publishers. Pg 19.

¹²² Bickford, A. and S. Sullivan (1984). Assessing the research significance of historic sites. Site Surveys and Significance Assessment in Australian Archaeology. S. Sullivan and S. Bowdler. Canberra, Dept. of Prehistory Research School of Pacific Studies Australian National University: 19-26. Pg 21.

¹²³ Native and Historic Objects Heritage Protection Ordinance (1955) Northern Territory. For further detail, see the discussion of Northern Territory legislation in Chapter 5.

¹²⁴ Renfrew, C. (1991). "The identity and future of archaeological science." Proceedings of the British Academy 77: 285-293.

¹²⁵ Jones, A. (2002). Archaeological theory and scientific practice. Cambridge, Cambridge University Press. Pg 49.

2.7 The seductive certainty of 'science'

Based on the primacy of the 'scientific' paradigm outlined above, this thesis suggests that establishment of archaeology as a 'science' in Australia was part of the preconditions necessary for the establishment of legal protection mechanisms. The act of defining the past gave lawmakers a sense of certainty as to what aspects of the past required protection. One of the things which this objective scientific school of archaeological thought brought to the law was the belief that the study of archaeology was no longer just inference and opinion, but that it was now scientific fact, as backed up by techniques like radiocarbon dating. This perception of archaeology gave the law boundaries which it could build into a conceptual framework and protective mechanisms, which would have been more difficult in a framework which lacked the perceived objective rigour of a scientific process. Australian lawmakers continue to struggle in circumstances where they must deal with more subjective values, such as indigenous cultural value.¹²⁶ This relates to Kohl's point discussed earlier, that the layperson is likely to uncritically accept archaeological facts presented in a scientific form, due to the appearance of rigour and neutrality believed to be inherent in science generally.¹²⁷ Yet while the field of archaeology has advanced from such a position and now recognises other values for archaeological heritage, the legislation retains this scientific focus.

Related to this is the expectation amongst the lay public that there are aspects of archaeological heritage which *require* the intercession of archaeologists in order to be understandable. While the majority of laypeople could puzzle out the use and meaning of a historic building without substantial guidance, given their familiarity with the nature of buildings generally, the key aspects of an archaeological site are less readily apparent to the casual observer. The role of the archaeologist is to interpret this unformed mass of information into a form comprehensible to the non-archaeologist, although doubtless many indigenous people would question the need for an archaeologist to interpret their heritage for them.¹²⁸ This interpretive role of the archaeologist parallels the role of the scientist in the physical or natural sciences; the interaction of subatomic particles, or chemical reactions, are not inherently comprehensible to the non-scientist, so the role of the scientist is to translate this information into a comprehensible form. Given that the scientific conception of archaeology was pre-eminent in the formative period of Australian archaeology, it is unsurprising that the legal interpretation of the "archaeological past" was based on what was of greatest interest to archaeologists—sites and artefacts. The implication being that, if these aspects of the archaeological past were made available for scientific study, they would

¹²⁶ See for example the discussion of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in Chapter 5.

¹²⁷ Although see for example Balme and Wilson's survey of the perceptions of young Australians regarding archaeology, where archaeology can be conflated with other disciplines and issues. Balme, J. and M. Wilson (2004). "Perceptions of archaeology in Australia amongst educated young Australians." *Australian Archaeology* 58: 19-24.

¹²⁸ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 52-54. Langford, R. F. (1983). "Our heritage - your playground." *Australian Archaeology* 16: 1-6.

provide insights into the past for the benefit of the public, yet there is no way protective legislation can ensure this occurs.

The Australian legal framework relies on definition and boundary to protect the concrete, the physical aspects of the past. And while a heritage building or monument has easily observable physical features which could be protected, such as the form of its roof, or ornamental detail, an archaeological site generally lacks such readily observable characteristics. Through defining the physical aspects of the archaeological past in scientific terms, legislators were provided with something to protect. Even the notion of protecting “research value”, the primary focus of most archaeological protection regimes in Australia, is somewhat nebulous. Without this physical dimension of artefacts and sites which can be legally defined, trying to conceptualise what it is about the archaeological past which requires protection, such as spatial relationships, context or stratigraphy becomes more difficult, as the concepts are more abstract. This protection of abstract heritage concepts is an ongoing problem, given the current difficulties and debates within the heritage discipline regarding the protection of intangible or spiritual values.¹²⁹ As a science, the objects of study—the sites, relics, objects—seem more concrete and can be enumerated, defined and protected by statute.

Jones considers that the “archaeological record” and the “archaeological past” are themselves artificial constructions of archaeologists, to provide a framework to describe and explain the past,¹³⁰ which non-archaeologists have been socially conditioned to accept. Not all archaeological sites can or need to be analysed with the same scientific techniques, nor will a scientific approach always produce the best outcomes or understanding of the past. Scientific enquiry will not necessarily be compatible with community values, particularly for indigenous archaeological heritage. But legislative practice around protecting “scientific” archaeology has acted as a form of social conditioning, as to what should be valued about the past. This has driven a rationalist view of the world as it presupposes the archaeological world can be ordered and described through law-like statements. Slowly this view is shifting, as greater reliance is now placed on the documentary record, oral traditions or cultural practices and contemporary social values, with scientific techniques forming one of many tools used in understanding the past through the archaeological record. It has been noted by Aboriginal people that site management practices have existed for thousands of years, but have not been accepted as legitimate as they were not scientifically based.¹³¹ But the Australian law to protect archaeological heritage seems to be founded on a notion of archaeology as science and, while practice has changed, this notion remains enshrined within the legal framework.

¹²⁹ E.g. Truscott, M. (2000). "Intangible values' as heritage in Australia." *Historic Environment* 14 (5): 22-30.
Beazley, O. (2005). "'Five feet from heaven': the World Heritage Convention, 'mountains of meaning' and inspirational landscapes. Identifying and protecting mountains' intangible heritage values." *Historic Environment* 18 (2): 3-10.
Brown, M. F. (2005). "Heritage trouble: recent work on the protection of intangible cultural property." *International Journal of Cultural Property* 12: 40-61.

¹³⁰ Jones, A. (2002). *Archaeological theory and scientific practice*. Cambridge, Cambridge University Press. Pg 11.

¹³¹ Bridgewater, P. (1992). Sharing country: a personal perspective. *Aboriginal Involvement in Parks and Protected Areas*. J. Birkhead, T. De Lacy and L. Smith. Canberra, Aboriginal Studies Press: 379-382.

2.8 Considering archaeological heritage management in Australia

Since the 1970s, the framework for archaeological heritage management has been underpinned by one or more pieces of legislation in most Australian jurisdictions. The issue of what constitutes “heritage management” generally and “archaeological heritage management” specifically have been debated at some length and need not be re-canvassed here.¹³² For the purposes of this thesis, “archaeological heritage management” is considered to be any conscious action taken in accordance with an external frame of reference to understand the value of and decide the fate of elements of the archaeological heritage. This does not include mere wanton destruction, but does leave open the possibility that site destruction *can* be a management option, in the right circumstances. The external frame of reference used to manage an archaeological resource may be a piece of legislation, an environmental impact assessment report, government-issued guidelines, a code of practice, a set of research questions, existing traditional or cultural practices or other process which allows for the consideration of archaeological values and the weighing up of courses of action.

To be imbued with authority, a management framework must be underpinned by processes which validate the outcomes and provide for consequences for invalid outcomes. Ideally, these processes should be transparent and open to review or challenge. This is the case for not just the management of archaeological heritage, but for managing any sort of environmental issue. While there are a number of ways this can be done including peer review (for an academic framework), binding professional codes of practice (for accredited professions,¹³³ which does not include archaeology in Australia) or licences to undertake an activity (for many industries and activities, although again excluding Australian archaeology), the most broadly-based method for ensuring the implementation of a management framework is via legislation. In general, this process currently involves a requirement for a permit or approval to be obtained in advance of work affecting archaeological heritage, with conditions attached to that permit. Legislation provides a mechanism for enforcement of codes of behaviour and practice, as well as a mechanism for punishing non-complying actions or behaviours. O’Keefe and Prott note that, despite a notion that the inherent value of items of cultural heritage should itself be a bar to preventing harm to that heritage, the realities and dangers

¹³² Cooper, M.A. *et al.* (eds) 1992 *Managing Archaeology* Routledge: London and New York.

Pearson, M & S Sullivan 1995 *Looking After Heritage Places* Melbourne: Melbourne University Press.

Davison, G *et al.* (eds) 1991 *A Heritage Handbook* North Sydney: Allen & Unwin.

¹³³ E.g. professions such as solicitors, barristers, doctors, architects, engineers or accountants, which all have professional associations which set the level of credentials and standards necessary to work in that profession, have boards which review issues of professional conduct and can levy sanctions, including expulsion from the profession for serious misconduct. Membership in these professional associations is mandatory to practice in these accredited professions. No such system of accreditation exists in Australia for archaeologists. Even the Australian Association of Consulting Archaeologists Inc., while acting as a quasi-professional organisation, does not accredit practitioners in this sense, and there is no legal requirement to be a member of AACAI to practice as an archaeologist in Australia. The Register of Professional Archaeologists (RPA) in the United States and the Institute of Field Archaeologists in the United Kingdom are more akin to professional accreditation bodies, although it is not mandatory to belong to either body in order to practice as an archaeologist. In the US, the de facto standard for qualifications for archaeological works is *The Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation—Qualification Standards* (1983) (48 FR 44716). These have been slightly updated by the US National Park service and are still in use. See http://www.cr.nps.gov/local-law/arch_stnds_0.htm. Accessed 17 May 2006. There is no equivalent national standard in Australia.

facing cultural heritage in general do require some level of governmental intervention, generally through legislation.¹³⁴

In Australia, the focus in law has been on the management of the physical remains of the archaeological past, by protecting either specific types of objects (termed relics, objects or artefacts, depending on jurisdiction) or specific areas of land. This drive for protection has been underpinned by both the international heritage treaties to which Australia is a signatory,¹³⁵ as well as by domestic documents containing statements of principles, such as the Australia ICOMOS Burra Charter.¹³⁶ Underlying all of this is the fundamental proposition that the remains of the past must be protected, as they will allow us to better understand contemporary society. In Australia, there is also a belief that archaeology is a discipline principally based on a research agenda, and that archaeological material must be protected to allow it to be researched. This is due to the influences of the positivist archaeological traditions discussed above. Australian archaeological work has also, until quite recently, been seen primarily as a process of excavation of material remains in the archaeological record and the subsequent study of that material. This view of the primacy of excavation and of the archaeological object¹³⁷ is reinforced through the general public perception of archaeological work as synonymous with excavation. Hodder notes that archaeological practice in some areas is beginning to “move away from the centrality of digging within archaeological practice”.¹³⁸ However this is by no means a universal shift in practice and, given current legal structures, excavation retains its primacy within the canon of archaeological techniques.¹³⁹

Moser noted in 1995 that no extensive analysis had been undertaken of the history, development and underlying philosophy of the Australian archaeological discipline.¹⁴⁰ While her research was primarily focussed on the development of a professional culture within Australian prehistoric archaeology, she observed a progression within the discipline from a museum- and collector-based culture, to an academic culture starting in the 1960s to the current “public sector” culture.¹⁴¹ Moser’s tracing of the evolution of Australian archaeological heritage management to a public sector culture aligns neatly with the analysis by Byrne and others of “social significance” and

¹³⁴ O’Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. Pp 12-13.

¹³⁵ Including the UNESCO and World Heritage Conventions. Details of ratification by Australia are in Chapter 3.

¹³⁶ Australia ICOMOS (1999). *The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. Burra Charter*.

¹³⁷ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pg 42.

¹³⁸ Hodder, I. (1999). *The Archaeological Process: An Introduction*. Oxford, Blackwell Publishers. Pg 19.

¹³⁹ Techniques such as remote sensing, for example, are sometimes used as a part of the pre-excavation investigatory and assessment process but are never seen as a substitute for traditional excavation and recording techniques.

¹⁴⁰ Moser, S 1995 *Archaeology and Its Disciplinary Culture: The Professionalisation of Australian Prehistoric Archaeology*. University of Sydney, School of Archaeology, Classics and Ancient History. Unpublished PhD thesis.

Although see Ulm, S., S. Nichols, et al. (2005). "Mapping the shape of contemporary Australian archaeology: implications for archaeology teaching and learning." *Australian Archaeology* 61: 11-23.

¹⁴¹ Horton, D. (1991). *Recovering the tracks : the story of Australian archaeology*. Canberra, Aboriginal Studies Press. Murray, T. and P. White (1981). "Cambridge in the Bush? Archaeology in Australia and New Guinea." *World Archaeology* 13 (2): 255-63.

McBryde, I. (1986). "Australia's once and future archaeology." *Archaeology in Oceania* 21 (13-28).

the public sector aspects of archaeological heritage management.¹⁴² While Byrne and colleagues were writing principally about Aboriginal heritage management, the phases they have identified ring true for non-Aboriginal heritage management as well, particularly historical archaeology. The initial phase was derived from the establishment of legislation to protect archaeological relics and that heritage management at that time was principally dominated by the field of archaeology.¹⁴³ The following phase saw a large increase in the amount of archaeological work undertaken, in response to environmental impact assessment and abatement; however the consequence of this was the “virtual exclusion of community heritage values”.¹⁴⁴ This mirrors the rise in compliance-driven archaeology observed in America over the same period.¹⁴⁵ The authors suggest a future goal of developing a “holistic approach” towards heritage management, where the conception of heritage moves away from the merely material aspects to a wider conception of heritage as a form of social action.¹⁴⁶ Nevertheless, these authors do not deny the need for heritage protection legislation, but rather call for reform within it, to cater for the acknowledgement of changing contemporary values and the intangible values of places.¹⁴⁷ Thus even within the case for broad reform in Australian heritage management, there is consensus that regulation through legislation is required, as opposed to voluntary measures, and archaeological heritage management will remain within the public sector realm.¹⁴⁸

Following on from this analysis, it is observable that the discipline of archaeology is currently split into three distinct yet related strands—university or museum-based research archaeology, archaeological heritage management and archaeological consulting. Each of these three strands overlaps with the others yet all have separate goals and responsibilities. Ideally, each strives for the appropriate treatment of the archaeological resource, but the end results can and should be quite different. Academic or research archaeologists have the luxury of being able to pursue their own research agendas, and may not ever need to become involved with the public sector culture of archaeological heritage management. Researching using textual sources, or existing archaeological collections, or pursuing theoretical issues, can leave the academic archaeologist outside the legal realm. It is only when they seek to interact with the physical aspects of the archaeological past that legal requirements are triggered. In some jurisdictions, this may be

¹⁴² Byrne, D., H. Brayshaw, et al. (2001). *Social Significance: A discussion paper*. Hurstville, NSW National Parks and Wildlife Service: 161. Pp 35-41.

¹⁴³ *Ibid.* Pg 35.

¹⁴⁴ *Ibid.* Pg 39.

¹⁴⁵ Neuman, T. W. and R. M. Sanford (2001). *Cultural Resources Archaeology - An introduction*. Walnut Creek, CA, AltaMira Press. Pp 1-26.

¹⁴⁶ Byrne, D., H. Brayshaw, et al. (2001). *Social Significance: A discussion paper*. Hurstville, NSW National Parks and Wildlife Service: 161. Pp 41; 55-74.

¹⁴⁷ *Ibid.* Pp 118.

¹⁴⁸ It should be noted that this call for the continuation of legal regulation of heritage management is from within the heritage profession and is not universal. The recent report of the Commonwealth Productivity Commission, which is primarily an economic policy body, has called for the complete removal of all legislative control of privately-owned heritage places, to be replaced with a system based solely on voluntary agreements administered at the level of local government. See Productivity Commission (2005). *Conservation of Australia's historic heritage places - draft report*. Melbourne, Australian Government. Pp XLIV-XLV, particularly Recommendations 8.1, 9.2, 9.3, 9.7 and 9.8.

limited to when physical excavation is actually proposed, however in others this may include surveys or studies of the archaeological resource.

Heritage managers are concerned with managing archaeological places and administering heritage legislation. They may be responsible for enforcing compliance or setting policy which may direct the manner in which the archaeological past is managed, impacted upon or used. In some instances, this has included restricting access to the archaeological resource, even from legitimate researchers, where there have been significant community issues.¹⁴⁹ The heritage managers are largely responsible for maintaining the “public sector” culture to which Byrne, Moser and Smith¹⁵⁰ allude and which Carman has described as the bureaucracy of archaeology.¹⁵¹ This may have little to do with the research-oriented goals of the academic archaeologist and more to do with legislation, policy and politics. But as the keeper of the public sector culture, it is incumbent upon the heritage manager to seek the best public outcomes, to demonstrate the importance of archaeology to the public or to specific communities.¹⁵² The archaeological heritage manager’s role is one of enabling engagement and creating value for the community from the archaeological record.

Archaeological consultants represent the private sector involvement with archaeology and are principally concerned with compliance issues. The archaeological consulting culture is a direct outgrowth of the establishment of heritage legislation and compliance requirements upon non-archaeologists. In the absence of legislation, it is unlikely that such a branch of archaeology would have arisen. It is also unlikely that archaeology would be practiced on the scale that it currently is, in the absence of legislation. The archaeological consultant must be focussed on the site at hand and may rarely have the opportunity to consider the bigger picture issues, or indeed follow any significant research agenda, other than that dictated from the public sector heritage managers. Writing from the perspective of the early period of contract historical archaeology in Australia, Higginbotham noted ambiguities inherent in the archaeological protective legal regime, such as the provision of funding, or the degree of excavation required for a site to adequately reveal the “meaning” for which it has ostensibly protected.¹⁵³ These questions remain pertinent in the current practice of compliance-driven archaeology. Ultimately, the archaeological consultant is present to ensure their non-archaeological

¹⁴⁹ Murray, T. (1996). "Aborigines, Archaeology and Australian heritage." *Meanjin* 55 (4): 725-735. , Murray, T. (1996). *Archaeologists, Heritage Bureaucrats, Aboriginal organisations and the Conduct of Tasmanian Archaeology*. Australian Archaeology '95: Proceedings of the 1995 Australian Archaeological Association Conference, St Lucia, University of Queensland. , Colley, S. M. (2002). *Uncovering Australia: archaeology, indigenous people and the public*. Crows Nest, N.S.W., Allen & Unwin. Pp 101-104.

¹⁵⁰ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 90-91.

¹⁵¹ Carman, J. (2002). *Archaeology and heritage : an introduction*. London ; New York, Continuum. Pp 99-100.

¹⁵² This relates to Smith’s broader point that archaeologists, as the experts and the keepers of the language and debate around archaeology, need to acknowledge this power and seek to use it to bridge the divide between themselves and others. Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 54-55. Ellis is critical of the fact that administrative procedures developed around heritage legislation were dominated or, in his words, “preoccupied”, with the language of archaeology, in a way which denied the consideration of other values such as social significance. See Ellis, B. (1994). "Rethinking the paradigm: cultural heritage management in Queensland." *Ngulaig* 10. Pp 15-16.

¹⁵³ Higginbotham, E. (1984). Contract archaeology: some problems and solutions relevant to the growth of historical archaeology in NSW. *Historical archaeology and conservation philosophy. Papers from the Historical Archaeology Session of the ANZAAS Conference, Sydney 1982*. M. Pearson and H. Temple. Sydney, Heritage Council of NSW: 88-95.

client complies with heritage legislation.¹⁵⁴ If a public or research outcome can be delivered along the way, this is an added benefit. The consultant archaeologist must work closely with the archaeological heritage manager but may have limited interaction with research archaeologists. It remains open to debate as to whether the primary archaeological function of consulting archaeologists is to gather data for analysis by university or museum-based research archaeologists, as it must be acknowledge that the actual activities undertaken by archaeological consultants are driven by legislative compliance issues rather than by any substantial research framework.

The public sector culture which manages all Australian archaeological heritage is a direct product of the legislation which underpins it, forcing a culture of compliance upon archaeology, backed up with potentially serious consequences for both archaeologists and their clients should they choose to operate outside of the legislative framework. Coutts remarked that "if the community (through the State agencies) grants an archaeologist the privilege of carrying out an [archaeological] investigation...then it has the right to demand certain things in return."¹⁵⁵ This may include access to archaeological places, influence on their management or simply to be entertained. The presence of archaeological heritage legislation in and of itself elevates the status of the archaeological record in a privileged manner and while Coutts asserted that archaeologists have a right of access to the archaeological record, this is tempered with a need to act responsibly and to engage with the community.¹⁵⁶ McGowan however observed that this hardline "right of access" stance has significantly shifted through the 1980s and 1990s, to recognise the need for indigenous community involvement in heritage management.¹⁵⁷ Now professional codes of ethics in Australia, such as those of the Australian Association of Consulting Archaeologists Incorporated (AACAI)¹⁵⁸ or the Australian Archaeological Association (AAA)¹⁵⁹ explicitly acknowledge both the public¹⁶⁰ and specific groups¹⁶¹ such as indigenous peoples as having a legitimate claim upon the archaeological resource.

Many archaeologists have written about the value of "community" or "public" archaeology, for both the general public and the indigenous community.¹⁶²

¹⁵⁴ King, T. F. (1998). *Cultural resource laws & practice: an introductory guide*. Walnut Creek, CA, AltaMira Press. Pp 10-11.

King, T. F. (2002). *Thinking about cultural resource management : essays from the edge*. Walnut Creek, CA, AltaMira Press. Pp 97-100.

¹⁵⁵ Coutts, P. J. F. (1984). A Public Archaeologist's View of Future Directions in Cultural Resource Management. *Archaeology at ANZAAS, Canberra*. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pg 218.

¹⁵⁶ Ibid. Coutts is referring primarily to work to the indigenous archaeological record, however the principles apply across the spectrum of archaeological work.

¹⁵⁷ McGowan, A. (1996). "A view from the castle: administering Aboriginal heritage legislation in a changing policy environment." *Tempus* 6: 301-309. Pg 305.

¹⁵⁸ Australian Association of Consulting Archaeologists Incorporated (<http://www.aacai.com.au/> - accessed 18 April 2005). AACAI Code of Ethics - <http://www.aacai.com.au/codeofethics.html> accessed 18 April 2005.

¹⁵⁹ Australian Archaeological Association (<http://www.australianarchaeologicalassociation.com.au/index.php> - accessed 18 April 2005). AAA Code of Ethics (<http://www.australianarchaeologicalassociation.com.au/codeofethics.php>) accessed 18 April 2005.

¹⁶⁰ AACAI Code of Ethics Clause 2–Duty To The Public; AAA Code Of Ethics Clause 2.4 - Principles Relating To The Archaeological Record.

¹⁶¹ AACAI Code Of Ethics Clause 3–Duty To Certain Groups; AAA Code Of Ethics Clause 3 - Principles Relating To Indigenous Archaeology.

¹⁶² Greer, S., R. Harrison, et al. (2002). "Community-based archaeology in Australia." *World Archaeology* 34 (2): 265-287. ; Clarke, A. F., L. Smith, et al. (1996). *Issues in management archaeology*. St Lucia, Qld., Anthropology Museum University of Queensland. ; McIntyre-Tamwoy, S. (2002). Places people value: social significance and cultural exchange in post-invasion Australia. *After Captain Cook: The archaeology of the recent indigenous past*

This has often arisen out of a desire to educate or present the results of archaeological work to the public, to invite public participation in the archaeological fieldwork or analysis process or to provide a lasting tangible reminder of the archaeological past through on-site interpretation or *in situ* conservation. Less frequently this desire for public or community interaction includes the necessity for the public to participate in or drive the direction of archaeological work, or to make management decisions about archaeological places. This last is perhaps the most difficult, as it requires the professional archaeologist to relinquish their last role as arbiter and protector of the archaeological past. Much interesting work is being done in this area in terms of archaeology as a tool of ‘community’ or ‘civic engagement’, particularly in the United States.¹⁶³ This work leads towards what this thesis argues should be the goal of legislative protection of archaeological heritage—delivering a net ‘public good’ to the community, discussed in detail in the following chapter. Current legislation however continues to mandate a compliance regime which often lacks community-focussed outcomes.

Given that shift, the next logical progression is the consideration of wider community values when undertaking archaeological works and assessing the ‘value’ of archaeological sites and objects. Ideally archaeologists operating within this culture of compliance should be striving to meet those community expectations, recognising their privileged position within society to both access and interpret archaeological materials.¹⁶⁴ Archaeological work or outcomes should be commensurate with the privilege of access to archaeological materials. Inflexibility within legislative regimes, coupled with the commercial realities of much compliance-driven archaeological work, has often meant that the end product of an archaeological investigation is more focussed on a compliance-based result,¹⁶⁵ rather than work which recognises that a privilege, that of disturbing a limited resource, has been granted. To achieve more than a mere “culture of compliance”, heritage legislation must be suitably flexible in its form and administration to allow the achievement of what Byrne and colleagues termed a “holistic approach” or the ‘public good’ considerations which are argued for in this thesis.

2.9 The birth of a common environmental and heritage consciousness

Internationally, environmental consciousness began to grow in the 1960s, spurred on by a rapidly changing world, broad social upheaval and a general questioning of society’s mores. In Australia, this did not take concrete form until the first public heritage battle, to save the site of Kelly’s Bush, a small area of untouched bushland in suburban Sydney, in 1971.¹⁶⁶ At about this

in Australia. R. Harrison and C. Williamson. Sydney, Archaeological Computing Laboratory, University of Sydney. 8: 171-190.

¹⁶³ Including a session on “Archaeology as a tool for civic engagement” at the 2005 Society for Historical Archaeology Conference in York, UK.

¹⁶⁴ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 42-43, 53-54.

¹⁶⁵ E.g. a grey-literature report of a technical nature.

¹⁶⁶ Munday, J. (1981). *Green bans & beyond*. Sydney, Angus & Robertson. Pp 81-83.

Munday, J. (1987). From Red to Green: Citizen-Worker Alliance. *Green Politics in Australia*. D. Hutton. North Ryde, N.S.W., Angus & Robertson: 105-122.

Burgmann, M. and V. Burgmann (1998). *Green bans, red union : environmental activism and the New South Wales Builders Labourers Federation*. Sydney, UNSW Press.

same time, the first “green” political party was established in Tasmania¹⁶⁷ and the Australian Council of National Trusts began to investigate and lobby for the introduction of heritage legislation across Australia.¹⁶⁸ Internationally, the field of environmental law was undergoing significant development, driven by the efforts of the United Nations.¹⁶⁹ Public fights about large-scale developments and related environmental and heritage issues brought the matter into the broader public forum, particularly the fights over the proposed damming of the Franklin River in Tasmania, which led directly to the passing of the Commonwealth *World Heritage Properties Conservation Act* (1983) and ensuing battle in the High Court regarding the validity of that legislation.¹⁷⁰ This particular battle also saw the intertwining of cultural and natural heritage issues as the presence of archaeological sites and subsequent Native Title claim were as important factors as the natural heritage values in the conservation of the Franklin Valley.¹⁷¹ A similar environmental and heritage battle arose in the late 1990s, over the establishment of the Jabiluka uranium mine within the boundaries of the Kakadu World Heritage Area.¹⁷²

While the initial phases of the Australian heritage movement concentrated on the conservation of the built environment and, to a lesser extent concerns such as archaeological sites, throughout the 1990s a broader focus on the notion of ‘heritage’ began to prevail, one which included cultural/spiritual (or intangible) values as well as natural heritage values. This is expressed most fully through the establishment of such documents as the Australian Natural Heritage Charter¹⁷³ and amendments to the Australia ICOMOS Charter for Places of Cultural Significance¹⁷⁴ (the Burra Charter) and various pieces of heritage legislation at State, Territory and Commonwealth levels to include

¹⁶⁷ Brown, B. (1987). Greening the Conservation Movement. *Green Politics in Australia*. D. Hutton. North Ryde, N.S.W., Angus & Robertson: 35-48.

¹⁶⁸ James, P. C. and J. Mora (1996). *Australian Mosaic: A handbook for the conservation of the National Estate*. Cairns, Mukkamanna Holdings. Pg 17.

¹⁶⁹ Wensley, P. (1994). Global trends: the emergence of international environmental law. *Environmental Outlook: Law and Policy*. B. Boer, R. Fowler and N. Gunningham. Annandale, NSW, The Federation Press. 1: 7-16.

¹⁷⁰ *Commonwealth of Australia v. Tasmania* (1983) 158 CLR 1. For a brief commentary on this case see, for example: Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 97-98.

Bates, G. M. (2002). *Environmental law in Australia*. Sydney, LexisNexis Butterworths. Pp 60-65.

Hutton, D. and L. Connors (1999). *A History of the Australian environmental movement*. Melbourne, Cambridge University Press. Pp 159-164.

Bates, G. M. (1984). "The Tasmanian Dam Case and Its Significance in Environmental Law." *Environmental Planning Law Journal* 1: 325-345.

¹⁷¹ Allen, J. (1983). "Aborigines and Archaeologists in Tasmania." *Australian Archaeology* 16: 7-10. , Mulvaney, J. (1983). Towards a new national consciousness. *Prehistory and Heritage: the writings of John Mulvaney*. Canberra, Dept. of Prehistory Research School of Pacific Studies Australian National University: 310. , Burnham, B. (1987). Aboriginal Australia and the Green Movement. *Green Politics in Australia*. D. Hutton. North Ryde, N.S.W., Angus & Robertson: 91-104. , Griffiths, T. (1996). *Hunters and Collectors: The antiquarian imagination in Australia*. Melbourne, Cambridge University Press. Pp 265-66.

Bonyhady, T. (1993). *Places Worth Keeping: Conservationists, Politics, Law*. Sydney, Allen & Unwin. Pp 50-53.

¹⁷² O'Brien provides an historical account of uranium exploration in the Kakadu area in O'Brien, J. (2003). "Canberra yellowcake: the politics of uranium and how Aboriginal land rights failed the Mirrar people." *Journal of Northern Territory History* 14: 79-91.

For discussion of the World Heritage issues, see for example:

Hallam, J. (1998). "Jabiluka: what the big fuss Down Under is all about." *Issues*: 4-10.

Biodiversity Group Environment Australia (1998). "Jabiluka uranium mine and Kakadu National Park." *Issues* (December 1998): 11-15.

Maswood, S. J. (2000). "Kakadu and the politics of World Heritage Listing." *Australian Journal of International Affairs* 54 (3): 357-372.

Mulvaney, J. (2002). "Uranium and cultural heritage values." *Dissent* 7 (Summer 2001-2002): 47-50.

¹⁷³ IUCN and Australian Heritage Commission (2002). Australian Natural Heritage Charter for the conservation of places of natural heritage significance (Second edition). Originally adopted in 1996.

¹⁷⁴ Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. *Burra Charter*.

natural and cultural heritage values.¹⁷⁵ This drawing together of natural and cultural concerns

In part reflects that indigenous Australians do not separate natural and cultural concerns. In the non-indigenous community this has been expressed as the concept of 'sustainability' or ecologically sustainable development, a process of considering and balancing environmental, social and economic factors. The utility of the sustainability concept within the legal management of archaeological heritage is considered later in this thesis. Given the growing social concern over such environmental and heritage issues, it would be hoped that conservation efforts could be progressed in the absence of legislation. The following section considers the necessity of a legislative approach to heritage conservation.

2.10 Legislative protection of archaeological heritage as a reflection of social value

There are many different potential "purposes" for archaeology,¹⁷⁶ the most broad-ranging being that analysis of the archaeological record provides a deeper understanding of the past which assists in the understanding of the present. Yet other disciplines provide insight into the past—history, classics, philosophy—however they have not generally required legislative responses. What is it about archaeology which has required a response in a way other academically-derived disciplines have not? Certainly one aspect must be that the "doing" of archaeology requires the access to the physical remains of the past. We see similar issues in history with respect to historic documents, where legislation exists to protect archival materials.¹⁷⁷ The legislation is not in place solely because the public or government of the day wanted to facilitate the "doing" of history; rather there was a recognition that the source material of history, the documentary record, was fragile and needed protective legislative assistance to ensure its protection. The end result was not merely to ensure that historians had many old documents to pore over, but to allow the possibility that knowledge and understanding of the past could be derived from those preserved documents. They, as with the archaeological record, represent 'potential history'.

¹⁷⁵ E.g. the Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999, which established an omnibus natural and cultural heritage protection regime at Commonwealth level, or the NSW *Heritage Act*, amended 1998 to include 'natural heritage'. See the further detailed discussion of these Acts in Chapters 5 and 7 respectively.

¹⁷⁶ See, for example the views contained in: Connah, G. (1997). "The purpose of archaeology." *Australian Archaeology* 45: 48-53. Craddock, P. (1991). The emergence of scientific language into the past. *Science and the past*. S. Bowman. Toronto, University of Toronto Press: 11-15. Davidson, I. (1999). Sex, politics and religion - archaeology for a polite society. Inaugural public lecture. Armidale, University of New England. , Moreland, J. (2001). What is historical archaeology? *Archaeology and text*. J. Moreland. London, Duckworth: 98-120. , Baran, U. and Y. Rowan (2004). Archaeology after nationalism: globalisation and the consumption of the past. *Marketing Heritage: archaeology and the consumption of the past*. U. Baran and Y. Rowan. Walnut Creek, CA, AltaMira Press: 3-23. Little, B. J. (2004). Is the medium the message? The art of interpreting archaeology in US National Parks. *Marketing Heritage: archaeology and the consumption of the past*. Y. Rowan and U. Baran. Walnut Creek, CA, AltaMira Press: 269-286.

And more broadly see Loewenthal's remarks on history and heritage conservation: Loewenthal, D. (1985). *The past is a foreign country*. Cambridge, Cambridge University Press. , Loewenthal, D. (1998). *The heritage crusade and the spoils of history*. Cambridge, Cambridge University Press.

¹⁷⁷ E.g. the *Archives Act* 1983 (Cth), *State Records Act* 1998 (NSW), *State Records Act* 2000 (WA). It should also be noted that these Acts serve a significant function in ensuring documents are preserved for legal, as well as historical, reasons.

Lowenthal cites the strong nostalgic value of the physical remains of the past for those in the present, particularly if the present contains unpleasant or uncertain aspects¹⁷⁸ which, through the veil of nostalgia, appear to be absent from the past. This nostalgia may account for some of the public drive to see aspects of the past preserved, but does not account for the professional-objective interest in the past as generally espoused by archaeologists. Both serve to influence the protective mechanisms which may be applied through law. Emerging groups within societies may themselves see different values for the remains of the past, which were perhaps not valued or protected under previous regimes. In Australia, indigenous heritage is the primary example of this, where the vast majority of statutory protection focussed on places of archaeological value, but a gradual shift is being seen towards protecting places of significance to the indigenous community. These places may have little or no scientific value, but may serve a social, spiritual or perhaps even a nostalgic function in the politics of contemporary identity. Nostalgia in this context can however be a distinct negative, particularly for indigenous cultures, where a common perception of “traditional” society can limit an indigenous culture’s ability to establish a contemporary identity, without being seen to be rejecting their own past.¹⁷⁹

British academic John Carman succinctly summarised a key rationale behind archaeological heritage legislation: “*Laws...act primarily as symbols of the importance of archaeology.*”¹⁸⁰ In Carman’s view, the main purpose of archaeological heritage legislation was to indicate to the general body of the populace that archaeological heritage had a value. What should not be overlooked in this process however is that the community may attach symbolic values of its own to archaeological sites or objects,¹⁸¹ which may not align with the “professional” archaeological values the law generally seeks to protect. Lowenthal has argued that this drive to protect in a statutory sense is inextricably linked to the focus in Western conservation movements on fabric over value and a fear of losing something valuable due to a lack of understanding about what is in fact important about the past.¹⁸² But establishing legislative protection is also part of the process of moving conservation and appreciation of the past from the private to the public sphere.¹⁸³ In addition to these positive regulatory aspects, Smith notes that laws function to regulate areas of conflict,¹⁸⁴ as well as areas of value. Those things which a society values are generally protected through legislation, elevating their status and placing obligations upon society and its members to see that the protected things are dealt with in accordance with society’s wishes. Evans indicates that a key function of heritage legislation is to provide

¹⁷⁸ Lowenthal, D. (1998). *The heritage crusade and the spoils of history*. Cambridge, Cambridge University Press. Pp 3-5.

¹⁷⁹ *Ibid.* Pp 86-87.

¹⁸⁰ Carman, J. (1995). The importance of things: archaeology and the law. *Managing Archaeology*. Cooper. London, Routledge: 19-32.

¹⁸¹ Greer, S., R. Harrison, et al. (2002). "Community-based archaeology in Australia." *World Archaeology* 34 (2): 265-287. Pg 283.

¹⁸² Lowenthal, D. (1998). *The heritage crusade and the spoils of history*. Cambridge, Cambridge University Press. Pp 29-30.

¹⁸³ *Ibid.* Pp 60-61.

¹⁸⁴ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 78-79. See also Ellis, B. (1994). "Rethinking the paradigm: cultural heritage management in Queensland." *Ngulaiq* 10. Pp 11-12.

contemporary relevance to the past, with law being the mechanism for supporting the process of determining what to keep of that past, but not necessarily defining *why* an element of the past is important.

He states that:

whilst environmental planning law looks to the future, heritage conservation law, as a component of environmental planning law, does not merely revisit the past, but more importantly, provides its present and future cultural, natural and contextual basis, and *raison d'être*.¹⁸⁵

The law therefore is the primary mechanism for ascribing appropriate behaviour with respect to a protected class of thing, practice or concept and acts to make the thing protected relevant to wider society. The moral implications arising from this are examined in Chapter 3. James and Mora indicate however that legislation should play a minor part in the conservation of a nation's heritage.¹⁸⁶ The law, in their view, acts as a cautionary mechanism but the actual desire to conserve heritage is one which should be driven by inherent societal valuing of that heritage rather than due to legislative dictate. The mere act of legislating does not necessarily mean that the protections enshrined in law are appropriate, enforceable or well thought through. The presence of a law exerts a degree of moral force upon members of society, backed up with the notion of penalty, which may be more persuasive than a moral argument alone. To quote one Victorian parliamentarian during the 1972 debates over the *Aboriginal and Archaeological Relics Preservation Bill* "it is not enough to leave it to chance or individuals to protect our heritage", legislation was required.¹⁸⁷ Similar sentiments about the difficulty of protecting remote sites affected by increasing industrial exploration and tourism in remote areas were echoed in Western Australia in the same period.¹⁸⁸ These sentiments had not changed more than 20 years later when another Victorian parliamentarian remarked, during debate on the *Heritage (Amendment) Bill 2003 (Vic)*:

Not all Victorians are absolutely passionate about their heritage because that is why the bill has been introduced—it prescribes tougher penalties for those who breach heritage permits. Not everybody shares the same level of passion for our heritage.¹⁸⁹

Similarly, in NSW it was noted that the introduction of legislation may obviate the need for "wearying and unsatisfactory" fights to protect heritage items.¹⁹⁰ The presence of legislation increases the certainty of outcome in many

¹⁸⁵ Evans, M. (2000). *Principles of Environmental & Heritage Law*. St Leonards, Prospect Publishing. Pp 7-8.

¹⁸⁶ James, P. C. and J. Mora (1996). *Australian Mosaic: A handbook for the conservation of the National Estate*. Cairns, Mukkamanna Holdings. Pp 15-16.

¹⁸⁷ Parliament of Victoria (1972). *Hansard*, Melbourne: Victorian Government Printer. Volume 306 (21 March 1972) Pg 4322. Speech by Mr Hamer, Chief Secretary of the Legislative Assembly.

¹⁸⁸ Parliament of Western Australia (1972). *Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly*. Twenty-Seventh Parliament Third Session. *Aboriginal Heritage Bill Second Reading Speech* by the Hon W.F. Willesee (Member for North-East Metropolitan, Leader of the House), 11 April 1972, Pg 472.

¹⁸⁹ Parliament of Victoria (2003). *Hansard*. *Sic*. Speech by the Hon P R Hall, Member for Gippsland, 14 October 2003, Pg 747.

¹⁹⁰ Parliament of New South Wales (1977). *Parliamentary Debates (Hansard) Forty-Fifth Parliament*. Speech by Mr Rozzoli, Member for Hawkesbury and Leader of the Opposition, Pg 9804.

instances, by clarifying the requirements for the behaviour of citizens, for the benefit for the community at large:

For instance, somebody fossicking on what is actually an archaeological site may be an innocent mistake but the fossicking can do untold damage to that site, particularly if the fossicking becomes something that large numbers in the community are doing. It is extremely important to explain to people that the site is significant for a particular reason and to make it clear to them what is and is not acceptable in terms of this heritage legislation.¹⁹¹

In addition, it is necessary for such protective systems to accommodate changing views and conceptions of what comprises the “heritage” of a society. Social change, better information and deeper understandings of the past will influence the perceptions of what is valued and why, influencing in turn what is legally protected. Nevertheless, legislation will not act as an absolute deterrent to damaging archaeological heritage deliberately or through ignorance, but should provide guidance as to why certain places are important.

2.11 The limits of legislation

Legislation can exist unamended for a considerable period of time and thus it is important to achieve the appropriate balance within it, to prevent undue burdens being placed on society.¹⁹² E. H. Carr, writing more generally about history, noted that history is always being rewritten and reinterpreted, and it should be accepted that “old” histories can look foolish or outdated from the perspective of the present,¹⁹³ and there is no reason that this observation should not hold for interpretations of the archaeological record or for heritage legislation. As archaeological theory changes, in response to fashion, politics or evolution of intellectual debate, we should expect the same evolution in heritage protection legislation. Considered in the historical context of the archaeological literature of 1960s and 1970s, which viewed archaeology as “science”, regulation became about creating the opportunity for archaeologists to prove or disprove perceptions of the past. While such a positivist notion is now generally unfashionable within the archaeological world,¹⁹⁴ as discussed earlier in the chapter, during the Australian debates regarding heritage protection it was inevitable that this perspective would have coloured the views of lawmakers at the time. Viewed in the historical retrospect to which Carr alludes, this “scientific” emphasis may be seen as a simplistic or outmoded view of archaeology, but one which remains embedded in Australian law.¹⁹⁵

¹⁹¹ Parliament of Victoria (2003). Hansard. Speech by the Hon. A. P. Olexander, Member for Silvan. 14 October 2003, Pg 760.

¹⁹² See comments by Mr Lewis during the Second Reading debate regarding the Heritage of Western Australia Bill 1990. Parliament of Western Australia (1990). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Thirty-Third Parliament Second Session. 23 August 1990, Pg 4135.

¹⁹³ Carr, E. H. (1987). *What is history? (Second edition)*. London, Penguin. Pp 7-8.

¹⁹⁴ Colley, S. (1996). “Caught in the web: Cultural policy, cultural places and Australian archaeology.” *Culture and Policy* 7 (2): 141-154.

¹⁹⁵ See discussions on the focus of Australian heritage legislation on “scientific” values in Chapters 5 to 7.

Fundamentally, the testing of legislation occurs before the courts, however in the case of the archaeological heritage legislation in Australia, there have been relatively few instances where this has occurred. This has led to inconsistency in the definition of the nature of heritage to be protected between Australian jurisdictions, and even within jurisdictions often the definitions of indigenous and non-indigenous heritage are inconsistent. This same situation applies to the heritage significance assessment criteria used at Commonwealth, State and Territory level.¹⁹⁶ The scale of penalties for offences are highly variable and often inconsistent with broader criminal legislation, leading one member of the Victorian Parliament to note it would be preferable to be convicted under the *Crimes Act* 1958 (Vic) for removing an object from an archaeological site without permission, as the penalties under the *Heritage Act* were considerably more severe, although non-criminal in nature.¹⁹⁷ Circumstances where such issues have been tested by the courts are minimal, but there are however numerous examples of, generally small, changes to the various archaeological protections through amendment. Given this lack of judicial testing, it is difficult to know with any certainty whether the laws are truly acting as an effective moral force. It remains possible legislation is merely under-enforced, with verification of compliance difficult or that government heritage agencies have chosen to seek negotiated outcomes rather than to institute legal proceedings. Chapter 8 contains analysis of that case law which does exist, and examines the courts' consideration of the value of archaeological heritage and the protections within the legislation. Despite the lack of substantial case law, the legislation can still be said to be performing a function, but to what end? Is that legislation still acting, as Carmen suggested, as a relevant symbol of the societal value of archaeological heritage? And, as a symbol, is the legislation still relevant to the public of the twenty-first century, as opposed to the public of the 1960s and 1970s, when much of the legislation was established?¹⁹⁸ If archaeological heritage law does in fact primarily act as a symbol of the importance of archaeology, as Carman asserts, why, at a deeper level, should the wider society of non-archaeologists consider this practice important?

Archaeological theorist Ken Dark cautions that the public perceptions of the purpose of archaeology may not coincide with the motivations of archaeologists. However, the views of archaeologists can influence those of the public, thus a professional position that archaeology is scientific endeavour which can "prove" the past will colour this public perspective.¹⁹⁹ Significantly then, it is arguable that those laypeople involved in the creation of archaeological regulation (that is, the lawyers and legislators) were steeped in this "scientific" perspective. This perspective would then imply that, if the archaeological remains of the past were not protected, there would be an inevitable loss of scientific data, which would prevent archaeology from

¹⁹⁶ James, P. C. and J. Mora (1996). *Australian Mosaic: A handbook for the conservation of the National Estate*. Cairns, Mukkamanna Holdings. Pp 61-66.

¹⁹⁷ Parliament of Victoria (2003). Hansard. Speech by the Hon. R. Dalla-Riva, Member for East Yarra, debating the *Heritage (Amendment) Bill* (Vic) 2003. 14 October 2003, Pg 756. It should be noted the member strongly opposed the bill due to the large proposed increases in penalties and the proposal to allow inspectors under the *Heritage Act* 1995 (Vic) to enter property for the purposes of inspection.

¹⁹⁸ Note that some new heritage legislation has been established in recent years, such as the ACT *Heritage Act* (2004), although most legislation has its roots in this earlier period.

¹⁹⁹ Dark, K. R. (1995). *Theoretical archaeology*. London, Duckworth. Pp 30-32.

“proving” new “truths” about the past. Kohl, while suspicious of the positivist, infallible view of archaeological science, is more cautious about endorsing a multivocal interpretation of the archaeological record, feeling that too many perspectives may lead to a failure to grapple with significant issues thrown up by the archaeological record.²⁰⁰ Jones advocates a position which embraces the methodological rigour of scientific archaeology, while using an interpretive theoretical framework, which can account for factors outside of the “facts” of the archaeological record.²⁰¹ In terms of a legal heritage management framework, the challenge becomes to create an opportunity where study or use of the archaeological record can recognise a range of interests and questions, without necessarily privileging one perspective, as has happened with the legal privileging of the “scientific” paradigm in Australian archaeological heritage law. But even so, heritage legislation cannot guarantee absolute protection or correct interpretation of the archaeological past.

2.12 The public value of Australian archaeology

The Australian archaeological tradition has tended to privilege technical, professional significance for archaeological heritage over other values.²⁰² Implicit in the practice of archaeology is a belief that a better understanding of the past assists our understanding of our place in the present and future. Yet even this can be the source of tensions between the heritage professional and the community, particularly with indigenous communities,²⁰³ due to values for the archaeological heritage. Renfrew put the position that archaeology “permits the reconstruction of the past of humankind” through the study of the information and context of materials in the archaeological record.²⁰⁴ He calls for “strong laws” to protect the archaeological record, but does not elaborate on how those laws should function.²⁰⁵ Significantly, however, he does express a view that “archaeology is no longer simply an interesting and perhaps romantic academic discipline. It is now an area of considerable public concern.”²⁰⁶ This sentiment is echoed by Hodder,²⁰⁷ amongst others.²⁰⁸ Dobb noted that a focus on protecting the rights of a small group, at the expense of the wider community, is rarely viewed with great acceptance; rather, a balance of interests must be sought.²⁰⁹ As a public concern, there must be a

²⁰⁰ Kohl, P. L. (1993). Limits to a post-processual archaeology (or, the dangers of a new scholasticism). *Archaeological theory - who sets the agenda?* N. Yoffee and A. Sherratt. Cambridge, Cambridge University Press: 13-19. Pp 15-16

²⁰¹ Jones, A. (2002). *Archaeological theory and scientific practice*. Cambridge, Cambridge University Press. Pp 22-26

²⁰² Greer, S., R. Harrison, et al. (2002). "Community-based archaeology in Australia." *World Archaeology* 34 (2): 265-287. Pg 280.

²⁰³ Ibid. Pg 266.

²⁰⁴ Renfrew, C. (2000). *Loot, legitimacy, and ownership: the ethical crisis in archaeology*. London, Duckworth. Pg 18

²⁰⁵ Ibid. Pg 16

²⁰⁶ Cookson, N. A. (2000). *Archaeological heritage law*. Chichester, Barry Rose Law Publishers. Introduction by Colin Renfrew, p ix. Emphasis in the original.

²⁰⁷ Hodder, I. (1999). *The Archaeological Process: An Introduction*. Oxford, Blackwell Publishers. p 17

²⁰⁸ Kennedy, R. G. (2002). Introduction: The Value of Archaeology. *Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: xiii-xv. ; Little, B. J. (2002). Archaeology as a Shared Vision. *Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: 3-19. ; Goddard, T. (2002). Potsherds and Politics. *Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: 208-218.

²⁰⁹ Dobb, R. (1995). Legislation for Aboriginal places of significance. *Cultural conservation: towards a national approach*. S. Sullivan. Canberra, Australian Government Publishing Service. 9: 39-43. Pp 40-41.

reconciliation between the concerns of the discipline of archaeology and the concerns of the public, which is reflected in heritage protection legislation.

Murray noted that one of the key values of archaeology was as a tool for non-archaeologists to discover aspects of their pasts which would otherwise have gone unrevealed. He particularly notes the manner in which archaeology has helped Aboriginal people discover their past.²¹⁰ This position is somewhat problematic, as it assumes that whatever aspects of the Aboriginal past Murray was referring to were either lost or unknown to Aboriginal people. At one level, this harks back to earlier conceptions of archaeology which assumed Aboriginal people were unknowing about themselves. At the same time it must be acknowledged that archaeological knowledge has been of practical value to Aboriginal people in certain circumstances, particularly around issues such as land rights,²¹¹ through demonstrating an ongoing connection to lands through archaeological investigation. This highlights some of the problems with multivocality which Kohl alludes to, however there should be sufficient space within the archaeological record to accommodate such views. The constraints on this space come particularly from the legislative frameworks which define what is archaeological and limit the ability to consider the non-scientific values of archaeological heritage.

Connah laments that fundamental archaeological research is being neglected in Australia, due to the prevalence of what he terms “commercial archaeology”. He considers that archaeology’s main value is that “[it] can offer something history cannot: it can extract unique information from physical evidence, provided it asks archaeological questions...and uses appropriate processes”²¹² and does not acknowledge it as a broad public concern. Implicit in his argument is a suggestion that “commercial archaeology”, which is driven by the need for legislative compliance, is distracting archaeologists from archaeological research, which should be the main concern of the discipline. Much earlier in his career, Connah had critically observed that, from a public perspective, archaeology equals excavation,²¹³ and this public perception would certainly influence the way in which the public *expects* Australian governments to protect archaeological heritage through legislation. In a related article, Connah expresses the view that “archaeology [is] basically a scholarly discipline”. And while he recognises the support the “tax-paying public” indirectly provides to archaeology and therefore a need to provide archaeological information to the public, he views archaeology’s proper place as being situated in Australian universities, with a research focus.²¹⁴ Universities are no longer however solely about research and are more and more in a position of participating in or actively pursuing commercially focussed projects with teaching and public education roles, including

²¹⁰ Murray, T. (1993). Communication and the importance of disciplinary communities: who owns the past? *Archaeological theory - who sets the agenda?* N. Yoffee and A. Sherratt. Cambridge, Cambridge University Press: 105-116.

²¹¹ Sheehan, J. (2000). "Linking cultural heritage and native title." *Land Rights Queensland* June 2000: 12.

²¹² Connah, G. (2003). "Problem orientation in Australian historical archaeology." *Historical Archaeology* 37 (1): 146-158.

²¹³ Connah, G. (1997). "The purpose of archaeology." *Australian Archaeology* 45: 48-53. This is the republished text of a lecture originally delivered on 13 October 1986, on the opening of the University of New England's archaeology program.

²¹⁴ Connah, G. (1998). "Pattern and purpose in historical archaeology." *Australasian Historical Archaeology* 16: 3-7. Pg 4

archaeological projects. Kennedy views the unwillingness amongst some archaeologists to engage with the public as problematic, and notes that public engagement will be essential for the long-term future of the archaeological discipline and the protection of the physical remains of the past.²¹⁵

Mackay and Karskens explicitly refuted Connah's position and felt that the consulting aspects of (historical) archaeological practice were both delivering value to the public and building links with academia.²¹⁶ They cite, at some length, the "public" aspects of a large archaeological project in Sydney's Rocks area, which included public tours, volunteer community excavators, publications, film and print media and an education kit. This was however in the context of a project which was not compliance-driven, but rather based on the desire of a public authority with a cultural heritage management responsibility to exploit one of its archaeological sites to produce exactly this type of public engagement.²¹⁷ Yet it has taken ten years from the time the excavation works were completed to develop a proposed use for the site, which will interpret its archaeological values within a new development.²¹⁸ Mackay and Karskens' response to Connah's argument is somewhat glib, as their tone implies that the public should be pleased to receive whatever consulting archaeology may choose to offer, with no consideration of public input or lasting community benefit. The public may be entertained, amused or enlightened by the types of public interactions Mackay and Karskens describe, but are these interactions in fact relevant when dealing with a largely self-selected group of "interested" members of the public? This is a particularly important consideration when dealing with a typical compliance-driven archaeological project, such as one undertaken in advance of a commercial redevelopment, rather than a specifically-conceived "public archaeology" project such as Mackay and Karskens describe.

As cited briefly in Chapter 1, others Australian authors have explicitly focussed on the "social value" of archaeology and heritage²¹⁹ and there is a well-established field of "public archaeology". Mackay and Karskens describe consulting archaeology as a "conduit between academia and the community."²²⁰ It remains unclear what elements of the community or the public may be on the receiving end of this conduit. As Carman noted, while archaeological heritage management may be based on a notion that the past belongs to everyone, not everyone is interested in its preservation.²²¹ The community is, by its nature, a construct of diverse parts, thus the challenge in

²¹⁵ Kennedy, R. G. (2002). Introduction: The Value of Archaeology. *Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: xiii-xv.

²¹⁶ Mackay, R. and G. Karskens (1999). "Historical archaeology in Australia: historical or hysterical? Crisis or creative awakening?" *Australasian Historical Archaeology* 17: 110-115.

²¹⁷ The Cumberland/Gloucester Streets archaeological excavations were carried out between 1993 and 1994 by consultants on behalf of the Sydney Cove Authority, the public authority responsible for managing Sydney's historic Rocks district. Godden Mackay Pty Ltd and G. Karskens (1999). *The Cumberland/Gloucester Streets site, The Rocks, archaeological investigation report (4 volumes)*. Sydney, Sydney Cove Authority.

²¹⁸ Norrie, J. (2006). Hostel plan wins tender for dig site at The Rocks. *Sydney Morning Herald*. Sydney.

²¹⁹ E.g. Allen, J. (1987). The politics of the past: an inaugural address to the La Trobe University School of Archaeology. Melbourne, La Trobe University: 1-14. , Byrne, D., H. Brayshaw, et al. (2001). Social Significance: A discussion paper. Hurstville, NSW National Parks and Wildlife Service: 161.

Greer, S., R. Harrison, et al. (2002). "Community-based archaeology in Australia." *World Archaeology* 34 (2): 265-287.

²²⁰ Mackay, R. and G. Karskens (1999). "Historical archaeology in Australia: historical or hysterical? Crisis or creative awakening?" *Australasian Historical Archaeology* 17: 110-115. Pg 112.

²²¹ Carman, J. (2002). *Archaeology and heritage : an introduction*. London ; New York, Continuum. Pp 108-111.

any publicly focussed archaeological project is to make findings relevant beyond self-selected interested persons. Lilley sees that archaeologists have an ethical duty to clearly communicate their goals and findings, but see those messages as tailored to specific audiences, rather than striving for a general public engagement.²²² The public value of archaeological heritage has also been noted by lawmakers.²²³ During the Parliamentary debates on the Tasmanian *Historic Cultural Heritage Bill* in 1995, for example, one parliamentarian noted that while heritage (in a general sense) has educative value and therefore should be protected, its greater value was how “[people’s] association with the built heritage and the experiences that have informed them over their lifetimes have built this sense of place and this sense of self-worth...”²²⁴ For this reason, heritage protection legislation was viewed as something critical to the maintenance of the identity of the Tasmanian people into the future.

Ireland has explored in depth the notion of archaeology as a tool for the construction of national identity.²²⁵ To building on what Carman said, this further emphasises the symbolic value of archaeology, just as the listing of a place on a heritage register may be as much a protective as a symbolic act. Marsh noted that archaeological collections provide symbols which assist in the search for identity, while recognising that most archaeological work adopted a “utilitarian” approach to the collections, seeking only to extract meaning from the collection with respect to the specific site from which it was excavated.²²⁶ Trigger, however, notes that archaeology has traditionally been a middle-class pursuit, bringing with it the potential biases and preconceptions which stem from this middle-class basis.²²⁷ These will influence the nature of the identity being developed, as well as influencing the nature of legislation enacted to protect archaeological heritage. Baran and Rowan see globalisation and increased affluence as causing the commodification of archaeological heritage, one which can create a tension between the interpretation of that heritage to support local/regional/national identities and those seeking to experience a “common human heritage” through tourism.²²⁸ When undertaken within a public context, either when legislatively mandated or for explicit presentation to the public, archaeological work should strive to serve public purposes and deliver broad benefits to the community. These

²²² Lilley, I. (2005). Archaeology and the politics of change in a decolonizing Australia. Object lessons: archaeology & heritage in Australia. J. Lydon and T. Ireland. Melbourne, Australian Scholarly Publishing: 89-106.

²²³ For example see remarks by the Hon. B. N. Atkinson, Member for Koonung, during debates on the Heritage (Amendment) Bill 2003. Parliament of Victoria (2003). Hansard. 14 October 2003.

²²⁴ Parliament of Tasmania (1995). Parliamentary Debates (Hansard), House of Assembly, Forty-Second Parliament - Fourth Session. Speech by Ms Putt (Member for Denison), 26 September 1995, Pg 3694.

²²⁵ Ireland, T. (1996). Excavating national identity. Sites: nailing the debate: archaeology and interpretation in museums. C. Paine. Sydney, Historic Houses Trust of NSW: 85-106. , Ireland, T. (2001). An Artefact of Nation: Historical archaeology, heritage and nationalism in Australia. Prehistoric and Historical Archaeology. Sydney, University of Sydney: 346. , Ireland, T. (2002). "Giving value to the Australian historic past: historical archaeology, heritage and nationalism." Australasian Historical Archaeology 20: 15-25.

See Howard for a more general discussion on the value of heritage in the construction of identity: Howard, P. (2003). Heritage: Management, interpretation, identity. London, Continuum. Pp 147-185.

²²⁶ Marsh, G. S. (1984). Relics, artefacts or working models? Conservation alternatives in historical archaeology. Historical archaeology and conservation philosophy. Papers from the Historical Archaeology Session of the ANZAAS Conference, Sydney 1982. M. Pearson and H. Temple. Sydney, Heritage Council of NSW: 74-81. Pg 74

²²⁷ Trigger, B. (1989). A History of Archaeological Thought. Cambridge, Cambridge University Press. Pp 14-15

²²⁸ Baran, U. and Y. Rowan (2004). Archaeology after nationalism: globalisation and the consumption of the past. Marketing Heritage: archaeology and the consumption of the past. U. Baran and Y. Rowan. Walnut Creek, CA, AltaMira Press: 3-23.

may be symbolic, educative or economic in nature, and will be driven by both the nature of the site and the needs and aspirations of the community. What those purposes may be will need to be determined through a process of involvement with the community.

2.13 Conclusion

It remains open as to whether a legislative approach has achieved appropriate protection of Australian archaeological heritage. To generalise Carman's point noted above, legislation symbolises the importance of something to society. That thing may be a class of object (archaeological sites or protected species), a cultural value (racial or gender equality) or a common law principle (the right to own property).²²⁹ Where laws exist to protect such things on paper, each thing is noted as having a value to society. In the instance of archaeological heritage law, the laws also symbolise Australia's commitment to international initiatives to protect cultural heritage more generally, as the domestic laws support Australia's obligations under international agreements. In the absence of these laws, it is unlikely that moral force alone would prevent transgressions (deliberate or accidental) against the archaeological heritage. In fact, in the absence of legislation, the situation may be that archaeological heritage would be specifically viewed as not being valued, and thereby be potentially more subject to threat. In the absence of legislation, it is likely that the path of least resistance or least economic cost would be sought, which may be in opposition to societal values. Archaeological heritage legislation therefore serves a useful purpose, as it reinforces society's value for the physical remains of its past and ensures that past is protected.

However, having entered into the legislative realm, archaeological heritage is no longer the concern solely of archaeologists, and therefore needs to be relevant to a wider set of values. By explicitly considering wider values, it is possible for archaeological heritage management frameworks to overcome some of this legislative solipsism. Chapter 3 examines how other considerations are being brought into the realm of environmental conservation, through the use of the sustainability principles. Developing a wider frame of reference, which takes into consideration environmental, social and economic factors ensures that heritage conservation is not merely measured against itself, but in relation to other things which are valued by the community. This may sit uneasily with traditional approaches to heritage conservation, particularly those which place the highest value on the conservation of the fabric of places, over the conservation of other values. But to what end is that past protected? Does the legal protection of the past serve the 'public good'? Chapter 3 situates Australian heritage protection more broadly within the area of environmental protection and examines how the concept of 'public good conservation' can be used to protect archaeological heritage.

²²⁹ The Productivity Commission recommendations are, for example, founded in a view on the primacy of private property rights, as opposed to the broader public value of heritage conservation. Productivity Commission (2006). Conservation of Australia's historic heritage places - final report. Melbourne, Australian Government.

Chapter 3—Establishing a basis for ‘public good conservation’

Chapter 2 examined the underlying paradigm for the legal protection of archaeological heritage in Australia, a paradigm primarily bedded in a processual, scientific view of the value of archaeological heritage. That chapter introduced ‘public good conservation’, an emerging view within environmental conservation and law, as an alternate basis for archaeological heritage protection. Using environmental philosophy as a tool, Chapter 3 analyses the underlying social and moral duties which exist in relation to environmental protection generally and examines how those positions may be extended to archaeological heritage protection. The thesis then considers how these positions within environmental moral philosophy may be transferred into protective legislation for the environment and archaeological heritage. By forming philosophical links between environmental conservation and archaeological heritage conservation, it is possible to demonstrate the applicability of the ‘public good conservation’ concept to archaeological heritage protection. Having established archaeology as an environmental issue for the purposes of legal analysis, this chapter applies emerging legal and policy tools for environmental conservation and the transmission of environmental benefit to the public to the area of archaeological conservation. Such concepts provide a useful method for managing archaeological heritage within a ‘public good’ environmental context. This model is of assistance given the very limited jurisprudence regarding heritage and archaeological matters in Australia.¹

Following on from that discussion, the Chapter turns to an analysis of the concept of ‘heritage significance’ with respect to Australian archaeological heritage, and draws conclusions about the value and utility of existing significance frameworks and their relationship to heritage legislation. Significance frameworks underlie heritage legislation, forming the criteria which are designed to put a degree of objective rigour and transparency of process behind the identification and classification of a place or object as having heritage value. The classification of a heritage place within a significance framework will largely determine what, if any, legal protection will be assigned. Good in theory, the practical application is often not altogether rigorous and the frameworks remain, perhaps inevitably, subjective. This thesis contends that these significance frameworks, as with the legislation, prioritise the concept of the ‘research’ or ‘scientific’ significance of archaeological heritage over other values, yet at the same time fail to effectively underpin the legal frameworks in such a way that this research value can be realised. Current legislation and significance frameworks do not generally reflect more recent evolutions in archaeological thought, which has largely moved beyond the centrality of the scientific paradigm. This has led to a focus on the legal or compliance process rather than the outcomes of the protective legislation. The analysis then moves to a discussion of broadening the conception of the significance of archaeological heritage, to consider its place in and contribution to broader public interests. The chapter concludes with an argument in favour of ‘public good conservation’ as the appropriate

¹ For a detailed discussion of what limited Australian case law exists for archaeological matters, see Chapter 8 of this thesis.

basis for contemporary archaeological heritage management and sets the stage for the reconsideration of the existing Australian legal frameworks.

3.1 What is the 'public good' as a basis for conservation?

The notion of the 'public good' is a generalised moral concept which holds that an activity which is in the 'public good'² must have a broad positive reach beyond a localised outcome, which flows directly or indirectly to wider society over a long period of time. This activity may be undertaken by government, private sector groups or individuals. The benefits should flow to the community generally, rather than principally to an individual, group, business or government. It should account for both the present needs of society, as well as the potential needs of future generations and seeks the "harmonization of the public and private spheres".³ As an environmental conservation philosophy, conservation "in the public good" should present environmental conservation as relevant and useful to society broadly and facilitate culture change favouring conservation through embedding this philosophy within social norms. Protection of environmental values is likely to require collective action with the support of an institution such as a government agency. In this circumstance, one of the contributions government can make is the establishment of appropriate regulation.⁴ 'Public good conservation' is not, however, conservation for its own sake, where the beneficiary is principally the environment itself, and human implications of lesser, or no, consideration. Many activities have been described as public good activities, including pro bono legal services⁵, public services and utilities,⁶ public health programs⁷, biodiversity conservation⁸ and scientific research.⁹ Indeed, archaeological

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- ² Here the term 'public good' is used as an expression of positive moral force which supports community well-being, as opposed to the economic definition of a 'public good', which is a physical good (i.e. thing or service) which is universally available, provided without profit and unable to be readily restricted. For a range of economic definitions of 'public good' see for example:
 Definition of public good (collective goods) at Special Investor.com Financial Dictionary: <http://www.specialinvestor.com/terms/2658.html> (accessed 25/10/05);
 Entry for Public Good at Wikipedia: http://en.wikipedia.org/wiki/Public_good (accessed 25/10/05);
 Discussion of Public Goods and Externalities at the Concise Encyclopaedia of Economics: <http://www.econlib.org/library/Enc/PublicGoodsandExternalities.html> (accessed 25/10/05).
 See also Ver Eecke, W. (1999). "Public goods: an ideal concept. ." *The Journal of Socio-Economics* 28 (2): 139-156. Ver Eecke conceives of a 'public good' as something which allows, in economic terms, the realisation of a collective gain. For environmental and heritage conservation examples of this sense of a 'public good', see Bennett, J. (1995). "Protecting nature - privately." *Policy*: 11-15. and Kling, R. W., C. F. Revier, et al. (2004). "Estimating the Public Good Value of Preserving a Local Historic Landmark: The Role of Non-substitutability and Citizen Information." *Urban Studies* 41 (10): 2025-2041. Bennett discusses environmental 'public goods' in terms of the economics of private sector nature conservation while Kling et al. apply economic modelling to determine what the financial costs and values are in the conservation of a 'public good' in the form of a heritage building.
- ³ Grange, J. (1996). "The disappearance of the public good: Confucius, Dewey, Rorty." *Philosophy East and West* 46 (3): 351-366.
- ⁴ Blamey, R. (1998). "The activation of environmental norms: extending Schwartz's model." *Environment and Behavior* 30 (5): 676-708. While here Blamey is using "public good" in the economic sense he is discussing the factors which influence the public's choice in choosing to protect those "goods" as parts of the environment.
- ⁵ Pro bono is shorthand for "pro bono publico", Latin for "in the public good". See for example Di Cesare, E. and J. Pride (2000). Public good for goodness' sake. *Bulletin*: 24-25.
- ⁶ Anderson, J. and G. Renouf (2003). "Legal services 'for the public good'." *Alternative Law Journal* 28 (1): 13-17.
- ⁷ Hayward, D. (2002). "The public good and the public services." *Dissent* Autumn/Winter: 8-12. , Wilkenfeld, G. and P. Spearritt (2004). *Electrifying Sydney*. Sydney, EnergyAustralia. Pp 4.
- ⁸ Das, V. "Public good, ethics and everyday life: beyond the boundaries of bioethics." 99-133.
- ⁹ Ishwaran, N. (2004). "International conservation diplomacy and the World Heritage Convention." *Journal of International Wildlife Law & Policy* 7 (1-2): 43-56. Pp 55-56.
- ⁹ Dalrymple, D. G. (2005). "Scientific knowledge as a public good." *The Scientist* (June 20 2005): 10.

heritage management has itself has been described as a 'public good'.¹⁰ One moral philosopher has characterised the 'public good' as simply "acting consistently for the sake of the people"¹¹ while another has noted that there is no unitary public good and concepts of what is in the public good will change as society changes.¹²

'Public good conservation' is related to the notion of the 'public trust' as espoused by Bonyhady, which holds that actions affecting public resources—air, water, land, for example—should be done within a context of stewardship and sustainability,¹³ rather than in an exploitative manner for short-term or one-off gain. Bates notes that this concept is quite ancient and is expressed in modern form through the principle of right of public access to places like foreshore lands or the establishment of parks and reserves, although the concept is not universally embedded in Australian law at present.¹⁴ Knetsch observed that pollution control legislation, for example, while an imposition upon the rights of the polluter, is generally perceived by the public as "fair",¹⁵ as a 'public good' activity which benefits the community rather than a select group,¹⁶ through protecting public and environmental health and promoting responsibility for polluting actions. Similarly, Blamey cautions that this perception as to whether environmental regulation is "fair" in the eyes of the public can be strongly influenced by the credibility of the scientists or scientific institution advocating for the issue.¹⁷ Thus while it can be argued by specialists (e.g. environmental scientists or archaeologists) that an aspect of environmental protection is "in the public good" this does not necessarily guarantee recognition or support by the public. As Blamey put it "notions of fairness and responsibility thus need to be balanced against freedom from coercion" when the public is assessing its participation in environmental protection initiatives.¹⁸ Environmental protection and, this thesis argues, heritage protection, fall within the realm of 'public good' concepts, which need to be appropriately underpinned through legislation and public support.

'Public good' is a distinct concept from 'public benefit', which is a more specific form of public good, focussed on a specific observable public outcome stemming from a particular action, but which may have no long-term or far-reaching positive moral consequences.¹⁹ The majority of projects referred to as "public archaeology" projects would classify as public benefit

¹⁰ Fowler, D. D. (1984). Ethics in contract archaeology. *Ethics and Values in Archaeology*. E. L. Green. New York, The Free Press: 108-116. Although Carmen has challenged this assertion. See: Carman, J. (2002). *Archaeology and heritage: an introduction*. London ; New York, Continuum. Pp 96-100.

¹¹ Grange, J. (1996). "The disappearance of the public good: Confucius, Dewey, Rorty." *Philosophy East and West* 46 (3): 351-366.

¹² Kingwell (1999). "Mirror stage: infinite reflections on the public good." *Queen's Quarterly* 106 (1): 50-61.

¹³ Bonyhady, T. (1995). "A useable past: the public trust doctrine in Australia." *Environmental and Planning Law Journal* 12: 329. In the economic sense, air, water and land can all be classed as public goods as per the definitions at Note 2, above.

¹⁴ Bates, G. M. (2002). *Environmental law in Australia*. Sydney, LexisNexis Butterworths. Pp 23-24

¹⁵ Knetsch, J. L. (1990). Property and environmental values. *Property rights and environment protection*. B. Boer and D. James, Environment Institute of Australia, Inc.: 1-15. Pp 11-12.

¹⁶ Boer, B. (1990). Some legal and ethical issues. *Property rights and environment protection*. B. Boer and D. James, Environment Institute of Australia, Inc.: 43-56. Pp 52.

¹⁷ Blamey, R. (1998). "The activation of environmental norms: extending Schwartz's model." *Environment and Behavior* 30 (5): 676-708.

¹⁸ *Ibid.*

¹⁹ For a general discussion of varying perceptions of 'public benefit' archaeology, see Little, B. J., Ed. (2002). *Public Benefits of Archaeology*. Gainesville, University Press of Florida.

projects, as they produce a locally focussed, ostensibly positive, public outcome, including on-site tours, educative material and publicly-oriented publications.²⁰ By their very nature these projects tend to be limited in duration and scope, due to financial or other pressures.²¹ However in the absence of a wider impact, they would not classify as works embodying the 'public good conservation' principle. The distinctions between these two concepts are not necessarily readily apparent: Boer observed, for example, that the Victorian courts had considered that the purpose of the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972* was to preserve relics for the "public benefit"²² but in this context perhaps this can be taken to mean preserved for the public good, as something which envisaged long-term, permanent conservation efforts rather than short-term archaeological projects. Archaeological projects with a 'public benefit' focus may lead in time to a general force for long-term 'public good' conservation outcomes, as a part of the process of culture change. But one-off public efforts which are not part of a wider 'public good' framework are liable to become lost or forgotten over time or in the press of other initiatives. If archaeological heritage conservation is to act as a form of 'public good conservation' it needs to be supported by appropriate protective legislation.

3.2 Public perceptions and the urge to protect

The step of legislating to protect archaeological heritage has taken place at different times in different societies²³ and, until the establishment of international heritage treaties²⁴ was largely an internal domestic matter. It was up to the individual society to determine when it was appropriate or necessary to legislate to protect its heritage, a readiness which may have stemmed from practical necessity or moral evolution. But judging the level of social concern for such an issue is difficult. The Society for American Archaeology in the United States undertook a telephone survey into the public's attitudes towards archaeology.²⁵ This survey indicated a broad public support and value for archaeological heritage, including the need for legislation.²⁶ No such study has been undertaken in Australia.²⁷ If heritage conservation were not relevant

²⁰ Mackay, R. (2003). Whose archaeology is it, anyway? *Exploring the modern city*. T. Murray. Sydney, Historic Houses Trust of NSW and La Trobe University: 169-173.

²¹ Colley, S. (1996). "Caught in the web: Cultural policy, cultural places and Australian archaeology." *Culture and Policy* 7 (2): 141-154. Pp 149-150.

²² Boer, B. (1985). "Aboriginal heritage in Victoria." *Environmental and Planning Law Journal* 2: 94-97. Pg 94. Boer was commenting on the case of *Walker v. Shire of Flinders and Ors* ([1984] V.R. 409).

²³ See, for example Carman, J. (2002). *Archaeology and heritage : an introduction*. London ; New York, Continuum. Pp 73-76.

Carman, J. (1996). *Valuing ancient things : archaeology and law*. New York, Leicester University Press. Pp 97-102.

Pugh-Smith, J., J. Samuels, et al. (1996). *Archaeology in law*. London, Sweet & Maxwell. Pp 3-7.

These three references principally chart the development of United Kingdom legislation. For a more comprehensive, if dated, outline of archaeological legislation internationally, see O'Keefe, P. J. and L. V. Prot (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. Pp 31-70.

²⁴ Discussed in Chapter 4.

²⁵ Pokotylo, D. and N. Guppy (1999). "Public opinion and archaeological heritage: views from outside the profession." *American Antiquity* 64 (3): 400-16.

²⁶ Ramos, M and D. Duganne (2000) *Exploring Public Perceptions and Attitudes about Archaeology* cited in Little, B. J. (2002). *Archaeology as a Shared Vision. Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: 3-19. Pg 4.

²⁷ But see Balme, J. and M. Wilson (2004). "Perceptions of archaeology in Australia amongst educated young Australians." *Australian Archaeology* 58: 19-24. Balme and Wilson's survey was restricted to a relatively small sample of university students and this thus not directly comparable with the Society for American Archaeology

it would be reasonable to expect social indifference to legislative protection. Analysis of the survey²⁸ suggests that American society is prepared to place upon themselves what Boer described as an additional “moral duty” to protect an aspect of the environment.²⁹ The existence of protective legislation alone should not itself be seen as a ‘public good’, given the potential for poorly framed, mis-used or mal-administered legislation to cause harm. Knetsch suggests that, regardless of how “right” a piece of environmental regulation may be in a technical sense, it is unlikely to be publicly supported if perceived to be unfair,³⁰ in that it unreasonably disadvantages one or more parties. This holds true for heritage protection as for any other environmental issue.³¹ Despite forthright statements from authors such as Lowenthal, who asserted “that heritage must be a general good is now a general faith”,³² protective legislation must be appropriately framed to ensure the conservation of the collective heritage is seen as both relevant and fair to the general populace. The legal processes surrounding archaeological heritage protection therefore need to be established carefully and with sufficient transparency to allow the general public to understand the process and assumptions upon which decisions are based.³³

Many other societal values—property rights, criminal codes, human rights—have been enshrined in legislation before thought was given to protecting cultural heritage. Environmental and heritage conservation are not as fundamentally embedded in common law principles and cannot automatically be assumed to be part of the general legal principles to which a society subscribes.³⁴ It requires societal recognition of a common cultural property, which it is in the common interest to value and protect.³⁵ One West Australian Parliamentarian observed during debate on the *Heritage of Western Australia Bill* 1990 that “...we, as responsible members of society, all have a responsibility to contribute to its betterment”, referring not only to the societal advantages of conserving heritage, but of participating in the general “betterment” of society, without the need for compensation.³⁶ However, this

survey. See also Lilley, I. (2005). Archaeology and the politics of change in a decolonizing Australia. Object lessons: archaeology & heritage in Australia. J. Lydon and T. Ireland. Melbourne, Australian Scholarly Publishing: 89-106. The Heritage Chairs and Officials of Australia and New Zealand have recently commissioned some research into public attitudes towards heritage generally: Allen Consulting Group (2005). Valuing the Priceless: The Value of Historic Heritage in Australia (Research Report 2). Sydney, Heritage Chairs and Officials of Australia and New Zealand.

²⁸ Little, B. J. (2002). Archaeology as a Shared Vision. Public Benefit of Archaeology. B. J. Little. Gainesville, University Press of Florida: 3-19. Pg 10.

²⁹ Boer, B. (1990). Some legal and ethical issues. Property rights and environment protection. B. Boer and D. James, Environment Institute of Australia, Inc.: 43-56. Pg 49.

³⁰ Knetsch, J. L. (1990). Property and environmental values. Property rights and environment protection. B. Boer and D. James, Environment Institute of Australia, Inc.: 1-15. Pp 11-12.

³¹ See for example the comments of the Commonwealth Government Productivity Commission on the fairness of economic impacts on owners of heritage properties. Productivity Commission (2006). Conservation of Australia's historic heritage places - final report. Melbourne, Australian Government.

³² Lowenthal, D. (1998). The heritage crusade and the spoils of history. Cambridge, Cambridge University Press. Pg 67.

³³ Deeben, J. (1999). "Proposals for a practical system of significance evaluation in archaeological heritage management." European Journal of Archaeology 2 (2). Pg 178.

³⁴ Stone, C. (1987). Earth and other ethics: the case for moral pluralism. New York, Harper & Row. Pp 73-75.

³⁵ Boer, B. (1990). Some legal and ethical issues. Property rights and environment protection. B. Boer and D. James, Environment Institute of Australia, Inc.: 43-56. Pg 43.

³⁶ Parliament of Western Australia (1990). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Thirty-Third Parliament Second Session. Speech by Mr McGinty (Member for Fremantle) 23 August 1990, Pg 4119. Similar points raised again, including a reference to heritage legislation being for the “collective good” on 28 August 1990, Pg 4289. For a stark contrast, consider a recent op ed piece in the *Sydney Morning*

view was not universally held during the debates, with another member of Parliament contending that heritage legislation “compelled [a person] to become a philanthropist...”,³⁷ a sentiment which has been echoed more recently.³⁸ Despite the naysayers, there is clear legislative intent for public participation in and benefit from heritage conservation. Cultural enrichment and public participation is part of the concept of the ‘public good’ and is inherent in the overarching concept of ‘heritage’, which enjoins people to understand, appreciate and celebrate their past, to provide insight into their present lives. Contingent with that is a clear message that the protection of the past is for general societal benefit, rather than for that of a small professional elite. Heritage legislation should therefore be reflective of this desire to see heritage protected for the public good.

While initial archaeological heritage legislation can be seen as primarily protecting the interests of archaeologists, properly framed and applied, legislation can have a broader application which can serve the public good. Poorly considered or administered legislation is more likely to undermine its intent through requirements which are widely perceived to be unfair, onerous, overly technical, inequitable or difficult to enforce.³⁹ Current legal regimes for archaeological heritage tend to provide for one-off public benefit situations rather than public good outcomes. Key amongst current legal limitations is a lack of mechanisms to consider a range of factors beyond scientific value. This is particularly driven by the way in which the value of archaeological heritage has been framed in influential documents, such as the Hope Report and the Burra Charter, discussed later in this chapter. These documents, and their underlying conceptions, have been instrumental in the development of Australian heritage conservation philosophy and the legal protective responses.

3.3 The protective response in Australia

In Australia, post-Contact Australian society existed for more than 160 years before even rudimentary heritage protection legislation was introduced (in 1955 in the Northern Territory⁴⁰). Britain and the United States had introduced legislation in the nineteenth century, due to both lobbying by interested parties and a perceived need to protect aspects of the past.⁴¹ By contrast, Australia’s

Herald, drafted by a lawyer, who described heritage listing as “theft”. Anderson, A. (2005). Historical overkill as the urge to preserve leaves us with the same old story. *Sydney Morning Herald*. Sydney: 11.

³⁷ Parliament of Western Australia (1990). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Thirty-Third Parliament Second Session. Comments by Mr Weise (Member for Wagin) 28 August 1990, Pg 4275.

³⁸ Anderson, A. (2005). Historical overkill as the urge to preserve leaves us with the same old story. *Sydney Morning Herald*. Sydney: 11.

Productivity Commission (2006). *Conservation of Australia's historic heritage places - final report*. Melbourne, Australian Government. A range of public submissions to the Inquiry advanced the view that an individual's property rights should not in any way be encumbered by heritage restrictions, without financial compensation from one or more levels of government. Several of such submissions are extensively quoted by the Commission in its report, as the Commissioners evidently found the argument to be a compelling one.

³⁹ O’Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. Pp 109-110.

⁴⁰ *Native and Historic Objects Heritage Protection Ordinance* (1955) Northern Territory.

⁴¹ For an account of the development of the first US legislation, see McLaughlin, R. H. (1998). “The Antiquities Act of 1906: politics and the framing of an American anthropology & archaeology.” *Oklahoma City Law Review* 23 (1-2): 61-91. For an account of the development of early UK legislation see Pugh-Smith, J., J. Samuels, et al. (1996). *Archaeology in law*. London, Sweet & Maxwell. Pp 3-7; Hunter, J., I. Ralston, et al. (1993). The structure

first environmental regulation, designed to protect the early colony of Sydney's water supply and the public health, was passed in the 1790s, less than ten years after European settlement.⁴² Necessity, rather than morality or lobbying, was the key factor in obtaining a legislative response. Certainly the relatively late date for Australian heritage protection was due in part to the fact that there was no "Australian archaeology" as such until the latter half of the twentieth century.⁴³ As noted in Chapter 2, the agitation for protective legislation had started significantly before the first legislative response. By the same token, Australian indigenous societies already valued their own sites in ways which were not appreciated by wider society until comparatively recently, and had their own traditional methods of "protecting" those sites, based around cultural practices.⁴⁴

Carment noted that, until the 1970s, there was little strong interest in protecting archaeological or other types of heritage, and preservation was often through accident rather than by design.⁴⁵ During that early period, Megaw observed it was easier to gain support in the form of government research funding for archaeological projects overseas than domestically.⁴⁶ At that time, Australian archaeology was still very much in its early stages of development, and had yet to develop to the point where archaeological conservation was perceived as a public issue. Lowenthal remarked that the rationale to preserve the past is often taken to be self-evident,⁴⁷ but Australian society had to reach a certain level of social and moral maturity and complexity before something as seemingly discretionary and abstract, as protecting the remains of the past became a viable consideration: "a hallmark of a community's maturity is its sense of history and its commitment to protect its cultural heritage" one Australian Parliamentarian remarked during Parliamentary debate regarding West Australian heritage legislation.⁴⁸ Yet even after thirty years of formalised heritage protection, there is still no definitive view as to which past and whose past should be protected. Boer and Wiffen indicate there is a broad conception within law as to what may be termed "heritage"⁴⁹ and commentators such as Little and Ireland have argued

of British archaeology. *Archaeological Resource Management in the UK: An Introduction*. J. Hunter and I. Ralston. Phoenix Mill, Alan Sutton: 30-43.

⁴² By 1795, at least two proclamations had been made by colonial Governors Phillip and Hunter to protect the Tank Stream, the water supply for the early colony of Sydney. This order forbade the dumping of waste into the Tank Stream as well as the grazing of stock or construction of buildings within 50 feet of either side of the watercourse. Beasley, M. (1988). *Sweat of their Brows: 100 years of the Sydney Water Board 1888-1988*. Sydney, Sydney Water Board. Pp 1-3; Kennedy, B. and B. Kennedy (1993). *Sydney Tunnels*. Kenthurst, NSW, Kangaroo Press. Pp 14-15.

⁴³ Although Mulvaney and Kamminga note that "antiquarian excavation" of Aboriginal sites dates to the period of Governor Phillip and the First Fleet. Mulvaney, D. J. and J. Kamminga (1999). *Prehistory of Australia*. St Leonards, N.S.W., Allen & Unwin. Pp 11-12. See also Griffiths, T. (1996). In search of Australian antiquity. *Prehistory to politics: John Mulvaney, the humanities and the public intellectual*. T. Bonyhady and T. Griffiths. Carlton South, Vic., Melbourne University Press: 42-62.

⁴⁴ Maddock, K. (1984). Aboriginal customary law. *Aborigines & the law*. P. Hanks and B. Keon-Cohen. Sydney, George Allen & Unwin: 212-237.

Howden, K. (2001). "Indigenous traditional knowledge and native title." *UNSW Law Journal* 24 (1): 60-84.

Sullivan, S. (2004). "Aboriginal sites and the Burra Charter." *Historic Environment* 18 (1): 37-39.

⁴⁵ Carment, D. (1991). Heritage legislation in the Territory. *Packaging the past? Public histories*. J. Rickard and P. Spearritt. Melbourne, Melbourne University Press: 70-77. Pg 70.

⁴⁶ Megaw, J. V. S. (1973). *Archaeology from Down Under - A Personal View. An inaugural lecture delivered in the University of Leicester 24 February 1973*. Leicester, Leicester University Press. Pg 6.

⁴⁷ Lowenthal, D. (1985). *The past is a foreign country*. Cambridge, Cambridge University Press. Pp 36-40.

⁴⁸ Parliament of Western Australia (1989). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Thirty-Third Parliament First Session. Second Reading Speech for the Heritage of Western Australia Bill. Speech by Mrs Beggs (Member for Whitford, Minister for Planning), 21 November 1989, Pg 4856.

⁴⁹ Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 7-8.

that there is no single, correct view in this regard.⁵⁰ Blake notes this broadness can cause difficulties in interpreting cultural heritage protective principles in a legal context.⁵¹

Australian governments, at all levels, have opted to take on additional obligations to protect evidence of the collective Australian past, in the belief that this is beneficial to Australian society. This decision grew out of the social changes and green zeitgeist of the 1960s and 1970s and what Lowenthal described as Australians developing “a positive sense of the past”.⁵² During the 1977 debates in New South Wales for the NSW *Heritage Act*, one parliamentarian noted that “matters affecting the environmental heritage vitally affect all citizens...and therefore should be treated as matters where public involvement and interest in decisions thereon should be encouraged and facilitated.”⁵³ More broadly, the concept of “common cultural property” has developed, with an implication of a wide societal mandate to see such property protected for the common good.⁵⁴ Blake notes the term ‘cultural property’ itself is problematic, due to what she terms the “underlying baggage” of legal concepts of property rights generally, which can be at odds with conservation objectives.⁵⁵ Nevertheless, “cultural property” carries with it a notion of a stewardship role for the present to ensure such common property is transmitted to the future.⁵⁶ The regulation to protect such cultural property must have a moral basis and function within wider society. These moral positions are discussed in the following sections.

3.4 Establishing a moral basis for the function of heritage law

Legislation is not established in a moral or social vacuum and it is possible to derive some understanding of that underlying moral position through legislative analysis. Establishing legislation to protect something (archaeology, threatened species, property rights, etc.) is a process of making a value judgement about what is important enough to protect.⁵⁷ Ethicist Charles L. Stevenson is of the view that value judgements, by their very nature, urge a wider acceptance of the point of view or value.⁵⁸ Thus the act of legislating to protect archaeological heritage draws archaeology into the public realm⁵⁹ and raises archaeology as a moral concern for society at large. It requires all members of society to, at some level, value that heritage, even if that process

⁵⁰ Little, B. J. (2002). Archaeology as a Shared Vision. Public Benefit of Archaeology. B. J. Little. Gainesville, University Press of Florida: 3-19. Pg 7; Ireland, T. (2002). "Giving value to the Australian historic past: historical archaeology, heritage and nationalism." Australasian Historical Archaeology 20: 15-25.

⁵¹ Blake, J. (2000). "On defining the cultural heritage." International and Comparative Law Quarterly 49 (1): 61-85. Pp 62-65

⁵² Lowenthal, D. (1976). Perceiving the Australian environment. Man and landscape in Australia: towards an ecological vision. G. Seddon and M. Davis. Canberra, Australian Government Publishing Service: 357-365. Pg 360

⁵³ Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Speech by Mr Haigh, Member for Maroubra, 16 November 1977. Pg 9793.

⁵⁴ Vernon, M. C. (1994). "Common Cultural Property: The Search for Rights of Protective Intervention." Case Western Reserve Journal of International Law 26: 435-479.

⁵⁵ Blake, J. (2000). "On defining the cultural heritage." International and Comparative Law Quarterly 49 (1): 61-85. Pp 65-66.

⁵⁶ Evans, M. (2000). Principles of Environmental & Heritage Law. St Leonards, Prospect Publishing.

⁵⁷ Carman, J. (1995). The importance of things: archaeology and the law. Managing Archaeology. Cooper. London, Routledge: 19-32.

⁵⁸ Stevenson, C. L. (1983). Value Judgements: Their implicit generality. Ethical Theory in the Last Quarter of the Twentieth Century. N. Bowie. Indianapolis, Hackett Publishing Company: 12-36. Pg 14

⁵⁹ Carman, J. (2002). Archaeology and heritage : an introduction. London ; New York, Continuum. Pp 101-102.

of valuing is principally to avoid sanctions or public shame at having contravened the law. This supports a utilitarian view of the function of law as set out by Hart,⁶⁰ that the law provides an opportunity for people to follow a particular moral path, but furthermore, obligates adherence to that path. The law can also act in part as a coercive mechanism to direct what has been judged to be socially-appropriate behaviour,⁶¹ in this case the protection of archaeological heritage. Heritage protective legislation requires all members of society to act to protect that heritage, or to be subject to the consequences of non-compliance, and to endeavour to develop outcomes which respect the values which are protected. James and Mora adopt such a position with respect to Australian heritage law, noting that its coercive power should not be the main reason for conservation of heritage, but should direct members of society along that moral path.⁶² Smith⁶³ and Knetsch⁶⁴ view legislation as useful in managing conflict and resolving competing claims of interest, providing a basis for discussion and negotiation of outcomes which might not have existed in the absence of legislation. Therefore a less coercive reading of the function of law in such circumstances indicates laws should encourage compliance with the moral code they espouse, without necessarily forcing or dictating particular actions.

Hart notes that the moral environment changes and evolves, containing multiple views, thus by implication the legislation that underpins a particular moral or ethical stance will evolve as society changes.⁶⁵ The establishment of the initial archaeological heritage protection regimes in Australia was based on the values and moral positions of those who lobbied for the legislation to be established, of which the early Australian archaeologist practitioners were a central force.⁶⁶ Thus heritage legislation represents the adoption of a particular “moral duty” by society, in addition to other moral duties already in existence.⁶⁷ In Hart’s view, laws function to enforce a central morality to prevent societal disintegration.⁶⁸ In the case of the body of law for heritage protection, it can also be viewed as an act designed to integrate a new value (heritage conservation) into society and in this regard, legislation has been generally successful. Thus the law can act as an agent of social change, however, as noted by Hart, such efforts will inevitably bear mixed results, due to the moral evolution of society.

⁶⁰ Hart, H. L. A. (1983). Social solidarity and the enforcement of morality. Ethics and Public Policy: an introduction to ethics (second edition). T. L. Beauchamp and T. P. Pinkard. Englewood Cliffs, Prentice-Hall: 62-75.

⁶¹ Knetsch, J. L. (1990). Property and environmental values. Property rights and environment protection. B. Boer and D. James, Environment Institute of Australia, Inc.: 1-15. Pg 1 .

⁶² James, P. C. and J. Mora (1996). Australian Mosaic: A handbook for the conservation of the National Estate. Cairns, Mukkamanna Holdings. Pp 15-16.

⁶³ Smith, L. (2004). Archaeological theory and the politics of cultural heritage. London, Routledge. Pp 76-78; 126-127.

⁶⁴ Knetsch, J. L. (1990). Property and environmental values. Property rights and environment protection. B. Boer and D. James, Environment Institute of Australia, Inc.: 1-15. Pg 1.

⁶⁵ Hart, H. L. A. (1983). Social solidarity and the enforcement of morality. Ethics and Public Policy: an introduction to ethics (second edition). T. L. Beauchamp and T. P. Pinkard. Englewood Cliffs, Prentice-Hall: 62-75.

⁶⁶ See discussion in Chapters 1 and 2. See also Crawford, I. (1975). "The Role of the Australian Archaeological Association." Australian Archaeology 2: 3-4. and Dobb, R. (1995). Legislation for Aboriginal places of significance. Cultural conservation: towards a national approach. S. Sullivan. Canberra, Australian Government Publishing Service. 9: 39-43.

⁶⁷ Boer, B. (1990). Some legal and ethical issues. Property rights and environment protection. B. Boer and D. James, Environment Institute of Australia, Inc.: 43-56. Pg 49.

⁶⁸ Hart, H. L. A. (1983). Social solidarity and the enforcement of morality. Ethics and Public Policy: an introduction to ethics (second edition). T. L. Beauchamp and T. P. Pinkard. Englewood Cliffs, Prentice-Hall: 62-75. Pp 72-74.

Changes in social values have, to some extent, been incorporated into heritage policy and legislation, perhaps the most significant in Australian heritage policy being the addition of spiritual values to the Burra Charter.⁶⁹ Spiritual values (and other intangible values) are not as yet integrated into the bulk of Australian heritage legislation. However the incorporation of such values into influential documents of principle, such as the Burra Charter, creates the social space in which a new protective value can potentially be integrated into society (and thereby into legislation). Again, it is a value which, most likely, will require the force of legislation behind it to assist its integration into social mores. This is because heritage, and particularly its more abstract aspects such as intangible or archaeological heritage, remain somewhat marginalised as social concerns. Therefore linking future changes in moral and thereby legal frameworks to more widely recognised and accepted environmental protective frameworks may provide a greater opportunity for driving future social change in this area.

3.5 Expressing the moral duty to protect the environment

The development of environmental consciousness over the course of the twentieth century has been concerned with the present and future relationship between humans and their environment. When applied to the remains of the past, archaeology forms part of the historic environment and can therefore be considered an environmental matter in broad terms.⁷⁰ Positions on the relationship between humans and the environment have ranged from the very utilitarian notion that nature should be conserved so it can be exploited (the notion of husbandry), to the notion that nature should be used sustainably and passed on to future generations (the notion of stewardship) to more radical notions as to what aspects of the natural world do and do not have 'rights'⁷¹ or whether humans should have any impact upon the natural world beyond that minimally required to support human life.⁷² Lockwood separates these environmental value frameworks into two broad categories: anthropocentric and ecocentric values. Anthropocentric values are those which are assigned to the environment for the value it has to humans, whereas ecocentric values ascribe value to nature in its own right, irrespective of human perception.⁷³ While Lockwood indicates these values are not mutually exclusive, it is difficult to see cultural heritage as having anything other than an anthropocentric value, even in terms of indigenous value systems which do not separate nature and culture. The existence of a social moral position on a particular environmental issue does not necessarily translate into legal protection, particularly where that moral position may be at odds with more widely held

⁶⁹ See discussion of this issue in Chapter 4, as well as Truscott, M. and D. Young (2000). "Revising the Burra Charter: Australia ICOMOS updates its guidelines for conservation practice." *Conservation and Management of Archaeological Sites* 4: 101-116.

Mulvaney, D. J. (2004). "The road to Burra: memories of an ancient traveller." *Historic Environment* 18 (1): 9-13.

Allen, C. (2004). "The road from Burra: thoughts on using the Charter in the future." *Historic Environment* 18 (1): 50-53.

⁷⁰ Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pg 8.

⁷¹ Stone, C. D. (1972). "Should trees have standing? Towards legal rights for natural objects." *University of Southern California Law Review* 45: 450-501.

⁷² Boer, B. (1990). Some legal and ethical issues. *Property rights and environment protection*. B. Boer and D. James, Environment Institute of Australia, Inc.: 43-56. Pg 49.

⁷³ Lockwood, M. (2005). "Integration of natural area values: foundations and methodological approaches. ." *Australasian Journal of Environmental Management* 12 (Sept 2005 - Supplementary Issue): 8-19.

moral positions.⁷⁴ The first step in establishing a new moral position within law is to persuade, through lobbying or other action, a portion of society to support that position.

A moral position in favour of protecting the environment is not socially inherent, it is a position which must be consciously adopted.⁷⁵ Nash views the development of moral and ethical positions for environmental value as lying at the far end of a moral/ethical continuum, or what he terms the “ethical circle”.⁷⁶ He sees this ethical circle as progressively widening, beginning with ethical concerns for the self, before extending those concerns to family and humans generally.⁷⁷ Eventually the ethical circle may widen to value protection or conservation of the living environment⁷⁸ before reaching ethical consideration of the nonliving environment and the wider universe. He notes that expansion of this circle is not necessarily direct, or automatic, nor do all people or societies necessarily reach the same point in terms of what aspects of the environment they value.⁷⁹ These ethical positions underlie attitudes towards conservation and therefore not all individuals or societies will have the same level of moral and ethical concern for conservation issues. Nor will they necessarily agree on the appropriate course of protective action.⁸⁰ Thus conservation values are not universal in nature across societies, nor are they necessarily always enshrined in legislation. Hart noted that bodies of law are generally influenced by both general moral concerns and by what he termed the “enlightened moral criticism” of those in the minority⁸¹ and that, furthermore, the law generally lags behind morality. In the development of Australian archaeological protective legislation, it was the role of archaeologists to provide the enlightened moral criticism in the critical early phase of heritage protection, just as it was the role of the environmentalists to advocate for environmental protection.

If legislation is accepted as a method for the expression of the ethical and moral positions of society, as Hart suggests, then the development of an Australian heritage consciousness and attendant legislation in close proximity to the development of an environmental consciousness reinforced with legislation should come as no surprise. Australian society’s ethical circle, in Nash’s terms, had expanded to the point where it began to capture environmental values. This can be seen in an initial concern for the living aspects of the natural environment,⁸² progressing to concern for the nonliving

⁷⁴ E.g. conservation vs exploitation, at the most basic level.

⁷⁵ Boer, B. (1990). Some legal and ethical issues. *Property rights and environment protection*. B. Boer and D. James, Environment Institute of Australia, Inc.: 43-56. Pp 49-50.

⁷⁶ Nash, R. (1990). *The rights of nature: a history of environmental ethics*. Leichhardt, Primavera Press. Pp 4-8.

⁷⁷ Stone notes that in this regard morality tends to be homocentric, creating difficulties for the “deep ecology” school of thought which tends to ascribe what would otherwise be terms “human rights” to features of the natural world. Stone, C. (1987). *Earth and other ethics: the case for moral pluralism*. New York, Harper & Row. Pp 77-80. Boer has a similar position, that ascription of “inherent value” to aspects of the natural world is still a human value judgement—what the natural world thinks about itself and its existence is inherently unknowable. Boer, B. (1990). Some legal and ethical issues. *Property rights and environment protection*. B. Boer and D. James, Environment Institute of Australia, Inc.: 43-56. Pp 49-50.

⁷⁸ Nash, R. (1990). *The rights of nature: a history of environmental ethics*. Leichhardt, Primavera Press. Pp 55-86.

⁷⁹ *Ibid.* Pp 4-5.

⁸⁰ *Ibid.* Pp 193-198.

⁸¹ Hart, H. L. A. (1994). *The Concept of Law*. Oxford, Clarendon Press.

⁸² Hutton, D. and L. Connors (1999). *A History of the Australian environmental movement*. Melbourne, Cambridge University Press. Pp 128-144.

environment, including cultural heritage.⁸³ Nash's moral continuum would indicate that within each of his categories of moral concern, there are a spectrum of values and concerns. Using Lockwood's terminology, a range of anthropocentric and ecocentric values can be expected to be ascribed to different aspects of the environment. Lockwood argues these require consideration in an integrated manner if a rational framework for environmental valuation and decision-making is to be developed.⁸⁴ A rational consideration of the social relevance of an environmental issue will determine the level of legal response as an expression of societal ethics and moral duty. Within heritage conservation that moral value is typically expressed through reference to the 'significance' of places.

3.6 Establishing the concept of 'significance'

In Australian heritage management, the concept of 'significance' is paramount. Significance criteria are meant to establish an objective framework for measuring the "heritage value" of a place, which in turn determines how that significance may be appropriately protected. This concept flows largely from the Burra Charter⁸⁵, which establishes the basic criteria for cultural significance which still are in wide usage: aesthetic, social, historical or technical/scientific significance. The Burra Charter, in turn, drew on the significance classifications in the *Australian Heritage Commission Act 1975* (Cth) (repealed) which are in turn derived from the 1974 Hope Inquiry into the National Estate.⁸⁶ Significance, particularly when applied to the 'social' criterion can suffer from vagueness as a concept,⁸⁷ and therefore is particularly difficult to define legally which can in turn lead to weaknesses in protective legislation.⁸⁸ In 1999, the Burra Charter was amended to include 'spiritual' significance, in response to a desire for the Charter to be more inclusive, particularly in relation to indigenous values.⁸⁹ The Burra Charter defines cultural significance as:

aesthetic, historic, scientific, social, or spiritual value for past, present or future generations⁹⁰

⁸³ Davison, G. (1984). A brief history of the Australian heritage movement. *A Heritage Handbook*. G. Davison and C. McConville. North Sydney, Allen & Unwin: 14-27.

⁸⁴ Lockwood, M. (2005). "Integration of natural area values: foundations and methodological approaches." *Australasian Journal of Environmental Management* 12 (Sept 2005 - Supplementary Issue): 8-19.

⁸⁵ Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. *Burra Charter*. The Burra Charter is discussed in greater detail in Chapter 4. Also see also Carman's discussion of other archaeological significance frameworks in Carman, J. (2002). *Archaeology and heritage: an introduction*. London ; New York, Continuum. Pp 156-160. Carman draws heavily on Briuer and Clay's survey of the literature on archaeological significance. See Briuer, F. L. and C. Mathers (1997). *Trends and Patterns in Cultural Resource Significance: An Historical Perspective and Annotated Bibliography*. Washington DC, US Army Corps of Engineers.

⁸⁶ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service.

⁸⁷ Dobb, R. (1995). Legislation for Aboriginal places of significance. *Cultural conservation: towards a national approach*. S. Sullivan. Canberra, Australian Government Publishing Service. 9: 39-43. Pg 39

⁸⁸ Gerus, M. (1993). "The Heritage of Western Australia Act 1990 and culturally sustainable development." *Australian Environmental Law News* 3: 31-39. Pp 32-33.

⁸⁹ This was the fourth revision of the Burra Charter since its inception in 1979. Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. *Burra Charter*. Pg 22; Truscott, M. and D. Young (2000). "Revising the Burra Charter: Australia ICOMOS updates its guidelines for conservation practice." *Conservation and Management of Archaeological Sites* 4: 101-116. , Australia ICOMOS (2001). Statement on Indigenous Cultural Heritage.

⁹⁰ Burra Charter, Article 1.2

and recognises that a place may have multiple values.⁹¹ But values are mutable and reflect principles and standards which are not necessarily fixed, making definitive assessments challenging. Although some authors have noted the mutable nature of archaeological significance,⁹² this is not reflected in the rigid approach to its protection enshrined in legislation. Others have cautioned that scientific archaeological significance should not be ignored in favour of other community interests or values.⁹³

While archaeology exists alongside heritage conservation generally, as a discipline it has had different practices and goals from mainstream conservation. Heritage conservation in Australia, particularly with respect to historic buildings, concentrates on the retention of the historic fabric of the place above all else, whereas archaeology tends to focus on the conservation of 'research' significance or potential. The credo of fabric conservation is embedded within the Burra Charter, which argues that change to a heritage place should be "as much as necessary...but...as little as possible,"⁹⁴ a phrase with little resonance for archaeological heritage. This statement embodies an attitude within Australian conservation philosophy that the significance of a place is derived most fundamentally from its fabric, rather than its use or social attachment.⁹⁵ This has led to a circumstance where the conservation of fabric may be an end in itself, rather than a means by which heritage significance is retained. Nevertheless, this retention of conserved historic fabric is often seen as being "in the public good". Yet it is a common maxim that archaeology is a destructive enterprise, which in this respect is at odds with this aspect of western conservation philosophy. The act of excavation destroys or transforms the archaeological site, disassembling it into components for further study, although it has been argued that this destruction-through-excavation is in fact an act of archaeological "creation" which is necessary to instil meaning in an archaeological place.⁹⁶

This systematised approach to heritage significance criteria however seems to exist outside a notion of changing value systems, and provides that all

⁹¹ Truscott, M. and D. Young (2000). "Revising the Burra Charter: Australia ICOMOS updates its guidelines for conservation practice." *Conservation and Management of Archaeological Sites* 4: 101-116.

⁹² Bowdler, S. (1984). Archaeological significance as a mutable quality. *Site Surveys and Significance Assessment*. S. Sullivan and S. Bowdler. Canberra, Australian National University: 1-9. See also Little, B. J. (2002). Archaeology as a Shared Vision. *Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: 3-19. Pg 4.

⁹³ Sullivan, N. and D. Carment (1992). Cultural heritage conservation in the Northern Territory. Canberra, Australian National University: 27. Pg 23.

⁹⁴ Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. *Burra Charter*. Preamble

⁹⁵ Contrast this with Asian attitudes to conservation where use and social attachment are paramount. The classic example of this being that a "thousand year old temple" may have been rebuilt many times, but the significance is derived from the fact that there has been a temple in that place for a thousand years, rather than the physical fabric of any particular phase of usage.

For discussion of these contrasting attitudes to conservation see: Byrne, D. (1993). *The past of others: archaeological heritage management in Thailand and Australia*. Canberra, Australian National University.

Stille, A. (2002). *The future of the past*. London, Picador. Pp 40-70.

Rogers, L. (2004). "The heavens are high and the Emperor is far away': cultural heritage law and management in China." *Historic Environment* 17 (3): 38-43.

Agnew, N., M. Demas, et al. (2004). "The begetting of charters: genesis of the China Principles." *Historic Environment* 18 (1): 40-45.

Sullivan, S. (2005). Loving the ancient in Australia and China. *Object lessons: archaeology & heritage in Australia*. J. Lydon and T. Ireland. Melbourne, Australian Scholarly Publishing: 265-285.

⁹⁶ Frankel, D. (1993). "The excavator: creator or destroyer?" *Antiquity* 67 (257): 875-878. In this article, Frankel does explicitly discount the views of indigenous people in the inscription of meaning to archaeological places.

potential past, present and future values are equal and equally important. In addition, the criteria do not reflect an understanding that professional views of significance are likely to be divergent from those held by the public,⁹⁷ particularly in areas such as research significance, which is almost entirely a “professional” value. This is why authors such as Little⁹⁸ have argued that archaeologists need to improve their interactions with the public, to ensure that these professionalised values are seen as relevant to the public.⁹⁹ Similarly, when dealing with indigenous peoples and the archaeological remains of their pasts, ascription of a scientific value can be perceived as a colonising or dispossessing act,¹⁰⁰ or merely antithetical to the values which are relevant to the indigenous culture.¹⁰¹ Essential in the management of significance is the need to strike a balance between competing or overlapping interests.

3.7 Problems with archaeological significance frameworks

Byrne, Brayshaw and Ireland have strongly criticised the four-part significance classification system (with categories of aesthetic, historical, social and scientific significance) in their discussion of social significance.¹⁰² They see this system as overly focussed on the concept of preserving heritage fabric, over the realisation of wider values for a site.¹⁰³ They view the four-part system as having established a set of professional-objective criteria which largely ignore or sideline community values and call for a more balanced approach which takes into account, among other things, economic¹⁰⁴ and spiritual values of archaeological sites.¹⁰⁵ Since that writing, push for consideration of the wider implications of heritage conservation, particularly

⁹⁷ Greer, S., R. Harrison, et al. (2002). "Community-based archaeology in Australia." *World Archaeology* 34 (2): 265-287. Pg 278. Jones, A. (2002). *Archaeological theory and scientific practice*. Cambridge, Cambridge University Press.

⁹⁸ Little, B. J. (2002). Archaeology as a Shared Vision. *Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: 3-19. ; Little also chaired a session on “archaeology as a tool for civic engagement” at the 2005 Society for Historical Archaeology conference in York, England, which contained a number of papers following this theme.

⁹⁹ This call for relevance echoes sentiments raised by Fritz and Plog in the early 1970s. See Fritz, J. M. and F. Plog (1970). "The nature of archaeological explanation." *American Antiquity* 35: 405-412. quoted in Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pg 35.

¹⁰⁰ Byrne, D. (1996). "Deep nation: Australia's acquisition of an indigenous past." *Aboriginal History* 20: 82-107.

¹⁰¹ Ah Kit, J. (1994). "Aboriginal aspirations for heritage conservation." *Northern Perspective* 17 (1): 17-21.

¹⁰² Sullivan, S. (2004). "Aboriginal sites and the Burra Charter." *Historic Environment* 18 (1): 37-39.

¹⁰³ This four-part system is largely derived from the 1974 Hope Report and is reinforced in the Burra Charter. See Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. and Australia ICOMOS (1999). *The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance*. *Burra Charter*.

¹⁰⁴ Byrne, D., H. Brayshaw, et al. (2001). *Social Significance: A discussion paper*. Hurstville, NSW National Parks and Wildlife Service: 161. Pg 4.

¹⁰⁵ There has been a distinct reluctance to engage with the economic aspects of heritage generally until quite recently. Such engagement has largely focussed on the issues surrounding built heritage and listing of properties, however the Australian Commonwealth Government's Productivity Commission was initially designed to examine the economic, social and environmental costs and benefits of a range of heritage issues for non-indigenous heritage, however the final report focussed almost exclusively on one aspect, economic costs. For the initial Terms of Reference for the Inquiry see Productivity Commission (2005). Circular No. CAHHP C1 - Conservation of historic heritage places, Australian Commonwealth Government. and for the final report see Productivity Commission (2006). *Conservation of Australia's historic heritage places - final report*. Melbourne, Australian Government. . See also Abelson, P. and C. Dominy (2001). *Economics of Heritage Listings*. Parramatta, NSW Heritage Office. , Deodhar, V. (2004). Does the housing market value heritage? Some empirical evidence. *Macquarie Economics Research Papers*. Sydney, Macquarie University. and Newell, G., P. Wills, et al. (2004). *Heritage Australia: A Review of Australian material regarding the economic and social benefits of heritage property*. Parramatta, NSW Heritage Office & University of Western Sydney. for more general discussion on the economic issues surrounding built heritage.

¹⁰⁶ Byrne, D., H. Brayshaw, et al. (2001). *Social Significance: A discussion paper*. Hurstville, NSW National Parks and Wildlife Service: 161. Pp 4-7.

the economic values,¹⁰⁶ is being strongly felt from outside of the heritage movement. Their discussion focuses mainly on these issues with respect to Aboriginal heritage management which, they note, has been overwhelmingly dominated by the discipline of archaeology since the early 1970s.¹⁰⁷ Due to this, a perception arose, and to a degree still persists, that Aboriginal heritage is *solely* archaeology, causing one author to remark on the perceptions of Aboriginal heritage, that "...your [Aboriginal] culture is now an archaeological resource."¹⁰⁸ The indigenous past ceased to be associated with a living community and became "science".¹⁰⁹

Particularly with respect to 'social' significance, the professional-objective approach to archaeological heritage can fail, as it is based in a conception that social value is logical and systematic. Indigenous cultures may ascribe social or spiritual values to a site based on status in mythology or oral tradition which by its very nature can never be reconciled with a demonstrable relationship to significance criteria. This is the essence of 'spiritual' significance, as it relies on the faith of the members of the culture who are ascribing the value. From a secular perspective, such non-rational, non-objective elevation of a site's status in community eyes can be termed 'community attachment' and in a legal sense has variously been defined as "sacredness" or "special value".¹¹⁰ This by its very nature may be a value or value system which is irrelevant or illogical by the standards of the external and, to date, generally non-indigenous, professional-objective researcher. In the normal course of events such professionals are responsible for assessing a site against the heritage significance criteria. The weakness in the professional-objective approach will be no starker than when comparing or attempting to reconcile community attachment with the 'scientific' or 'research' values usually ascribed to archaeological sites.

3.8 Considering scientific significance in compliance-driven archaeology

Within archaeological heritage management, analysis of the cultural significance of archaeological places has generally been restricted to its 'scientific' significance (also referred to as research or technical significance). This has been reinforced by the nature of Australian heritage legislation, resulting in the management of archaeological heritage as being disproportionately focussed on managing scientific value expressed in terms of data collection and analysis, while largely ignoring the other potential values of archaeological sites and the issues associated with their management. In order to facilitate the management of the different values of

¹⁰⁶ Molesworth, S. R. (1999). "Barbarians at the gates of the Garden of Eden - revisited". Heritage protection foundation for the new millennium. *Environmental Outlook No 3: Law and Policy*. P. Leadbeter, N. Gunningham and B. Boer. Annandale, NSW, The Federation Press: 222-247. See also Productivity Commission (2006). *Conservation of Australia's historic heritage places - final report*. Melbourne, Australian Government.

¹⁰⁷ Byrne, D., H. Brayshaw, et al. (2001). *Social Significance: A discussion paper*. Hurstville, NSW National Parks and Wildlife Service: 161. Pp 14-17.

¹⁰⁸ Ellis, B. (1994). "Rethinking the paradigm: cultural heritage management in Queensland." *Ngulaig* 10.

¹⁰⁹ Byrne, D. (1996). "Deep nation: Australia's acquisition of an indigenous past." *Aboriginal History* 20: 82-107.

¹¹⁰ Contrasting the approaches of the *Northern Territory Aboriginal Sacred Sites Act* (1978) Northern Territory. and the definition of an "Aboriginal place" under the *National Parks and Wildlife Act* (1974) New South Wales. Both Acts are discussed more fully in Chapters 6 and 7.

archaeological heritage, Bickford and Sullivan¹¹¹ proposed in the mid-1980s a series of additional “archaeological significance” criteria. Their view was that “archaeological significance” meant one of two things—either that archaeology could be used as a *technique* to investigate the significance of a place, or secondly that the site had *research potential* to contribute to understanding current archaeological problems. This suggests that the “science” within archaeology was as the method of investigation, rather than the product of that investigation. Smith takes the view that the intent of these criteria was not to imply that these research values were inherent in the archaeological site itself, but were values which could be ascribed through the application of the criteria.¹¹² These criteria were designed to supplement and refine the concept of scientific significance for historical archaeological sites, although their application could be made to any other type of archaeological heritage:

- Can the site contribute knowledge that no other resource can?
- Can the site contribute knowledge that no other site can?
- Is the knowledge relevant:
 - to general questions about human history?
 - to other substantive questions relating to Australian history?
 - to other major research questions?

These criteria were designed to allow a research archaeologist to ask the question, ‘is this site worth excavating?’ or ‘is this site interesting archaeologically?’ Significantly, the article these criteria are derived from includes discussion of the public value of an archaeological site; however the criteria themselves are focussed on research significance only. Furthermore, in practice there has been little difference in terms of the way ‘scientific’, ‘research’ and ‘technical’ significance have been used. Coutts, in his discussion of the future of historical archaeology written in the early 1980s, indicated that the discipline required “a solid theoretical context and interpretive models” in order to establish a rigorous approach to assessing the significance of historical archaeological sites, particularly in the context of legislatively-driven compliance archaeology,¹¹³ but in general such an approach has not developed. Bickford and Sullivan’s approach assumed there was a robust, widely-accepted and active research framework existing more broadly in Australian archaeology, which had an ongoing approach to investigating archaeological questions about the past. Murray noted that archaeology undertaken in this type of management context “rarely [rose] above the level of potential usefulness of many [archaeological] resources.”¹¹⁴ Compliance-driven archaeological heritage management has tended to adopt

¹¹¹ Bickford, A. and S. Sullivan (1984). Assessing the research significance of historic sites. *Site Surveys and Significance Assessment in Australian Archaeology*. S. Sullivan and S. Bowdler. Canberra, Dept. of Prehistory Research School of Pacific Studies Australian National University: 19-26.

¹¹² Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pg 116.

¹¹³ Coutts, P. J. F. (1984). A Public Archaeologist’s View of Future Directions in Cultural Resource Management. *Archaeology at ANZAAS, Canberra*. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pg 217. See also Murray, T. (1987). *Remembrance of things present : appeals to authority in the history and philosophy of archaeology*. , Murray, T. (2002). “But that was long ago: theory in Australian historical archaeology 2002.” *Australasian Historical Archaeology* 20: 8-14.

¹¹⁴ Murray, T. (1984). Relativism, conservation philosophy and historical archaeology. *Historical archaeology and conservation philosophy. Papers from the Historical Archaeology Session of the ANZAAS Conference, Sydney 1982*. M. Pearson and H. Temple. Sydney, Heritage Council of NSW: 2-17. Pg 7

a very loose approach to determining the ‘research’ or ‘scientific’ significance of archaeological sites, treating all sites as if they were equal in potential.

The Bickford and Sullivan criteria, while well known in Australian historical archaeology, have not been widely used in heritage management frameworks. In New South Wales, where the Bickford and Sullivan criteria have been incorporated into government-produced archaeological assessment guidelines,¹¹⁵ these criteria are treated as desirable rather than mandatory to address,¹¹⁶ and assessments tend to fall back on the legislative definitions of archaeological heritage,¹¹⁷ where these criteria have had little effect. Even where adopted and used, the criteria are meant merely as a guide to determining if the site under assessment can contribute meaningfully to research efforts, but the criteria do not represent a research framework itself. Additionally, from a ‘public good’ conservation point of view, these criteria are still very ‘research’ focussed, not taking the step of asking what the public may find interesting or valuable about a site.¹¹⁸ They allow archaeologists to ask themselves, ‘Do I find this site interesting enough to investigate?’ but do not allow the next question to be asked, ‘Is this site valued by the wider community?’

3.8 Moral value and heritage significance

If, as noted above, environmental moral value is not absolute or inherent, but variable and socially determined, there should be limits ascribed to protection of the environment (such as archaeological heritage) which reflect the relative moral value of that environmental aspect. Archaeological heritage may not necessarily be owed the same moral (and by implication, legal) duty as all other aspects of the environment, due to these value limits. Heritage significance frameworks need to be reconciled with these societal moral limits, as it is not necessarily clear that archaeological heritage may have the same ‘right of existence’ as other aspects of the environment. Nash’s view is that rights do not extend beyond sentience,¹¹⁹ thereby excluding consideration of something such as archaeological heritage, however this does not necessarily mean moral concerns cease at the level of sentience as well. By contrast, Stone argues that non-human aspects of the environment¹²⁰ should be accorded with moral rights of existence where protection of those rights will be beneficial to humans, regardless as to whether that benefit is for commercial exploitation or simple enjoyment.¹²¹ This can, but does not necessarily, lead to these aspects of the environment being accorded some level of legal protection or status. Belshaw takes these moral obligations further, and sees moral concerns extending into the realm of the non-sentient and the inanimate, insofar as they are reflective of a human action.¹²² He argues that

¹¹⁵ NSW Heritage Office and Department of Urban Affairs and Planning (1996). *Archaeological Assessments*. Sydney, NSW Government.

¹¹⁶ *Ibid.* Pg 27.

¹¹⁷ In this case ‘relics’ more than 50 years old. See the discussion of the NSW *Heritage Act* in Chapter 5.

¹¹⁸ Mackay, R. (2003). Whose archaeology is it, anyway? *Exploring the modern city*. T. Murray. Sydney, Historic Houses Trust of NSW and La Trobe University: 169-173.

¹¹⁹ Nash, R. (1990). *The rights of nature: a history of environmental ethics*. Leichhardt, Primavera Press. Pp 60-65.

¹²⁰ Stone, C. (1987). *Earth and other ethics: the case for moral pluralism*. New York, Harper & Row. Pp 74-75. Stone terms these as “Nonpersons”.

¹²¹ *Ibid.*

¹²² Belshaw, C. (2001). *Environmental philosophy*. Chesham, Acumen Publishing. Pp 147-150.

an act can be objectively positive or negative for a non-sentient, non-living part of the environment, such as a natural geological feature or, by extension, an archaeological place. A negative act, in Belshaw's terminology is one which "diminishes" the value of the thing in question. Such act therefore falls within the realm of human morality to consider whether or not an objectively negative act should take place, if it is an act stemming from human action or inaction. This is an interesting consideration, given that archaeological places are usually composed of lost, abandoned or forgotten cultural objects, which are ascribed with new, archaeological, values through the process of identification or investigation.

Under this view, the progressive loss of a natural feature through weathering, such as the Three Sisters in the Blue Mountains, NSW (Figure 3.1, second overleaf), is an objectively negative impact upon that natural feature. But there is no moral consideration at play, until the place is valued by humans, who may decide to act or not act to mitigate that negative impact. The Three Sisters does not "want" to exist but we can argue under an ecocentric perspective that it would be "bad" for it not to exist as existence is a preferable state to non-existence. In the example of the Three Sisters, given the indigenous, scenic, social and economic values of the place,¹²³ it is likely to be considered morally wrong to allow the place to be destroyed through natural action, just as it would be considered morally wrong to deliberately destroy the place. This is due to the place's anthropocentric value. A more dramatic example of this was the loss in 2005 of one of the Twelve Apostles, a group of scenic stone formations along the Great Ocean Road in Victoria (Figure 3.2, second overleaf). This loss (through wave action) was documented at the exact moment of its collapse.¹²⁴ Reports of the loss cast no moral judgement—there was no sense that the formation could or should have been saved—but the loss can be seen as a negative consequence for Australia, due to the community attachment and tourism value which had developed around these natural features.¹²⁵ Thus despite the more ecocentric moral position of those such as Belshaw, it is still primarily the anthropocentric value that determines the perception of loss and the necessity for moral action, particularly when dealing with the inanimate aspects of the environment.

Moral consideration is most relevant when there is a question about what action to take: should a natural or cultural feature be destroyed by human action, for example. This intention to act, and a preference for outcome, is a

¹²³ Thomas, M. (2003). *The Artificial Horizon: Imagining the Blue Mountains*. Carlton, Vic., Melbourne University Press. Pp 150-167. Note Thomas disputes the basis for the Aboriginal legend surrounding the place, citing conflicting and dubious historical sources for the story. See also Illert, C. R. (2003). "Three Sisters dreaming, or, did Katoomba get its legend from Kangaroo Valley?" *Shoalhaven Chronograph (Special supplement)* 23 (9). and Smith, J. (1992). *Aboriginal legends of the Blue Mountains*. Wentworth Falls, N.S.W., J. Smith.

¹²⁴ See for example: La Canna, X. and M. Murphy (2005). Ninth Apostle crumbles. *The Age*. Melbourne. <http://www.theage.com.au/articles/2005/07/03/1120329326001.html>
BBC News Website. (2005). "Sea claims Australian 'apostle'." Retrieved 4 July 2005, from <http://news.bbc.co.uk/2/hi/asia-pacific/4647857.stm>.
CNN News International website. (2005, 4 July 2005). "Apostles lose one of their own." from <http://edition.cnn.com/2005/WORLD/asiapcf/07/04/australia.apostles/>.

¹²⁵ La Canna, X. and M. Murphy (2005). Ninth Apostle crumbles. *The Age*. Melbourne. Although the Victorian Government did claim that the international coverage generated by the collapse had actually increased international tourism to the area. See Tourism Victoria (2005). Twelve Apostles collapse sparks visitor interest - Corporate newsletter July 2005. Tourism Victoria, Victorian Government. http://www.tourismvictoria.com.au/newsletter/july_2005/index.php?page=05. Accessed 15 February 2006. Note the report did not quote any figures to back up this claim.

strictly human characteristic¹²⁶ which requires an application of moral decision-making. This does not mean that all objectively negative environmental impacts need be prevented; morally 'bad' acts should however be prevented, where they conflict with societal values. In some instances, the arresting of loss or decay through the conservation of fabric may itself be an immoral act.¹²⁷ The challenge is to frame significance frameworks and protective legislation which prevent the morally bad impacts, mitigate the 'diminishing' acts where social value has attached, while allowing other aspects of the environment to be affected. Social moral concern does not automatically extend to all elements of the environment; certain elements are valued more highly than others. This selective valuation should then be reflected in heritage significance frameworks and environmental protective legislation.

¹²⁶ Stone, C. (1987). Earth and other ethics: the case for moral pluralism. New York, Harper & Row. Pp 75-78.

¹²⁷ See for example Whiting, D. (1995). "Conservation of marae structures." Historic Environment 11 (2&3): 47-49. which discusses the different approach required to conserve Maori structures in New Zealand, where decay is a part of the life of the structure. In a more western construction, conservation of the patina of wear or use is generally seen as desirable, rather than restoration to a pristine state. Similarly, when dealing with human remains there is generally an acceptance of decay or loss, with some cultures or religions having a prohibition on embalming, or a requirement for burial shortly after death (e.g. Islam and Judaism).



Figure 3.1: The Three Sisters rock formation in Katoomba, NSW, Australia.¹²⁸

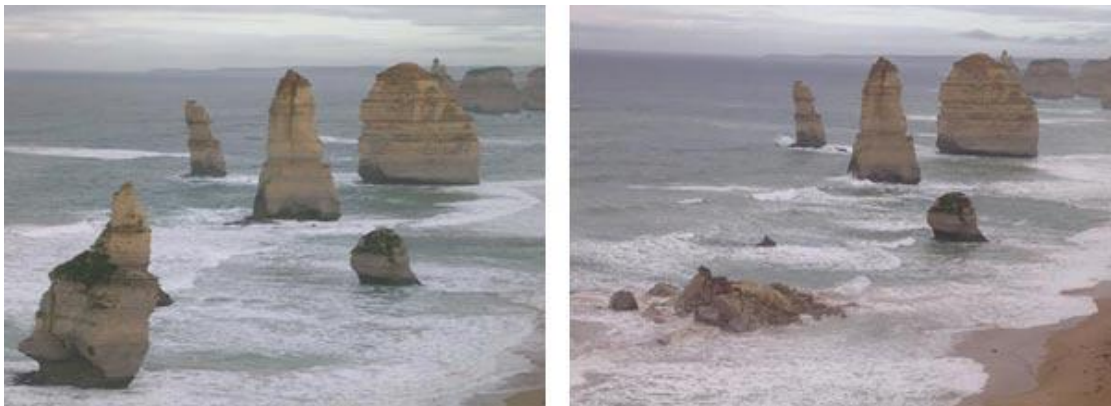


Figure 3.2: Collapse of one of the Twelve Apostles on 3 July 2005, Victoria, Australia.¹²⁹

¹²⁸ Image credit: Wikipedia. http://en.wikipedia.org/wiki/Image:Blue_mountains_-_three_sisters.jpg

¹²⁹ Parks Victoria website, photographer uncredited. http://www.parkweb.vic.gov.au/1park_display.cfm?park=175. Accessed 12 February 2006.

3.9 A moral purpose for archaeological protection

This reasoning can be applied to the protection of archaeological sites as well as any other part of the non-sentient environment. An archaeological site is created in a moral-neutral state; its creation was incidental to its existence, as no party sets out to deliberately create an archaeological site (time capsules and archaeological experiments which simulate depositional processes aside). Note that by referring to an archaeological site as being created in a moral-neutral state this is not the same as a value-neutral state (as processual archaeology would contend). As the creation of an archaeological site is not a deliberate act, there is no moral consideration in its creation. It is neither right nor wrong that an archaeological site has been created. However, those sites, whether during or following their creation, may have a social or moral value that exists independent of the circumstances of their physical creation. Similarly, moral considerations may come into play when deciding whether the place should be subject to disturbance, through archaeological excavation or development.

An example of this would be a battlefield. While the battle was occurring, the participants were not considering whether it was right or wrong that the battlefield was being changed into an archaeological site which reflected the activity which was taking place. Participants *may* have been caught up in moral considerations as to whether the battle and their actions during it were morally right or wrong, but those considerations do not form part of the archaeological record and cannot be extracted from it. Subsequently however, a great deal of social value may be attributed to the place by the survivors and their descendents. The post hoc social value attributed to the place may draw on the morality of past actions at the place and influence the morality and values of subsequent generations: it may be viewed as a site of sacrifice, celebration or shame, or a combination of values. In such circumstances, the archaeological place may become a symbol of values or morals expressed socially, but those values or morals are not manifest in the archaeological record itself.

Once the site is ascribed the character of 'archaeological' the moral processes of those interacting with it begin to come into play, and individual and societal values begin to be applied with regard to how the site should be managed. Clearly archaeologists have a high moral and ethical duty to protect archaeological heritage, essentially due to enlightened self-interest. This is expressed in the Codes of Ethics for various archaeological societies.¹³⁰ But as discussed earlier in this chapter regarding the moral duty for environmental protection, the moral duty for archaeological heritage protection is not inherent. A society must adopt a position of value and protection for that heritage and, thereby, the obligations which flow from such a moral position. Heritage legislation provides one of the tools for effecting this, by providing the moral filter to determine what impacts or changes to the archaeological

¹³⁰ E.g. Australian Archaeological Association (2004). Code of Ethics. Clause 2.
Australian Association of Consulting Archaeologists Inc (2004). Code of Ethics. Clause 2.
Archaeological Institute of America (1997). Code of Ethics.
http://www.archaeological.org/pdfs/AIA_Code_of_EthicsA5S.pdf (Accessed 17 May 2005).

environment are socially acceptable. But the primary ‘moral filter’ which has been applied to archaeological heritage protection has been the potential ‘research significance’ and loss of scientific information. Yet the moral value of ‘archaeological research significance’ is inherently relevant only to the archaeologist or heritage professional or those with a strong interest in their work, in the absence of a demonstrable flow-on social benefit.¹³¹

The destruction of archaeological places can be considered a diminution of the environment such as Belshaw describes. But if the purpose of archaeology is, in part, to generate an improved understanding of the past, what of the knowledge or social values embedded within the archaeological site? Is the moral duty to preserve the archaeological fabric or to preserve those other, intangible values from negative consequences? This highlights the fundamental dichotomy of archaeology, that the investigation of an important resource results in its destruction. Ideally, this results in the creation of new knowledge about the past, through the transformation of archaeological fabric into data for analysis. That said, not all that is contained within the archaeological record is of interest or importance to archaeologists, the understanding of the past or the wider community. Hence the need to consider the question of significance and value in the widest possible construction. If what is contained within the site is not significant or of value, then while the destruction of the site may be a negative act, as Belshaw describes it, it is not an immoral act and by extension, should not automatically be an illegal act. The moral discretion is exercised in the consideration of the significance and value of the site. Thus there is no moral onus upon society to protect all aspects of the archaeological environment, but rather those which have the greatest moral relevance.

3.10 The exercise of moral decision-making

To pick up Prentis’s point raised in Chapter 2, the initial impetus to study the Australian past was not based on “motiveless curiosity” but by a desire to explore scientific as well as social concerns.¹³² Scientific debate and public interest, rather than legislative directive, underpinned the need for study. Where there is public concern about the outcome of such research, it can serve the public good.¹³³ This is however not a typical phenomenon in archaeological heritage management. Archaeology has a role in influencing the mind of the public, which relies on experts to provide information about the past.¹³⁴ There is a danger that, particularly with highly legalistic interpretations of heritage protection, the law can itself force a “motiveless” approach to the

¹³¹ See for example comments on archaeology as principally a middle class pursuit: McGuire, R. H. and M. Walker (1999). "Class Confrontations in Archaeology." *Historical Archaeology* 33 (1): 159-183.

Trigger, B. (1989). *A History of Archaeological Thought*. Cambridge, Cambridge University Press. Pp 14-15. Similarly, Pokotylo and Guppy’s survey of public attitudes towards archaeology tended to be more extensive or positive based on level of education. Pokotylo, D. and N. Guppy (1999). "Public opinion and archaeological heritage: views from outside the profession." *American Antiquity* 64 (3): 400-16. Pp 412-415.

¹³² Prentis, M. D. (1995). "From Lemuria to Kow Swamp: The rise and fall of tri-hybrid theories of Aboriginal origins." *Journal of Australian Studies* (45): 79-91. Pp 80-81.

¹³³ Although it is certainly debatable that such study was at all advantageous to indigenous people themselves.

¹³⁴ Head, L. (1992). *Australian Aborigines and a changing environment - views of the past and implications for the future. Aboriginal Involvement in Parks and Protected Areas*. J. Bircckhead, T. De Lacy and L. Smith. Canberra, Aboriginal Studies Press: 47-56. Pg 48.

study of archaeological heritage. Much legislation, rather naïvely, purports to allow archaeological “data” to be gathered for future consideration within ‘potential’ research frameworks. These research frameworks may never, in fact, be developed, making the data-gathering exercise essentially fruitless. Frankel has rightly pointed out the problematic nature of this assumption.¹³⁵ By widening the legal considerations for archaeological heritage protection beyond that of ‘research significance’ it becomes possible to consider what other values should be identified, investigated and conserved for archaeological places. Under Belshaw’s theory of diminution, the implication is that the loss of any value is a negative consequence, a sentiment echoed in the World Heritage Convention.¹³⁶ Yet legislative regimes for archaeological heritage provide the illusion of capturing all value by protecting archaeological heritage as data for research, but in a practical and epistemological sense, it is impossible to ensure that all information (data, research value, moral value) for a site is captured. This issue aside, there is the additional issue of ensuring that the data captured is in fact utilised effectively to generate a deeper understanding of the archaeological past.

Belshaw notes that nonliving entities have whatever value is assigned to them by humans. In the absence of sentience; these natural features have no inherent value.¹³⁷ Yet consider the recent loss of a cultural feature which shares characteristics of the natural environment. The Giant Buddas of Bamiyan, in Afghanistan, were a *cause celebre* in the international heritage movement in the late 1990s.¹³⁸ These giant stone carvings, cut into the cliffside at Bamiyan and enshrined on the World Heritage List,¹³⁹ were threatened and then ultimately destroyed by the Taliban during its rule in Afghanistan (Figures 3.3a and 3.3b, second overleaf). The Taliban considered the images blasphemous and contrary to their fundamentalist moral view of Islam. Despite international lobbying at the time, the statues were destroyed, leaving only the niches in the cliff where the statues once stood.¹⁴⁰ Under Belshaw’s theory of diminution, it is clearly possible to say that this act was objectively negative as well as morally “bad” for both the statues themselves (insofar as they have ceased to exist) and for the common heritage of the world. Their destruction was as much a political act as a moral one, designed to demonstrate the military power and authority of the Taliban as much as to remove something perceived as a religious affront.

Here we have a clear example of the exercise of moral considerations in decision-making by humans, highlighting an occasion where differing morality and social values can come into conflict. It is in such circumstances that Stone

¹³⁵ Frankel, D. (1993). "The excavator: creator or destroyer?" *Antiquity* 67 (257): 875-878.

¹³⁶ Molesworth, S. R. (1999). "Barbarians at the gates of the Garden of Eden - revisited". Heritage protection foundation for the new millennium. *Environmental Outlook No 3: Law and Policy*. P. Leadbeter, N. Gunningham and B. Boer. Annandale, NSW, The Federation Press: 222-247. Pp 233-234. Also see the World Heritage Convention (1972) Preamble.

¹³⁷ Taylor, P. W. (1986). *Respect for nature: A theory of environmental ethics*. Princeton, Princeton University Press.

¹³⁸ The discussion of the Bamiyan Buddhas is based in part on a paper entitled "The thinking beneath—archaeology and the law" delivered to the Society for Historical Archaeology conference in York, England in January 2005.

¹³⁹ World Heritage List Item # 208. See <http://whc.unesco.org/en/list/208>. Accessed 17 March 2005.

¹⁴⁰ For a general discussion of the issues surrounding this case and its aftermath, see: O’Keefe, R. (2004). "World cultural heritage: obligations to the international community as a whole?" *International and Comparative Law Quarterly* 53 (1): 189-209. Ishwaran, N. (2004). "International conservation diplomacy and the World Heritage Convention." *Journal of International Wildlife Law & Policy* 7 (1-2): 43-56.

believes it is necessary to assign moral values to nonliving things, to explicitly inject moral considerations into the decision-making process where they might otherwise be absent, because the decision is about an object rather than a person.¹⁴¹ It is fair to say that at an international level there is a genuine regret of the loss of these features, but it is because they were cultural constructs. If the Taliban had just destroyed a featureless cliff, perhaps there would have been some discussion as to whether it was a responsible act, but it would not have garnered the same attention and criticism as the destruction of these cultural artefacts. Again to use Belshaw's language, it may have been objectively negative for the cliff to be destroyed, but it would not necessarily have been morally wrong. The cultural value came not from the rock from which the statues were made, but from the artistry, effort and spiritual association with the statues themselves.

Once those natural features had been imbued with a social value, moral considerations attached to their future disposition and management by society. On a less dramatic scale, archaeological heritage legislation requires such social and moral decision-making, ideally within a rational framework. From Belshaw's perspective, destruction, while a negative act, is not a moral absolute and may have neutral or positive consequences elsewhere which should be taken into consideration.¹⁴² With the Bamiyan Buddhas example, we can however ascribe a moral value to the actions of the Taliban, just as we could ascribe a moral value to societal inaction which caused damage to any significant cultural artefact. If a stone is just a stone, its destruction is of little moral consequence. But if a stone is a symbol, its protection should be directly related to the social value ascribed to it.

¹⁴¹ Stone, C. (1987). *Earth and other ethics: the case for moral pluralism*. New York, Harper & Row. Pp 75-77.

¹⁴² Belshaw, C. (2001). *Environmental philosophy*. Chesham, Acumen Publishing. Pp 151.

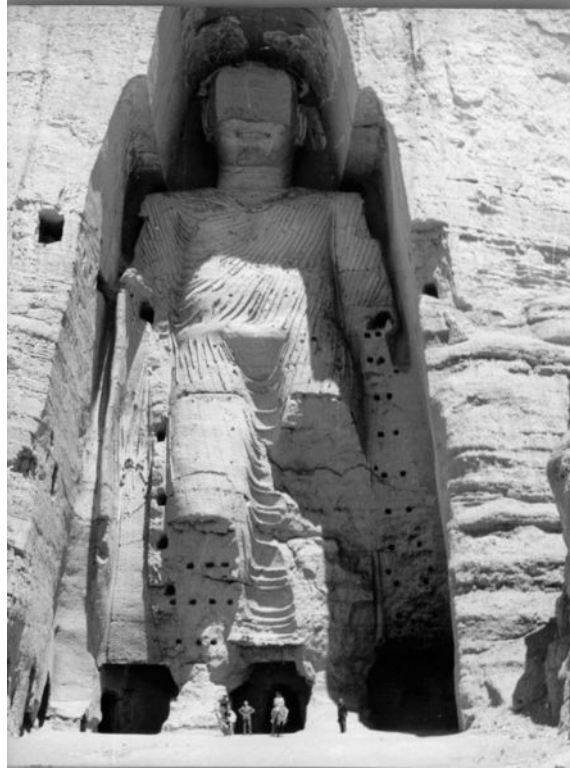


Figure 3.3a: One of the Bamiyan Buddhas prior to its destruction in 2001.¹⁴³



Figure 3.3b: The empty niche following the destruction of one of the statues.¹⁴⁴

¹⁴³ <http://www.unesco.org/bpi/eng/unescopress/2001/afghanistan.shtml>

¹⁴⁴ <http://www.talesofasia.com/afghanistan-bamiyan.htm>

Writing specifically of archaeological resources, Little emphasises that public support and maintenance of public relevance is critical for the survival of those resources.¹⁴⁵ To this end, Belshaw notes that “human centred ethics involves a compromise between the individual and the community”.¹⁴⁶ This need for compromise is as relevant between archaeologists and the community, with ‘sustainability’ the emerging framework for balancing the aspects of such compromise. If a legislative response is indeed appropriate or desirable to advance archaeological heritage protection, as a reflection of an adopted social moral duty, it is clear that this legislation must reflect the social relevance of the thing being protected. While heritage legislation can act as the symbol of integration of a new social value, based in the “enlightened moral criticism” of the heritage conservation movement, a legislative response cannot ride roughshod over all other social concerns. The establishment of protective legislation and the integration of a new social value should not be seen as a *carte blanche* which obligates society to do something it perceives as irrelevant or not in the wider interest.

3.12 Frameworks for balancing interests and expectations

Within environmental protection, the concept of ‘sustainability’,¹⁴⁷ involves a consideration of issues which weigh up environmental, economic and social factors of any given situation. Sustainability is a process of balance and compromise which, ideally, achieves an outcome which sits squarely within the nexus of all three factors. When applied to cultural heritage, this concept is often referred to as “cultural sustainability”¹⁴⁸ and points the way towards integrating public good conservation into archaeological heritage protection. Evans has applied these principles to the general notion of heritage conservation in Australia.¹⁴⁹ He posits a rational view of heritage conservation, based around a right of the present and future community to access the past and an obligation thereby arising to preserve elements of our various pasts. Part of this process involves people ascribing broad ‘cultural values’ to objects and, by extension, significance to heritage items. Evans asserts that sustainable conservation essentially involves an ethic of stewardship¹⁵⁰ for the past and advocates using nonbinding documents of principle rather than legislation to implement this ethic,¹⁵¹ with the ‘soft law’ sustainability principles as the tool.

¹⁴⁵ Little, B. J. (2004). Is the medium the message? The art of interpreting archaeology in US National Parks. *Marketing Heritage: archaeology and the consumption of the past*. Y. Rowan and U. Baran. Walnut Creek, CA, AltaMira Press: 269-286.

¹⁴⁶ Belshaw, C. (2001). *Environmental philosophy*. Chesham, Acumen Publishing. Pg 174.

¹⁴⁷ Also referred to as ‘sustainable development’, ‘ecologically sustainable development’ or ESD.

¹⁴⁸ Gerus, M. (1993). “The Heritage of Western Australia Act 1990 and culturally sustainable development.” *Australian Environmental Law News* 3: 31-39. Pp 31-32.

¹⁴⁹ Evans, M. (2000). *Principles of Environmental & Heritage Law*. St Leonards, Prospect Publishing.

¹⁵⁰ Within the context of Aboriginal heritage management, Murphy has advocated a similar concept of Aboriginal ‘guardianship’ of cultural heritage, where a Native Title connection with the land has been established. Although the ‘guardianship’ Murphy describes implies an ongoing spiritual as well as physical connection to the land, which is a different type of relationship to Evans’ ‘stewardship’. The latter implies more of an ongoing connection to present and future generations, expressed through the conservation of heritage, rather than a deep spiritual connection to the physical expressions of that heritage per se. Murphy, L. (1996). “The political application of cultural heritage management: indigenous participation or indigenous control?” *Tempus* 6: 141-146. Pp 141-142.

¹⁵¹ Evans, M. (2000). *Principles of Environmental & Heritage Law*. St Leonards, Prospect Publishing. Pg 62-66. Evans refers to these instruments as “soft law” instruments, in that they are guiding, rather than binding, documents.

The sustainability principles, as implemented in Australia are largely focussed on the natural, living environment. They have been conceived as the principles of “ecologically sustainable development” (or ESD) and, due to that focus, are not directly adaptable to the cultural environment. The ESD principles, as implemented in Australian legislation are set out as follows:

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- (b) 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;
- (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.¹⁵²

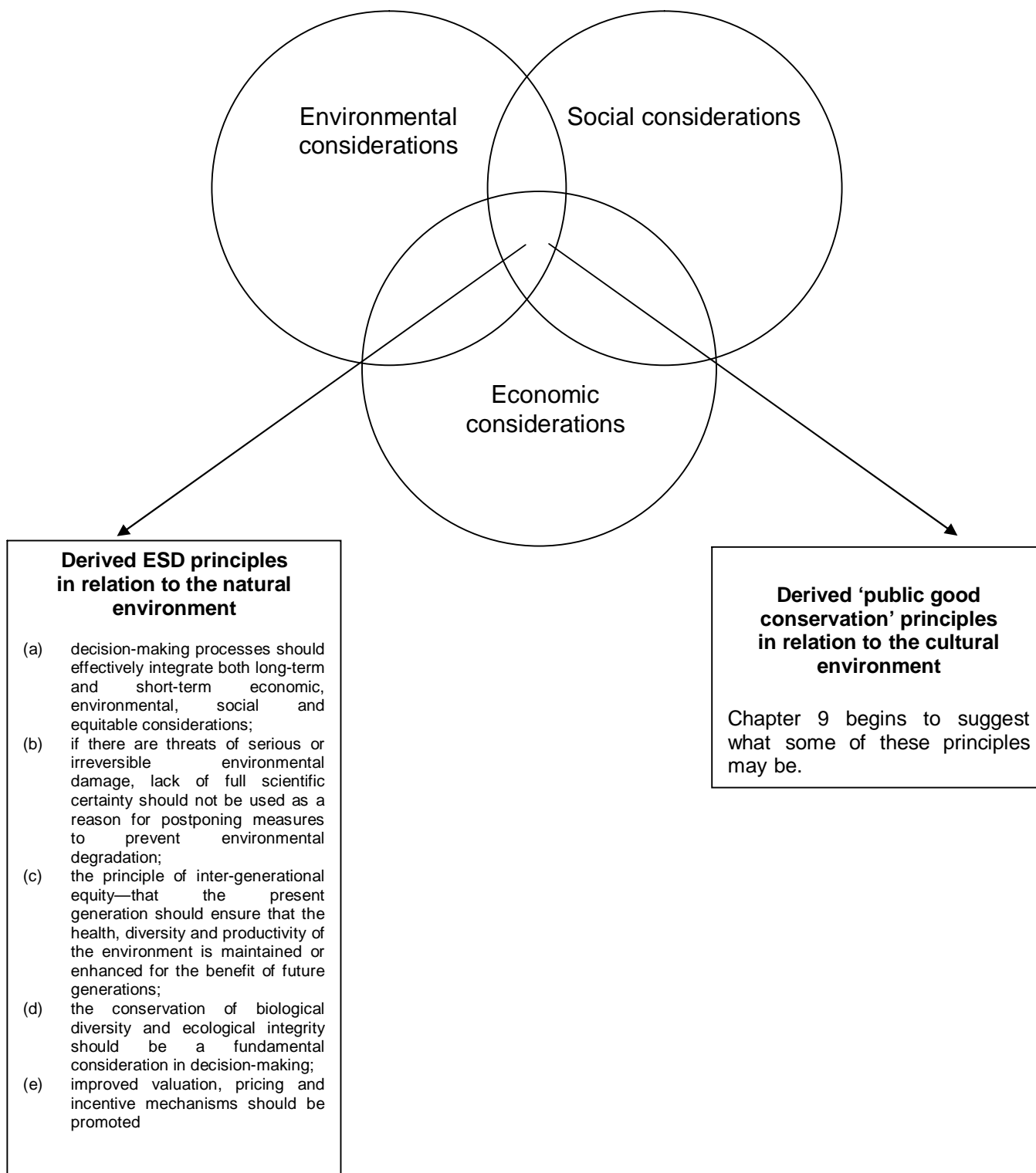
Boer and Wiffen have noted the difficulty in translating the concerns of the ESD principles, with their natural environment focus, to the cultural environment.¹⁵³ Similarly, other authors have noted that there are multiple conceptions of what “sustainability” may mean, and the concerns of developed nations may be very different from those of developing nations.¹⁵⁴ But the underlying principle behind ESD, that environmental, social and economic considerations should be taken into account in decision-making, is also an underlying principle of ‘public good conservation’. In essence, the ‘public good conservation’ considerations should be to the cultural environment what the ESD principles have become to the natural environment. This relationship is shown in the diagram overleaf (Figure 3.4). The conclusion of this thesis, in Chapter 9, begins to point to what some of those ‘public good conservation’ principles may be.

¹⁵² *Environment Protection and Biodiversity Conservation Act* (1999) Commonwealth. Section 3A. These principles are themselves derived from Section 3 of the 1992 Intergovernmental Agreement on the Environment. Australian Commonwealth Government (1992). Intergovernmental Agreement on the Environment. Canberra. <http://www.deh.gov.au/esd/national/igae/index.html>. See also the discussion of the development of the ESD principles in Hutton, D. and L. Connors (1999). *A History of the Australian environmental movement*. Melbourne, Cambridge University Press. Pp 245-260.

¹⁵³ Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 15-16.

¹⁵⁴ Schnaiberg, A. and K. A. Gould (2000). *Environment and society: the enduring conflict* (2nd edition). Caldwell New Jersey, Blackburn Press. Pp 211-216.

Figure 3.4: Relationship between the sustainability principles, ESD and 'public good conservation'



The rationality inherent in Evans' view of heritage and environmental conservation is an essential criterion for applying the balance which the sustainability framework brings to the consideration of any given environmental concern. Writing somewhat earlier, Mayer-Oakes had explicitly advocated for a stewardship ethic within American archaeological heritage management, and considered that a part of that stewardship process was ensuring that archaeological work should serve the public interest.¹⁵⁵ While writing prior to the concept of 'sustainability' in the sense Evans uses it, Mayer-Oakes' conception of archaeological stewardship within a public interest context fits neatly within the sustainability framework. These conceptions of stewardship are also reinforced through the Codes of Ethics of various archaeological professional and interest groups, including the Australian Archaeological Association¹⁵⁶ and the Australian Association of Consulting Archaeologists Incorporated.¹⁵⁷ Smith, for one, remains sceptical of the archaeological stewardship concept, viewing it as an intellectual ruse to justify the role of archaeologists as the stewards of the archaeological record.¹⁵⁸ Where stewardship is used by archaeologists or the heritage profession generally, as a justification for the exercise of an unequal power or control relationship with other parties with a claim to the remains of the past, this is a justified criticism. But where stewardship can be used to bring about an inclusive or collaborative relationship in accessing or interpreting the past, it is a useful concept.

The concept of sustainability, as a process for balancing the impacts and outcomes of actions, has value and moral force. It reinforces the notion that "heritage" is a collective construction and therefore a collective concern.¹⁵⁹ As a concept, it has been developed in the international arena through an extensive process of consultation and negotiation, and is enshrined in international treaties and charters, much as with the underlying principles of archaeological heritage conservation, which are discussed in Chapter 4. From a domestic perspective, this gives the sustainability principles an overarching imprimatur. This authority assists in driving the principles into domestic legislation at all levels of government, which Boer notes is essential for achieving the goals of sustainability.¹⁶⁰ Viewed broadly, the principles of sustainability when considered for heritage conservation assist in the establishment of a 'public good' framework for archaeological heritage conservation in law.

3.13 The need for 'public good conservation'

There is no unitary 'public' for whom good can necessarily always be done. But drawing on examples cited earlier, initiatives taken 'in the public good' are those which are aimed at improving quality of life or disseminating a positive

¹⁵⁵ Mayer-Oakes, W. J. (1989). Science, Service and Stewardship - a Basis for the Ideal Archaeology of the Future. *Archaeological Heritage Management in the Modern World*, H. F. Cleere. London, Unwin Hyman: 52-58.

¹⁵⁶ Australian Archaeological Association (2004). Code of Ethics.

¹⁵⁷ Australian Association of Consulting Archaeologists Inc (2004). Code of Ethics.

¹⁵⁸ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 82-83.

¹⁵⁹ Lowenthal, D. (1998). *The heritage crusade and the spoils of history*. Cambridge, Cambridge University Press. Pp 55-56.

¹⁶⁰ Boer, B. (1995). "Institutionalising ecologically sustainable development: the roles of national, state, and local governments in translating grand strategy into action." *Willamette Law Review* 31 (2): 307-358.

outcome to the broadest possible spectrum of the population. 'Public good conservation' shares these aims by seeking to make conservation beneficial and relevant to society more broadly. This is particularly the case as these disciplines are fairly mature, having been established for more than thirty years.¹⁶¹ Such a period of time potentially allows complacency to develop in both the interest groups and the general public, who may consider such issues resolved in their minds. More worryingly, the public may view achievements in these areas to be inadequate or inappropriate. This may be particularly true for sectors of society who feel aggrieved or philosophically opposed to conservation efforts. This leaves open the possibility of a winding-back of protective mechanisms which have evolved over time.¹⁶² When considered within the context of sustainability, 'public good' outcomes will be those which adequately balance competing interests and provide equal or greater benefits to the wider community than to the party or individual which might undertake a particular action. As the sustainability principles become more and more enshrined in bodies of domestic legislation, those practices which do not appear to be providing this level of balance will become increasingly pressured to review and reform. Environmental and heritage conservation activities are, by their very nature, prime candidates for this type of conservation, as there is an inherent implication that these activities are about providing a wide community benefit.

An Australian Government Parliamentary Committee has examined, to a limited extent, the issue of 'public good conservation' for environmental conservation.¹⁶³ While this work was primarily focussed on assessing the impacts of 'public good conservation' environmental efforts on the livelihoods of farmers and landowners, the analysis represents a significant policy document which explores the various facets of 'public good conservation' in some detail. The Committee took the view that, while every landowner had a duty of care to manage their land and the environment in a sustainable manner, those activities which are beyond their immediate personal benefit are 'public good conservation' initiatives. Those initiatives, the Committee argued, are a real (predominantly economic) concern for landowners and require balance to be brought into the process.¹⁶⁴ This goes back to the ethic of stewardship, which Evans discusses, but with an added dimension which explores the inputs to the 'public good conservation' process. An essential element of the Committee's findings was that public good conservation is a shared responsibility.¹⁶⁵

Undertaking a 'public good conservation' activity was viewed therefore not merely another obligation upon the undertaker; the activity should have a 'public good' outcome beyond a benefit for the undertaker. To this end,

¹⁶¹ Hutton, D. and L. Connors (1999). *A History of the Australian environmental movement*. Melbourne, Cambridge University Press.

Lowenthal, D. (1998). *The heritage crusade and the spoils of history*. Cambridge, Cambridge University Press.

¹⁶² Examples of such winding-back of heritage protective legislation are discussed in Chapters 5 to 7.

¹⁶³ Standing Committee on Environment and Heritage House of Representatives. Parliament. Australia (2001). *Public Good Conservation: Our Challenge for the 21st Century: Interim report of the inquiry into the Effects upon Landholders and Farmers of Public Good Conservation Measures Imposed by Australian Governments*. Canberra, Australian Government Publishing Service.

¹⁶⁴ *Ibid.* Pp 53-56.

¹⁶⁵ *Ibid.* Pp 135-136.

government and the community should be assisting the party which undertakes the activity as much as possible. This sentiment is echoed in the more recent examination of “historic heritage”¹⁶⁶ conservation by the Commonwealth Productivity Commission.¹⁶⁷ A key element of this when considered in legislation, is the question as to whether the legal provisions requiring a conservation activity are themselves balanced and designed to produce, rather than thwart, a ‘public good’ outcome.

3.14 The scientific paradigm, the ‘public good’ and archaeological heritage legislation

Naive positivism about the value of the archaeological record is a legislative artefact, albeit a powerful one, from the influence of the processualist New Archaeology of the 1960s and 70s.¹⁶⁸ It is one which denies any moral consideration of the value of particular sites and thereby supports a blanket approach to their legal protection. The strong legislative focus on scientific value provides very little opportunity for communities, particularly indigenous communities, to input into the development of broad-based research frameworks.¹⁶⁹ The outputs of compliance-driven “research” are therefore unlikely to reflect public interests or perceptions of the archaeological heritage. Similarly, most professional archaeologists lack the opportunity to contribute to such research frameworks, as they are concerned either with their own personal research agendas (if academics) or with assisting clients with archaeological compliance (if consultants). Here it must be recognised that the archaeological heritage manager (i.e. the administrator of heritage legislation) is in an advantageous position to facilitate, if not necessarily develop, broad research frameworks. Smith argues that this focus on regional research frameworks is still mired in processualist modes of thinking.¹⁷⁰ She views regional research frameworks as inherently driven by the scientific mode of thought, as necessary to legitimate archaeological data. But provided such frameworks are guiding documents only and do not unduly limit the consideration of other research themes or community agendas, regional research frameworks have the potential to provide a coherence to what is otherwise a disconnected series of archaeological projects across the landscape. New South Wales has attempted this with respect to historical research, through the development of ‘historic themes’ and ‘regional histories’ which are intended to provide a shared basis for historical research within that state.¹⁷¹

¹⁶⁶ I.e. non-indigenous. In practice, while the brief of the Productivity Commission was wider, their analysis focussed almost exclusively on the economic issues associated with the conservation of heritage-listed buildings by private individuals. See Productivity Commission (2005). Conservation of Australia's historic heritage places - issues paper. Melbourne, Australian Government. For the initial, broader Terms of Reference for this enquiry.

¹⁶⁷ Productivity Commission (2006). Conservation of Australia's historic heritage places - final report. Melbourne, Australian Government.

¹⁶⁸ Kohl, P. L. (1993). Limits to a post-processual archaeology (or, the dangers of a new scholasticism). Archaeological theory - who sets the agenda? N. Yoffee and A. Sherratt. Cambridge, Cambridge University Press: 13-19.

¹⁶⁹ Greer, S., R. Harrison, et al. (2002). "Community-based archaeology in Australia." World Archaeology 34 (2): 265-287. Pg 267. See the detailed analysis of Australia heritage legislation in Chapters 5 to 7 of this thesis.

¹⁷⁰ Smith, L. (2004). Archaeological theory and the politics of cultural heritage. London, Routledge. Pp 117-120.

¹⁷¹ NSW Heritage Office and Department of Urban Affairs and Planning (1996). Regional Histories. Sydney, NSW Government.

From a professional perspective, public views of archaeological significance may be seen as irrational or misinformed, concerned with aliens, dinosaurs, religious happenings or the exploits of fictional archaeologists.¹⁷² A narrowly-focussed interpretation of 'research' significance as the primary heritage value allows such community views to be excluded, on the basis that they do not support a scientific understanding of the value of a site.¹⁷³ The public's perception of a site is an opportunity for the construction of community identity and social value.¹⁷⁴ In such an instance, the public view may reflect the ambitions a society has for itself, or for the past or future it wishes to construct for itself. Archaeological research should be able to contribute to community identity, but if it is to do so, that requires the cooperation and participation of the community. Similarly, the use of archaeological heritage in a non-research oriented way should not necessarily be precluded. If the public attaches a social value to a site there should at least be sufficient flexibility within a heritage management framework to consider this value alongside research values, yet many of the legal regimes for archaeological heritage management discount or exclude such views. The public use of archaeological heritage in this way may seem at odds in some instances with the professional/research/scientific values of a site, particularly in instances where the public may want a site preserved, even though from a 'purely' research-oriented point of view, the site may not warrant such action. But an archaeological site may become symbolic of other non-archaeological or non-heritage values which the community is attempting to articulate about itself,¹⁷⁵ whether this is demonstrating appreciation for its own past, valuing open space or educative facilitates or not allowing a site to be overdeveloped.¹⁷⁶

In its current form, Australian heritage legislation does not promote the *use* of the archaeological heritage, even for research purposes, but merely its preservation as data, data which may *never* be analysed. Community values are rarely directly catered for in the legislation and can only be dealt with administratively within the context of conditions placed on an approval to impact archaeological material or places. Some of this is due to the manner in which archaeological heritage legislation has been administered. In other cases heritage managers have been constrained by the legislation itself. Detailed analysis of these issues is contained in Chapters 5 to 7. Furthermore, those non-archaeologists who are bound to comply with archaeological legislation have no obligation, nor necessarily any desire, to undertake the

¹⁷² Pokotylo, D. and N. Guppy (1999). "Public opinion and archaeological heritage: views from outside the profession." *American Antiquity* 64 (3): 400-16.

Balme, J. and M. Wilson (2004). "Perceptions of archaeology in Australia amongst educated young Australians." *Australian Archaeology* 58: 19-24.

¹⁷³ Greer, S., R. Harrison, et al. (2002). "Community-based archaeology in Australia." *World Archaeology* 34 (2): 265-287. Pp 278-280.

¹⁷⁴ Lowenthal, D. (1998). *The heritage crusade and the spoils of history*. Cambridge, Cambridge University Press. Pp 55-87.

Ireland, T. (2002). "Giving value to the Australian historic past: historical archaeology, heritage and nationalism." *Australasian Historical Archaeology* 20: 15-25.

¹⁷⁵ Kohl, P. L. and C. Fawcett, Eds. (1995). *Nationalism, politics and the practice of archaeology*. Cambridge, Cambridge University Press.

Baran, U. and Y. Rowan (2004). *Archaeology after nationalism: globalisation and the consumption of the past. Marketing Heritage: archaeology and the consumption of the past*. U. Baran and Y. Rowan. Walnut Creek, CA, AltaMira Press: 3-23.

¹⁷⁶ Hall, C. M. and S. McArthur (1996). *Managing community values: Identity-place relations: An introduction. Heritage Management in Australia and New Zealand: The Human Dimension*. C. M. Hall and S. McArthur. Melbourne, Oxford University Press: 180-184.

types of community-oriented archaeological work which might be recommended in policy or guidelines. A formal, legalistic approach to treating archaeological heritage solely as research data to be analysed can enshrine little more than a data-collecting antiquarianism.¹⁷⁷ The Codes of Ethics of archaeological organisations such as the Australian Archaeological Association and the Australian Association of Consulting Archaeologists Incorporated may seek to push archaeological work in the direction of community-based outcomes, but again there is no compliance requirement which can ensure this will happen. What requires protection, then, is not so much the “research value” of archaeological heritage, but a method of ensuring that *research* is actually undertaken, which can support wider benefits to the community,¹⁷⁸ as well as ensuring the public values of the site are adequately conserved and presented to the community.

3.15 Conclusion—Building a framework for ‘public good’ archaeology

For ‘public good conservation’ to work, the legislative frameworks for conservation must support ‘public good’ outcomes. The establishment of broad frames of reference are a part of providing the opportunity within the legal framework for ‘public good’ outcomes. Broad frameworks such as the sustainability principles can support public good outcomes in environmental conservation, due to their level of acceptance at international and national levels.¹⁷⁹ The effectiveness of the principles relies directly upon their being driven down to the subordinate legal frameworks at state and local level.¹⁸⁰ Similarly, a suitably broad-based understanding of an environmental ‘duty of care’ can, if implemented throughout the levels of government and across jurisdictions, achieve a ‘public good conservation’ outcome.¹⁸¹ Research significance, however, is a narrow frame of reference, primarily designed to suit the needs of archaeologists and, as discussed earlier, those needs are primarily derived from a now-outdated framework for academic research.

For archaeological heritage legislation to achieve a ‘public good’ status, it must move away from the current focus on research significance and consider a wider frame of reference. The move away from the primacy of scientific significance should acknowledge the fact that little research is in fact being produced and the research significance of many sites itself is going unrealised. This indicates the need to seek out other valid outcomes for archaeological heritage management. Fundamental changes are required to the mechanics of the existing archaeological heritage legislation, which is largely designed to protect archaeological objects, archaeological sites and

¹⁷⁷ Lipe, W. D. (2002). Public Benefits of Archaeological Research. Public Benefit of Archaeology. B. J. Little. Gainesville, University Press of Florida: 20-28. p20

¹⁷⁸ Little, B. J. (2002). Archaeology as a Shared Vision. Public Benefit of Archaeology. B. J. Little. Gainesville, University Press of Florida: 3-19. p3

¹⁷⁹ Evans, M. (2000). Principles of Environmental & Heritage Law. St Leonards, Prospect Publishing. Pp 64-68.

¹⁸⁰ Boer, B. (1995). "Institutionalising ecologically sustainable development: the roles of national, state, and local governments in translating grand strategy into action." Willamette Law Review 31 (2): 307-358. Pp 330-331; 357-358.

Rothwell, D. and B. Boer (1995). "From the Franklin to Berlin: the internationalisation of Australian environmental law and policy." Sydney Law Review 17 (2): 242-277. Pp 275-277.

¹⁸¹ Standing Committee on Environment and Heritage House of Representatives. Parliament. Australia (2001). Public Good Conservation: Our Challenge for the 21st Century: Interim report of the inquiry into the Effects upon Landholders and Farmers of Public Good Conservation Measures Imposed by Australian Governments. Canberra, Australian Government Publishing Service.

their underlying or assumed research significance first and foremost. These will in turn require resources, infrastructure, education or standards which support the implementation of a new framework. As will be discussed later in the thesis, even in circumstances where legislation gives some protection to, the indigenous cultural values of archaeological heritage, the actual implementation of protective mechanisms can be difficult. The focus on these narrowly defined protections has limited the ability of archaeology to provide a “useable past” to the public, as is called for by Little.¹⁸² The development of a ‘public good’ test for archaeological heritage protection which is implemented in law will, by broadening the frame of reference, lead to a conservation of Australia’s archaeological heritage which is more in keeping with the underlying principles of archaeological conservation, sustainability and current societal values. This need not negate the value of research significance, but will rather require consideration of research significance as one of a number of equally significant criteria, rather than the determining factor for conservation or the driving force behind archaeological heritage protection legislation.

As an expression of societal values, legislation must evolve and change in response to the changes within society. Archaeological practice in Australia has also evolved, largely driven in a particular direction by heritage legislation. This has had unintended consequences, which has left existing legislation and practice out of step with contemporary values. The development of a broad environmental consciousness in Australia and internationally over this period has come to an ethical position based on the balancing of competing interests rather than the primacy of any one interest. Heritage conservation generally has started to grapple with these issues but archaeological heritage conservation has remained mired in a focus on research significance which largely ignores wider values. The development of legal regimes which protect archaeological heritage within a ‘public good conservation’ framework is necessary for archaeological heritage to be considered relevant to the wider community. Sustainability, which includes notions of stewardship and duty of care, is focussed on providing these wider outcomes for the community.

Building on the philosophical position set out in Chapter 3, Chapter 4 explores in greater detail the underlying principles of archaeological heritage protection, as expressed in charters, treaties and other “soft law” documents of principle which have helped shape the Australian legal landscape. These are considered in light of the broad goals of heritage conservation and how they can support a notion of ‘public good conservation’. This analysis of the underlying principles of archaeological heritage conservation is followed by an assessment of their application in current Australian legal regimes in Chapters 5 to 7. Through this detailed analysis of existing legal regimes it will be possible to see where the gaps lie between the existing legal frameworks and the goal of ‘public good conservation’.

¹⁸² Little, B. J. (2002). Archaeology as a Shared Vision. *Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: 3-19.

Chapter 4—Identifying underlying principles of archaeological heritage protection

4.1 Establishing principles of protection

Chapter 4 analyses the international and domestic instruments which provide the underlying basis for protecting heritage generally and considers how these relate to both the scientific and ‘public good’ protective paradigms discussed in previous chapters. Most are applicable in Australia and have been ratified or adopted by many countries. Each of these instruments, while in most cases not principally concerned with archaeological heritage, establishes key principles for its protection. This chapter identifies three main underlying principles of archaeological heritage protection in these instruments, setting the scene for analysing their implementation in Australian heritage law in Chapters 5 to 7. These three key principles of archaeological heritage protection, protection of the archaeological object, protection of the archaeological site and transmission of knowledge gleaned from the archaeological record to present and future generations, underlie all archaeological heritage protection legislation to a greater or lesser degree.

International and domestic treaties, charters and codes of practice have all had a bearing on the framing of heritage legislation in Australia. Select other key documents are also considered where they relate to archaeological heritage protection although they may not be specifically implemented in Australia. The majority of these documents are concerned with heritage protection more generally, but all make reference to archaeological heritage. As the underlying documents of legal heritage protection regimes in Australia, analysis of these documents allows the fundamental principles of archaeological heritage protection to be distilled. Existing legal regimes for archaeological heritage protection in Australia are then evaluated against these protective principles, as well as against the concept of ‘public good conservation’.

4.2 Key heritage instruments

This section considers the key extralegal instruments which have helped shape the legal landscape for archaeological heritage management in Australia. These documents are influential “soft law” documents—documents of policy and principle, but without the force of statute—which Evans argues are key in implementing heritage protection legislation.¹ These instruments take three forms: international Conventions, UNESCO Recommendations and Charters. Conventions place binding obligations on those countries which become signatories² to the Conventions, generally including a requirement that the signatory nations enact appropriate national legislation to ensure the Convention can be implemented within the signatory nation, although such arrangements vary.³ UNESCO Recommendations are non-binding statements

¹ Evans, M. (2000). *Principles of Environmental & Heritage Law*. St Leonards, Prospect Publishing. Pp 62-66.

² Also referred to as “States Parties”

³ O’Keefe, P. J. (2000). *Commentary on the UNESCO 1970 convention on illicit traffic*. Leicester, Institute of Art and Law. Pg 102.

of recommended regulatory principle which UNESCO has endorsed.⁴ Member states of the UN are not required to implement the principles. Recommendations are voluntary, but have a degree of moral force and can help establish the basis for a formal, binding instrument such as a Convention at a later date. The Constitution of UNESCO itself prevents the organisation's intervention in domestic matters,⁵ thus the voluntary adoption of these guiding documents and their implementation in domestic law is a key element in their effectiveness. Charters are again statements of principle, however those discussed in this chapter are issued by nongovernmental agencies, and thus have no legal force. Adoption of the Charters is voluntary and, as with the Recommendations, they act as moral forces which establish sets of guiding principles.

Australia is a signatory to two of the three main international heritage conventions: the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*⁶ and the 1972 *Convention for the Protection of the World Cultural and Natural Heritage*.⁷ Australia has not, as yet, chosen to participate in the 1995 *Unidroit Convention on Stolen or Illegally Exported Cultural Objects*.⁸ By becoming a signatory to these Conventions, specific legal obligations⁹ have been placed on Australia to implement the key elements of the Conventions in domestic legislation and to cooperate with the international community to see that the Conventions are implemented. The UNESCO and Unidroit conventions are primarily concerned with preventing the illegal transfer of cultural property out of the home country and placing restrictions on the public (UNESCO) and private (Unidroit) spheres to prevent this practice. The World Heritage Convention is concerned with the protection of places entered on the World Heritage List and unlisted places which may be under consideration for World Heritage status. Each of these Conventions has had some bearing on the protection of archaeological heritage under Australian law, as domestic legislation is required to reinforce the broad principles set out in the

⁴ United Nations (2004). Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution. Article 1(b) states that "Recommendations...[contain]...principles and norms for the international regulation of any particular question...Member States [may] take whatever legislative or other steps may be required...to apply the principles and norms aforesaid within their respective territories." Thus the application of the Recommendations to domestic law is entirely at the direction of a particular State.

See also Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 34-35.

⁵ Merryman, J. H. (2005). "Cultural heritage internationalism." *International Journal of Cultural Property* 12: 11-39. Pp 20-21. The limitations on UNESCO's actions are contained in Article 1 of its Constitution.

⁶ Accepted by Australia on 30/10/1989. Hereafter UNESCO Convention.

⁷ Ratified by Australia on 22/08/1974. Hereafter World Heritage Convention.

⁸ The Convention entered into force internationally on 24/06/1995 but Australia is not, as yet, a party to this Convention. See <http://www.unidroit.org/english/implement/i-95.pdf>. Accessed 20 April 2006. Hereafter Unidroit Convention.

Note unlike the United Nations, which is a quasi-governmental organisation in its own right, with membership of essentially all nations on the planet, Unidroit is an intergovernmental cooperative organisation which seeks to develop consistency and cooperation between nations in the fields of private and commercial law. To become members, states must accede to the *Unidroit (International Institute for the Unification of Private Law) Statute* 1993. Australia is one of 60 member States in Unidroit and is represented within Unidroit by the Commonwealth Attorney-General's Department. See <http://www.unidroit.org/english/presentation/main.htm>. Accessed 20 April 2006.

⁹ UNESCO Convention Articles 5(a), 6(b), 7(b), 8 and 13.
World Heritage Convention Articles 5(d) and 11(1).
Unidroit Convention Articles 5(1), 5(3).

Conventions.¹⁰ Such legislation must be tailored to suit local circumstances in individual jurisdictions.¹¹

There are also several nonbinding extralegal documents which set standards relevant to the protection of archaeological heritage. The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance¹² (Burra Charter) is the principal document in Australia and has substantial influence in the framing of Australian heritage legislation. It was itself heavily influenced by the 1966 Venice Charter¹³ and the findings of the Hope Inquiry into the National Estate,¹⁴ the latter is discussed later in this chapter. In addition, there are two specifically archaeological extralegal documents which need to be considered in the analysis of the principles for protecting archaeological heritage: the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations¹⁵ and the 1990 ICOMOS Charter for the Protection and Management of the Archaeological Heritage.¹⁶ Neither of these latter two documents has been implemented in Australia nor adopted by Australian governments or Australian archaeological professional bodies. Nevertheless, as specifically archaeological international documents they provide a basis for the discussion of the principles of archaeological heritage protection developed in this chapter. These conventions and extralegal guiding documents provide the basis for the conservation of archaeological sites in Australia, and each will be examined in turn. The chapter concludes with an examination of several archaeological Codes of Ethics, including the Codes for the Australian Association of Consulting Archaeologists Incorporated (AACAI) and the Australian Archaeological Association (AAA) and the New South Wales Government's archaeological Code of Practice.¹⁷ This will analyse how the profession has responded to the challenges and issues raised in the treaties and charters.

4.3 International Legal Instruments—Conventions

Australia has implemented the two key UNESCO heritage conventions, the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the*

¹⁰ Jowers, K. F. (2003). "International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico." *Texas International Law Journal* 38: 145. Pg 154. In Australia, the *Protection of Movable Cultural Heritage Act 1986* (Cth) does this at the Commonwealth level and in the United States a similar function is served at the Federal level by the *Convention on Cultural Property Implementation Act 1983* (USA). Public Law 97-446 [H.R. 4566], 96 Stat. 2329, approved January 12, 1983.

¹¹ *Ibid.* Pg 160.

¹² Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. *Burra Charter*. Hereafter Burra Charter, as revised 1999.

¹³ (1966). International Charter for the Conservation and Restoration of Monuments and Sites. *Venice Charter*. The Venice Charter was never adopted by Australia. As the Venice Charter is primarily concerned with built heritage, it will not be considered by this thesis. Furthermore, the establishment of the Burra Charter in Australia in 1979 essentially rendered the Venice Charter redundant in the Australian context. See also Truscott, M. and D. Young (2000). "Revising the Burra Charter: Australia ICOMOS updates its guidelines for conservation practice." *Conservation and Management of Archaeological Sites* 4: 101-116.

¹⁴ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service.

¹⁵ UNESCO (1956). Recommendation on International Principles Applicable to Archaeological Excavations. *New Delhi Recommendation*. The New Delhi Recommendations were never adopted in Australia.

¹⁶ International Council on Monuments and Sites (1990). Charter for the Protection and Management of the Archaeological Heritage. *ICOMOS Archaeological Charter*. The ICOMOS Archaeological Charter has not been adopted in Australia, although it remains in effect internationally.

¹⁷ NSW Department of Planning and Heritage Council of NSW (1993). *Code of Practice: Historical Archaeological Excavations*. Sydney, NSW Government. As of mid-2006, this document was undergoing revision prior to reissue.

Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1972 *Convention for the Protection of the World Cultural and Natural Heritage*. These Conventions, as well as other charters and documents have been of considerable influence internationally, particularly in encouraging cooperative efforts to protect cultural heritage.¹⁸ While these Conventions are not specifically concerned with archaeological matters, they have been enormously influential in the shaping of domestic heritage legislation and policy.¹⁹ The Conventions are analysed in the order in which they were adopted by Australia, rather than in chronological order.

4.3.1 The World Heritage Convention 1972

The World Heritage Convention was drafted in 1972 in response to a perception that rapid social changes around the world threatened to conservation of highly significant heritage places. The impetus for the Convention was, in part, an outgrowth of the international cooperative efforts of the 1960s to save the Abu Simbel temples in Egypt, which were to be flooded by the construction of the Aswan Dam.²⁰ Historically, it is the most important of the heritage Conventions for Australia, as it represents the first adoption of a document of heritage conservation principles by an Australian Government. Australia was amongst the first nations to ratify the Convention and now almost all UN member nations are parties to it.²¹ The Convention was highly influential in Australia in the early days of the heritage conservation movement and debate on its ratification occurred simultaneously with the establishment in 1973 of the Committee of Inquiry into the National Estate,²² from which much Australian heritage legislation and philosophy flows. Domestically, the protection of World Heritage Places is effected through the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*²³ though that legislation has been criticised for focusing protective efforts on the listed World Heritage values rather than protecting the totality of the place and any as-yet-unidentified values.²⁴ The Convention is concerned with protecting cultural and natural places of “outstanding universal value”²⁵ and the Preamble states that “deterioration or disappearance of any item of the cultural or natural heritage”²⁶ constitutes a harmful impoverishment of the

¹⁸ Merryman, J. H. (2005). "Cultural heritage internationalism." *International Journal of Cultural Property* 12: 11-39. Pp 22-24.

¹⁹ Evans, M. (2000). *Principles of Environmental & Heritage Law*. St Leonards, Prospect Publishing. Pp 38.

²⁰ Brief History of the World Heritage Convention. <http://whc.unesco.org/en/169/>. Accessed 20 April 2006. See also (1990). "The World Heritage Convention: a new idea takes shape." *UNESCO Courier* (October 1990): 42--45. and (1997). "What is the World Heritage?" *UNESCO Courier* (September 1997): 6-9.

²¹ The Convention was passed by the UN General Conference on 16 November 1972 and Australia was the 7th nation to become a party to the Convention on 22/08/1974. The convention came into force internationally on 17 December 1975. As of 2006, there are 182 States Parties to the Convention. <http://portal.unesco.org/la/convention.asp?KO=13055&language=E>. The United Nations has 191 Member Countries as of 2006. <http://www.un.org/geninfo/faq/faq/faq.html>. Accessed 20 April 2006.

²² Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Established 17 May 1973 with findings delivered in 1974. See discussion later in this Chapter.

²³ Protections for World heritage places were added to this legislation in 1999 when the *World Heritage Properties Conservation Act 1983 (Cth)* was repealed by the *Environmental Reform (Consequential Provisions) Act 1999 (Cth)*—Schedule 6, Section 1.

²⁴ Nichols, W. (2001). World Heritage at the crossroads. *Habitat Australia*. August 2001: 12-15.

²⁵ UNESCO (1972). *Convention for the Protection of the World Cultural and Natural Heritage*. *World Heritage Convention*. Preamble.

²⁶ Ishwaran observes that the notion of “natural heritage” considered by the Convention is focussed more on aesthetic or scenic values and predated the broader concept of biodiversity conservation usually associated with

heritage of all nations of the world” and that “parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as a part of the world heritage of mankind as a whole.”²⁷ The purpose of the Convention is to establish both the protective framework and cooperative mechanisms necessary for this to happen at an international level. And while the language of the Convention may imply the need for a universal protection for cultural heritage places, its focus is only on those places of “outstanding universal value”.

The Convention conceives of archaeological heritage as one of the potential forms of heritage of outstanding universal value. Article 1 of the Convention defines the nature of different categories of cultural heritage places and specifically mentions monuments, which include “elements or structures of an archaeological nature” of outstanding value for history, art or science, as well as sites, defined as “works of man or the combined works of nature and of man and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.” In the *Operational Guidelines* to the Convention, archaeological heritage is identified as one of the key components of the heritage values of urban centres and abandoned places such as uninhabited cities and towns.²⁸ The language of Article 1, while couched in terms of “outstanding universal value” makes significant use of the technical and scientific language typical of the period in which it was drafted, which can lead to conflict between listing places on the basis of technical, professional-objective criteria and social significance. This has led to a tendency to list “monumental” sites with perceived self-evident values over sites with perhaps greater social significance but fewer obvious visible characteristics.²⁹ That said Article 5 provides direction that the “cultural and natural heritage [has] a function in the life of the community”³⁰ as a rationale for its conservation rather than conservation on primarily on technical values. It is thus possible to read “outstanding universal value” as a form of ‘public good’ conservation.

The Convention requires States Parties to identify places within their territory which may meet the criterion of “outstanding universal value” and places the obligation for the conservation of such places on individual member states, with international assistance if required.³¹ Signatories are encouraged to establish domestic conservation services³² as well to take appropriate legal measures³³ to ensure conservation measures are effective. Fundamentally,

natural heritage conservation more recently. Ishwaran, N. (2004). "International conservation diplomacy and the World Heritage Convention." *Journal of International Wildlife Law & Policy* 7 (1-2): 43-56. Pp 45-46.

²⁷ UNESCO (1972). Convention for the Protection of the World Cultural and Natural Heritage. *World Heritage Convention*.

²⁸ UNESCO World Heritage Centre (2005). *Operational Guidelines for the Implementation of the World Heritage Convention*. Paris, UNESCO World Heritage Centre. Pg 85.

²⁹ Zouain, G. (1997). "Words and deeds: ambiguities in the World Heritage Convention criteria for choosing cultural sites." *UNESCO Courier* (September 1997): 26-29.

³⁰ UNESCO (1972). Convention for the Protection of the World Cultural and Natural Heritage. *World Heritage Convention*. Article 5(a) provides significant support for this objective. A number of “living places” have been designated as World Heritage sites, particularly urban centres, including the Historic Centre of Macao, China (World Heritage List Item # 1110, 2005), the Historic Centre of Brugge (World Heritage List Item # 996, 2000) and the Historic Town of Zabid in Yemen (World Heritage List Item # 611, 1993).

³¹ *Ibid.* Article 4.

³² World Heritage Convention Article 5(b).

³³ World Heritage Convention Article 5(d).

the Convention establishes heritage conservation as an international cooperative duty,³⁴ rather than something undertaken solely in the national interest. In this regard it can be considered highly successful, as an almost universally adopted instrument which has facilitated international cooperation,³⁵ although concerns have been raised that lack of follow-up commitment and increased tourism at World Heritage sites can cause more harm than good.³⁶ The Convention establishes the World Heritage Committee as the international administrative and oversight body,³⁷ with its main tools being the World Heritage List³⁸ and the List of World Heritage in Danger.³⁹ Other major objectives of the Convention are the encouragement of private conservation efforts⁴⁰ and the education of the public.⁴¹

It is interesting to consider the value and position the World Heritage Convention, and indeed 'soft law' heritage instruments more generally in circumstances where a signatory government may itself decline to ensure the conservation of (indeed participate in the destruction of) a World Heritage place. Undoubtedly the most dramatic recent example of this was the destruction of the giant Buddas in Bamiyan, Afghanistan, discussed in the previous chapter, which despite being inscribed on the World Heritage list and international protestations, were destroyed by the ruling government of the time.⁴² In Australia, related questions arose when the Federal Government considered and then ultimately approved the recommencement of uranium mining in Kakadu World Heritage Area in the Northern Territory.⁴³ Only through political machinations did Australia prevent the inscription of Kakadu on the List of World Heritage in Danger.⁴⁴ In circumstances where the responsible State Party chooses to act in a manner which is contrary to the conservation of a World Heritage Place, there is little the international community can do in a legal sense;⁴⁵ the List of World Heritage in Danger is the major tool of moral suasion to persuade governments to take appropriate action to limit harm, but there is no mechanism to compel action. Sanctions, if any, are a matter left to domestic legislation.

In terms of archaeological heritage conservation, the Convention can be a significant tool but one which has been used to only limited effect in this

³⁴ World Heritage Convention Articles 6 and 7. Articles 19 to 26 set out the conditions and procedures for the rendering of cooperative assistance.

³⁵ von Droste, B. (1997). "The World Heritage Convention: 25 years on." *UNESCO Courier* (September 1997): 8-9. Ishwaran, N. (2004). "International conservation diplomacy and the World Heritage Convention." *Journal of International Wildlife Law & Policy* 7 (1-2): 43-56.

³⁶ (2006). "The curse of approval: if UNESCO designates it, they will come. Does identifying World Heritage sites do more harm than good?" *Newsweek International* (April 10 2006).

³⁷ UNESCO (1972). Convention for the Protection of the World Cultural and Natural Heritage. *World Heritage Convention*. Articles 8-10.

³⁸ World Heritage Convention Article 11(2).

³⁹ World Heritage Convention Article 11(4).

⁴⁰ World Heritage Convention Article 17.

⁴¹ World Heritage Convention Article 27.

⁴² O'Keefe, R. (2004). "World cultural heritage: obligations to the international community as a whole?" *International and Comparative Law Quarterly* 53 (1): 189-209. Pp 195-196.

⁴³ Mulvaney, J. (2002). "Uranium and cultural heritage values." *Dissent* 7 (Summer 2001-2002): 47-50.

O'Brien, J. (2003). "Canberra yellowcake: the politics of uranium and how Aboriginal land rights failed the Mirrar people." *Journal of Northern Territory History* 14: 79-91.

⁴⁴ Maswood, S. J. (2000). "Kakadu and the politics of World Heritage Listing." *Australian Journal of International Affairs* 54 (3): 357-372.

⁴⁵ O'Keefe, R. (2004). "World cultural heritage: obligations to the international community as a whole?" *International and Comparative Law Quarterly* 53 (1): 189-209. Pp 207-208.

regard in Australia. Many archaeological places internationally have been inscribed upon the World Heritage list, including well-known archaeological sites such as Troy,⁴⁶ Delphi⁴⁷ and Moenjodaro,⁴⁸ although places nominated principally on archaeological values represent a relatively small proportion of all listed sites.⁴⁹ In Australia, efforts were initially focussed on the listing of places of natural heritage value, such as the Great Barrier Reef,⁵⁰ however more recent efforts have focussed on built heritage, including the listing of the Melbourne Royal Exhibition Building⁵¹ and the nomination of the Sydney Opera House.⁵² Two places nominated initially only for natural values, Kakadu⁵³ and Uluru National Parks⁵⁴ in the Northern Territory, were subsequently renominated for indigenous cultural values which did include archaeological heritage, but the primary cultural impetus was the ongoing cultural connection indigenous people had with these places, rather than specific archaeological values.

At a conceptual level, the World Heritage Convention is concerned with the preservation of the heritage values of a place as a whole, rather than just individual elements within a place. The place may be principally considered archaeological in nature, or archaeology may form a major or minor component of the overall values of place. In this regard, the Operational Guidelines to the Convention state that:

It is important for urban archaeological sites to be listed as *integral units*. A cluster of monuments or a small group of buildings is not adequate to suggest the multiple and complex functions of a city which has disappeared; remains of such a city should be preserved in their entirety together with their natural surroundings whenever possible.⁵⁵

The Convention offers little other specific protection for archaeological heritage, but is highly important for establishing heritage conservation as a 'public good' issue, for both the responsible State Party and the international community. Perhaps the greatest value of the Convention is the establishment of the "common heritage of mankind" and "outstanding universal value" as very compelling notions which enjoin a consideration of conservation beyond

⁴⁶ In Turkey—World Heritage List Item # 849. Inscribed in 1998. All of the following World Heritage List details were taken from the online World Heritage database: <http://whc.unesco.org/pg.cfm?cid=31>, accessed 28 April 2006.

⁴⁷ In Turkey—World Heritage List Item # 849. Inscribed in 1998.

⁴⁸ In Greece—World Heritage List Item # 393. Inscribed in 1987.

⁴⁹ In Pakistan—World Heritage List Item # 138. Inscribed in 1980.

⁵⁰ 34 sites on the World Heritage list are identified principally as "archaeological sites" out of 812 places presently on the list. Based on a search of the online World Heritage database on 28 April 2006. <http://whc.unesco.org/pg.cfm?cid=31>

⁵¹ World Heritage List Item # 154. Inscribed in 1981.

⁵² World Heritage List Item # 1131. Inscribed in 2004.

⁵³ Nominated for World Heritage Status by the Australian Government in 2005 for consideration in 2006.

⁵⁴ World Heritage List Item # 147. Originally inscribed for natural values only in 1981, the site was subsequently expanded in size and relisted on a mix of cultural and natural values in 1992. See Report of the 18th Session of the World Heritage Committee 31 January 1995, WHC-94/CONF.003/16. <http://whc.unesco.org/archive/repcom94.htm#447>. Accessed 28 April 2006.

⁵⁵ World Heritage List Item # 447. Originally inscribed for natural values only in 1987, the site was subsequently relisted on a mix of cultural and natural values in 1994. See Report of the 16th Session of the World Heritage Committee 14 December 1992, WHC-92/CONF.002/12. <http://whc.unesco.org/archive/repcom92.htm#147>. Accessed 28 April 2006.

⁵⁶ UNESCO World Heritage Centre (2005). Operational Guidelines for the Implementation of the World Heritage Convention. Paris, UNESCO World Heritage Centre. Pg 85. Clearly the Convention sees heritage places as being greater than the sum of their parts.

the immediate needs and values of local concerns or political considerations. That said, World Heritage is of course highly politicised and, as noted above, no level of international concern can necessarily stop a government bent on international bad acts. The destruction of the giant Buddas of Bamiyan in Afghanistan, as the first deliberate act of that sort by a national government, did serve to galvanise the international community in condemning the destruction, which was described by the General Conference of UNESCO as a “crime against the common heritage of humanity.”⁵⁶ O’Keefe noted that, at the time, the universal international condemnation was not expressed in terms of Afghanistan’s obligations under the Convention and was described in suitably vague terms to render the condemnation to be more of a rhetorical than legal nature.⁵⁷ While clearly not as robust as legally-enforceable domestic statute, the World Heritage Convention, as an almost universally adopted ‘soft law’ heritage instrument has been enormously significant in Australia and internationally in establishing heritage conservation generally, if not archaeological heritage specifically, as a universally applicable ‘public good’ value.

4.3.2 The UNESCO Convention 1970

The 1970 UNESCO Convention provides the basis for the protection of cultural property (here principally referring to moveable cultural property) at the international level and is supported by many later documents and domestic legislation. Although it was the first of the major international heritage conventions, it was not adopted by Australia until 1989.⁵⁸ The essential purpose of the Convention is to provide a framework to prevent the international trade in illicitly-removed or stolen cultural property. It establishes a basis for assessing claims of illegal removal while providing a mechanism for the return of illegally-removed cultural property, though it has been criticised as a mechanism for legitimating the hoarding of cultural property.⁵⁹ The Convention is however restricted to cultural property within government control (such as that located in museums and state institutions) and does not deal with cultural property which is privately held. While the effectiveness and relevance of the UNESCO Convention has been the subject of debate,⁶⁰ as a

⁵⁶ UNESCO Doc 31C/Res 26, 2 November 2001, cited in O’Keefe, R. (2004). “World cultural heritage: obligations to the international community as a whole?” *International and Comparative Law Quarterly* 53 (1): 189-209. Pg 196.

⁵⁷ *Ibid.* Pp 202-204.

⁵⁸ The UNESCO Convention was passed by the UN General Conference on 14 November 1970 and came into force internationally on 24 April 1972. Australia was the 64th nation to become a party to it on 30/10/1989 and it entered into force in Australia on 30/01/1990. As of 2006, there are 109 States Parties to the Convention. <http://portal.unesco.org/la/convention.asp?KO=13039&language=E>. Accessed 20 April 2006.

Australia did not accede to the Convention until after the implementation of the *Protection of Moveable Cultural Heritage Act* 1986 (Cth). See Second Reading Speech for the *Protection of Moveable Cultural Heritage Bill*, 27 November 1985. Speech by The Hon B Cohen, member for Robertson, Minister for Heritage and the Environment. Australia. Parliament. House of Representatives. (1985). *Official Reports of the Parliamentary Debates (Hansard)*. Pg 3739, as well as the Question on Notice No 2672 by Mr C Hollis, Member for Throsby, on 29 November 1985. Australia. Parliament. House of Representatives. (1985). *Official Reports of the Parliamentary Debates (Hansard)*. Pg 4271.

⁵⁹ Merryman, J. H. (2005). “Cultural heritage internationalism.” *International Journal of Cultural Property* 12: 11-39. Pg 22.

⁶⁰ O’Keefe, P. J. (1996). “Developments in cultural heritage law: what is Australia’s role?” *Australian International Law Journal* (1996): 36-59.

O’Keefe, P. J. (2000). *Commentary on the UNESCO 1970 convention on illicit traffic*. Leicester, Institute of Art and Law.

O’Keefe, P. J. (2000). “International cultural property: Traditional culture and folklore: Droit de suite.” *Media and Arts Law Review* 5 (2): 121-125.

document of principle it remains influential in the formation of domestic heritage legislation, including in Australia. The preamble to the Convention provides its *raison d'être*, namely that the international community must take steps to protect the cultural property within its borders, to work cooperatively to return stolen cultural property and to ensure that cultural institutions within its borders accumulate items of cultural property in an ethical way. Jowers notes, however, that this ethical restriction on the accumulation of cultural property is effectively limited to those cultural institutions under governmental control—it has moral suasive force only upon private collecting institutions.⁶¹ This gap later led to the establishment of the Unidroit Convention, which deals specifically with cultural property in private ownership. A fundamental element of the Convention is that, through cooperation, individual nations can ensure that their respective cultures are not diminished through the loss of cultural property.⁶²

Article 1 of the convention identifies the types of “cultural property” protected by the Convention and sets out the characteristics of archaeological relics protected by the convention including:

- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

The convention specifically protects archaeological relics legitimately excavated by archaeologists as well as those excavated by looters, monuments removed from sites and “antiquities” over 100 years in age. This appears to principally designate those classes of items which are collected by enthusiasts or museums and actively traded internationally. While prohibiting the practice of illicit excavation of archaeological sites is not specifically mentioned, it falls into the terms of Article 2(2), as one of the causes or practices by which cultural property is illicitly transferred. In theory, this should preclude the collusion of the national authorities at an official or unofficial level from allowing the illegal excavation of archaeological sites within their jurisdiction. It should also prevent agents acting on behalf of government in a foreign country, such as archaeological researchers or museums, illicitly acquiring cultural property and bringing in back into their home country.

Article 5 enjoins signatory nations to create national agencies to care for cultural heritage. In Australia, this initially took the form of the Australian Heritage Commission,⁶³ later followed by State level heritage agencies in all

Leiboff, M. (1999). "The embodiment of culture: the Protection of Movable Cultural Heritage Act 1986 (Cth)." *Australian Feminist Law Journal* (12): 3-19.

⁶¹ Forrest, C. (2004). "Australia's Protection of foreign states' cultural heritage." *UNSW Law Journal* 27 (3): 605-630.
 Jowers, K. F. (2003). "International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico." *Texas International Law Journal* 38: 145. Pg 152

⁶² *Ibid.* Pg 150

⁶³ Although the creation of this agency occurred some considerable time prior to Australia becoming a party to the Convention. The Australian Heritage Commission was dissolved on 1 January 2004 and replaced by the Australian Heritage Council as a result of amendments to the *Environment Protection and Biodiversity*

States and Territories. Among the duties of protection of these agencies is subclause 5(d), which requires national agencies to:

[organise] the supervision of archaeological excavations, [ensure] the preservation in situ of certain cultural property, and [protect] certain areas reserved for future archaeological research.

This clause is perhaps the most important for the archaeological heritage within Australia. By requiring States Parties to manage the process of archaeological investigation within their borders, it puts archaeology into a class of discipline to be regulated, much as any other. It moves archaeology out of a remote, academic framework into the essential business of government.⁶⁴ And as a part of the business of government, it inevitably touches on the lives of the citizens of signatory nations, making the protection of cultural property a general societal concern. The latter half of the clause identifies the importance of archaeological sites remaining *in situ*, that is, in their original location. This statement therefore acknowledges archaeological sites as drawing at least some of their inherent worth from their original location; relocating archaeological relics and monuments to museums and other cultural institutions is therefore not always appropriate. Lastly, by requiring areas be set aside for future research and excavation, this is an attempt to provide future access to what is a finite and non-renewable resource, and privileges the “research culture” discussed in Chapter 2.

While the majority of the remainder of the Convention does not specifically mention archaeological sites or relics, the duty to prevent the illicit transfer of a range of cultural objects is clearly spelled out by the Convention. The last Article requiring specific mention in relation to archaeology is Article 10, which in part requires antique dealers to establish a register of provenance for all cultural property in which they deal. Australia has acceded to this Convention subject to a reservation for Article 10, citing an inability to enforce the keeping of a register of cultural property by antique dealers. Clause 10 (b) however, relates specifically to the States Parties’ responsibility with respect to the education of the public, to “create and develop in the public mind a realisation of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports.” As the reservation by Australia only specifically mentions the keeping of a register, there is an implication that clause 10 (b) should still apply, thereby making public education one of Australia’s responsibilities under the Convention.

The UNESCO Convention, much like the World Heritage Convention, is enormously influential as a document of principle and drove the establishment of the Commonwealth *Protection of Moveable Cultural Heritage Act* 1986. Like

Conservation Act 1999 (Cth). The new Council is enabled under the *Australian Heritage Council Act* (2003) Commonwealth. Note that the *Protection of Movable Cultural Heritage Act* is in fact administered by the Commonwealth Department of Environment and Heritage on behalf of the Minister. See <http://www.deh.gov.au/heritage/movable/index.html>. Accessed 28 April 2006.

⁶⁴ Differing levels of government involvement in the undertaking or regulation of archaeology exist around the world. See for example Hunter, J., I. Ralston, et al. (1993). *The structure of British archaeology. Archaeological Resource Management in the UK: An Introduction*. J. Hunter and I. Ralston. Phoenix Mill, Alan Sutton: 30-43. for a discussion of the UK situation, or for a brief review of the US situation see Advisory Council on Historic Preservation (2001). *Protecting Historic Properties: A Citizen's Guide to Section 106 Review*.

the World Heritage Convention, it seeks to establish a notion that the protection of cultural heritage is a collective responsibility, one which requires international cooperation. It establishes archaeological objects as items worthy of protection, but acknowledges the value of the context of those items, rather than focusing solely on the object. While principally focussed on museums and collecting bodies, it does support the notion of conservation in the 'public good', rather than for the benefit of those countries with the power or resources to claim cultural objects as their own.

4.3.3 Unidroit Convention on Stolen or Illegally Exported Cultural Objects 1995

The Unidroit Convention was established in 1995, to complement the 1970 UNESCO Convention, by placing international responsibilities for protection of cultural property on the individual as well as on governments. It complements the UNESCO Convention by providing processes which individuals as well as governments can use in the recovery of stolen cultural property, in addition to the State-to-State mechanisms established under the UNESCO Convention.⁶⁵ As yet, Australia has not ratified this Convention and to do so would require some amendment to the *Protection of Moveable Cultural Heritage Act 1986* (Cth).⁶⁶ The Unidroit Convention establishes a basis to prevent the private trade in illicit cultural property and to establish frameworks by which claims of illicit removal can be assessed and property returned to the rightful owners.⁶⁷ The preamble to the Convention specifically mentions archaeological sites as items to be protected and the Convention being:

...deeply concerned with the illicit trade in cultural objects...in particular by the pillage of archaeological sites and the loss of irreplaceable archaeological, historical and scientific information.

The preamble goes on to state specific objectives in the preservation and protection of cultural heritage and specifically the "physical protection of archaeological sites" and is couched in the professional-objective language of archaeology. Despite this cultural heritage is perceived as significant to local and national communities, as well as to humanity generally.⁶⁸ The choice of language in this Convention is significantly different from the UNESCO Convention in this regard, as the goals of the Unidroit Convention now explicitly acknowledge the need to protect not only the intrinsically valuable

⁶⁵ Prot, L. V. (1997). *Commentary on the Unidroit Convention on Stolen and Illegally Exported Cultural Objects 1995*. Leicester, Institute of Art and Law. Pg 15.

UNESCO and Unidroit (2005). UNESCO and Unidroit - cooperation in the fight against illicit traffic in cultural property (UNESCO Information Note CLT-2005/Conf/803/2). Paris, UNESCO.

⁶⁶ O'Keefe, P. J. (1996). "Developments in cultural heritage law: what is Australia's role?" *Australian International Law Journal* (1996): 36-59. Pp 39-43. O'Keefe notes the key points of divergence between the Convention and Australian legislation are in relation to the payment of compensation where the possessor of a stolen object did not know the status of the object (required under Articles 4 and 6 of the Convention, but not under the *Protection of Movable Cultural Heritage Act*) and on the time limits for proceedings to be brought to recover objects (under Article 3 of the Convention, 3 years from the date of discovery of the location or possessor of the object and generally no more than 50 years after the act of theft itself, however the Act provides for no time limits).

Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 42-44.

⁶⁷ O'Keefe, P. J. (1996). "Developments in cultural heritage law: what is Australia's role?" *Australian International Law Journal* (1996): 36-59. Pp 41-42.

Prot, L. V. (1997). *Commentary on the Unidroit Convention on Stolen and Illegally Exported Cultural Objects 1995*. Leicester, Institute of Art and Law.

⁶⁸ *Ibid.* Pp 18-19

cultural object, but also the “irreplaceable...information” associated with it, or in other words, the object’s context. The Unidroit Convention also provides for a somewhat broader understanding of the significance of archaeological sites, by seeking to protect both “historical and scientific” information. While this clause seems, as with the UNESCO Convention, to be concerned mainly with scientific research, there is an acknowledgement of historical value of sites, which may extend beyond their scientific value.

The Convention makes some specific provisions for archaeological materials, in recognition of the different circumstances which can surround the discovery of such items, as opposed to issues arising from the theft of works of art, for example. Article 3(2) states

a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

This Article establishes the concept that an unexcavated archaeological object is not ownerless. In general such objects will belong to the State or the landowner, thus either party should have an opportunity to commence legal proceedings for their return. It has been noted, however, that proof of origin in such cases can be extremely difficult.⁶⁹ This clause places a particular onus on archaeologists, indicating that even where an object has been legally excavated, this does not indicate an entitlement of ownership or the right to remove objects without appropriate permission. Thus an archaeologist working in a signatory nation cannot presume a right to take excavated cultural material out of the country without having appropriate approval. The clause also places an onus on the signatory nation, to have appropriate controlling legislation in place to make the unauthorised excavation of sites an offence.

The matter of context is explored in Article 5, which provides for States to claim against one another for stolen cultural property in their territories. This Article identifies the preservation of context,⁷⁰ the maintenance of the integrity of a larger whole⁷¹ and the “traditional or ritual use”⁷² of cultural objects as key reasons why courts should order the return of cultural objects. O’Keefe notes here that this clause is drafted in such a way as to not necessarily apply to all types of stolen cultural property, but only those which meet the criteria set out in the clause. However the *Protection of Movable Cultural Heritage Act 1986* (Cth) provides for a broader range of controlled cultural property in Australia.⁷³ The Convention also recognises the potential social harm which can come from the loss of important objects by indigenous communities.⁷⁴ This is most relevant in Australia with respect to Aboriginal archaeological objects which

⁶⁹ Ibid. Pp 32-33.

⁷⁰ Unidroit Convention Article 5(1)(a)

⁷¹ Unidroit Convention Article 5(1)(b)

⁷² Unidroit Convention Article 5(1)(d). Note this clause applies only to indigenous communities.

⁷³ O’Keefe, P. J. (1996). “Developments in cultural heritage law: what is Australia’s role?” *Australian International Law Journal* (1996): 36-59. Pp42-43.

See also comments by Prott on this issue in Prott, L. V. (1997). *Commentary on the Unidroit Convention on Stolen and Illegally Exported Cultural Objects 1995*. Leicester, Institute of Art and Law. Pp 58-59.

⁷⁴ Unidroit Convention Article 5(1)(d)

may have been illegally excavated, as it recognises the continuity of cultural context of an object, despite its physical disposition or antiquity. This is consistent with the procedures for the return of cultural significant objects to indigenous people under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).⁷⁵

The Unidroit Convention fills a significant legal and policy gap in international heritage law by providing a framework to address the actions of individuals, as well as government entities, in the loss of cultural property. For archaeological heritage, the Convention recognises the importance of not just individual objects, but the significance of their context, the information associated with them and their social value. While the question of social value is most strongly expressed for indigenous communities, who are likely to be the least empowered to reclaim items of stolen cultural property, the Convention stresses that conservation of cultural property is a collective concern. As a document focussed on the private sector, however, it is less supportive of a 'public good' conservation notion, as it is principally supportive of the property rights of individuals.

4.4 Documents of principle—Charters and 'soft law' instruments of protection

In addition to the Conventions discussed above, which are important moral and legal documents which are substantially supported by domestic legislation, there is another category of instruments which have no legal force. These are documents of principle which may be generated by quasi-governmental agencies such as UNESCO or professional and public interest groups such as ICOMOS.⁷⁶ Three such documents are discussed here, the 1956 UNESCO *Recommendation on International Principles Applicable to Archaeological Excavations*, the 1990 ICOMOS *Charter for the Protection and Management of the Archaeological Heritage* and the 1999 Australia ICOMOS *Charter for the Conservation of Places of Cultural Significance (Burra Charter)*. While the first two of these documents have never been adopted in Australia, they remain influential internationally and are specifically concerned with archaeological issues. The Burra Charter, while not specifically concerned with archaeological heritage, is the fundamental guiding document of heritage principle in Australia, which has status with all Australian heritage authorities and has assumed a quasi-legal status in Australia. These 'soft law' documents, while non-binding, give a strong insight into the fundamental protective principles for archaeological heritage, which should be expressed in protective legislation.

4.4.1 The UNESCO *Recommendation on International Principles Applicable to Archaeological Excavations* 1956

The UNESCO *Recommendation on International Principles Applicable to Archaeological Excavations*⁷⁷ emanated from a UNESCO General

⁷⁵ *Aboriginal and Torres Strait Islander Heritage Protection Act* (1984) Commonwealth. Section 12.

⁷⁶ The International Council on Monuments and Sites. See <http://www.icomos.org/>

⁷⁷ Hereafter New Delhi Recommendations.

Conference in 1956 in New Delhi, India. As a Recommendation, the document has no legal force and is not binding,⁷⁸ but provides professional and moral guidance on the management of archaeological heritage by member states. Recommendations do not have to be formally adopted by member states following their adoption by UNESCO and the New Delhi Recommendation has never been specifically implemented in Australia. The key principles established by the Recommendation found their way into subsequent UNESCO cultural heritage instruments, particularly the notion that cultural heritage is a common concern and international cooperation is required to effect its conservation.⁷⁹ Given the lengthy gap between the issue of the Recommendation and the establishment of broad archaeological heritage protection regimes in Australia, it does not appear that the Recommendation had any significant influence within Australia. As an historical document it is nevertheless worth examining the Recommendation for its stance on archaeological protective legislation.

The Preamble to the Recommendation notes the ability of archaeological heritage to enrich domestic and international cultural values, promote international understanding and advance the cause of science. In the interests of preserving archaeological heritage, the Recommendation calls for protection through the regulation of excavations,⁸⁰ protection of objects which meet certain criteria,⁸¹ establishment of standards and the requirement that approval be obtained for excavation or surface collection of artefacts.⁸² The Recommendation specifically suggests legally defining the archaeological heritage⁸³ and the "archaeological sub-soil" as well as clearly establishing ownership of the sub-soil.⁸⁴ Article 5 recommends specific recognition of State ownership of the archaeological sub-soil for relevant member states, as land ownership practices vary worldwide. In some instances there is a presumption that the owner of the land owns everything below ground. However in other instances the below ground resources are reserved for the State.⁸⁵

The Recommendation explicitly recognises archaeology as a science and calls for protection of samples of archaeological resources to be retained unexcavated, to allow for future investigation with improved techniques or

⁷⁸ See the 'General introduction to the standard-setting instruments of UNESCO' for a brief introduction to the key differences between Recommendations and Conventions.

http://portal.unesco.org/unesco/ev.php?URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201&reload=1101727325# Accessed 5 May 2006.

⁷⁹ Blake, J. (2000). "On defining the cultural heritage." *International and Comparative Law Quarterly* 49 (1): 61-85.

⁸⁰ UNESCO (1956). Recommendation on International Principles Applicable to Archaeological Excavations. *New Delhi Recommendation*. Articles 3, 4 and 5.

⁸¹ New Delhi Recommendation

⁸² New Delhi Recommendation Articles 5 and 8.

⁸³ New Delhi Recommendation Article 3(a).

⁸⁴ New Delhi Recommendation Article 5(e).

⁸⁵ Jowers, K. F. (2003). "International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico." *Texas International Law Journal* 38: 145. Pg 163. Jowers cites the example of some Latin American countries, which have essentially "nationalised" their archaeological heritage in order to protect it. See also Carman's critique of the issue of private versus state ownership of heritage objects. Carman, J. (2002). *Archaeology and heritage: an introduction*. London ; New York, Continuum. Pp 195-199.

Fourmile critiques this practice with respect to Australian indigenous heritage, viewing it as a colonial holdover which dispossesses indigenous people of their own heritage. This issue is further examined in Chapters 5 to 7 with respect to Australia. See Fourmile, H. (1996). "The Queensland Heritage Act 1992 and the Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (Qld) :legislative discrimination in the protection of Indigenous cultural heritage." *Australian Indigenous Law Reporter* 1 (4): 507-529. , Fourmile, H. (1996). "The law of the land : whose law, whose land." *Tempus* 5 (1996): 9-17.

knowledge and the management of collections of objects for future study.⁸⁶ This reflects the emergence of scientifically-focussed processual archaeology, as discussed in Chapter 2. The Recommendation also calls for prohibition of trade in illegally excavated antiquities and penalties for the illicit disturbance of archaeological sites.⁸⁷ While calling for regulation, the Recommendation also specifically recognises archaeology as a public concern, referring to the discipline in the Preamble as being “in the general interest.” Significantly, the Recommendation does not call for the protection of all potential archaeological remains, nor does it suggest that all such remains are of equal interest. From a legal perspective, this indicates the intent of the Recommendation was selective protection of archaeological materials based on criteria to be determined by individual states, rather than assuming a blanket protection of any material which could conceivably be considered “archaeological”. This is consistent with the World Heritage Convention notion of “outstanding universal value”, which sets a very high bar for the attributing of World Heritage value to places. Similarly, the UNESCO and Unidroit Conventions set certain criteria which objects must meet in order to achieve protected status.

Article 2 applies a “public interest” criterion to the application of the Recommendation, stating that:

[the] Recommendations apply to any remains, whose preservation *is in the public interest* from the point of view of history, art or architecture, each Member State being free to adopt the most appropriate criterion for assessing the public interest of objects found on its territory.⁸⁸

Thus while the Recommendation adopts, in places, the language of science, it does not give primacy to the scientific perspective. The Recommendation clearly conceives of the archaeological heritage as something which should be protected, in a selective manner, for the benefit of wider society. So even at this early stage in the thinking regarding archaeological heritage protection, it is possible to see the germ of ‘public good’ considerations. Article 3 goes on to state that the criterion for assessing public interest should be based on the object belonging to “a given period or of a minimum age fixed by law.” It does not necessarily follow however that protection of all objects of a given period or older than a certain age will in fact be in the public interest. The systems in place in Australia tend to subscribe to the tests of an object belonging to a given period (for example, pre-Contact Aboriginal materials⁸⁹) or older than a given age (for example, 50 years⁹⁰). Defining indigenous heritage has tended to have a broader focus, with definition often based on the value of an object to “Aboriginal tradition”.⁹¹ The difficulties with these approaches are dealt with

⁸⁶ UNESCO (1956). Recommendation on International Principles Applicable to Archaeological Excavations. New Delhi Recommendation, Articles 9 and 10.

⁸⁷ New Delhi Recommendation.

⁸⁸ New Delhi Recommendation Article 2, emphasis added.

⁸⁹ See for example the *Aboriginal Relics Act 1975* (Tas), which limits protection to objects created before 1876 (Section 2(4)).

⁹⁰ E.g. the *Heritage Act 1977* (NSW) sets the age of archaeological materials at older than 50 years (Section 4), while for some classes of object on the Cultural Heritage Control List under the *Protection of Movable Cultural Heritage Act 1986* (Cth) the age of protection is 30 years (Schedule 2).

⁹¹ E.g. the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), Section 3 or the *Aboriginal Cultural Heritage Act 2003* (Qld), Section 9 and Schedule 2.

in Chapters 6 and 7. The Recommendation articulates the key principles of archaeological heritage protection as the protection of the archaeological object, the protection of the research potential of archaeological places and the transmission of discovered information to the wider public. Significantly, the Recommendation recognises that this needs to be undertaken in a “public interest” context. This supports the notion of ‘public good’ conservation argued for in this thesis.

4.4.2 ICOMOS Charter for the Protection and Management of the Archaeological Heritage 1990

The ICOMOS *Charter for the Protection and Management of the Archaeological Heritage 1990*⁹² is an outgrowth of the 1964 *Venice Charter on the Conservation and Restoration of Monuments and Sites*⁹³ and builds explicitly upon the principles of the 1956 *New Delhi Recommendation*. It is however designed to be distinct from the more architectural concerns of the Venice and Burra Charters and deals specifically with conservation issues for archaeological sites. This Charter is not specifically implemented in Australia, nor adopted by any Australian heritage professional bodies, which in general rely on the Australia ICOMOS Burra Charter, discussed below. In this regard, the Archaeological Charter has no formal or informal standing in Australian heritage management, however it provides a number of statements on the role of legislation to protect archaeological heritage that are relevant to the analysis in this thesis. The language and format of the *Archaeological Charter* is considerably less formal than the Venice or Burra Charters. Nevertheless, its principles are largely compatible with those documents, while being focussed specifically on archaeological heritage.

The *Archaeological Charter* adopts the position of archaeology as “science” and sees that protection of the archaeological heritage is necessary “to enable archaeologists and other scholars to study and interpret it on behalf of and for the benefit of present and future generations.”⁹⁴ It does recognise that “archaeological heritage constitute[s] part of the living traditions of indigenous peoples, and for such sites and monuments the participation of local cultural groups is essential for their protection and preservation”.⁹⁵ Thus while recognising that there is a public and community dimension to the discipline of archaeology, the protection of the archaeological resource is still strongly directed towards archaeological protection for the benefit of archaeologists and “science”. The Charter identifies the need for protection for archaeological sites to be integrated into legislation and planning policies at all levels of government⁹⁶ and seeks many of the same general outcomes as the *New Delhi Recommendation*, including the establishment of archaeological

⁹² Prepared by the International Committee for the Management of Archaeological Heritage (ICAHM) and approved by the 9th General Assembly of ICOMOS in Lausanne in 1990. Hereafter referred to as the Archaeological Charter. http://www.international.icomos.org/charters/arch_e.htm

⁹³ Developed at the 11th International Congress of Architects and Technicians of Historic Monuments, Venice, 1964 and adopted by ICOMOS in 1965. http://www.international.icomos.org/charters/venice_e.htm

⁹⁴ Archaeological Charter International Council on Monuments and Sites (1990). Charter for the Protection and Management of the Archaeological Heritage. [ICOMOS Archaeological Charter](#). Introduction.

⁹⁵ Archaeological Charter.

⁹⁶ Archaeological Charter Article 2.

reserves, transmission of information to the public and international cooperation to protect archaeological heritage.

The Charter shows signs of having been influenced by contemporary concerns relating to development, planning and impact assessment and highlights development as “one of the greatest threats” to the archaeological heritage.⁹⁷ The Charter recognises legislation as a key protective tool and Article 3 sets out an extensive list of key principles for protective legislation. It advocates the need for approvals to excavate archaeological material and sanctions for unauthorised excavation,⁹⁸ but notes that excavation should in fact be a last resort.⁹⁹ It further calls for a legislative presumption in favour of “full excavation” of archaeological sites which may be subject to authorised destruction (for example through development). This is however expressed in a somewhat self-serving manner, as the same Article (Article 3) states that it is a common duty of people and government to conserve the archaeological heritage and to provide “adequate funds” for this purpose. However the Introduction to the Charter makes it clear that the main beneficiaries of this societal largess are to be archaeologists and “science”. Implicit in this is a belief that what is good for science is good for the public, however this is not convincingly demonstrated.

Despite its more plain-speaking style, the recommendations inherent in the Archaeological Charter are more strongly worded than other charters and focussed more on the interests of archaeologists than those of the public. The view presented by the Charter is that the archaeological record should be protected primarily for its future study by archaeologists versed in a scientific conception of archaeology. The Archaeological Charter offers only limited support for broad-based notion that protection of the archaeological heritage should serve any wider societal needs. Thus while providing some acknowledgement of the public aspect of archaeological heritage protection, this Charter cannot truly be said to be supporting a ‘public good’ conception of heritage protection.

4.4.3 The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance 1999

The Australia ICOMOS *Charter for the Conservation of Places of Cultural Significance* 1999¹⁰⁰ serves as the base document for conservation policy for most heritage organisations (government or private) and heritage professionals in Australia. In basic form, structure and aim, it was adapted

⁹⁷ Archaeological Charter Articles 2 and 3.

⁹⁸ Archaeological Charter.

⁹⁹ Archaeological Charter Article 5.

¹⁰⁰ The initial version of the Australia ICOMOS *Charter for the Conservation of Places of Cultural Significance* was adopted by Australia ICOMOS on 19 August 1979 at Burra, South Australia. Revisions were adopted on 23 February 1981, 23 April 1988 and 26 November 1999. Hereafter referred to as the Burra Charter. All references in this thesis are to the 1999 revision of the Charter. <http://www.icomos.org/australia/burra.html> Accessed 7 May 2006.

Mulvaney provides a general outline of the political and social factors which motivated those involved in the production of the original version of the Burra Charter. See Mulvaney, D. J. (2004). "The road to Burra: memories of an ancient traveller." *Historic Environment* 18 (1): 9-13.

from the 1964 *Venice Charter*,¹⁰¹ for Australian circumstances.¹⁰² It describes itself as “[setting] a standard of practice for those who provide advice, make decisions about, or undertake works to places of cultural significance, including owners, managers and custodians”¹⁰³ and in this regard it has been highly effective at creating a consistent national framework of conservation principles.¹⁰⁴ In and of itself, the Burra Charter does not have any legal power, as Australia ICOMOS is a non-government body, albeit one intimately involved with UNESCO.¹⁰⁵ Nevertheless, the use or adoption of the Burra Charter by bodies such as the Commonwealth Department of Environment and Heritage¹⁰⁶ as well as at State and Territory government level¹⁰⁷ and by professional organisations like Australia ICOMOS gives the principles espoused by the Charter the effect of a *de facto* legal instrument.¹⁰⁸ Many of the Charter’s principles have found their way into domestic heritage legislation, although few pieces of legislation encompass all areas dealt with by the Charter.¹⁰⁹ The Burra Charter is not specifically concerned with archaeological heritage¹¹⁰ however as the key document of heritage principle in Australia it has been highly influential in all areas of heritage protection, including the formation of government policy and legislation.

¹⁰¹ International Council on Monuments and Sites (1964). International Charter for the Conservation and Restoration of Monuments and Sites. *Venice Charter*.

¹⁰² Kerr, J. S. (2004). "The Burra Charter of Australia ICOMOS in 1983 (Reprint)." *Historic Environment* 18 (1): 22-24.

¹⁰³ Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. *Burra Charter*. Preamble.

¹⁰⁴ Allom, R. (1997). "Is the conservation industry its own worst enemy?" *Historic Environment* 12 (3&4): 105-111. Pg 105.

¹⁰⁵ The International Council on Monuments and Sites was established as a result of a resolution put forward by UNESCO calling for the creation of a nongovernmental international heritage organisation, at the 1964 Second Congress of Architects and Specialists of Historic Buildings in Venice, Italy. This was the same conference where the Venice Charter was adopted. http://www.international.icomos.org/hist_eng.htm Accessed 5 May 2006

¹⁰⁶ The Commonwealth Department of Environment and Heritage specifies the use of the Burra Charter as the basis for Commonwealth agencies preparing management plans for Commonwealth heritage places identified in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). See <http://www.deh.gov.au/heritage/publications/guidelines/index.html> Accessed 5 May 2006.

¹⁰⁷ The Burra Charter is used in a variety of ways by State heritage authorities, for example: The NSW Heritage Office has a requirement to use the Burra Charter for the preparation of conservation management documents prepared under the NSW system. See NSW Heritage Office (2004). *Conservation Management Documents*. Parramatta, NSW Heritage Office. Pg 3. http://www.heritage.nsw.gov.au/docs/hm_conservationman2002.pdf Heritage Victoria similarly endorses the Burra Charter as providing “the guiding philosophy for the care of important places”. <http://www.heritage.vic.gov.au/page.asp?ID=40> Accessed 5 May 2006.

The South Australian Department of Environment and Heritage “voluntarily subscribes” to the principles of the Burra Charter. Department for Environment and Heritage (South Australia) (2005). *Annual Report*. Pg 11.

¹⁰⁸ Truscott, M. and D. Young (2000). "Revising the Burra Charter: Australia ICOMOS updates its guidelines for conservation practice." *Conservation and Management of Archaeological Sites* 4: 101-116. Pg 102

The Burra Charter has also been referred to or considered in a number of court judgements, though none of which deal with archaeological heritage. See for example: *Alesci Investments Pty Ltd v Kingston CC* [2005] Unreported, VCAT, 17 October 2005, Member Nicholas Hadjigeorgiou at 19; *Engelen Moore P/L v Woollahra MC* [2005] Unreported NSWLEC, 15 August 2005, Murrell C at 52; *V Willis v Hobart City Council and Smartgrowth Pty Ltd and P Trowbridge v Hobart City Council and Smartgrowth Pty Ltd and T & P Holmes v Hobart City Council and Smartgrowth Pty Ltd* [2004] Unreported, TASRMPAT, 5 Oct 2004 B McNeill Member at 12-13; *ACT Chapter of Royal Australian Institute of Architects and ACT Heritage Council & Anor* [2003] Unreported, ACTAAT, 11 April 2003 Preedom (P), O’Neil and McMichael Members at 51-53; *National Trust of Australia (Tasmania) -v- Northern Midlands Council and JD Edwards* [1997] Unreported TASRMPAT, 18 March 1997, Cannell, Cunningham and Cooper Members.

¹⁰⁹ Allen, C. (2004). "The road from Burra: thoughts on using the Charter in the future." *Historic Environment* 18 (1): 50-53.

¹¹⁰ However two notable Australian archaeologists, John Mulvaney from the Australian National University and Judy Birmingham from the University of Sydney, were heavily involved in the initial conceptualisation and drafting of the Burra Charter. Kerr notes a number of changes were made to the draft text in 1979 to clarify, at Birmingham’s request, that the Charter should apply to archaeological sites. Kerr, J. S. (2004). "The Burra Charter of Australia ICOMOS in 1983 (Reprint)." *Historic Environment* 18 (1): 22-24. Pg 23.

The primary aim of the Charter is the conservation of cultural significance. Cultural significance in this case includes “aesthetic, historic, scientific [and] social value for past, present and future generations.”¹¹¹ The Charter aims to be all-encompassing, by providing an extremely broad definition of what a culturally significant “place” might be, and includes the contents and setting of that place.¹¹² Ideally, the Charter seeks to draw the community into the “heritage process” which forms the basis for protective mechanisms.¹¹³ While much of the language of the Charter seems preoccupied with the built environment, it is regularly applied to non-indigenous archaeological sites as a document of guiding principles. Quite soon after its adoption, it was being hailed in archaeological circles as an important document relevant to archaeological conservation.¹¹⁴ In practice its relevance to archaeological heritage conservation has been questioned, particularly in relation to indigenous sites.¹¹⁵ More recently it has been noted that while the Burra Charter was intended by Australia ICOMOS to apply to the conservation of Aboriginal sites, the drafting of the Charter did not involve indigenous people and was focussed on the scientific, aesthetic and historical values of Aboriginal places to the non-indigenous community.¹¹⁶

Sullivan has noted that the Burra Charter was initially primarily concerned with the conservation of fabric of historic places, which she describes as a particularly Western approach to conservation but one which was a necessary step¹¹⁷ in the evolution of contemporary conservation practice. Indeed the Charter itself describes conservation in terms of respect for “existing *fabric, use, associations and meanings*”¹¹⁸ but it is clear from the past and current application of the Charter in Australia that historic fabric remains the focus. Despite efforts to broaden the remit of the Charter to adequately cater for social and other non-fabric-based values,¹¹⁹ in conflicts between the conservation of fabric and the conservation of intangible or associative use values, fabric conservation tends to be the focus.¹²⁰ Ireland has commented that this has allowed historical archaeology to be relegated to the role of an analytical technique, “authenticating the material evidence” rather than contributing to the interpretation and understanding of a place.¹²¹ The terms of the Charter are however sufficiently broad that the conservation of a wide range of values is possible. The essence of the Charter is “to retain the

¹¹¹ Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. Burra Charter. Definitions Article 1.2

¹¹² Ibid. Article 1.1

¹¹³ Truscott, M. and D. Young (2000). “Revising the Burra Charter: Australia ICOMOS updates its guidelines for conservation practice.” Conservation and Management of Archaeological Sites 4: 101-116. Pg 103

¹¹⁴ Mulvaney, D. J. (1981). “What future for our past? Archaeology and society in the eighties.” Australian Archaeology 13: 16-27. Pg 22.

¹¹⁵ See for example, comments in Meehan, B. (1984). “Victoria’s Heritage - A Future for the Past.” Australian Archaeology 19 (December 1984): 143-147. Pg 144 and Truscott, M. (1994). “Indigenous cultural heritage protection program.” Australian Archaeology 39: 127-129. Pg 127.

¹¹⁶ Sullivan, S. (2004). “Aboriginal sites and the Burra Charter.” Historic Environment 18 (1): 37-39.

¹¹⁷ Ibid.

¹¹⁸ Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. Burra Charter. Article 3.1. Emphasis in the original.

¹¹⁹ Mackay, R. (2004). “Associative value and the revised Burra Charter: a personal perspective.” Historic Environment 18 (1): 35-36.

¹²⁰ Allen, C. (2004). “The road from Burra: thoughts on using the Charter in the future.” Historic Environment 18 (1): 50-53. Pg 51.

¹²¹ Ireland, T. (2004). “The Burra Charter and historical archaeology: reflections on Port Arthur.” Historic Environment 18 (1): 25-29. Pg 25.

cultural significance of a place".¹²² Such a broad definition must accommodate a range of potential significances for any cultural place, including the scientific archaeological values as well as the 'public good' values argued for in this thesis. The problem, then, has been in the narrow interpretation and application of the Charter with respect to archaeological materials to date, as noted by a number of the authors cited above. While various heritage practitioners in Australia have called for a flexible application of the Charter,¹²³ it appears any flexibility has been limited.

The Burra Charter, as a type of domestic 'soft law' instrument, has enormous potential to encourage a public good approach to heritage conservation. The language of the Charter is not absolutist: "Places of cultural significance *should* be conserved."¹²⁴ Such language invites consideration of what values should be conserved and how this may be done. In order to put this into effect, the heritage profession, policy- and law-makers and heritage interest groups must be prepared to acknowledge a range of potential values for archaeological places. The Charter will need to be applied in a manner which encourages the identification and conservation of other types of values for archaeological heritage, beyond the scientific values traditionally considered in past applications of the Charter. As the Charter has been such an instrumental document in the formation of heritage policy and law in Australia, should future amendments to the Charter explicitly take 'public good' into consideration, this would significantly improve the chances of such values making their way into future Australia heritage legislation.

4.5 Principles of archaeological protection and conservation

The international conventions and extralegal charters discussed above provide the international frame of reference for heritage protection in Australia. All recognise the value of archaeological heritage to the domestic and international communities and most specifically acknowledge archaeological sites as a non-renewable resource.¹²⁵ Each identifies legislation as an essential mechanism for heritage preservation and such preservation is obligatory under the international conventions.¹²⁶ Ideally, legal protections for archaeology should be integrated into the planning system,¹²⁷ which is generally the case in Australia. Heritage, if not archaeology specifically, forms a matter for consideration in all Australian planning legislation.¹²⁸ These

¹²² Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. *Burra Charter*. Article 2.2. Emphasis in the original.

¹²³ For example Allom, R. (1997). "Is the conservation industry its own worst enemy?" *Historic Environment* 12 (3&4): 105-111. and more recently Allen, C. (2004). "The road from Burra: thoughts on using the Charter in the future." *Historic Environment* 18 (1): 50-53. And Ireland, T. (2004). "The Burra Charter and historical archaeology: reflections on Port Arthur." *Historic Environment* 18 (1): 25-29.

¹²⁴ Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. *Burra Charter*. Article 2.1. Emphasis added.

¹²⁵ UNESCO Convention Article 5; World Heritage Convention Article 5; Unidroit Convention Article 3; ICOMOS Archaeological Charter Article 2.

¹²⁶ UNESCO Convention Article 5; World Heritage Convention Article 5(d); Unidroit Convention Article 17.

¹²⁷ World Heritage Convention Article 5(a); ICOMOS Archaeological Charter Article 3.

¹²⁸ Heritage is typically integrated into State and Territory planning legislation as a matter for consideration when developing a planning scheme or assessing a development application. See for example: Australian Capital Territory—*Land (Planning and Environment) Act 1991*—Sect 231. New South Wales—*Environmental Planning and Assessment Act 1979*—Sect 76A. Northern Territory—*Planning Act 1999*—Sect 51R. Queensland—*Integrated Planning Act 1997*—Sect 2.1.3A.

principles have underpinned the form and evolution of Australian heritage legislation.

Archaeological items obtain the majority of their non-monetary values from their context (i.e. the archaeological site) rather than from their intrinsic qualities as objects. The UNESCO and Unidroit Conventions are primarily concerned with protecting objects out of their original context, however they do identify illegal excavation of archaeological sites as one of the central threats to cultural heritage,¹²⁹ a sentiment more strongly put in the specific archaeological documents. Whenever possible, retention of archaeological sites in their original location (*in situ*)¹³⁰ and establishing archaeological reserves for future generations are highly desirable, as is a policy of minimal intervention in archaeological sites when disturbance is necessary.¹³¹ The international instruments also create an obligation to maintain the collections of archaeological material excavated from sites which are destroyed, as they provide the sole record of a site once excavated or destroyed.

The principle of retaining heritage values for the broader appreciation of the present community¹³² and future generations¹³³ is central to the international conventions and extra-legal heritage documents and is well embedded in international law.¹³⁴ The concept “intergenerational equity”, a fundamental tenet of the sustainability principles, holds that present generations should not use or treat the environment in such a way as to leave future generations in a worse environmental position than the present.¹³⁵ Evans summarised this as the “stewardship ethic” in heritage and environmental conservation.¹³⁶ Similarly, it is common conservation philosophy that future generations may not necessarily share the same values as present generations with respect to heritage and therefore present generations do not have the sole right to decide the fate of heritage items.¹³⁷ Both of these concepts support the notion that heritage is a ‘public good’ in the sense that it is not merely a resource to be exploited but a valued collective asset which is to be, ideally, passed on to the future. Thus the present holds the collective heritage in trust for the future. It is perhaps this principle more than any other that sits uneasily with the

South Australia—*Development Act* 1993—Sect 23.

Tasmania—*Local Government Act* 1993—Sect 89.

Victoria—*Heritage Act* 1995—Sect 64. Heritage is not an explicit consideration in the general planning legislation (*Planning and Environment Act* 1987).

Western Australia—*Town Planning and Development Act* 1928—Sect 18C.

Note that while the Australian Commonwealth Government is not a planning authority in the strict sense, impacts to heritage places which fall within “matters of national environmental significance” may require approval from the Commonwealth under the *Environment Protection and Biodiversity Conservation Act* 1999—Sect 12 (World Heritage places), Sect 15B (National heritage places) and 341ZC (Commonwealth heritage places).

¹²⁹ New Delhi Recommendations Article 29; UNESCO Convention Articles 1(c), 5(d) and 9; Unidroit Convention Preamble and Article 3.

¹³⁰ New Delhi Recommendations Article 9; UNESCO Convention Article 5(d); ICOMOS Archaeological Charter Article 6

¹³¹ Also see Frankel's contra viewpoint on this issue: Frankel, D. (1993). “The excavator: creator or destroyer?” *Antiquity* 67 (257): 875-878.

¹³² New Delhi Recommendations Preamble; UNESCO Convention Preamble; World Heritage Convention Preamble; Burra Charter Preamble; Unidroit Convention Preamble; ICOMOS Archaeological Charter Preamble

¹³³ World Heritage Convention Article 4; Burra Charter Preamble; ICOMOS Archaeological Charter Preamble

¹³⁴ Blake, J. (2000). “On defining the cultural heritage.” *International and Comparative Law Quarterly* 49 (1): 61-85. Pp 83-84.

¹³⁵ Evans, M. (2000). *Principles of Environmental & Heritage Law*. St Leonards, Prospect Publishing. Pg 76.

¹³⁶ *Ibid.* Pp 88-91.

¹³⁷ Australian Commonwealth Government (1994). *Intergovernmental Agreement on the Environment*. Canberra. Section 3.5.2

Australian legal situation, which is more often concerned with actions in the present than the potential views of future generations.

4.6 Australian efforts to establish a broad basis for heritage conservation in Australia

The role of the archaeological profession in lobbying for heritage legislation has been discussed in Chapters 2 and 3. This lobbying was successful in seeing archaeological heritage protection legislation passed in selected jurisdictions by the early 1970s, principally to protect Aboriginal archaeological heritage. Broad-based heritage protection legislation across the whole of Australia did not attract widespread support until the mid-1970s, following two significant events: the Committee of Inquiry into the National Estate in 1974 and the signing of the World Heritage Convention in 1975. The Committee of Inquiry into the National Estate (the 'Hope Inquiry') was commissioned by the then Prime Minister, Gough Whitlam, in 1973, with a report presented to the Australian Parliament in 1974. The Committee had a broad ambit to investigate the nature of the National Estate in Australia and make recommendations for its protection. The Committee sat for over a year, held public hearings and accepted over 650 submissions from governmental bodies, private sector entities, interest groups and the Australian public.¹³⁸

4.6.1 The Hope Inquiry into the National Estate

The Hope Inquiry represented the first large-scale effort to canvass the opinion of a diverse range of bodies in Australia as to what the national heritage was, and how it should be protected. As such, the report represents perhaps the earliest formal 'statement of intent' with respect to the conservation of Australian heritage. Its examination sheds some light into the philosophy behind early heritage conservation initiatives at a governmental level. The Inquiry examined the full range of potential heritage issues in Australia. However the analysis below is principally confined to those issues affecting archaeological heritage. While over 30 years old, the fundamental principles laid down by the Committee continue to resonate within Australian heritage protection thought and practice.

The Hope Inquiry viewed itself as the formalisation of a widespread public sentiment in Australia, that action was required to conserve the nation's heritage. This was supported through the public hearing and submission process, as well as through statistical analysis in the growing membership of 'conservation societies' with respect to total population. Other important factors in the Committee's view were the diminishing of Australian 'cultural cringe' with respect to the value of Australian heritage as compared to European heritage, and a growing respect and understanding for the place of Aboriginal people in contemporary Australian society, as evidenced by the overwhelming popular support in the 1967 Referendum which gave Aboriginal people recognition as Australian citizens.¹³⁹

¹³⁸ Hope, R. M. (1974). Report of the Committee of Inquiry into the National Estate. Canberra, Australian Government Publishing Service. Pp 12-13.

¹³⁹ Ibid. Pp 24-25.

A particular driver, in the Committee's eyes, for formal government action on heritage conservation was the speed of urban growth which was impacting on Australian urban areas and the pressure of the high percentage of the Australian population living in urban centres was inevitably exerting on the national heritage.¹⁴⁰ Among the potential values that the national heritage had for the Australian people included education and recreation,¹⁴¹ as well as general value for "aesthetic, historical, scientific, social, cultural, ecological or other special value" at an international, national or local level.¹⁴² Archaeological sites, referred to as "areas of special archaeological interest" were specifically considered by the Committee, including Aboriginal sites, historic sites, relics and geological sites.¹⁴³ All types of heritage were viewed as requiring 'conservation' (active, dynamic management which respected heritage values) and 'presentation' (a process of providing public access and enjoyment as well as contributing to public knowledge).¹⁴⁴ Thus, from the very inception of national heritage conservation in Australia, Australian heritage was constructed as something of public value. The main purpose for its conservation was its ability to contribute to public education, understanding, enjoyment or knowledge. The Committee did however refer to areas of "special" archaeological interest and did not adopt a broad interpretation as to the nature of archaeological sites to conserve and present. The Committee was also definite in its recommendations that appropriate statutory mechanisms were required to protect the National Estate, stating:

We recommend:

that the Australian Government introduce legislation to give uniform protection on a national basis to Aboriginal sites of significance throughout Australia...

and

that the other States be encouraged to examine the existing South Australian legislation for the protection of historic sites with a view to introducing similar legislation...¹⁴⁵

The Committee strongly felt mere 'good will' would not suffice to see Australia's heritage conserved. The principles espoused in the Hope Report remain fundamental to present-day heritage management, although in some instances they have been substantially reworked in their implementation.

¹⁴⁰ Hope Report Pg 26.

¹⁴¹ Hope Report Pg 27.

¹⁴² Hope Report Pg 35.

¹⁴³ Hope Report Pp 34-35.

¹⁴⁴ Ibid.

¹⁴⁵ Hope, R. M. (1974). Report of the Committee of Inquiry into the National Estate. Canberra, Australian Government Publishing Service. Pg 340, Recommendations 29 and 34. Recommendation 34 is referring to the *Aboriginal and Historic Relics Preservation Act (1965)* South Australia. At the time this was viewed as model heritage legislation. See further discussion of this Act in Chapter 5.

4.6.2 The Hope Inquiry and archaeological heritage

The Hope Inquiry considered Aboriginal¹⁴⁶ and historical (referred to as 'historic', in the Inquiry) archaeological heritage, geological sites and movable 'cultural property'.¹⁴⁷ The major focus was on Aboriginal sites, with substantial recommendations made for that class of site. Historical archaeological sites received a far more cursory treatment. The Inquiry observed that the ignorance of much of white Australia with respect to the culture of Aboriginal people had been a key element for the decline in Aboriginal cultural tradition. The Inquiry implied that the need to conserve Aboriginal heritage was strongly about assisting Aboriginal people in reclaiming their heritage and determining the manner in which they would live in the future (that is, in a traditional, or non-traditional manner, with the choice being fully theirs). The Committee stated that Australia and the international community could benefit from the protection of Aboriginal heritage, but that the protection mechanisms which existed at the time were ineffectual.¹⁴⁸

The Report made several observations about the role of archaeologists with respect to Aboriginal heritage, including the need to identify and record sites where traditional owners were no longer present, or to assist traditional owners in areas where a strong association with the land continued. White co-operation in this task was emphasised, but the Committee fell back on the devices of 'crash teams' of archaeologists to assess sites subject to development proposals and the establishment of museums to collect Aboriginal cultural artefacts for presentation.¹⁴⁹ The Committee did note the dichotomy here however, between preserving the physical remains of a past culture and the conserving of living traditions into the future. In addition they observed that different values were ascribed to Aboriginal sites by those living Aboriginal people associated with them, as opposed to those archaeologists or tourists who might wish to study or inspect them. Significantly, the Committee stated:

[i]nsofar as the Australian Government accepts the right of Aboriginals to determine their future, this must have a significant effect on the manner and extent of archaeological procedure. It is important however that the Aboriginals be made aware of the importance of archaeological research in increasing their own awareness, and that of the white community, of the great time-depth and complexity of their cultural heritage. There is a need for suitably oriented publications to explain the past culture.¹⁵⁰

¹⁴⁶ Note the term "Aboriginal" is used throughout this section, as at the time the report was drafted, the distinction between mainland Aboriginal people and Torres Strait Islanders was not widely recognised.

¹⁴⁷ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Archaeological and geological heritage are dealt with in Chapter 5 and cultural property in Chapter 6 of the Hope Report.

¹⁴⁸ Hope Report Pg 166.

¹⁴⁹ Hope Report Pp 166-167, Paragraph 5.9. The suggestion for "crash teams" came from the Australian Institute for Aboriginal Studies, as it was then known.

¹⁵⁰ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Pp 169-170, Paragraph 5.20

This view is particularly significant in light of the changes which have been taking place over the last decade with respect to access to Aboriginal archaeological material. The Committee emphasised the value of undertaking archaeological research with the aim of benefiting both Aboriginal and non-Aboriginal people, but it also set the stage for Aboriginal self-determination with respect to the access of archaeologists to the past remains of that culture. That said, the Committee then went on to state that much of the Aboriginal archaeological heritage could be viewed as having "been preserved chiefly for the scholarship of European man"¹⁵¹ but made no further attempt to grapple with what, at the time, may have been an intractable issue. The Committee further noted that, where Aboriginal people had lost all "interest or knowledge", the archaeologists should have access to such archaeological heritage on the basis of both the principle that the reclamation of knowledge of the Aboriginal past was a noble end in itself, but also in the hope that such knowledge could, in some manner, be returned to Aboriginal people in the future.¹⁵²

The Committee examined some of the protection regimes which were in existence at the time, including State and Territory legislation. Specific criticism was levelled at the Northern Territory *Native and Historical Objects Preservation Ordinance* 1955 due to its requirement that before any site could be protected, the owner had to be paid compensation and the site acquired by the Territory government; this requirement meant that only six sites were protected under the Ordinance between 1955 and 1973.¹⁵³ The framing of the Ordinance meant that sites could be destroyed with impunity while still in private ownership, thus demonstrating the weakness of a legislative approach which required prior identification, listing and acquisition of archaeological sites.¹⁵⁴ The Report further noted that all States and Territories had legislation to protect Aboriginal sites by 1972 but only South Australia had legislation to protect historical sites.¹⁵⁵

Interestingly, the Report calls for a uniform approach to the protection or prevention of the traffic of 'portable objects' or relics from sites across state borders, and indicated a need to restrict the ability to on-sell archaeological materials.¹⁵⁶ While there is anecdotal evidence as to the traffic in archaeological materials continuing into the present day, there is still little restriction on their sale or transfer; what restrictions do exist mainly prevent the traffic in certain classes of listed objects at an international level, without an export permit, via the *Protection of Movable Cultural Property Act* 1986 (Cth). As of the early twenty-first century, there is still no regime to restrict the traffic in archaeological objects domestically, regardless of whether they have been excavated legally or illegally.¹⁵⁷ Some domestic heritage legislation,

¹⁵¹ Hope Report Pg 170, paragraph 5.21.

¹⁵² Hope Report Pp 167-170.

¹⁵³ Hope Report Pg 173, paragraph 5.38

¹⁵⁴ Hope Report Pg 173.

¹⁵⁵ *Aboriginal and Historic Relics Preservation Act* (1965) South Australia. 1965 (SA)

¹⁵⁶ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Pg 173.

¹⁵⁷ It is interesting to consider whether the prohibitions on the sale of stolen goods in the criminal code could be used for this purpose, particularly in circumstances where the ownership of the cultural heritage item is claimed by the state (as in NSW, under the *National Parks and Wildlife Act* 1974, section 83) or is vested in indigenous

such as the New South Wales and Victorian *Heritage Acts*, provide for seizure of materials excavated without a consent,¹⁵⁸ and the South Australian *Aboriginal Heritage Act 1988* provides that excavated materials cannot be removed from the state without permission, although it is difficult to see how such measures can be enforced.¹⁵⁹ The Hope Report notes the need for penalties for illegal acts affecting archaeological heritage to be substantial, in order to provide a real deterrence, particularly in isolated areas where disturbance or destruction might go unnoticed.¹⁶⁰

4.6.3 The Hope Report and historical archaeological sites

The Hope Report drew the distinction between landmark historic sites (for example Captain Cook's landing place¹⁶¹) which have a greater cultural significance, and other archaeological remains which may also be of historic interest. It further noted the difficulty in protecting many such sites, particularly in the second category, due to their potential remoteness.¹⁶² At the time the Report was written, the authors noted that there was a rising interest in such types of heritage. However the Commission devoted scant attention to historical archaeological heritage, in comparison to Aboriginal archaeological heritage. This focus is reflected in the progress of Australian heritage legislation, with early action taken to protect, even at a rudimentary level, Aboriginal heritage, but with some delay for legislation to come to grips with the protection of historical material. It is worth noting that the then very new Australian Society for Historical Archaeology did make a submission to the Commission.¹⁶³ Protections recommended by the Report included the listing of historical sites by a proposed Commonwealth heritage authority.¹⁶⁴ The Report further encouraged the other States and Territories to examine and consider adopting protective mechanisms for historical sites based on the South Australian *Aboriginal and Historic Relics Preservation Act 1965*, which

communities (as in the *Aboriginal Cultural Heritage Act 2003* (Queensland) and *Torres Strait Islander Cultural Heritage Act 2003* (Queensland), Section 19).

¹⁵⁸ *Heritage Act* (1977) New South Wales. Section 146B—the Minister can direct that an illegally excavated relic be given to a “museum or conservation body”, regardless as to whether there has been any prosecution over the illegal excavation.

Heritage Act (1995) Victoria. Section 134—it is an offence to buy, sell or possess a relic for the purposes of sale, unless the relic was acquired before 1972, the date the *Aboriginal and Archaeological Relics Preservation Act 1972* (Vic), the predecessor to the *Heritage Act 1995* (Vic) came into effect.

¹⁵⁹ *Aboriginal Heritage Act* (1988) South Australia. Section 29(1)(b)—“(1) A person must not, without the authority of the Minister (b) remove an Aboriginal object from the State”. More recent Aboriginal heritage protection legislation, such as the *Aboriginal Cultural Heritage Act* (2003) Queensland, and the *Torres Strait Islander Cultural Heritage Act* (2003) Queensland, provides for an offence for unauthorised excavation, relocation or taking away of Aboriginal or Torres Strait Islander heritage items (section 25 of both Acts) but does not explicitly deal with the trade in such items.

¹⁶⁰ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Pg 174.

¹⁶¹ Now Kammay Botany Bay National Park, on the Kurnell Peninsula, in southern Sydney, NSW. This area was listed on the National Heritage List under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) on 28/2/2005, ID # 105812.

¹⁶² Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Pp 175-176.

¹⁶³ *Ibid.* Pg 360. The Society was founded at the University of Sydney in 1971 and is now known as the Australasian Society for Historical Archaeology. Australian Society for Historical Archaeology (1970). *Introductory Newsletter*. Sydney, Australian Society for Historical Archaeology.

¹⁶⁴ The Hope Report recommended the establishment of a body called the National Estate Committee. In 1975 the Australian Heritage Commission was established to serve this function, with control of the Register of the National Estate as the national heritage list. The Commission was replaced by the Australian Heritage Council in 2004 and the Register of the National Estate, while preserved, ceased to serve any statutory function. See detailed discussion on these changes in Chapter 5.

recognised both Aboriginal and non-Aboriginal relics as classes of protected objects.¹⁶⁵

The Hope Report did not note the inherent similarities in the practicalities of protecting Aboriginal archaeological material, historical archaeological material, geological and fossil material, and did not make uniform recommendations for the protection of all such heritage. This may be due to the nature of the submission to the Committee on these matters, which were from single-issue interest groups. At that time, there were few broad-based heritage interest groups other than the National Trust, which has never had a strong focus on archaeological heritage. Nevertheless, in retrospect it seems surprising that the Committee did not appreciate the similarity of the management issues for archaeological, geological and palaeontological material when developing its recommendations. This lack of a coordinated approach to protections for these issues continues to be reflected in the various legal regimes which exist across Australia, which generally have separate protective provisions for Aboriginal and historical archaeological heritage, and little or no protection for geological or palaeontological heritage,¹⁶⁶ except for sites which appear on a heritage list. These protective mechanisms are discussed in detail in Chapters 5 and 6

4.6.4 The National Estate and the ‘public good’

The Hope Inquiry took a broad perspective on the types of heritage which may be important to Australians and recommended a series of broad-based protections at Commonwealth, State and Territory level. The submissions received by the Committee were of a mixed nature and included government agencies at Federal, state and local level, amateur and professional organisations with an interest in heritage, tourism and business groups, indigenous organisations, religious groups and individuals from across the country.¹⁶⁷ The number and diversity of submissions demonstrates the broad public interest in heritage as an issue.¹⁶⁸ The Committee described the conservation of Australia’s cultural and natural heritage as a societal “need”¹⁶⁹ and of broad relevance to all Australians and to the international community. With indigenous heritage, the Committee indicated that its conservation had the potential to forge closer links between the indigenous and non-indigenous populations of Australia. Without expressing it in precisely these terms, the Committee clearly viewed heritage conservation as a ‘public good’ exercise. The Committee did not conceive of the benefits of heritage conservation as accruing or being restricted to any particular interest group.

¹⁶⁵ *Aboriginal and Historic Relics Preservation Act* (1965) South Australia. Section 3.

¹⁶⁶ The South Australian *Heritage Places Act* 1993 is the exception, in providing protection for palaeontological heritage. See discussion in Chapter 6.

¹⁶⁷ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Appendix C pp 360-369. It is noted in the Report’s preface that the Committee received more than 650 submissions.

¹⁶⁸ The 2005/2006 Commonwealth Productivity Commission Inquiry into Conservation of Historic Heritage attracted a similar level of diverse interest, with 417 submissions from across Australia. See <http://www.pc.gov.au/inquiry/heritage/subs/sublist.html> Accessed 10 May 2006.

¹⁶⁹ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Pg 26, paragraphs 1.36 and 1.37.

The Hope Report was undeniably a significant, even monumental, achievement but even nearly 30 years on, many of its key recommendations have not been implemented, and the pressures upon Australia's cultural heritage have become even greater. Perhaps the Committee's key achievement was in establishing heritage conservation in Australia as an important public activity and one in which government agencies and legislation played key roles. In that regard, the Report was enormously successful, as all States and Territories have protective legislation and heritage agencies within government. Since the drafting of the Hope Report, the notion of "what is heritage?" has changed and there is now a temptation to see potentially any aspect of the natural or cultural environment as "heritage". At times, too broad a focus on what may be considered heritage has led to paralysis in the effective identification, protection and management of that which is genuinely significant. Heritage legislation has at times been perceived as capricious, vague and inequitable.¹⁷⁰ The only subsequent national enquiry into heritage conservation in Australia has a substantially different tone from the Hope Report, one which reflects these perceived problems with the system which has evolved out of the Hope Inquiry.

4.6.5 The Productivity Commission Inquiry into Conservation of Historic Heritage Places

The Commonwealth Productivity Commission Inquiry into Conservation of Historic Heritage Places,¹⁷¹ which ran over 2005/2006, is considerably less sympathetic to the heritage cause. The Productivity Commission, which is a government economic policy and research agency, was directed¹⁷² to examine the costs and benefits of heritage conservation in Australia. The terms of reference were limited to "historic heritage" (that is non-indigenous heritage). While historical archaeological places fell within the Terms of Reference for the Inquiry, the Commission focussed its attention almost exclusively on the impacts to private owners of placing buildings on a heritage list and the Commissioners addressed archaeological heritage in only a cursory manner.¹⁷³ Nevertheless, the Inquiry received a great deal of public attention and represented the first such public inquiry since the Hope Commission. The Hope Inquiry sought to build a national heritage consciousness and protective system and was, if the significance of a place warranted such action, prepared to see conservation over-ride the private

¹⁷⁰ Productivity Commission (2005). Conservation of Australia's historic heritage places - issues paper. Melbourne, Australian Government.

¹⁷¹ Productivity Commission (2005). Circular No. CAHHP C1 - Conservation of historic heritage places, Australian Commonwealth Government.

Productivity Commission (2005). Conservation of Australia's historic heritage places - issues paper. Melbourne, Australian Government.

Note the Inquiry's Terms of Reference specifically excluded consideration of indigenous cultural heritage. This Inquiry made only minimal comment on archaeological issues, although they were included within the Terms of Reference. Productivity Commission (2005). Conservation of Australia's historic heritage places - draft report. Melbourne, Australian Government. Pg 17. The Inquiry did receive submissions from two archaeological interest bodies: the Australasian Institute for Maritime Archaeology (Submission 138) and the Australasian Society for Historical Archaeology (Submission DR330). For the text of these submissions see <http://www.pc.gov.au/inquiry/heritage/subs/sublist.html> Accessed 10 May 2006.

¹⁷² By the Federal Treasurer. See Productivity Commission (2005). Circular No. CAHHP C1 - Conservation of historic heritage places, Australian Commonwealth Government.

¹⁷³ Productivity Commission (2006). Conservation of Australia's historic heritage places - final report. Melbourne, Australian Government. Pp 247-248.

property rights of individuals.¹⁷⁴ By contrast, the Productivity Commission Inquiry largely viewed heritage conservation as a generally unreasonable imposition on private property rights. In the draft findings of the Commissioners, the key recommendation was for Australia to revert to an entirely voluntary heritage protection system:¹⁷⁵

Privately-owned properties should be included on a national, State, Territory, or local government statutory heritage list only after a negotiated conservation agreement has been entered into and should remain listed only while an agreement is in force.¹⁷⁶

This recommendation, while focussed on privately-owned property, would have dismantled much of what the Hope Inquiry set out to establish. Such a recommendation would have removed statutory protection from many historic places including archaeological sites, supporting a strong private property interest rather than a 'public good' interest in heritage conservation. Following substantial additional public comment and submissions from interest groups on both sides of the heritage issue,¹⁷⁷ the Commissioners re-examined their recommendations, settling on the introduction of a notion of determining the effect of "unreasonable costs" upon the owners of heritage places.¹⁷⁸ The Commissioners' notion of "reasonableness" accords with the view that environmental regulation generally must be perceived as "fair" in order to be supported.¹⁷⁹ The Commissioners felt that, when considering the provision of heritage protection to a place, if the costs of conservation were determined to be an unreasonable imposition upon the owner, then heritage protection should be voluntary, rather than mandatory. In such circumstances, the Commissioners held the view that the government seeking to ascribe heritage protection to the place should enter into a binding conservation agreement with the owners and the government should fund a share of the costs of conservation. Note the Commissioners extended this "reasonableness" test to the undertaking of archaeological work, which was perceived as a research activity to be undertaken by government.¹⁸⁰

The Commissioners have essentially identified the need to build economic considerations into the protection of heritage places in a more transparent

¹⁷⁴ Hope, R. M. (1974). Report of the Committee of Inquiry into the National Estate. Canberra, Australian Government Publishing Service. Pg 167.

¹⁷⁵ Productivity Commission (2005). Conservation of Australia's historic heritage places - draft report. Melbourne, Australian Government.

¹⁷⁶ *Ibid.* Pg XLII, Draft Recommendation 8.1.

¹⁷⁷ There were 192 written submissions to the Commission prior to the Draft report and a further 226 following publication of the Draft Report. <http://www.pc.gov.au/inquiry/heritage/subs/sublist.html> Accessed 28 July 2006.

Additionally, there was an initial round of public hearings in most Australian capital cities during the data-gathering phase of the Inquiry and a further round in response to the Draft Report (17 days of public hearings in total). <http://www.pc.gov.au/inquiry/heritage/trans/translist.html> Accessed 28 July 2006. This is comparable to the Hope Inquiry, which had nearly 800 written submissions and hearing appearances. See Hope, R. M. (1974). Report of the Committee of Inquiry into the National Estate. Canberra, Australian Government Publishing Service. Appendix C. Pp 360-369.

¹⁷⁸ Productivity Commission (2006). Conservation of Australia's historic heritage places - final report. Melbourne, Australian Government. Pp 234-242.

¹⁷⁹ See discussion of this issue in Chapter 3, as well as Knetsch, J. L. (1990). Property and environmental values. Property rights and environment protection. B. Boer and D. James, Environment Institute of Australia, Inc.: 1-15. and Blamey, R. (1998). "The activation of environmental norms: extending Schwartz's model." Environment and Behavior 30 (5): 676-708.

¹⁸⁰ Productivity Commission (2006). Conservation of Australia's historic heritage places - final report. Melbourne, Australian Government. Pp 247-248.

manner. The results of the Inquiry identify the need to take a wider range of issues into consideration, given the potential impacts of extending legal heritage protection to a place. This leads part of the way towards building a 'public good' framework for heritage conservation, but the principally economic focus of both the analysis and the conclusions in the Inquiry comes at the expense of other values. While the recommendations of the Productivity Commission are not binding on any level of government, and may never be implemented, this highly-publicised inquiry has been deeply damaging to heritage conservation efforts in Australia. It is too early to say if the results of this Inquiry will be accepted and implemented at any level of government.¹⁸¹ But what this does demonstrate is that the support for heritage conservation is not always perceived as a 'public good' nor is legislation necessarily perceived as desirable. From the perspective of heritage conservation, it is to be hoped that the results of the Productivity Commission Inquiry are not nearly as far-reaching as that of the Hope Inquiry.

4.7 'Public good' and archaeology as a discipline—Professional Codes of Ethics

The archaeological profession in Australia has also endeavoured to engage with the protective principles for archaeological heritage and bases itself within Codes of Ethics or Codes of Practice. However these still largely remain focussed on the duties of archaeologists to the archaeological heritage,¹⁸² or their clients,¹⁸³ rather than necessarily considering the concerns, costs or benefits for the wider community. Additionally, there is no one universally accepted Code of Ethics within Australian archaeology, nor is compliance with such a code mandatory. While the Australian Archaeological Association (AAA), Australian Association of Consulting Archaeologists Incorporated (AACAI) and New South Wales Heritage Office all have Codes of Practice or Codes of Ethics there are no mechanisms to ensure compliance with these Codes. Further, the Codes say little about the role of legislation to protect archaeological heritage, and are more concerned with ensuring compliance with extant legislation rather than seeking to set standards for best practice.

At the time of the establishment of the Australian Archaeological Association for example, Crawford stated that "public appreciation of [archaeologists'] aims is of fundamental importance" but further noted that "the passing of

¹⁸¹ The Final Report of the Productivity Commission Inquiry was presented to the Australian Government in April 2006 and released to the public in July 2006.

¹⁸² For example, the Australian Association of Consulting Archaeologists Incorporated *Code of Ethics* Clause 2 entitled "Duty to the Public" indicates that its members have a duty to ensure the "archaeological resource base and...information derived from it, are used...in the best interest of the public" yet this duty is expressed in terms of protecting the "archaeological resource" (Clause 2.1), generating good research product (Clauses 2.2 and 2.3) and ensuring appropriate storage of excavated material and derived information (Clause 2.4). The Code appears to assume that undertaking these acts in and of themselves is in the public interest. See <http://www.aacai.com.au/codeofethics.html>. Accessed 18 April 2006.

By contrast, the Code of Ethics for the Australian Archaeological Association makes no reference to a public duty. Section 2 of the AAA Code of Principles Relating to the Archaeological Record, and is concerned with the protection of the archaeological heritage in terms of sites, objects and information. Section 3 does recognise that archaeological cultural heritage has importance to indigenous communities, but there is no mention of the wider community. See <http://www.australianarchaeologicalassociation.com.au/codeofethics.php>. Accessed 18 April 2006.

¹⁸³ AACAI *Code of Ethics* Clause 6.

these Acts [to protect archaeological heritage] was encouraged by archaeologists and...they serve archaeologists well”, negating any notion that archaeological heritage legislation was established to serve the broader community.¹⁸⁴ This sentiment is echoed by Dobb, who observed the critical role of archaeologists and other heritage professionals in driving the enactment of initial Australian heritage legislation.¹⁸⁵ Greer and colleagues noted that community input into Aboriginal heritage and archaeological matters has widely been acknowledged as appropriate, if not necessarily embraced by heritage professionals. Historical archaeological matters however are still largely considered the preserve of experts, in the form of professional archaeologists.¹⁸⁶ The essence of these observations remains true to the present day, that archaeological heritage codes serve a limited set of interests, rather than providing a good framework for the consideration of the public value of archaeological heritage. Ideally these Codes of Ethics should reflect a broader understanding of the value of archaeological heritage to the wider community.

4.8 A basis for legislation—underlying principles of archaeological heritage protection

The impetus to protect archaeological heritage through legislation has come from many directions. The international charters have been particularly influential in seeing legislation implemented within Australia. Other non-statutory “soft law” instruments such as the Burra Charter and other documents of principle have been as influential if not more influential and have shaped both the legislation as well as the concept of how places are valued. The public interest in heritage as an issue of government and of law is undeniable, through the response to both the Hope and Productivity Commission Inquiries into heritage conservation in Australia. While having different foci, these Inquiries sought to engage the public on a wide range of heritage issues, to guide the response that Australian governments would have in heritage conservation. Several themes in archaeological heritage protection have emerged from this analysis, which form underlying protective principles which have been worked into Australian heritage legislation. These principles can be summarised as:

- Protection of the archaeological object;
- Protection of the archaeological site;
- Transmission of archaeological heritage to present and future generations.

The three points identified in this analysis provide the basis for archaeological heritage protection at an international and domestic level. McKinlay had

¹⁸⁴ Crawford, I. (1975). "The Role of the Australian Archaeological Association." *Australian Archaeology* 2: 3-4.

¹⁸⁵ Dobb, R. (1995). Legislation for Aboriginal places of significance. *Cultural conservation: towards a national approach*. S. Sullivan. Canberra, Australian Government Publishing Service. 9: 39-43. Pg 39.

¹⁸⁶ Greer, S., R. Harrison, et al. (2002). "Community-based archaeology in Australia." *World Archaeology* 34 (2): 265-287. Pg 267.

Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 120-121.

previously identified the first two points explicitly, in his analysis of the New Zealand heritage protection regime in the early 1970s. He had, however, only touched upon the third principle and any conception of a “public good” aspect to archaeological heritage management was confined to a notion that archaeological heritage belonged to “the people” rather than to any individual, and that this public interest should override any private concerns.¹⁸⁷ McGimsey, in his discussion of the “value of archaeology” provides arguments in favour protecting the first two points, as these represent the sum total of the “facts” which are available to the archaeologist. What is synthesised out of those facts is the third point, and forms the information which is passed on to other archaeologists and the wider community.¹⁸⁸ Yet Carman has noted the difficulty in bringing the public into the conservation of archaeological heritage,¹⁸⁹ precisely because heritage legislation tends not to provide avenues for their involvement. But analysis of this situation from outside the heritage discipline, through the Productivity Commission Inquiry, has shown a need to draw other factors into the conservation process, as these other factors, such as economic issues, are also legitimate areas of public concern. It may be necessary, therefore, to move beyond the three principles identified above, to establish a basis for ‘public good conservation’. The next three chapters consider the existing legal frameworks for archaeological heritage management at the Commonwealth, State and Territory levels and their support for these existing protective principles. This analysis demonstrates some of the flaws with too much a reliance of these principles, as these principles, while protecting archaeological heritage in a strict sense, can serve to further alienate the public from that heritage.

¹⁸⁷ McKinlay, J. R. (1973). Archaeology & legislation : a study of the protection of archaeological sites and material by legislative action. Wellington, New Zealand Archaeological Association. Pp 59-60.

¹⁸⁸ McGimsey III, C. R. (1984). The Value of archaeology. Ethics and Values in Archaeology. E. L. Green. New York, The Free Press: 171-174.

¹⁸⁹ Carman, J. (2002). Archaeology and heritage : an introduction. London ; New York, Continuum. Pp 108-111.

Chapter 5–The Commonwealth heritage regime and archaeological heritage protection

5.1 Introduction

Chapter 4 set out the broad framework for the legal protection of the archaeological heritage through an analysis of influential quasi-legal and non-legal charters, instruments and other policy tools. These have established underlying philosophical and legal principles of archaeological heritage protection, now expressed in domestic legislation. Building on the analysis in Chapter 3, it has been demonstrated that the documents of principle examined in Chapter 4 support the conclusion archaeological heritage protection was not conceived as principally a scientific exercise. Archaeological heritage was conceived as a part of the common cultural heritage of humanity, and therefore relevant to all portions of society. This lends support to the primary contention of this thesis that archaeological heritage protection should be based in ‘public good’ rather than scientific discourse. This and the following two chapters will analyse in detail the existing Australian legal regimes for archaeological heritage protection and their effectiveness in light of both the protective principles identified in chapter 4 and the ability to support a notion of ‘public good conservation’.

The definitive analysis of legal frameworks for archaeological heritage protection was O’Keefe and Prott’s work *Law and the Cultural Heritage: Volume 1 Discovery and Excavation*.¹ This work explored the legal issues associated with the protection of archaeological heritage around the world. As the law moves rapidly, much of the legislative detail in this work is now more than two decades out of date, but the underlying issues which the authors identified remain relevant to the present discussion. This chapter reconsiders a range of the issues raised by O’Keefe and Prott, within the context of the current Australian legal regimes and with respect to the question of public good conservation. When describing “the ideal relics law”, (while recognising that such could not be achieved in reality) O’Keefe and Prott advocated not a specific mix of protective mechanisms, but rather that protective legislation:

- Be consistent, within itself and as related to other legislation;
- Be comprehensive, allowing for no gaps which might be exploited;
- Have clear guidelines for administration;
- Be well publicised;
- Be practical in its methods; and,
- Be actively enforced.²

These are desirable criteria for any piece of legislation in any area of law. With archaeological heritage protection legislation, a major consideration should be “what are the problems which must be addressed?” and “how can legislation best be drafted to address these issues?” In Australia, the major problem faced by legal analysis such as this thesis is the lack of consistency across

¹ O’Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd.

² *Ibid.* Pg 109.

Australian jurisdictions. Australia has nine jurisdictions,³ many of which have multiple, overlapping pieces of heritage legislation and typically adopt a different approach to protecting historical, indigenous and maritime archaeological heritage. Due to this, there are more than 30 individual legislative approaches to protecting Australia's archaeological heritage. The quality of legislation examined here and its adherence to the "ideal legislation" criteria articulated by O'Keefe and Prott is extremely variable. Much Australian legislation has been guided by the 1974 Hope Report into the National Estate⁴ as well as the Australia ICOMOS Burra Charter. Often legislators and legal draftspeople have looked to other Australian jurisdictions for inspiration and guidance, as well as responding to particular local issues. Other legislation, particularly that enacted prior to the Hope Report, has taken its cue from overseas legislation and issues, in some cases misconstruing the nature of the problem and in others setting in place ineffectual and elaborate legal mechanisms. This last observation is particularly true with respect to the trade in archaeological materials, where there is little evidence of a significant problem in Australia.

5.2 The development and approach of Australian heritage legislation

In order to examine the ways in which Australian law protects archaeological heritage, it is necessary to understand the past and current practice in the area. This section provides a brief discussion of the approaches of the Commonwealth, State and Territory governments in protecting Australia's archaeological heritage. This forms the basis of the comparative legal analysis of the different approaches to implementing the underlying principles of archaeological heritage protection and the extent to which 'public good' conservation is supported by existing legislation. This analysis demonstrates the weaknesses in current, overly legalistic or vague approaches to protecting archaeological heritage, particularly where the conception of archaeological heritage is based on a paradigm of "scientific" significance as its primary value. The primacy of this concept has been to the detriment of achieving the goals expressed in the principles of archaeological heritage protection, and has created an inability in many cases, under current regimes, to implement activities which support 'public good' conservation. While the majority of the emphasis in Australian heritage legislation has been on "threat removal", it has been recognised by at least some Australian lawmakers that "a threat [to a heritage item] might not be capable of being countered by legislation,"⁵ and thus it is important to focus on objectives beyond threat removal or punitive remedies. Establishing a concept of 'public good' in heritage conservation may then also serve as a mechanism for finding ways to combat those threats which cannot be thwarted through legislation alone.

³ The Australian Commonwealth including external territories (e.g. Norfolk Island and the Australian Antarctic Territory), 6 States (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and 2 Territories (the Australian Capital Territory and the Northern Territory).

⁴ Hope, R. M. (1974). Report of the Committee of Inquiry into the National Estate. Canberra, Australian Government Publishing Service.

⁵ Australia. Parliament. House of Representatives. (1999). Official Reports of the Parliamentary Debates (Hansard). 9 December 1999, Pg 13231. Senator Gareth Evans, Second Reading Speech to the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 (Cth).

Australian legislation has relied on a range of mechanisms for the protection of archaeological heritage, which can be categorised as follows:

- Protection through definition—where an Act is designed to specifically protect archaeological heritage, there are one or more definitions of archaeological heritage. These definitions tend to focus on the archaeological object⁶ (or “relic”) or the archaeological place.⁷
- “Blanket” protection—blanket protection is a subset of definitional protection, where all items meeting a certain definition receive automatic statutory protection. No additional significance test is required, leaving such protection open to highly legalistic interpretation. Blanket protection has been used, most notably, in NSW⁸ and Victoria,⁹ for both indigenous and non-indigenous archaeological heritage. Prior to the recent reforms in indigenous heritage protection in Queensland, indigenous critics had argued that the lack of blanket protection for indigenous heritage in certain jurisdictions was due to institutional racism which devalued indigenous heritage.¹⁰
- Protection through listing—every Australian jurisdiction has one or more lists of heritage places, which have been assessed as meeting certain criteria and are accordingly placed on the list or register.¹¹ Unlisted places tend to have no automatic protection, but there is generally a power to place an emergency order over a place, if it is under threat, to allow time to assess its significance. Some states, such as Victoria, have a separate list for archaeological places.¹²
- Protection through posting of notices—this is a fairly weak form of protection which requires the placing of notices or signs at sensitive archaeological places, forbidding unauthorised entrance or disturbance to the place.¹³
- Protection through reservation—some legislation allows “archaeological areas” to be defined, as a limited form of reservation. Activities within these areas may be restricted or subject to administrative control.¹⁴

⁶ E.g. *Heritage Act 1977* (NSW) Section 4—definition of a “relic”.

⁷ E.g. *Heritage Act 1995* (Vic) Section 3—definition of an “archaeological site”.

⁸ Under both the NSW *Heritage Act* (non-indigenous) and the *National Parks and Wildlife Act* (indigenous).

⁹ Under the Victorian *Archaeological and Aboriginal Relics Preservation Act* (indigenous) and *Heritage Act* (non-indigenous).

¹⁰ Jago, M. and N. Hancock (1998). “The case of the missing blanket : indigenous heritage and states’ regimes.” *Indigenous Law Bulletin* 4 (16): 18-21.

¹¹ E.g. The WA Register of Heritage Places, established under the *Heritage of Western Australia Act 1990* (WA), Section 46.

¹² The Victorian Heritage Inventory, established under Section 120-121 of the *Heritage Act 1995* (Vic). By contrast, the NSW Department of Environment and Conservation maintains the Aboriginal Heritage Information Management System, which is a non-statutory register of Aboriginal heritage places and objects. <http://www.nationalparks.nsw.gov.au/npws.nsf/Content/How+to+obtain+AHIMS+data> Accessed 15 July 2006.

¹³ E.g. the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic), Section 19.

¹⁴ E.g. the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic), Section 15. The *National Parks and Wildlife Act 1974* (NSW) allows the declaration of “aboriginal areas” which, while they can contain archaeological places, are more designed to protect places of cultural significance to contemporary Aboriginal people.

- Protection through ownership—this type of protection may take two forms: compulsory acquisition of places to be protected, or a presumption of automatic state ownership of archaeological materials.¹⁵ While many Acts have compulsory acquisition powers, these are rarely used and schemes which have relied solely on this mechanism for protection have been ineffective. Some Acts do have a presumption of automatic state ownership of archaeological materials, but this is generally restricted to indigenous materials.¹⁶
- Permitting procedures restricting access or impacts to archaeological places—this is a common form of protection, which requires a statutory application to be made for an activity which will affect an item of archaeological heritage.¹⁷ Generally such permits are limited to archaeologists, but as will be discussed in Chapter 8, this is not always the case.¹⁸
- Restriction on trade or sale—while there is overarching Commonwealth legislation which restricts the international export of certain types of archaeological materials,¹⁹ some states have restrictions on the sale or trade of archaeological materials within the state, or on the removal of such materials from the state.²⁰

The details of the implementation of particular mechanisms in different jurisdictions are discussed over the next three chapters. All of these mechanisms have their utility in certain situations, and none represents a perfect mechanism for protection. The three most commonly used are definition, listing and permitting which, when used in conjunction, can provide an effective administrative regime for archaeological heritage management. The other mechanisms, while useful in certain situations, are much more difficult to enforce and monitor, limiting their effectiveness.

As a final matter, it should be noted that legislation is an ever-evolving area and much debate has been underway across Australia about the need for reforms of Commonwealth, State and Territory heritage legislation. In order to adequately contain this movable feast, legislation referred to in this chapter and subsequently is that which is in force or subject to debate (with respect to Bills) at or prior to June 2006.²¹ The following table provides a timeline for the development of key legislation and related documents which have had a bearing on the management of archaeological heritage in Australia. It is followed by a brief treatise on the Australian legal system and the

¹⁵ E.g. *Native and Historic Objects Heritage Protection Ordinance* 1955 (NT), now repealed, relied on this as the sole form of heritage protection and only 6 places were ever acquired during the first 20 years of its operation. See also the *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic), Section 18 which has specific powers to compulsorily acquire land containing “irreplaceable relics”.

¹⁶ E.g. *National Parks and Wildlife Act* 1974 (NSW), Section 83.

¹⁷ E.g. *Heritage Act* 1977 (NSW) Section 139, which sets out the procedure for obtaining an “excavation permit”.

¹⁸ A Victorian case involving the grant of a permit to a treasure hunter will be discussed in Chapter 8. See *Panama Downs P/L v. Borough of Queenscliffe* (1993) Unreported (Appeal no 1993/18716). Anonymous (1993). “Panama Downs Pty Ltd v Borough of Queenscliffe.” *Environmental Law Reporter* 12: 153-154.

¹⁹ Through the *Protection of Moveable Cultural Heritage Act* 1986 and the National cultural Heritage Control List defined under Schedule 2 of that Act.

²⁰ E.g. *Heritage Places Act* 1993 (SA) Section 28 and *Aboriginal Heritage Act* 1988 (SA) Section 29.

²¹ See limitations to the thesis outlined in Chapter 1.

mechanisms by which legislation is made, for the benefit of those readers without a legal background.

Treaties, Charters and Australian Heritage Legislation, 1950s to Present ²²

Jurisdiction/Decade	1950s	1960s	1970s	1980s	1990s	2000-2006
Treaties, Charters and other Agreements Note: Documents marked with an asterisk (*) have not been specifically implemented in Australia.	<ul style="list-style-type: none"> UNESCO Recommendation on International Principles Applicable to Archaeological Excavations 1956 * 	<ul style="list-style-type: none"> International Charter for the Conservation and Restoration of Monuments and Sites 1964 (Venice Charter) * European Convention on the Protection of the Archaeological Heritage 1966 * 	<ul style="list-style-type: none"> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (UNESCO Convention) <i>Convention For the Protection of the World Cultural and Natural Heritage 1972 (World Heritage Convention)</i> Australia ICOMOS Charter for Places of Cultural Significance 1979 (Burra Charter) 		<ul style="list-style-type: none"> ICOMOS Charter for the Protection and Management of the Archaeological Heritage 1990 * <i>Unidroit Convention on Stolen or Illegally Exported Cultural Objects 1995 (Unidroit Convention) *</i> 	<ul style="list-style-type: none"> Convention on the Protection of the Underwater Cultural Heritage 2001 * Convention for the Safeguarding of the Intangible Cultural Heritage 2003 *
Commonwealth of Australia			<ul style="list-style-type: none"> Australian Heritage Commission Act 1975 (<i>Repealed 2003</i>) Historic Shipwrecks Act 1976 	<ul style="list-style-type: none"> World Heritage Properties Conservation Act 1983 (<i>Repealed 1999</i>) Aboriginal and Torres Strait Islander Heritage Protection Act 1984 Protection of Movable Cultural Heritage Act 1986 	<ul style="list-style-type: none"> Environment Protection and Biodiversity Conservation Act 1999 	<ul style="list-style-type: none"> Australian Heritage Council Act 2003
Australian Capital Territory				<ul style="list-style-type: none"> Nature Conservation Ordinance 1980 (<i>Converted to the Nature Conservation Act 1980 when the ACT received self-government in 1988</i>) 	<ul style="list-style-type: none"> Heritage Objects Act 1991 (<i>Repealed 2004</i>) Land (Planning and Environment) Act 1991 	<ul style="list-style-type: none"> Heritage Act 2004
New South Wales		<ul style="list-style-type: none"> National Parks and Wildlife Act 1967 (Substantially revised and redated 1974) 	<ul style="list-style-type: none"> National Parks and Wildlife Act 1974 Heritage Act 1977 			
Northern Territory	<ul style="list-style-type: none"> Native and Historic Objects Heritage Preservation Ordinance 1955 (<i>Repealed 1991</i>) 	<ul style="list-style-type: none"> Native and Historic Objects and Areas Heritage Preservation Ordinance 1960 (<i>Repealed 1991</i>) 	<ul style="list-style-type: none"> Northern Territory Aboriginal Sacred Sites Act 1978 		<ul style="list-style-type: none"> Heritage Conservation Act 1991 	
Queensland		<ul style="list-style-type: none"> Aboriginal Relics Preservation Act 1967 (<i>Repealed 1987</i>) 		<ul style="list-style-type: none"> Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (<i>Repealed 2003</i>) 	<ul style="list-style-type: none"> Queensland Heritage Act 1992 	<ul style="list-style-type: none"> Aboriginal Cultural Heritage Act 2003 Torres Strait Islander Cultural Heritage Act 2003
South Australia		<ul style="list-style-type: none"> Aboriginal and Historic Relics Preservation Act 1965 (<i>Repealed 1979</i>) 	<ul style="list-style-type: none"> Aboriginal Heritage Act 1979 (<i>Never formally repealed but effectively superseded by the 1988 Act</i>) Historic Shipwrecks Act 1981 	<ul style="list-style-type: none"> Aboriginal Heritage Act 1988 	<ul style="list-style-type: none"> Heritage Act 1993 (<i>Substantially amended and name changed 2005</i>) 	<ul style="list-style-type: none"> Heritage Places Act 1993
Tasmania			<ul style="list-style-type: none"> National Parks and Wildlife Act 1970 Aboriginal Relics Act 1975 		<ul style="list-style-type: none"> Historic Cultural Heritage Act 1995 	
Victoria			<ul style="list-style-type: none"> Archaeological and Aboriginal Relics Preservation Act 1972 (<i>Repealed 2006</i>) 	<ul style="list-style-type: none"> Historic Buildings Act 1981 (<i>Repealed 1995</i>) Historic Shipwrecks Act 1981 (<i>Repealed 1995</i>) 	<ul style="list-style-type: none"> Heritage Act 1995 	<ul style="list-style-type: none"> Aboriginal Heritage Act 2006²³
Western Australia			<ul style="list-style-type: none"> Aboriginal Heritage Act 1972 Maritime Archaeology Act 1973 		<ul style="list-style-type: none"> Heritage of Western Australia Act 1990 	

²² This table outlines the years of establishment of key international charters and treaties as well as enactment of heritage legislation across Australia. The dates of amendment acts are not shown, however if an Act was substantially altered by amendment then it is relisted at the new date. Legislation related specifically to historic shipwrecks is listed, however it is not discussed in this thesis. The year legislation has been repealed is shown in italics. Current bills are not shown.

²³ While the Aboriginal Heritage Act 2006 has passed through the Victorian Parliament, the legislation has not been commenced, as of this writing. Once commenced, it will repeal the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic). Commencement relies on Commonwealth-level reformed to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. While the *Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2006* has been introduced to the Australian Parliament, it is still subject to debate.

5.3 The Australian legal framework

This section briefly reviews the structure of the Australian legal system, to provide context to the discussion of individual jurisdictions later in the thesis. The Australian legal framework is separated into three main jurisdictions: the Commonwealth, the States and the Territories. The Commonwealth legal framework provides the overarching, Federal-level legal regime for the whole of Australia, but is limited in its powers by the Australian Constitution.¹ The States and Territories have broad powers to regulate within their own borders, but in general are subordinate to the Commonwealth and certain activities are beyond their authority (for example, entering into international agreements, which is an “external affairs” issue reserved for the Commonwealth). Territories, while generally sovereign, can have their legislation disallowed by the Commonwealth, if the Commonwealth feels there is necessity.² The Commonwealth does not generally have the power to overturn State legislation.³

Legislation within all Australian jurisdictions is considered by the parliamentary legislature. The general arrangement is for a bicameral system, with a lower house of government and an upper house of review. Bills are introduced into the lower house either by the sitting Government, the Opposition or by individual members (referred to as Private Member’s Bills). When a bill is initially presented to the legislature, this is referred to as its First Reading. The members are presented with the bill and given time to analyse it prior to debate, with usually some gap in time between the First Reading and the Second Reading of a bill. The Second Reading is the core period of consideration for a bill. It is introduced through an explanatory speech by the sponsoring member (generally a minister if a Government bill) called the Second Reading Speech. This sets out the rationale behind the bill and broadly outlines its background and proposed powers. This is followed by debate by the members of the legislature prior to a vote on the bill. Debate may give rise to minor amendments, referral to a Parliamentary Committee for more detailed examination or withdrawal of the bill. Following completion of this process, the bill is sent to the upper house for consideration, where the same process of debate and amendment is undertaken. If the upper house requires amendment of the bill, it is passed back to the lower house for additional consideration. Once a bill has been passed by both houses it has its Third Reading and is passed to the Governor for the final making of the bill into an Act and it is published in the Government Gazette. There may be a delay between the gazettal of an Act and its commencement. All of these processes can take considerable time and there is no guarantee of a bill completing its passage through any stage.

¹ Section 51 of the Commonwealth of Australia Constitution Act 1900 (Cth) enumerates the powers reserved for the Commonwealth. All other powers are reserved for the States and Territories, except in certain instances, such as a referral of powers.

² Recent examples of this include the Commonwealth’s overturning of voluntary euthanasia legislation in the Northern Territory in 1997 and same-sex marriage in the Australian Capital Territory in 2005. For a general discussion of this issue see Australian Law Reform Commission (2000). Discussion Paper 64: The judicial power of the Commonwealth - A review of the Judiciary Act 1903 and related legislation. Sydney, Australian Law Reform Commission: Ch 7 - Judicial Power in the Territories.

³ The powers of the Commonwealth are limited to those set out in Section 51 of the Australian Constitution. Where there is an inconsistency between Commonwealth and State law, the Commonwealth prevails under Section 109, however Section 118 gives a broad recognition of the power of State laws in other circumstances.

The following several chapters rely heavily on the record of these parliamentary debates (the Hansard).⁴ Hansard is not necessarily a clear window into the legal intention behind a piece of legislation, but does provide an insight into the issues which led to the introduction of a particular bill, the conceptions the parliamentarians may have had about those issues and the broad context in which issues were considered. Analysis of Hansard has been used to a limited extent by a few Australian archaeologists, to chart the development of Aboriginal heritage legislation.⁵ Legal scholar Malbon has cautioned against too strong a reliance on Hansard for an “originalist” approach to analysing legislation, where the researcher attempts to go “back in time” in an effort to understand the underlying intentions of those involved in the original drafting and debate on a statute.⁶ Too rigid a use of this approach can lead to false conclusions, he argues, as it ignores what has passed since the enactment of legislation. In the case of this thesis, however, there is very little case law upon which a researcher could normally rely to see the evolution in statutory interpretation. While the Hansard cannot be assumed to completely reflect the views and motivations of those involved in the drafting and debate of heritage legislation, it does provide an important insight into legislative intent in the absence of any substantial jurisprudence arising from the testing of these statutes in the courts.

Archaeological issues receive some discussion in the parliamentary debates and analysis of that discussion indicates the conceptions or misconceptions that the members of the legislature have about archaeology as a discipline, its relationship and value to the public and its management in a public policy context. Despite the acknowledgement of archaeological issues during parliamentary debate, it is clear throughout the Hansard from the 1970s to the present and across jurisdictions that built heritage and, to a lesser extent, natural heritage are the main factors considered by legislatures across Australia in debating the merits and forms of heritage protection legislation. Archaeological heritage remains more of a misunderstood curiosity than something in which the legislatures of Australia have expressed a deep interest. In the context of this thesis, it is important to acknowledge that laws to protect archaeological heritage were not enacted on a whim, but rather because of a perceived need and because archaeological heritage had a perceived value. In the absence of either, legislation to protect archaeological heritage would not exist.

5.4 The Commonwealth heritage framework

Under Australian law, the Commonwealth has no direct power to regulate the environment (including the historic environment), as it is not one of the

⁴ The Hansard, which is a transcription of the speeches of parliamentarians. See <http://en.wikipedia.org/wiki/Hansard> for a detailed history of the term.

⁵ Principally McGowan and Murray. See for example their articles McGowan, A. (1996). "A view from the castle: administering Aboriginal heritage legislation in a changing policy environment." *Tempus* 6: 301-309. And Murray, T. (1996). "Aborigines, Archaeology and Australian heritage." *Meanjin* 55 (4): 725-735.

⁶ Malbon, J. (2002). "Avoiding the Hindmarsh Island Bridge Disaster: Interpreting the Race Power." *Flinders Journal of Law Reform* 6: 41-66. Pp 46-48. Malbon was speaking primarily of the use of this technique by judges when interpreting statutes.

enumerated powers of the Commonwealth under the Australian Constitution;⁷ environmental and heritage regulation has largely been left to the States and Territories. This has meant that, in most instances, there has been no overarching or consistent approach to the legal protection of archaeological heritage in Australia. The Commonwealth does have certain powers with respect to the environment, but these are principally restricted to Commonwealth-owned land, actions by Commonwealth agencies, dispensing of funding and ensuring Australia as a nation meets its obligations under international treaties relying on the Constitutional 'external affairs' powers. This latter issue was decided with respect to the Commonwealth's power to intercede in matters affecting World Heritage Areas in the 1983 Franklin Dam Case, which saw the Commonwealth overturn the Tasmanian State Government's decision to construct a hydroelectric dam which would have damaged the Franklin River World Heritage Area.⁸

Commonwealth heritage legislation has been in place since the mid-1970s. There are two Commonwealth constitutional powers which are key for an understanding of Federal regimes for heritage protection: the power to make laws for the benefit of any race and the external affairs power.⁹ As outlined in the discussion of the Hope report in Chapter 3, it is these powers which underpin the current and former Commonwealth heritage protection regimes, including the *Australian Heritage Commission Act 1975* (Cth),¹⁰ the *World Heritage Properties Conservation Act 1983* (Cth),¹¹ the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the *Protection of Movable Cultural Heritage Act 1986* (Cth), the *Native Title Act 1993* (Cth), the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Australian Heritage Council Act 2003* (Cth). While none of these Acts explicitly provides mechanisms for the protection of archaeological heritage, each has a bearing on the legal approach to managing that heritage.

5.5.1 The Australian Heritage Council Act 2003

The Commonwealth heritage management regime, past and present, has never made specific provision for the protection of archaeological heritage. While both the general value of archaeological heritage and specific issues surrounding scientific or research significance were recognised in the Hope Report, the main direct outcome of that Report was the enactment of the *Australian Heritage Commission Act 1975*. The main purpose of the 1975 Act has been described as "to prevent, in a constitutionally unobjectionable way, the destruction of the national estate."¹² In that Act itself there were no specific

⁷ *Commonwealth of Australia Constitution Act* (1900) Commonwealth. Section 51.

Crawford, J. (1991). "The Constitution and the Environment." *Sydney Law Review* 13: 1.

⁸ See *Commonwealth of Australia v. Tasmania* (1983) 158 CLR 1. for the full decision. For commentary, see:

Bates, G. M. (1984). "The Tasmanian Dam Case and Its Significance in Environmental Law." *Environmental Planning Law Journal* 1: 325-345.

Evans, M. (2000). *Principles of Environmental & Heritage Law*. St Leonards, Prospect Publishing. Pp 150-151.

Bates, G. M. (2002). *Environmental law in Australia*. Sydney, LexisNexis Butterworths. Pp 60-65.

Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 97-98.

⁹ Commonwealth of Australia Constitution Act 1900 (Cth) Sections 51(xxvi) and 51(xxix) respectively.

¹⁰ Repealed 2003.

¹¹ Repealed 1999.

¹² Mossop, D. (1997). "Some observations on the operation of the Australian Heritage Commission Act." *Australian Environmental Law News* (1): 17-20. Pg 17.

protections for archaeological heritage. Sites, if they met the relevant criteria, could only be listed on the Register of the National Estate¹³ and actions affecting such sites could only be restricted if they involved Commonwealth agencies or Commonwealth funds and there was no 'prudent and feasible alternative'.¹⁴ The actions of private individuals, state or local governments or businesses were, in general, not restricted under such a listing. The Register of the National Estate was more significant for its symbolic value¹⁵ than for the actual power of its protections. As the Register of the National Estate arose out of the Hope Inquiry, it was enormously influential in shaping other heritage listing processes at State and Territory level. With respect to archaeological heritage, however, it was fundamentally limited by the conception of archaeological heritage as something with "research" significance, thus making consideration of other heritage values difficult.

The *Australian Heritage Commission Act* was repealed in late 2003 and replaced by substantial amendments to the *Environment Protection and Biodiversity Conservation Act 1999*¹⁶ and the *Australian Heritage Council Act 2003*.¹⁷ The *EPBC Act* provides omnibus legislation for the Commonwealth to implement its environmental obligations which stem from a range of international agreements and implements the sustainability principles, discussed in Chapter 3.¹⁸ This should, theoretically at least, provide some framework for implementing 'public good' conservation outcomes at the Commonwealth level, in both the environmental and heritage spheres, through a balancing of environmental, social and economic factors. The *AHC Act* established the Australian Heritage Council as a body with the power to

¹³ Originally established under section 22 of the Australian Heritage Commission Act 1975. Now kept by the Australian Heritage Council under section 21 of the Australian Heritage Council Act 2003.

¹⁴ Australian Heritage Commission Act 1975 section 30(1). The discretion in that regard rested solely with the Commonwealth Minister for Heritage. Whitrow (Whitrow, D. L. (1985). "The Australian Heritage Commission Act: Some Serious Shortcomings." *Environmental and Planning Law Journal* 2: 94-97.) notes (pg 92) that this is a very vague requirement on the Minister, and that no guidance on 'prudent alternatives' are provided by the Act. James and Mora highlight the fact that this phrase is in fact borrowed from a piece of American legislation—section 4(f) of the US Federal *Department of Transport Act* 1966 and that while the phrase has been substantially considered by American courts, there has been little judicial interpretation of the phrase in Australia. James, P. C. and J. Mora (1996). *Australian Mosaic: A handbook for the conservation of the National Estate*. Cairns, Mukkamanna Holdings. Pp 31-32. See also Boer, B. (1989). "Natural resources and the National Estate." *Environmental and Planning Law Journal* 6 (2): 134. and Boer, B. (1995). The legal framework of heritage conservation. *Special Australian Heritage Publication Series*. S. Sullivan. Canberra, Australian Heritage Commission. 9.

¹⁵ Despite its primarily symbolic significance outside of the actions of the Commonwealth government, the *Australian Heritage Commission Act* 1975 was viewed with strong suspicion in some quarters and that symbolic value did have unintended negative consequences. See for example Pinwell, C. E. (1980). *The Heritage Hoax: Control of Private Property by Progressive Legislation*. Ravensbourne, Queensland, The Institute of Economic Democracy. Pinwell views heritage legislation generally and the Australian Heritage Commission Act specifically as a part of a socialist plot to dispossess Australians of private property. See also Whitrow (1985, above). Whitrow provides a mining industry perspective on the objections to the Australian Heritage Commission Act, particularly the "unlimited power [of the Commission] to decide what places should be registered" (p 91), although ultimately a Full Federal Court decision curtailed this power in *Australian Heritage Commission v. Mount Isa Mines* (1995) 60 FCR 456. See Mossop 1997, above, for discussion of that decision, which Mossop views as incorrect in law. Whitrow also notes (pg 93) that, in the public's mind, a listing on the Register of the National Estate, accorded a place a "quasi-national park status".

The spectre of "socialist plots" and heritage was raised again during the debates on the Heritage of Western Australia Bill 1990, particularly comments by the Hon Peter Foss, 19 September 1990. Parliament of Western Australia (1990). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Thirty-Third Parliament Second Session. Pg 5354, as well as more recently during submissions to the 2005/06 Productivity Commission Inquiry into Management of Australia's Historic Heritage Places. See for example the submission of Mr Gary Green to that inquiry—Submission DR199, pg 6, dated 12/01/2006, <http://www.pc.gov.au/inquiry/heritage/subs/subdr199.pdf> Accessed 15 May 2006.

¹⁶ Hereafter *EPBC Act*.

¹⁷ Hereafter *AHC Act*.

¹⁸ *EPBC Act* Section 3

provide advice to the Commonwealth Minister for the Environment but with no significant power of its own. Beyond having the power to make recommendations to the Minister regarding archaeological matters, the *AHC Act* provides no direct protection for archaeological heritage.

5.5.2 The *Environment Protection and Biodiversity Conservation Act 1999*

Since 1999 there has been a considerable reorganisation and consolidation of the Commonwealth's environmental and heritage powers in the *Environment Protection and Biodiversity Conservation Act 1999*. This Act replaced five pieces of earlier legislation dating from the 1970s and 1980s.¹⁹ Essentially this Act gives the Commonwealth limited powers of intervention where there is a matter of "national environmental significance" such as potential for impacts to environmentally protected areas under an international treaty (e.g. World Heritage Areas, Ramsar wetlands, migratory bird habitat)²⁰ or actions which affect "national heritage values" on the newly established National Heritage List. The Act also established the Commonwealth Heritage List, for Commonwealth-owned heritage items.²¹ The principles of ecologically sustainable development are fundamentally embedded within the Act²² which specifically directs the Minister to consider the precautionary principle in decision-making,²³ as well as any information contained in the Register of the National Estate.²⁴ This Act represents a change in approach by the Commonwealth to managing natural and environmental heritage, which had previously been dealt with under separate legislation. While perhaps an administrative convenience, this drawing together of natural and cultural heritage issues furthers the notion that cultural heritage is an environmental matter, as well as both aspects being part of a common heritage for Australia.²⁵

The *EPBC Act* provides for the management of World Heritage areas, replacing the regime established under the *World Heritage Properties*

¹⁹ The following Commonwealth Acts were repealed by the *Environmental Reform (Consequential Provisions) Act 1999* and their amended key functions incorporated into the *Environment Protection and Biodiversity Conservation Act 1999*:

Environment Protection (Impact of Proposals) Act 1974

National Parks and Wildlife Conservation Act 1975

Whale Protection Act 1980

World Heritage Properties Conservation Act 1983

Endangered Species Protection Act 1992

²⁰ *EPBC Act* Chapter 2 Part 3 enumerates the full range of environmental protection under the Act, including the three types cited.

²¹ The National Heritage List is established under section 324C of the *EPBC Act 1999* and came into existence on 1 January 2004. The Commonwealth Heritage List is established under section 341C. The Commonwealth Minister for Heritage is responsible for the management of this list and is the determining authority for actions which may affect the heritage values of listed items. The Minister is advised by the Australian Heritage Council however the Council has no power in its own right to list items or make decisions about proposed actions.

²² *Environment Protection and Biodiversity Conservation Act (1999)* Commonwealth. Sections 3(1)(b) and 3A.

²³ *Ibid.* Section 391. The precautionary principle states "that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage." Section 391(2). This has, in general, been applied to natural heritage but the Act directs its consideration when dealing with World, National or Commonwealth Heritage listed places. Section 391(3) Items 11, 11A and 13A.

²⁴ *Ibid.* Section 391A.

²⁵ Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 105-106.

Conservation Act 1983. Australia presently has 16 World Heritage items²⁶ and, until quite recently, these were primarily listed for natural rather than cultural values. Many of these World Heritage Areas do contain archaeological sites, which have been noted as contributory to their 'outstanding universal value'. This was particularly noteworthy during the Franklin Dam case, as a number of important Aboriginal archaeological sites would have been flooded by the dam and this was viewed as unacceptably diminishing the World Heritage values of the place,²⁷ contributing to the Commonwealth's decision to intercede and halt the project.

No Australian World Heritage places are identified as significant *primarily* because of the presence of archaeological materials, nor does the *EPBC Act* specifically mention the protection of archaeological heritage. The Act could be used to protect archaeological heritage specifically in two instances. The first circumstance would be a scenario where works were proposed within a World Heritage Area which would affect archaeological materials which contribute to the World Heritage values of a place. If the archaeological materials were of exceptional significance, proposed works could be declared a 'controlled action'²⁸ and trigger the requirement for an approval under the Act. This is not dissimilar to the Franklin Dam situation, which was dealt with under the now-repealed *World Heritage Properties Conservation Act* 1983. The second circumstance would be if a new World Heritage Place was declared specifically for its archaeological value. One proposed nomination, which has not as yet proceeded, includes a number of archaeological places. Following the commission in 1996 of a thematic study of convict heritage places,²⁹ a "Convict Serial Sites" World Heritage Listing was mooted for Australia but has not proceeded to any broad public debate. This listing would include a range of sites relating to convict transportation across Australia. These places are now principally archaeological sites, and include the Port Arthur Historic Site in Tasmania and the Convict Lumberyard site in Newcastle, NSW, among others.³⁰ Similar protective processes under the *EPBC Act* would be activated if an archaeological site were listed on the National or Commonwealth Heritage Lists. While the *EPBC Act* offers no specific protection to archaeological heritage beyond that accorded by most

²⁶ As of 2006. See also discussion in Chapter 4. See <http://whc.unesco.org/en/list/> for the current list of World Heritage Places. Accessed 15 May 2006. Note the Sydney Opera House was submitted for listing in early 2006, but has not been listed as of 30 June 2006.

²⁷ See the listing for the Tasmanian Wilderness World Heritage Area: <http://whc.unesco.org/en/list/181> and Commonwealth of Australia (1981). Nomination of Western Tasmania wilderness national parks : for inclusion in the World Heritage List.

²⁸ *Environment Protection and Biodiversity Conservation Act* (1999) Commonwealth. Section 67.

²⁹ Pearson, M. and D. Marshall (1996). Study of world heritage values : convict places Canberra, Department of the Environment, Sport and Territories.

³⁰ The nomination has not proceeded to date, perhaps due to the Commonwealth's current policy of requiring places nominated for World Heritage status to be listed on both the National Heritage list and any relevant State or Territory heritage lists prior to World Heritage nomination. While the "Convict Serial Sites" nomination has been mentioned by the Australian Government as recently as August 2005, it is not clear precisely which sites will be included in the nomination. Sites mentioned at various times have included Port Arthur Historic Site (Tasmania), the Ross Female Factory (Tasmania), Fremantle Prison (Western Australia), the Newcastle Convict Lumberyard (NSW) and portions of the Old Great North Road (NSW). For recent mentions of the listing, see for example press releases by the Commonwealth Minister for the Environment:

Federal Minister for the Environment and Heritage (The Hon Dr David Kemp MP) (2004). Port Arthur nomination for National Heritage Listing (press conference transcript). 20 April 2004

<http://www.deh.gov.au/minister/env/2004/tr20apr04.html>

Australian Minister for the Environment and Heritage (Senator the Hon. Ian Campbell) (2005). Fremantle Prison WA's first National Heritage listing (Media release). 1 August 2005.

<http://www.deh.gov.au/minister/env/2005/mr01aug305.html>

heritage listing regimes, its incorporation of the sustainability principles indicates a need to consider, and balance, competing environmental, social and economic objectives. This goes part of the way towards establishing a basis for a 'public good conservation' regime.

5.5.3 The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

Using the "race power" of the Australian Constitution,³¹ the Commonwealth enacted the *Aboriginal and Torres Strait Islander Heritage Protection Act* in 1984.³² This Act was designed to provide protection for indigenous heritage (including archaeological materials and in particular human remains) in areas where adequate protection did not exist at the State/Territory level and perhaps the political support did not exist for the enactment of such legislation.³³ The Act came into force during a complex debate about Aboriginal land rights, property rights, immigration and central versus local control of Aboriginal issues.³⁴ Arguably this debate commenced with the debate over the extension of citizenship to Australians in the 1960s, and continued well into the 1990s, with the Mabo and Wik cases regarding indigenous land rights. Aspects of this debate continue today.³⁵ The Act has been noted as having created Commonwealth/State tension at certain points,³⁶ but it has been further observed that delegation of these powers back to the States and Territories can be equally problematic.³⁷ Fulcher³⁸ and Malone³⁹ both describe the *ATSIHP Act* as an Act of "last resort" and Fulcher notes that only Victoria has strongly embraced the full extent of the Act.⁴⁰ This view remains despite a significant review of the legislation in 1996 by Justice Evatt following the Hindmarsh Island case.⁴¹ Perhaps the most widely known case brought under this Act, the 1996 Hindmarsh Island dispute⁴² centred on the construction of a bridge between the mainland and Hindmarsh Island in South Australia. The essence of that case was whether Aboriginal heritage

³¹ Under section (xxvi) of the *Commonwealth of Australia Constitution Act (The Constitution)* Commonwealth. The Parliament may create legislation with respect to "the people of any race ~~other than the aboriginal race in any State, [sic]~~ for whom it is deemed necessary to make special laws".

³² Hereafter *ATSIHP Act*.

³³ Australia. Parliament. House of Representatives. (1984). *Official Reports of the Parliamentary Debates (Hansard)*. , Evatt, E. (1996). Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Online version). Summary.

³⁴ Australia. Parliament. House of Representatives. (1984). *Official Reports of the Parliamentary Debates (Hansard)*. Debates for 31 May 1984 Pp 2667-2701.

³⁵ See, for example, the [Aboriginal Land Rights \(Northern Territory\) Amendment Bill 2006 \(Cth\) presently passing through Parliament, which seeks substantial reform to the Northern Territory land rights system](#).

³⁶ Waters, J. F. (1985). "Protection of Aboriginal Sites and Objects under the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 (Commonwealth)." *Aboriginal Law Bulletin* (17): 17. Significant aspects of the debate on this Bill during its Second Reading focussed on the Commonwealth versus States' rights issues. See generally Australia. Parliament. House of Representatives. (1984). *Official Reports of the Parliamentary Debates (Hansard)*. Debates for 31 May 1984 Pp 2667-2701.

³⁷ Finlayson, J. (1998). "Update on proposed changes to the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)." *Indigenous Law Bulletin* 4 (14): 21. See also Jago, M. and N. Hancock (1998). "The case of the missing blanket : indigenous heritage and states' regimes." *Indigenous Law Bulletin* 4 (16): 18-21.

³⁸ Fulcher, J. (1999). "Changes proposed to the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and their impact on project developments." *Australian Environmental Law News* (2): 67-69. Pg 67.

³⁹ Malone, A. (1996). "The Aboriginal and Torres Strait Islander Heritage Protection Act : how beneficial legislation has missed its mark." *The Olive Pink Society Bulletin* 8 (1): 23-32.

⁴⁰ See also Boer, B. (1985). "Aboriginal heritage in Victoria." *Environmental and Planning Law Journal* 2: 94-97.

Boer, B. (1986). "Aboriginal cultural heritage - Victoria." *Environmental and Planning Law Journal* 3 (1): 87.

⁴¹ Evatt, E. (1996). Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Online version).

⁴² *Chapman v Tickner* (1995) 133 ALR 74

values, referred to by opponents as “secret women’s business” (with a disputed archaeological basis, amongst other issues) should preclude the construction of a bridge to Hindmarsh Island in South Australia.⁴³ This action was ultimately unsuccessful and the bridge was constructed⁴⁴ following the passage of the *Hindmarsh Island Bridge Act 1997* (Cth), which exempted the bridge project from the *ATSIHP Act*.

The Act was established to specifically protect sites and objects,⁴⁵ and made no attempt to protect intangible heritage values. Boer and Wiffen note that, while there were over 200 applications for protection under the Act, only 8 objects were protected, 2 places received long-term protection and 5 places received short-term emergency protection.⁴⁶ The Act was viewed by the Government of the day⁴⁷ as separate but complementary to the debate over Aboriginal land rights⁴⁸ and part of a suite of measures necessary to protect the rights of Aboriginal Australians. Evatt observed that the protection of Aboriginal heritage serves a community purpose in addition to the specific benefits to Aboriginal Australians, bringing a public good element into the intent and effect of the legislation.⁴⁹ Evatt further noted that protections for archaeological heritage were placed in the Act specifically due to the lobbying of the Australian Archaeological Association.⁵⁰ This implies an attempt to balance the legitimate concerns of both the Aboriginal and archaeological communities, for the benefit of the wider community, in the drafting of this legislation. Despite this, the *ATSIHP Act* does not recognise archaeological “research” or “scientific” significance as a consideration for protection of Aboriginal heritage. For critics of the legislation such as Fourmile,⁵¹ this is a positive step towards official recognition of indigenous heritage as belonging first and foremost to the indigenous community. Evatt as well felt that the primary definitions of significance under the Act needed to come from indigenous people for all types of that heritage, including archaeological sites,

⁴³ Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 271-273.

⁴⁴ *Hindmarsh (Kumarangk) Island : Norvill and Milera v Chapman and Ors, Tickner v Chapman and Ors*, Unreported, Full Federal Court, Black CJ, Burchett and Kiefel JJ, 7 December 1995. For a discussion of this case, see for example Flood, E. (1999). “The Hindmarsh Island Case.” *Polemic* 10 (1): 58-63. , Malbon, J. (2002). “Avoiding the Hindmarsh Island Bridge Disaster: Interpreting the Race Power.” *Flinders Journal of Law Reform* 6: 41-66. , Taubman, A. (2002). “Protecting Aboriginal sacred sites : the aftermath of the Hindmarsh Island dispute.” *Environmental and Planning Law Journal* 19 (2): 140-158.

⁴⁵ Australia. Parliament. House of Representatives. (1984). *Official Reports of the Parliamentary Debates (Hansard)*. Second Reading speech, 9 May 1984 by Mr. Holding. Pp 2129. See also Evatt, E. (1996). Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Online version). Chapter 6, Section 6.5.

⁴⁶ Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pg 271 note 43.

⁴⁷ The Bill was introduced under the Hawke Labour Government.

⁴⁸ Australia. Parliament. House of Representatives. (1984). *Official Reports of the Parliamentary Debates (Hansard)*. Second Reading speech, 9 May 1984 by Mr. Holding. Pp 2130. The issue of Aboriginal land rights was not more fully resolved at the Commonwealth level until the Mabo High Court decision in 1992 (*Mabo v Queensland (No 2)* (1992) 175 CLR 1) and the passage of the *Native Title Act 1993* (Cth). This issue was again substantially reviewed by the High Court in the 1998 Wik decision (*Wik Peoples v The State of Queensland & Ors; the Thayorre People v The State of Queensland & Ors* (1996) 187 CLR 1) which led to significant amendments to the *Native Title Act*.

⁴⁹ Evatt, E. (1996). Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Online version). Chapter 6, Sections 6.5 and 6.6. Principle 6.6 of the Evatt report states: “The principle and purpose which should be reflected in all Aboriginal cultural heritage laws is that those laws are intended to benefit Aboriginal people, and in doing this, to benefit the whole society.” (Emphasis added).

⁵⁰ Ibid. Chapter 6, Section 6.5, note 5.

⁵¹ Fourmile, H. (1989). “Aboriginal heritage legislation and self-determination.” *Australian-Canadian Studies* 7 (1-2): 45-61.

Fourmile, H. (1996). “The law of the land : whose law, whose land.” *Tempus* 5 (1996): 9-17.

rather than from an externally imposed frame of reference, such as archaeology.⁵²

This represents an important principle, but one which is only just making its way into heritage protective regimes. Recent law reforms in Queensland⁵³ and proposed law reform in Victoria,⁵⁴ discussed later in the thesis, will start to see the ability of indigenous communities to influence the management of their significant places. This is a clear challenge to the scientific paradigm of archaeological heritage management and will redress some of the past imbalance in power over the control and access to indigenous heritage places. It will remain to be seen how this will be effectively dealt with within the planning system, and whether indigenous communities will have substantial influence on the outcomes of planning decision which affect their heritage places. The recent experience in New South Wales suggests that governments, while willing to provide a semblance of greater control to indigenous people, will retain significant power within the planning system to override community views when deemed necessary.⁵⁵

The *ATSIHP Act* focuses on protecting objects and places of significance to “Aboriginal tradition”, which is defined as:

...the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.⁵⁶

This is quite important as, because of the broad nature of the definition of indigenous object and indigenous area, requiring that the thing to be protected has “particular significance” for indigenous tradition provides an inherent limitation on the breadth of the legal protection. What this implies is that, while there may be a vast number of areas or objects which relate to indigenous heritage, it is only those with particular importance to indigenous tradition which warrant protection. This should mean, therefore, that not all items of indigenous *origin* are inherently significant or protected by the Act. Rather, the Act provides a filter which limits protection to some, but not all, items and places of indigenous origin or association. Sites and objects are protected under the Act where they are deemed to be significant to indigenous tradition. Fourmile has criticised the definition of indigenous heritage in this way as too restrictive and not appropriately encompassing the breadth of indigenous

⁵² Evatt, E. (1996). Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Online version). Chapter 6, section 6.13.

⁵³ The *Aboriginal Cultural Heritage Act* (2003) Queensland. and the *Torres Strait Islander Cultural Heritage Act* (2003) Queensland.

⁵⁴ *Aboriginal Heritage Act* (2006) Victoria. This Act is not yet commenced and will repeal the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic). Commencement of this Act is dependent on reforms to the *ATSIHP Act* to remove the special clauses relating to Victoria. The *Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2006* is presently subject to debate by the Federal Parliament, but has not yet passed beyond the Second Reading stage.

⁵⁵ E.g. the 2005 reforms to Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) which allows the Minister to declare certain areas or types of projects exempt from heritage legislation. This is discussed further in Chapter 7.

⁵⁶ *Aboriginal and Torres Strait Islander Heritage Protection Act* (1984) Commonwealth.

heritage. She sees the term “traditional” as inherently offensive⁵⁷, however Evatt noted that various definitions of “traditional” existed and favoured the use of the term in the sense that “Aboriginal tradition” has evolved, and continues to evolve over time.⁵⁸

Where legislation, other than the *ATSIHP Act*, uses “tradition” in a sense which sees indigenous culture as static, Fourmile has a valid criticism, as this reinforces and enshrines in law a notion that indigenous people are dispossessed from their past and can have no valid claim to it. It was exactly this conception of indigenous heritage which led to the de facto claim to the indigenous past by archaeologists for much of the early- and mid-twentieth century and led some archaeologists, such as Coutts, to advocate that there should be automatic State ownership of indigenous heritage.⁵⁹ The value of the physical remains of the indigenous past is to support the social cohesion of contemporary indigenous culture.⁶⁰ The legislation does, in its current form, cover those parts of the indigenous heritage which can be considered somehow “archaeological” in nature, but it is clearly not the legislative focus. The limited number of places and objects which have received protection under this Act are likely to reflect both a high threshold in terms of determining heritage significance, but, particularly in light of the Hindmarsh Island dispute highlight the high level of politicisation around the issue of indigenous heritage and an unwillingness to take a strong role in its protection.

This Act then is set up with a type of ‘public good’ in mind, although it is a ‘good’ which is limited to a certain subset of the population—indigenous people—and in the view of Fourmile and others,⁶¹ has not gone far enough towards providing appropriate recognition and authority for the role of indigenous people in managing the remains of their pasts. Malone particularly contends that the onerous procedures of the *ATSIHP Act* are in fact part of a regime which continues to punish and dispossess indigenous people for maintaining a difference in their identity from the mainstream Australian community.⁶² Given the politicisation and polarised attitudes between the

⁵⁷ Fourmile, H. (1989). "Aboriginal heritage legislation and self-determination." *Australian-Canadian Studies* 7 (1-2): 45-61. Pp 46-50. See also Fourmile, H. (1996). "The law of the land : whose law, whose land." *Tempus* 5 (1996): 9-17. For a further discussion of the Aboriginal perspective of fundamental problems with Australian heritage legislation more generally, particularly the issue of the legal ownership of the physical remains of the Aboriginal past.

⁵⁸ Evatt, E. (1996). Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Online version). Chapter 6, Section 6.10.

⁵⁹ Coutts, P. J. F. (1984). A Public Archaeologist's View of Future Directions in Cultural Resource Management. *Archaeology at ANZAAS, Canberra*. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pp 217-218.

Automatic State ownership of Aboriginal heritage applies in several states, including NSW (*National Parks and Wildlife Act* Section 83) and Victoria (*Archaeological and Aboriginal Relics Preservation Act* Section 20). Recently changes to Queensland legislation however provide default ownership to the relevant indigenous community. State ownership only applies in the absence of clear indigenous ties to the place. (*Aboriginal Heritage Act* 2003 and *Torres Strait Islander Heritage Act* 2003, Section 14). See also Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pg 222.

⁶⁰ Prentis, M. D. (1995). "From Lemuria to Kow Swamp: The rise and fall of tri-hybrid theories of Aboriginal origins." *Journal of Australian Studies* (45): 79-91. Pg 80.

⁶¹ For example, Murphy, L. (1996). "The political application of cultural heritage management: indigenous participation or indigenous control?" *Tempus* 6: 141-146. Murphy enjoins cultural heritage managers to ask themselves "How does what we do impact upon Australia's indigenous people?", particularly given the scope for recognition of Aboriginal customary law in Australia. Murphy argues that, in instances where Native Title has been established at least, indigenous land management practices should prevail over mainstream cultural heritage management practices. Pp 141-142.

⁶² Malone, A. (1996). "The Aboriginal and Torres Strait Islander Heritage Protection Act : how beneficial legislation has missed its mark." *The Olive Pink Society Bulletin* 8 (1): 23-32. Pg 24

indigenous and archaeological communities noted by Colley with respect to access to and management of the physical remains of the indigenous past,⁶³ it is debatable whether the Act in its current form effectively serves the interests of either party, let alone the wider community. While perhaps not entirely successful from the perspectives of those interest groups, what the legislation has done is laid the groundwork to acknowledge that heritage is a community concern and needs to be considered in a broad context, however the mechanisms are still in need of refinement.

Key amongst Justice Evatt's recommendations in her review of the Act was that protections for indigenous heritage should be based on a uniform set of principles across Australia. She suggested these principles rely on a broad definition of significance established by indigenous people and provide automatic protection for places that meet those significance criteria.⁶⁴ As discussed in Chapter 4, the de facto national standard for judging heritage significance, the Burra Charter, has deficiencies with respect to indigenous heritage, yet provides a nationwide assessment framework for heritage places generally. Thus the equivalent of an indigenous Burra Charter, which is accepted as a national standard, would be a significant advance in the protection of indigenous places across Australia. Evatt's recommendations do not go as far as the automatic blanket protection of indigenous places desired by some critics of the Act, as they are tied to the significance of the place, object or site and not merely to the physical presence of past indigenous activities. But returning to the discussion of significance in Chapter 3, not all places will be equally deserving of legislative protection. While undoubtedly there will be many places with a high degree of significance, for social or perhaps scientific value, there will also be many places of lesser or marginal significance. Therefore no moral obligation attaches to protect all indigenous sites and places as if they were equally significant. It is, of course, open to members of the indigenous community to dispute this point of view, however in terms of western environmental philosophy, selective protection is a valid legal mechanism.

The *ATSIHP Act* was designed to be a flexible tool for the protection of indigenous heritage places throughout Australia. It provides a potential mechanism for the protection of archaeological places, although it relies on those places having significance to an indigenous community. The Act serves to redress the power imbalance which has existed in past protective regimes, which have either favoured the scientific significance of a place or which have ignored indigenous values all together. As a tool of redress, it is therefore not acting strictly as a 'public good' conservation mechanism, but the Act does contemplate the relevance of indigenous heritage to all Australians, not just indigenous people. The reluctance to use the Act and the failure to substantially implement the recommendations of the Evatt review have however limited its effectiveness as a protective tool for indigenous heritage places of both an archaeological and non-archaeological nature.

⁶³ Colley, S. M. (2002). *Uncovering Australia: archaeology, indigenous people and the public*. Crows Nest, N.S.W., Allen & Unwin. Pp 67-75.

⁶⁴ Evatt, E. (1996). Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Online version). Recommendations 5.2, 6.1 and 6.2, Pp iii-iv.

5.5.4 The *Native Title Act* 1993

The *Native Title Act* 1993 provides a system by which indigenous people can claim legal title over certain lands in Australia. This is limited to lands where native title was not extinguished through an act granting exclusive possession of the land, such as the granting of freehold title. The *Native Title Act* was established following the long-running *Mabo* High Court indigenous land claim case,⁶⁵ decided in 1992. The Act, while not directly concerned with cultural heritage, recognises indigenous connection to the land through tradition and continuity⁶⁶ as key to establishing native title. It potentially provides a mechanism by which culturally significant areas can be placed into the ownership and control of indigenous people. The establishment of the *Native Title Act* served to reinforce the principles of the *Mabo* case and establish native title as an area of Commonwealth responsibility.⁶⁷ This helped address the fact that Australia had lagged behind other nations in recognising the land rights of indigenous people.⁶⁸ Pearson noted the key difference between the *Mabo* decision and earlier land rights legislation was that *Mabo* recognised an underlying right in land which predated white settlement, rather than previous land rights systems⁶⁹ which allowed land to be granted back to indigenous people in certain circumstances.⁷⁰ Murphy viewed the recognition of native title under the *Mabo* decision as a check against “government control and...the influence of anthropological perspectives in the development of cultural heritage management policy.”⁷¹ The native title system, while complicated, has established a process by which indigenous people can re-establish control of important places from which they may have been alienated.

The Act is largely irrelevant to the protection or management of archaeological heritage, but key for the recognition of native title is the ability of claimants to demonstrate an ongoing connection with the land over which a claim was asserted.⁷² This has involved the use of archaeological evidence to support the claim in some cases, in addition to evidence based on oral history and indigenous tradition and folklore. The use of archaeological evidence to demonstrate ongoing connection to the land has, in some instances, led to unexpected alliances between archaeologists and indigenous people. While the *Native Title Act* creates scope for archaeological places of significance to be vested in indigenous people, the Act itself provides no protection of

⁶⁵ *Mabo and Others v. Queensland (No. 2)* (1992) 175 CLR 1 F.C. 92/014. The High Court case was the culmination of a court action started in 1982 in the Queensland courts. See Bartlett, R. (1993). The Mabo decision. Sydney, Butterworths. Pp vi-viii for a brief history of the earlier cases.

⁶⁶ *Native Title Act* (1993) Commonwealth. Section 223.

Bartlett, R. (1993). The Mabo decision. Sydney, Butterworths. Pp viii-ix, xiv-xv.

⁶⁷ Rowse, T. (1993). "How we got a Native Title Act." Australian Quarterly 65 (4): 111-132. Rowse charts the development of the *Native Title Act* from the *Mabo* case in 1992 to the passage of the Act through Parliament in 1993.

⁶⁸ Kirby, M. (1996). "In defense of Mabo." Australian Quarterly 65 (4): 67-81. Pp 77-78.

⁶⁹ E.g. such as the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), which provided for claims over specific areas of land over a 20 year period, or the *Pitjanjatjara Land Rights Act* 1981 (South Australia) which was restricted to land claims by one particular indigenous group.

⁷⁰ Pearson, N. (1996). "From remnant title to social justice." Australian Quarterly 65 (4): 179-184.

⁷¹ Murphy, L. (1996). "The political application of cultural heritage management: indigenous participation or indigenous control?" Tempus 6: 141-146. Pg 145.

⁷² Bartlett, R. (1993). The Mabo decision. Sydney, Butterworths. Pg xix.

archaeological heritage, nor indeed was that its principle purpose. The Act therefore has little relevance to the issues considered in this thesis and is not further discussed here.

5.5.5 The *Protection of Movable Cultural Heritage Act 1986*

The final area of Commonwealth protection for heritage is through the *Protection of Movable Cultural Heritage Act 1986* (Cth) which provides for the restriction on trade of certain types of movable heritage items (that is, items which can be physically transported), which was previously provided under the *Customs Act 1901-1987* (Cth).⁷³ This Act enumerates a range of items of heritage which can only be exported from Australia with an export permit and a smaller, more select range of items which may not be exported under any circumstances. The concept of movable heritage, at law, is intimately tied up with the notion of property rights, however it implies that, in certain circumstances, heritage considerations should outweigh property considerations.⁷⁴ This is a form of 'public good' heritage protection, as it establishes a basis that in certain instances, the public value of an object should override personal or financial considerations for its owner; the public value of the object is derived from it remaining within Australia, even if it is never part of a public collection.

Archaeological materials⁷⁵ (primarily indigenous materials) appear in both categories of identified movable heritage items within the Act, under the National Cultural Heritage Control List. Aboriginal sacred objects and human remains are the two categories of archaeological material which may not be exported under any circumstance (Category A items). Other types of archaeological materials can potentially be exported following an expert assessment and determination that the export would not permanently diminish Australia's cultural heritage (Category B items). While there have been instances where there has been a refusal to grant an export permit,⁷⁶ there has never been a refusal for the export of archaeological materials and, by reference to the Annual Reports of the body which oversees the Act, there have been only 20 applications for the export of archaeological materials in the period of the Act's operation, none of which has been refused.⁷⁷

⁷³ Wiltshire, A. (1992). "Moveable cultural heritage - part 1." *Art and Entertainment Law Review* 3: 9.

⁷⁴ Leighfield, S. (2000). "Of ships and sealing wax : planning the preservation of movable cultural heritage within Australia." *Environmental and Planning Law Journal* 17 (3): 214-230. Pg 215.

⁷⁵ *Protection of Movable Cultural Heritage Act* (1986) Commonwealth. Section 3(5)(a).

⁷⁶ There have been 47 refusals of export permits between 1986 and 2006. See <http://www.deh.gov.au/heritage/movable/refused.html> for the complete list. Accessed 16 May 2006. For discussion of specific instances of refusal, see Ley, J. F. (1991). *Australia's protection of movable cultural heritage : report on the Ministerial review of the Protection of Movable Cultural Heritage Act 1986 and Regulations*. Canberra, Australian Government Publishing Service. With respect to the painting "Bath of Diana" and Leiboff, M. (1999). "The embodiment of culture: the Protection of Movable Cultural Heritage Act 1986 (Cth)." *Australian Feminist Law Journal* (12): 3-19. Pg 4. regarding military medals and sporting memorabilia. See also Wiltshire, A. (1992). "Moveable cultural heritage - part 2." *Art and Entertainment Law Review* 4: 1. Theoretically, items refused export permission can be purchased through the National Cultural Heritage Fund and fifteen objects have been acquired through this mechanism as of 2006. See <http://www.deh.gov.au/heritage/programs/movableaccount/index.html> Accessed 16 May 2006.

⁷⁷ Appendix 1 to this chapter outlines all applications of this Act to archaeological objects from 1986 until 2005. The 2005-06 report on the operation of this Act was not available as of the completion of this thesis. See also Ley, J. F. (1991). *Australia's protection of movable cultural heritage : report on the Ministerial review of the Protection of Movable Cultural Heritage Act 1986 and Regulations*. Canberra, Australian Government Publishing Service. Appendix G.

Export protection only focuses on an archaeological object once it is divorced from its context and thus provides only a limited protective benefit. If the object was initially illegally obtained (through unauthorised excavation, for example) there is no penalty and the possessor of such an object would need to be pursued through State or Territory legislation. As will be discussed in Chapter 8, these mechanisms have only been infrequently used, to limited effect. Should the export of a prohibited archaeological item be discovered, the Act provides Australia with a credible foundation on which a claim can be lodged within the terms of the UNESCO Convention, as Australia can be seen to have a legislatively defined import/export regime for cultural heritage items.⁷⁸ This type of arrangement is however generally reciprocal, thus if the receiving country is not a signatory to the UNESCO Convention (including such major collecting countries as the United Kingdom), it is unlikely a return of the object would be facilitated. Similarly, Australia is obligated to return items if it is determined that they have been illegally exported from their home country.⁷⁹ Thus while providing only minimal protection for Australian archaeological heritage, the establishment of the *PMCH Act* is essential to Australia credibly demonstrating its heritage protection commitment at an international level. The Act's primary value is as a deterrent mechanism and would be valuable if a significant illicit trade in Australian archaeological materials came to light. In the absence of such a trade, the effect of the Act is minimal with respect to Australian archaeological heritage.

5.6 The Commonwealth heritage regime—The best of intentions

Commonwealth legislation provides little direct protection for Australian archaeological heritage, save for the case of its export, and even then the actual effect of the movable heritage legislation has been minimal. This is however consistent with Constitutional limitations on the Commonwealth's powers. With respect to indigenous cultural heritage, the Commonwealth has shown itself to be reluctant to take a strong position on its protection, an issue so closely aligned to contemporary political issues as to be beyond the scope of this thesis to analyse in detail. The primary value of the Commonwealth legislation has, until quite recently, been largely symbolic, for the protection of all types of heritage. This was particularly the case for the now-repealed *Australian Heritage Commission Act 1975*, which was a direct outgrowth of the Hope Inquiry. The value of the Commonwealth leadership in heritage protection at that time must be acknowledged and the establishment by the Commonwealth of heritage protection legislation drove efforts in state jurisdictions across the country. While in some cases it has taken several decades for the moral force of the early Commonwealth acts to reach all states and territories, such regimes are present across the country. The major value of Commonwealth legislation is to ensure Australia is recognised internationally as fulfilling its obligations under international treaty and providing high-level influence for the subsequent enactment of state and territory heritage legislation. But the symbolic value of the Commonwealth legislation has not extended to the establishment of universal protective principles across Australia, as will be seen in the following chapters.

⁷⁸ Wiltshire, A. (1992). "Moveable cultural heritage - part 2." *Art and Entertainment Law Review* 4: 1. Pp 3-4.

⁷⁹ Wiltshire, A. (1992). "Moveable cultural heritage - part 1." *Art and Entertainment Law Review* 3: 9. Pg 11.

It is certainly possible to view the early efforts of the Commonwealth, in the signing of the World Heritage Convention, the undertaking of the Hope Inquiry and the passage of the *Australian Heritage Commission Act* as those of a government which perceived heritage to be fundamentally a 'public good' issue. The goal of that period was to establish the concept of a collective Australian heritage, which could be protected, conserved and enjoyed into the future. Archaeological heritage can be seen to be a lesser consideration for the Commonwealth in most instances as, aside from the intervention in the Tasmanian Dam Case, there has been little need for Commonwealth intervention in archaeological issues. Despite this, the Commonwealth legal regime has addressed the underlying protective principles identified in Chapter 4, through the protection of sites and landscapes under the *EPBC Act* and objects (however weakly) under the *ATSIHP Act* and *Protection of Moveable Cultural Heritage Act*. The goal of conserving Australia's heritage for the present and seeing it transmitted to future generations remains an underlying theme in all Commonwealth legislation. This ideal has however not always been borne out in reality, particularly with the highly politicised nature of Commonwealth level heritage issues. Archaeological heritage has not so much been poorly served by the Commonwealth legislation, as overlooked amongst other bigger picture heritage issues. Archaeological heritage protection, as a detailed heritage management issue, has been left to the primary attention of the states and territories. Chapters 6 and 7 analyse the legal regimes at this level, where most of the management decisions are made and the greatest potential exists to implement 'public good' initiatives in archaeological heritage conservation.

Appendix 1: Summary of the Operation of the *Protection of Movable Cultural Heritage Act 1986* with respect to archaeological heritage, for the period 1986 to 2005.

Note that as the descriptions in the *Protection of Movable Cultural Heritage Act* Annual Reports are often vague as to the precise details of the items subject to an application for an export permit, a broad definition of “archaeological” materials has been used to compile the table. As applications have often been for groups of objects, the totals reflect the number of applications for collections, rather than total number of individual objects.

The table specifically exclude items of an identifiably ethnographic or artistic nature which were likely obtained from living indigenous people, such as spears, clubs, shields and paintings.

Year	Total applications	Number Refused	Applications for Archaeological items	Number Refused for Archaeological Items	Details
1987-88 ⁸⁰	0	0	0	0	No relevant applications
1988-89 ⁸¹	26	0	2	0	1 collection of Aboriginal artefacts for permanent export: <ul style="list-style-type: none"> Aboriginal artefacts to New Zealand 1 collection of historical artefacts for temporary export: <ul style="list-style-type: none"> Objects recovered from historic shipwrecks to “Mutiny on the Bounty” Exhibition, United Kingdom
1989-90 ⁸²	41	1	3	0	2 collections of Aboriginal artefacts for temporary export: <ul style="list-style-type: none"> Aboriginal artefacts for display in Japan (4 items) Aboriginal artefacts for display in Japan (7 items) 1 collection of historical artefacts for temporary export: <ul style="list-style-type: none"> A piece of timber recovered from the shipwreck ‘Batavia’
1990-91 ⁸³	32	0	0	0	No relevant applications
1991-92 ⁸⁴	43	1	0	0	No relevant applications
1992-93 ⁸⁵	31	0	1	0	1 collection of Aboriginal artefacts for temporary export: <ul style="list-style-type: none"> Collection of Aboriginal stone artefacts from Shark Bay Western Australia
1993-94 ⁸⁶	124	3	1	0	1 collection of Aboriginal artefacts for permanent export: <ul style="list-style-type: none"> A collection of Aboriginal artefacts
1994-95 ⁸⁷	86	5	1	0	1 collection of Aboriginal artefacts for permanent export:

⁸⁰ Department of the Arts Sport the Environment Tourism and Territories (1988). Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1987-88. Canberra, Australian Government Publishing Service.

⁸¹ Department of the Arts Sport the Environment Tourism and Territories (1989). Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1988-89. Canberra, Australian Government Publishing Service.

⁸² Department of the Arts Sport the Environment Tourism and Territories (1990). Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1989-90. Canberra, Australian Government Publishing Service.

⁸³ Department of the Arts Sport the Environment Tourism and Territories (1991). Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1990-91. Canberra, Australian Government Publishing Service.

⁸⁴ Department of the Arts Sport the Environment and Territories (1992). Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1991-92. Canberra, Australian Government Publishing Service.

⁸⁵ Department of the Arts and Administrative Services (1993). Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1992-93. Canberra, Australian Government Publishing Service.

⁸⁶ Department of Communications and the Arts (1994). Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1993-94. Canberra, Australian Government Publishing Service.

⁸⁷ Department of Communications and the Arts (1995). Annual Report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1994-95. Canberra, Australian Government Publishing Service.

					<ul style="list-style-type: none"> Aboriginal artefacts including 3 circumcision knives, 2 quartzite knives, 24 Aboriginal implements, 1 ax blade from Tambo River, Victoria, 1 hatchet head from the Northern Territory
1995-96 ⁸⁸	81	0	3	0	2 collections of historical artefacts for permanent export: <ul style="list-style-type: none"> Artefacts from the Ross Female Factory, Tasmania 1 piece of pig iron ballast block from HMB <i>Endeavour</i> 1 collection of Aboriginal artefacts for permanent export: <ul style="list-style-type: none"> A collection of Aboriginal artefacts
1996-97 ⁸⁹	93	0	2	0	2 collections of Aboriginal artefacts for permanent export: <ul style="list-style-type: none"> 23 Aboriginal Artefacts Aboriginal Artefacts
1997-98 ⁹⁰	93	3	1	0	1 collection of historical artefacts for permanent export: <ul style="list-style-type: none"> Guilt [sic] Dragon coin approx 300 years old weighing 26 grams from a wreck of WA 1987 [sic]
1998-99 ⁹¹	108	1	1	0	1 collection of historical artefacts for temporary export: <ul style="list-style-type: none"> <i>Fides</i> Shipwreck Relics (31 pieces)
1999-2000 ⁹²	211	4	1	0	1 collection of Aboriginal artefacts for permanent export: <ul style="list-style-type: none"> An 8-inch Churinga stone
2000-01 ⁹³	159	4	1	0	1 collection of Aboriginal artefacts for permanent export: <ul style="list-style-type: none"> 44 Aboriginal and Torres Strait Island artefacts

⁸⁸ Department of Communications and the Arts (1996). Annual Report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1995-96. Canberra, Australian Government Publishing Service.

⁸⁹ Department of Communications and the Arts (1997). Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1996-97. Canberra, Australian Government Publishing Service.

⁹⁰ Department of Communications and the Arts (1998). Annual report on the operation of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1997-1998. Canberra, Department of Communications and the Arts.

⁹¹ Department of Communications Information Technology and the Arts (1999). Annual Report on the operation of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 1998-99. Canberra, Australian Government Publishing Service.

⁹² Department of Communications Information Technology and the Arts (2000). Annual Report on the operation of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Account 1999-2000. Canberra, Australian Government Publishing Service.

⁹³ Department of the Environment and Heritage (2001). Annual Report on the operation of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Account 2000-01. Canberra, Australian Government Publishing Service.

2001-02 ⁹⁴	248	8	0	0	No relevant applications
2002-03 ⁹⁵	482	3	2	0	1 collection of historical artefacts for permanent export: <ul style="list-style-type: none"> • Antarctic artefacts (5) used by Sir Douglas Mawson and Carsten Borchgrevinck 1 collection of Aboriginal artefacts for permanent export: <ul style="list-style-type: none"> • Aboriginal paintings and artefacts (214), John McCaffrey Collection of West Kimberley art and artefacts
2003-04 ⁹⁶	185	4	0	0	No relevant applications
2004-05 ⁹⁷	149	5	1	0	1 collection of historical artefacts for permanent export: <ul style="list-style-type: none"> • Wooden Fence Railings, Iron Hinges, ex Myall Creek
Summary Statistics					
Total number of applications for archaeological collections					20
Total number of applications refused for archaeological collections					0
Total number of historical archaeological collections exported					5 permanent 3 temporary
Total number of Aboriginal archaeological collections exported					9 permanent 3 temporary

⁹⁴ Department of the Environment and Heritage (2002). *Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 2001-02*. Canberra, Australian Government Publishing Service: 228-241.

⁹⁵ Department of the Environment and Heritage (2003). *Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 2002-03*. Canberra, Australian Government Publishing Service.

⁹⁶ Department of the Environment and Heritage (2004). *Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 2003-04*. Canberra, Australian Government Publishing Service.

⁹⁷ Department of the Environment and Heritage (2005). *Annual report on the working of the Protection of Movable Cultural Heritage Act 1986 and the administration of the National Cultural Heritage Fund 2004-05*. Canberra, Australian Government Publishing Service.

Chapter 6—An overview of State and Territory archaeological heritage protection regimes

Chapter 5 examined the basic structure of Australian legislation with respect to archaeological heritage protection and then focussed specifically on the Commonwealth legislative regime for heritage protection. Aside from some little-used protections in the *Aboriginal and Torres Strait Islander Heritage Protection Act*, the Commonwealth legal regime provides little specific protection for archaeological heritage. The exception is for those places specifically listed for archaeological heritage values on the World, National or Commonwealth Heritage Lists and thus subject to the *Environment Protection and Biodiversity Conservation Act*. Perhaps most significantly for this thesis, the Commonwealth regime does not privilege the scientific paradigm for archaeological heritage protection, but is structured to treat heritage as a broad public concern, even if not expressed explicitly in ‘public good’ terms. This is also supported through the integration of the sustainability principles in the Commonwealth heritage regime. Yet in practical terms, the bulk of archaeological heritage management falls to the States and Territories and is controlled through the legislation at that level.

Chapter 6 provides a brief overview of the State and Territory regimes for archaeological heritage protection.¹ The legislation analysed in this and the following chapter is the primary mechanisms used to manage Australia’s archaeological heritage. These laws constitute the bureaucracy of archaeological heritage management, as Carman termed it,² and fundamentally they are about making decisions regarding appropriate managements action for archaeological places. What follows is by no means intended as an exhaustive discussion of the legislation in every State and Territory, nor a history of Australian heritage legislation. It does, however, demonstrate the approaches which have been adopted in different jurisdictions, and facilitates the discussion which follows regarding the implementation of the underlying principles of archaeological heritage protection. Many of these regimes have a focus on the scientific paradigm, which is unsurprising given that most of the legislation examined here has its origins in the 1960s and 1970s. This focus can hamper the consideration of the wider values of archaeological heritage and preclude ‘public good’ heritage outcomes, due to the narrow conceptualisation of the value of archaeological heritage. Where legal regimes have considered the social value of archaeological heritage, it has been confined to indigenous places. Chapter 7 undertakes a more detailed analysis of the legislation in New South Wales and Victoria. These States were selected as case studies as they have the most comprehensive and far-reaching legal regimes for archaeological heritage protection.

¹ The state and territory legislative regimes are reviewed in alphabetical order.

² Carman, J. (2002). *Archaeology and heritage : an introduction*. London ; New York, Continuum. Pp 99-101. See also Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 154-155.

6.1 The administration of archaeological heritage protection

Chapter 4 identified key legal principles for archaeological heritage protection—protection of the archaeological site, protection of the archaeological object and transmission of knowledge about the archaeological past to present and future generations. Protection of archaeological objects, divorced from their context, characterised the earliest attempts at archaeological heritage protection legislation in the 1950s and 1960s, in the Northern Territory, South Australia and Queensland. The roots of this approach lie even earlier, in the law of treasure trove, which was more concerned with the archaeological object as a valuable commodity than for any other values. The form of the early Australian legislation was an outgrowth of the contemporary debate between the merits of collecting archaeological objects for personal pleasure, as opposed to their scientific study.³ Most early legislation came down squarely on the side of protecting objects for scientific study, however there have been instances where the legislation has been drafted to protect the interests of collectors, as this was seen as a legitimate pastime. Leiboff argues that “the law does not protect ephemeral pasts”—that is, the cultural practices and beliefs of past peoples who have left a material record—but rather specified “fetishised objects”⁴ which are judged as important by an interpreting professional class (including archaeologists, art historians, museum curators, bureaucrats). His concern is that too much uncritical faith in the power of heritage legislation can lead to an erroneous belief in two ways. One is a belief that the collective past has been protected or conserved by the legislation and further social action is not required. The second is a perception that what the law has chosen to protect is in fact the most important aspect or aspects of the collective past.

Leibhoff’s concern is justified, particularly considering that the law cannot specify with absolute certainty what aspects of the past are most important to protect, nor can the law reclaim lost cultural practices. Legal frameworks should provide the latitude for those administering the legislation to consider such issues; currently that is not the case with the majority of Australian heritage legislation as the frameworks are too rigid. One exception to this is that much Australian legislation established to protect Aboriginal cultural heritage does have clauses to facilitate the ongoing use of that heritage for cultural purposes. As will be seen later in this chapter, the Hansard debates surrounding that legislation often highlight a belief that protection of such heritage is important for the maintenance of Aboriginal cultural identity. So while the protective principles identified in Chapter 4 are important for the protection and conservation of archaeological heritage, they have not necessarily been explicitly considered and incorporated into Australian heritage legislation. They are also not the only protective principles which can apply to archaeological heritage, if a wider conception is taken of archaeological significance.

³ See discussion in Chapter 2.

⁴ Leiboff, M. (1999). "The embodiment of culture: the Protection of Movable Cultural Heritage Act 1986 (Cth)." *Australian Feminist Law Journal* (12): 3-19. Pg 3.

6.2 The Australian Capital Territory

Heritage protection in the Australian Capital Territory (hereafter ACT) is primarily achieved through the *Heritage Act* 2004.⁵ This Act replaced an earlier legislative regime, which contained protections for “heritage objects” in the *Heritage Objects Act* 1991⁶ and protection for “heritage places” in the *Land (Planning and Environment) Act* 1991.⁷ Under the previous regime, registration of places and objects was a drawn out process and only 71 places were registered in the period 1991-2004.⁸ The new Act was established to bring ACT heritage legislation into line with contemporary heritage practice in the other states and territories.⁹ The *Heritage Act* protects both heritage places and objects¹⁰ and, continuing the somewhat atypical arrangements of the *Heritage Objects Act*, combines protection for indigenous and non-indigenous heritage into the same piece of legislation.¹¹ The main protective tool under the Act is the ACT Heritage Register¹², which replaced the Heritage Objects Register¹³ and Heritage Places Register¹⁴ established under the previous scheme. The Act also establishes the ACT Heritage Council¹⁵ and requires that at least one member has expertise in archaeology.¹⁶

The Act makes no direct reference to the protection of archaeological heritage and the primary method of protecting any heritage place or object is via listing on the Heritage Register. Indeed, the heritage significance criteria stipulated under the Act make no reference to scientific significance at all¹⁷ although research significance is referred to in one criterion.¹⁸ This is somewhat unusual, particularly as it breaks with the Burra Charter emphasis on scientific significance. Heritage significance for scientific value is implied for places of natural heritage value.¹⁹ The Act provides blanket protection for Aboriginal places and objects, which are defined as follows:

⁵ The *Heritage Act* 2004 came into force on 9 March 2005.

⁶ Repealed by the *Heritage Act* 2004.

⁷ Hereafter, the *Land Act*.

⁸ Speech by Mr Wood (Minister for Arts and Heritage) *Legislative Assembly for the ACT: Week 5 Hansard (14 May 2004)* Pp 1941. The Minister also noted that there were 250 Aboriginal places subject to an interim registration under the old system and a backlog of 2500 Aboriginal places still requiring consideration.

⁹ ACT Government (2005) *ACT Heritage Legislation—what you need to know*. Pg 1. Dated 9 March 2005. http://www.environment.act.gov.au/_data/assets/pdf_file/13494/actheritagelegislationwhatyouneedtoknow.pdf

Accessed 16 March 2006.

See also speech by Mr Wood (Minister for Arts and Heritage) *Legislative Assembly for the ACT: Week 5 Hansard (14 May 2004)* Pp 1940-41. The Bill was however criticised by the opposition for introducing “non-standard” heritage definitions which departed from definitions used in other jurisdictions. Speech by Mrs Dunne *Legislative Assembly for the ACT: Week 8 Hansard (5 August 2004)* Pp 3542-43.

¹⁰ *Heritage Act* 2004 (ACT) Section 8.

¹¹ *Heritage Act* 2004 (ACT) Section 9.

¹² *Heritage Act* 2004 (ACT) Section 20.

¹³ *Heritage Objects Act* (1991) Australian Capital Territory. Section 6—Repealed.

¹⁴ *Land (Planning and Environment) Act* (1991) Australian Capital Territory. Section 54—Repealed.

¹⁵ *Heritage Act* 2004 (ACT) Section 16.

¹⁶ *Heritage Act* 2004 (ACT) Section 17(4)(c).

¹⁷ *Heritage Act* 2004 (ACT) Section 10.

¹⁸ *Heritage Act* 2004 (ACT) Section 10 criterion (j).

¹⁹ E.g. *Heritage Act* 2004 (ACT) Section 10, Criteria (i) and (j):

- (i) it is significant for understanding the evolution of natural landscapes, including significant geological features, landforms, biota or natural processes;
- (j) it has provided, or is likely to provide, information that will contribute significantly to a wider understanding of the natural or cultural history of the ACT because of its use or potential use as a research site or object, teaching site or object, type locality or benchmark site;

"Aboriginal place" means a place of particular significance to Aboriginal people because of either or both of the following:

- (a) Aboriginal tradition;
- (b) the history, including contemporary history, of Aboriginal people.

"Aboriginal object" means an object of particular significance to Aboriginal people because of either or both of the following:

- (a) Aboriginal tradition;
- (b) the history, including contemporary history, of Aboriginal people.²⁰

The Act stipulates that any discovery of an Aboriginal place or object must be reported to the ACT Heritage Council.²¹ This requirement does not apply to Aboriginal people with a traditional association with the land,²² recognising there may be cultural reasons for not disclosing such information. Aboriginal places or objects, once reported, are only heritage listed with the agreement of the relevant Aboriginal group.²³ Information on Aboriginal heritage places or objects on the Heritage Register may be restricted from general public access.²⁴ The Act provides that the unauthorised disturbance or removal of a discovered Aboriginal place or object is an offence, even if the place or object is not specifically listed.²⁵ No such offence applies to historical archaeological places or objects, unless they are listed on the Heritage Register.²⁶

Few archaeological places or objects have been registered in the ACT. As of early 2006, only one collection of Aboriginal objects has been registered²⁷ and 37 Aboriginal places are registered.²⁸ Not all of the registered Aboriginal places are archaeological in nature, although the bulk of listed Aboriginal places have some archaeological component. Ten nominations are pending for Aboriginal places, including several scarred trees and the Aboriginal Tent

²⁰ *Heritage Act 2004* (ACT) Section 9.

²¹ *Heritage Act 2004* (ACT) Section 51.

²² *Heritage Act 2004* (ACT) Section 52.

²³ *Heritage Act 2004* (ACT) Section 53.

²⁴ *Heritage Act 2004* (ACT) Section 54. While this restriction can apply to any type of heritage place, as drafted the provision primarily appears directed towards Aboriginal places and objects. See ACT Heritage Council (2005) *How is Aboriginal heritage protected?* Pg 2. Dated 9 March 2005. http://www.environment.act.gov.au/_data/assets/pdf_file/13443/actheritagelegislationhowisaboriginalheritageprotected.pdf Accessed 16 May 2006.

²⁵ *Heritage Act 2004* (ACT) Section 75.

²⁶ It should be noted that there is a general prohibition against damaging the heritage significance of a place or object under section 74 of the Act. There is however an ambiguity as to whether such places must be listed on the Heritage Register to be protected by this section as the significance of a place or object is only determined under the *Heritage Act* when it is considered for listing on the Register. By contrast, the definition of "Aboriginal place" and "Aboriginal object" under section 9 requires something defined under this section to be of "particular significance to Aboriginal people" before it is considered for registration. Thus arguably Aboriginal places and objects have protection regardless of registration status.

²⁷ Aboriginal stone artefact collection from site PH 44 (CMAG Collection) Item # 10008. This listing was transferred from the previous Heritage Objects Register.

See http://www.environment.act.gov.au/_data/assets/pdf_file/13235/heritageregister10008.pdf Accessed 16 May 2006.

²⁸ Note these registered Aboriginal places are actually groups of sites in unspecified numbers in each of the identified localities. The precise numbers and locations of individual sites are not recorded in the registration information, but in early 2004 it was noted that 344 individual Aboriginal sites had been discovered as a result of the widespread bushfires in the ACT in 2003. Question on Notice 1408 Ms Tucker to Mr Wood (Minister for Arts and Heritage) *Legislative Assembly for the ACT: 2004 Week 4 Hansard (1 April)* Pg 1696.

Embassy at Old Parliament House.²⁹ One place identified as a non-indigenous archaeological site has been nominated for the Register but is not, as of mid-2006, listed.³⁰ In its policy approach to listed Aboriginal places, the ACT Heritage Council has attempted to strike a balance between scientific and Aboriginal community values. This general policy approach, which is applied to all registered Aboriginal places in the ACT, gives strong emphasis to the community value of Aboriginal places:

The Heritage Council promotes a general conservation policy for all Aboriginal heritage sites. This policy states that Aboriginal sites are to be conserved appropriately in accordance with their individual heritage significance, taking into account their Aboriginal and archaeological heritage values.³¹

and

The ACT Aboriginal community considers all archaeological evidence of the past occupation of the ACT by Aboriginal people to be significant. Aboriginal places have the capacity to demonstrate and provide information about ways in which Aboriginal people lived in the past.³²

Such statements place the significance of Aboriginal sites in the hands of the Aboriginal community for determination, but do not provide a robust framework for detailed decision-making about the fate of a place which may be threatened by disturbance or development. While providing for the recognition of indigenous community values, the policy explicitly places all sites at an equivalent level of significance, potentially creating management difficulties when decisions must be made about impacts to registered Aboriginal places. This approach, while one apparently designed to empower the Aboriginal community in the management of its heritage, is as problematic an approach as one which ascribes an equivalent level of scientific significance to all archaeological places or objects. By establishing a policy position that all Aboriginal places are equally significant to the Aboriginal community, but not explicitly forbidding impact or change to those places, the policy leaves open the possibility that all Aboriginal places, with or without an archaeological component, are equally able to be impacted upon with approval. This creates a circumstance where a place of high social significance but limited archaeological value is legally equivalent to a place of limited archaeological value and little social value. Such a situation is inherently risky to the preservation of places of significance to the Aboriginal

²⁹ Based on a search of the ACT Heritage Register Summary List, dated 19 April 2006. http://www.environment.act.gov.au/_data/assets/pdf_file/13010/Heritage_Summary_list_19_April_2006.pdf Accessed 16 May 2006.

³⁰ Ibid. Pg 14. Described as "TG 1 archaeological site and adjacent road easement"

³¹ Heritage Register Item Report 20132. Aboriginal Places—Urban and Rural Bushfire Containment Lines Pg 4. http://www.environment.act.gov.au/_data/assets/pdf_file/13007/heritageregister20132.pdf Accessed 18 May 2006.

³² Heritage Register Item Report 20140. Aboriginal Places—Districts of Belconnen, Coree, Cotter River, Gungahlin, Paddys River & Stromlo Pg 2. http://www.environment.act.gov.au/_data/assets/pdf_file/13766/heritageregister20140.pdf Accessed 18 May 2006.

community as a policy which judged significance on scientific value alone, as it does not clearly establish that some places are more important than others. This undermines 'public good' considerations by not providing a clear framework for the consideration of multiple issues and establishing a basis for the balancing of competing interests for an archaeological place.

The ACT Heritage Council goes on to note that archaeological and Aboriginal community significance are different value systems which are not equivalent:

[A site's] significance to Aboriginal people may not necessarily, however, relate to or accord with archaeological significance assessments.³³

Despite this statement, the policy still provides some level of privilege to the research paradigm of archaeological significance:

*[A site's] true informational value, scientific value and significance to Aboriginal people can only be realised or determined through further research.*³⁴

This implies that the Aboriginal community is unable to recognise or realise the significance of its own heritage places without some form of research assistance from a third party. This seems to be at odds with what at least one parliamentarian imagined, when she stated "...heritage is a social and cultural construction and not the preserve of experts"³⁵ during the debates on the *Heritage Bill*. In its current form, the Act provides limited protection for archaeological heritage, unless a site or object has been specifically listed on the ACT Heritage Register. Aboriginal places and objects have a limited degree of automatic protection however the same is not true for non-indigenous archaeological heritage. While the ACT Heritage Council's policy efforts to build Aboriginal community values into the significance assessment and listing process is well-intentioned, in its current structure, the system continues to privilege the "research" paradigm of archaeological significance. There is also a need to ensure, no matter how legislatively empowered, the Aboriginal community has the infrastructure and, in effect, the bureaucracy, to exercise such power. The new Act's failure to grapple with questions of the degree of significance of indigenous places potentially places all such sites at risk. This limits the ability to consider other social values for archaeological places in a manner which hampers opportunities for 'public good' conservation outcomes.

6.3 The Northern Territory

The Northern Territory was the first jurisdiction in Australia to implement any form of heritage legislation, in the form of the *Native and Historic Objects*

³³ Heritage Register Item Report 20140. Aboriginal Places—Districts of Belconnen, Coree, Cotter River, Gungahlin, Paddys River & Stromlo Pg 3.

³⁴ Heritage Register Item Report 20124. Aboriginal Places—District of Belconnen Pg 2.
http://www.environment.act.gov.au/_data/assets/pdf_file/13052/heritageregister20124.pdf
Accessed 18 May 2006.

³⁵ Speech by Ms Tucker. Legislative Assembly for the ACT: Week 9 Hansard (17 August 2006) Pg 3765.

Heritage Protection Ordinance 1955,³⁶ although O’Keefe and Prott note that this is still a late date for such legislation by international standards. They attribute the slowness of Australian governments to act in this area to a colonial “contempt” for Aboriginal culture.³⁷ This Ordinance was passed by the Northern Territory Parliament at the same time as the first legislation in the Territory to protect natural areas.³⁸ This particular Ordinance is no longer in force and was of questionable effectiveness during its period of operation³⁹ as in order for a place to be protected, the Territory government was required to compulsorily acquire the land.⁴⁰ Due to the onerous nature of the provisions, the *Historic Objects Ordinance* was only used to protect six places during the first twenty years of its operation.⁴¹ The *Historic Objects Ordinance* was criticised for its somewhat vague definition of ‘relics’ and the lack of a mechanism to ensure Aboriginal people had access to ‘tribal relics’.⁴²

Archaeological heritage in the Northern Territory is now protected through the *Northern Territory Aboriginal Sacred Sites Act* 1978 (NT)⁴³ and the *Heritage Conservation Act* 1991 (NT).⁴⁴ These Acts are administered by the Aboriginal Areas Protection Authority⁴⁵ and the Heritage Advisory Council⁴⁶ of the Northern Territory respectively. The *Sacred Sites Act* is designed to protect “Aboriginal sacred sites” and recognises the potential for traditional connection between a portion of land and an Aboriginal person, based on Aboriginal tradition. By implication, this includes a spiritual connection as well as a physical connection which may have existed through use or occupation of land.⁴⁷ The definition of an Aboriginal sacred site is:

a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law

³⁶ Hereafter *Historic Objects Ordinance*.

³⁷ O’Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. Pg 69-70.

³⁸ The Northern Territory *National Parks and Gardens Ordinance* 1955. These Ordinances were debated concurrently by the Northern Territory Parliament and passed in the same sitting of Parliament. Northern Territory Legislative Council (1955). Legislative Council Debates. Fifth Council, First Session. Sydney, Northern Territory of Australia. Debates for 25, 28 and 29 March 1955. Both Ordinances proclaimed by the Governor-General on 28 November 1955.

³⁹ Carment, D. (1991). Heritage legislation in the Territory. *Packaging the past? Public histories*. J. Rickard and P. Spearritt. Melbourne, Melbourne University Press: 70-77. Pg 72; Sullivan, M. and D. Carment (1992). Cultural heritage conservation in the Northern Territory. Canberra, Australian National University: 27. Pg 2. By comparison, Flood describes the legislation as “pioneering”, but notes that it was not kept up to date. Flood, J. (1993). Cultural resource management in Australia: the last three decades. *A Community of Culture: The People and Prehistory of the Pacific*. M. Spriggs, D. E. Yen, W. Ambrose et al. Canberra, Australian National University. 21: 259-265. Pg 259.

⁴⁰ It is interesting to note that this concept of protection through compulsory acquisition has once again appeared, in the draft recommendations of the Productivity Commission Inquiry into Historic Heritage Management. Productivity Commission (2005). Conservation of Australia’s historic heritage places - draft report. Melbourne, Australian Government. The Final Report considerably moderated this position, indicating that compulsory acquisition should only be used in “exceptional circumstances”. Productivity Commission (2006). Conservation of Australia’s historic heritage places - final report. Melbourne, Australian Government. Pg 267-268.

⁴¹ Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Pg 173.

⁴² McKinlay, J. R. (1973). *Archaeology & legislation : a study of the protection of archaeological sites and material by legislative action*. Wellington, New Zealand Archaeological Association. Pg 78.

⁴³ Commenced 1978. Substantially amended 1983, 1989 and 2002. *Northern Territory Aboriginal Sacred Sites Act* (1978) Northern Territory. Hereafter *Sacred Sites Act*.

⁴⁴ Commenced 1 November 1991. Amended 1994 and 1996. *Heritage Conservation Act* (1991) Northern Territory.

⁴⁵ Under section 5(1) of the *Northern Territory Aboriginal Sacred Sites Act* (1978) Northern Territory.

⁴⁶ Under section 12 of the *Heritage Conservation Act*.

⁴⁷ *Sacred Sites Act* Preamble

of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.⁴⁸

As in the definition of “Aboriginal tradition” under the Commonwealth *ATSHP Act*, this definition implies a limitation to the breadth of what is protected; it is not every site which has some physical trace of the Aboriginal past, but those with particular importance according to Aboriginal custom. This is in strong contrast to the approach described above, which has been recently adopted in the ACT. But such a definition leaves open the possibility of sites having *no* definable physical trace of past Aboriginal activity but which, through tradition, have a high degree of cultural significance. In such instances, where the assertion of cultural significance is credible and, if necessary, able to be backed up through reference to past and current cultural practices among Aboriginal people, there represents a good argument for the protection of such places. Coutts analysed these issues shortly after the passage of the *Sacred Sites Act*. While supportive of the aims of connecting Aboriginal people with the places they held significant, he decried both the politicisation of Aboriginal heritage due to the land rights movement, which had created a climate of fear amongst landowners, and the limits that this had brought to the archaeological study of indigenous places.⁴⁹ In many ways, Coutts’ analysis was prescient, heralding the nationwide concern over indigenous land claims following the Mabo High Court decision.⁵⁰ Coutts was also keen to draw a distinction between indigenous heritage places with which the indigenous community had a genuine ongoing relationship, and what he referred to as the “secular” sites, which were principally of interest to archaeologists.⁵¹ This distinction remains problematic across Australia, where the political value of any archaeological site may well outweigh its community or scientific value. In the politics of contemporary indigenous life, heritage places have become one more tool in politics or negotiation over issues which may have nothing to do with heritage management or social value. This politicisation of heritage is by no means unique to indigenous heritage places, and is beyond the scope of this thesis to fully analyse, but has the propensity to sideline potential conservation outcomes for political outcomes. An interesting example in this is Chambers Pillar (Figure 6.1, below), a site with both indigenous and non-indigenous heritage value.

⁴⁸ The Sacred Sites Act uses the definition of a sacred site which is in section 3 of the Aboriginal Land Rights (Northern Territory) Act 1976.

⁴⁹ Coutts, P. J. F. (1984). A Public Archaeologist's View of Future Directions in Cultural Resource Management. *Archaeology at ANZAAS, Canberra*. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pg 213

⁵⁰ See for example Goot's analysis of the public polls and understanding of the Mabo issue during and shortly after the High Court decision. Goot, M. (1993). "Polls as science, polls as spin: Mabo and the miners." *Australian Quarterly* 65 (4): 133-156.

See also Ewing's predictions of the collapse of the Australian resources industry due to the Mabo decision. Ewing, G. W. (1993). "Terra Australia post Mabo: for richer or poorer." *Australian Quarterly* 65 (4): 157-166.

⁵¹ Coutts, P. J. F. (1984). A Public Archaeologist's View of Future Directions in Cultural Resource Management. *Archaeology at ANZAAS, Canberra*. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pp 215-216.

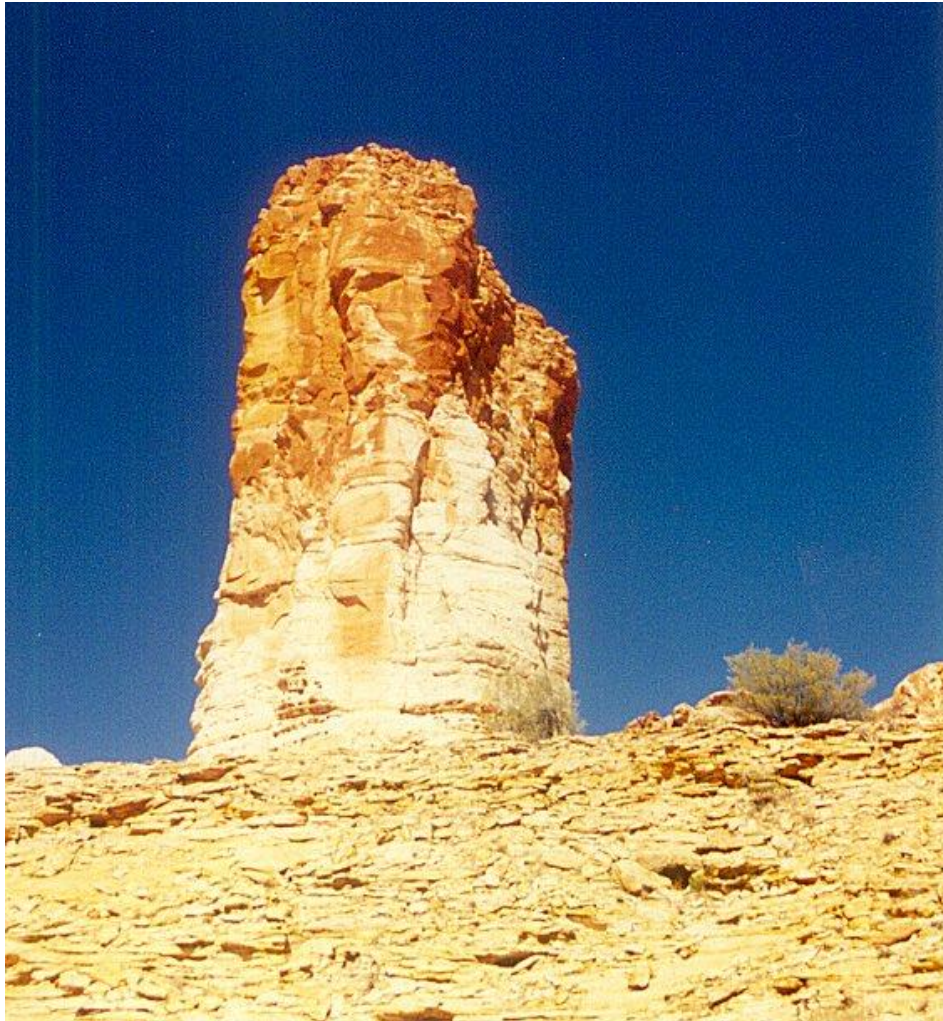


Figure 6.1: Chambers Pillar, a site with both Aboriginal and European cultural values.⁵²

⁵² http://en.wikipedia.org/wiki/Image:Chambers_pillar_email.jpg
Photo credit Cas Liber 1994. Released into the public domain.
See also the NT Heritage Register listing information for this site:
<http://www.nt.gov.au/nreta/heritage/ntregister/declared/display.html?chambersp>

The Chambers Pillar Historical Reserve is listed on the Northern Territory Heritage Register⁵³ due to its unique geological characteristics, historical association with early white exploration and its association with an Aboriginal morality story. Under Aboriginal tradition, the Pillar, a notable geological formation, represents two adulterous lovers, turned to stone for their illicit affair. In the Statement of Heritage Value, there is no mention of any *physical* traces of past Aboriginal use of the site; its Aboriginal significance is derived from the story association. This is a critical distinction for broadening the consideration of what elements of the past warrant conservation. Under a more traditional conception of Aboriginal heritage as ‘archaeological’ in nature, this site may not have been legally protected in the absence of any physical remains. Furthermore, if the site had contained physical remains of an archaeological nature, but such remains were considered of low ‘research’ or ‘scientific’ value from an archaeological perspective, it remains likely that the site would not have received any particularly strong legal protection. The low ‘scientific’ value archaeological materials may have been allowed to be removed and the intangible, social significance of the site to the Aboriginal community may have been ignored and potentially damaged, due to the primacy of the archaeological view of significance. The protection of this site for its multiple values and irrespective of the physicality of those values is a strong illustration of the ability of heritage legislation to protect a place for ‘public good’ reasons. The site has a strong social value with local indigenous and non-indigenous people, as well as being a tourist attraction and destination. The recognition and promotion of these multiple values is an important step towards conservation ‘in the public good’.

The *Heritage Conservation Act* provides more generalised heritage protection in the Territory and was passed in 1991 as a part of a package of legislation designed to demonstrate the Territory’s commitment to sustainable land management.⁵⁴ The Territory government explicitly acknowledged heritage conservation as an issue within the sustainability framework at the time.⁵⁵ The Act had a lengthy and fraught drafting process and its successful passage was driven primarily by the Northern Territory National Trust and professional historians, rather than archaeologists.⁵⁶ The *Heritage Conservation Act* provides for the establishment of a Register of Heritage Places⁵⁷ and sets guiding principles for the development of ‘heritage assessment criteria’.⁵⁸ These guiding principles do not specify ‘archaeological’, ‘scientific’ or

⁵³ Listed 5 October 1994. Northern Territory Government Gazette No. G40. For the full heritage listing see <http://www.lpe.nt.gov.au/heritage/register/chambersp/default.htm>. Note this site is not, in fact, a declared ‘sacred site’ under the *Sacred Sites Act*, but is used to illustrate the point that a site can have Aboriginal heritage significance warranting legal protection but with no observed physical evidence of past Aboriginal use or occupation.

⁵⁴ The proposal to enact legislation was first put forward in 1978 when the Northern Territory was granted self-government, however the impetus for the *Heritage Conservation Act* did not come about until 1988. Carment, D. (1991). Heritage legislation in the Territory. *Packaging the past? Public histories*. J. Rickard and P. Spearritt. Melbourne, Melbourne University Press: 70-77. Pp 70-71.

⁵⁵ Sullivan, M. and D. Carment (1992). Cultural heritage conservation in the Northern Territory. Canberra, Australian National University: 27. Pg 1-2.

⁵⁶ Carment, D. (1991). Heritage legislation in the Territory. *Packaging the past? Public histories*. J. Rickard and P. Spearritt. Melbourne, Melbourne University Press: 70-77. Pp 76-77.

⁵⁷ *Heritage Conservation Act* (1991) Northern Territory. Section 16.

⁵⁸ *Ibid.* Section 18. The full 14 criteria are spelled out in the Heritage Conservation Regulations, Section 5. Again, none of the criteria specifically refer to archaeology, scientific significance or research significance (except as pertaining to ‘natural history’—Criterion G), however Criterion J is sufficiently broadly worded to encompass these values: “by providing information contributing to a broader understanding of the history of human occupation”.

‘research’ significance to be one of the values underlying a heritage significance assessment. Hiscock noted that, during the debates, an Aboriginal member of Parliament remarked that “[m]ost certainly I would not wish to have a site that is sacred to me protected as if it were an archaeological site. I would want people to regard it from an historical perspective.”⁵⁹ Such a forthright position by a member of Parliament may have had some influence of the notion of archaeological significance being absent from the legislation, in favour of more broadly constructed criteria for significance.

Within a few years of enactment, the Act was the subject of criticism by archaeologists operating in the Northern Territory, particularly citing the attempted comprehensiveness and vague definitions in the legislation as key causes of problems.⁶⁰ In 2003, the Territory government implemented a comprehensive review of this Act.⁶¹ As of mid-2006, while the Northern Territory Cabinet has endorsed the establishment of a new *Heritage Act* at a conceptual level, the draft legislation is not available for comment.⁶² For archaeological heritage, the Act’s purview is limited to protecting archaeological sites and objects related to Aboriginal or Macassan inhabitation of the Northern Territory;⁶³ historical sites are excluded from the definition of archaeological heritage, although they can be listed on the Northern Territory Heritage Register.⁶⁴ “Over 5700” Aboriginal and Macassan sites had been identified and protected under the Act,⁶⁵ and 172 places are listed on the Northern Territory Heritage Register.⁶⁶ Of the sites on the

⁵⁹ Speech by Wesley Lanhupuy, Member for Arnhem, Northern Territory Legislative Assembly Parliamentary Record 1991, Pg 1336, cited in Hiscock, P. (1994). "Coming to terms with the Northern Territory Heritage Conservation Act 1991." *Australian Archaeology* 38: 55-60. Pg 57.

⁶⁰ Ibid. Pg 57. He cites as a particular failure of the legislation the lack of differentiation between archaeological and anthropological principles and terms, which are used interchangeably within the legislation but which do not correspond in practice.

⁶¹ Heritage Conservation Services (2003). Review briefing notes - Heritage Conservation Act (1991). Darwin, Northern Territory Government Department of Infrastructure Planning and Environment. , Office of Environment and Heritage (2003). Discussion paper - Heritage Conservation Act Review 2003. Darwin, Northern Territory Government Department of Infrastructure Planning and Environment. , Heritage Advisory Council. (2004, 30 January 2004). "Review of the Heritage Conservation Act." Retrieved 13 June, 2004, from <http://www.lpe.nt.gov.au/heritage/review/default.htm>.

⁶² <http://www.nt.gov.au/nreta/heritage/managing/review/index.html#update> Accessed 31 May 2006.

⁶³ Hiscock notes that this narrow definition excludes protection for the archaeological heritage of a range of other ethnic groups significant to the history of the Territory, particularly British, Chinese and Afghans. Hiscock, P. (1994). "Coming to terms with the Northern Territory Heritage Conservation Act 1991." *Australian Archaeology* 38: 55-60. Pg 56.

⁶⁴ *Heritage Conservation Act* (1991) Northern Territory. Section 4. The protections for archaeological heritage are contained in section 39 of the Act. The effect of the protections is the same as if the archaeological place or object was the subject of an interim conservation order and the consent of the Minister is required under section 29 of the Act to do “work” to the place or object. Archaeological places or objects must however meet a series of additional criteria under Section 3 of the Heritage Conservation Regulations in order to be considered “prescribed” places or objects:

(1) For the purposes of Part 6 of the Act, the following archaeological places are prescribed archaeological places:
 (a) places containing rock paintings or rock carvings;
 (b) prehistoric or protohistoric occupation places;
 (c) places (not being cemeteries within the meaning of the Cemeteries Act) containing human remains or burial artifacts.

(2) For the purposes of Part 6 of the Act, archaeological objects which are Aboriginal portable cultural objects (including but not limited to secret and ceremonial objects, log or bark coffins, human remains, portable rock or wood carvings or engravings or stone tools) are prescribed archaeological objects.

This limitation is noted as a problem with the current legislation requiring resolution in the Discussion Paper (Office of Environment and Heritage (2003). Discussion paper - Heritage Conservation Act Review 2003. Darwin, Northern Territory Government Department of Infrastructure Planning and Environment.) Pp 33-34.

⁶⁵ Heritage Advisory Council. (2004, 30 January 2004). "Review of the Heritage Conservation Act." Retrieved 13 June, 2004, from <http://www.lpe.nt.gov.au/heritage/review/default.htm>.

⁶⁶ Office of Environment and Heritage (2003). Discussion paper - Heritage Conservation Act Review 2003. Darwin, Northern Territory Government Department of Infrastructure Planning and Environment. Pg 9. The online version

Northern Territory Heritage Register, perhaps 12 places are principally archaeological in nature.⁶⁷ The Act also contains a power unique in Australian heritage legislation, which allows the Minister to declare a specific class of sites or objects to be “prescribed objects” under the Regulations,⁶⁸ and therefore protected, although such protection is weak and poorly defined.⁶⁹ This power of declaration could be used, potentially, to allow a particular locality or group of sites which relate to specific research issues or scientific values to be prescribed and protected.⁷⁰

The *Heritage Conservation Act* has been characterised as an attempt to grapple with heritage conservation squarely within the context of broad land management issues, considering heritage sites to be “features within landscapes”,⁷¹ rather than disconnected, single entities. Efforts striving towards this comprehensive management of a range of landscape issues is desirable, however the practicalities of such integration continue to elude most efforts in land management. Different, overlapping legislation, administered by different government agencies with conflicting priorities means that such integrated management is rarely achieved. Sullivan and Carment observed a specific difficulty with the *Heritage Conservation Act*, insofar as it attempts to manage both natural and cultural heritage in one piece of legislation, yet with little recognition of the different skills and requirements needed to manage these diverse types of heritage.⁷² Hiscock highlighted a similar issue with the limited archaeological expertise available to the Territory government and the concern that this may inhibit the effectiveness of the legislation.⁷³ Both rightly note that archaeological sites are often the least recognised features in such approaches to land management, due to their largely invisible nature to the casual observer and the need, generally, for a degree of specialist interpretation to realise their significance. The Northern Territory government has recognised the limitations of the existing legislation and, it can be hoped, new legislation will better strike a balance between protecting the values of different types of heritage places.

In Sullivan and Carment’s commentary on the Northern Territory legislation and reform process, they observe that cultural heritage and, more specifically,

of the NT Heritage Register lists 172 places as of 31 May 2006. <http://www.nt.gov.au/nreta/heritage/ntregister/index.html>

⁶⁷ No place listed on the Northern Territory Heritage Register is identified specifically as an archaeological site by name. The figure of 12 is ascertained from the published descriptions and statements of significance for items on the Register. Other sites may have archaeological components which were not specifically identified in their listing details. Heritage Advisory Council. (2003, 14 May 2003). "Northern Territory Heritage Register (Online version)." Retrieved 12 June, 2004, from <http://www.lpe.nt.gov.au/heritage/register/default.htm>. Reviewed 31 May 2006. Site now at <http://www.nt.gov.au/nreta/heritage/ntregister/index.html>

⁶⁸ *Heritage Conservation Act* (1991) Northern Territory. Sections 56(2)(a)-(d). Such prescribed places or objects are then listed in Section 3 of the Heritage Conservation Regulations. By contrast, the NSW Heritage Act 1977 contains a power which allows the Minister to gazette an order declaring certain classes of archaeological ‘relics’ to be excluded from protection under the Act. See NSW Heritage Act 1977 Section 139(4).

⁶⁹ Hiscock, P. (1994). "Coming to terms with the Northern Territory Heritage Conservation Act 1991." *Australian Archaeology* 38: 55-60. Pg 58.

⁷⁰ A further refinement of this process, which could include non-Aboriginal archaeological sites is one of the models proposed in the review of the current legislation. Office of Environment and Heritage (2003). Discussion paper - Heritage Conservation Act Review 2003. Darwin, Northern Territory Government Department of Infrastructure Planning and Environment. Pp 32-33.

⁷¹ Sullivan, M. and D. Carment (1992). Cultural heritage conservation in the Northern Territory. Canberra, Australian National University: 27. Pg 3.

⁷² Ibid. Pg 13.

⁷³ Hiscock, P. (1994). "Coming to terms with the Northern Territory Heritage Conservation Act 1991." *Australian Archaeology* 38: 55-60. Pp 58-59.

archaeological sites, are not able to be recreated once destroyed, a common maxim in archaeological practice.⁷⁴ Thus heritage *protection* legislation must focus on the retention of those things which make a place significant, as opposed to a system of heritage *exploitation*, which presupposes that the best management action for an archaeological site is in fact its excavation. Furthermore, they call upon the legislative definition of ‘archaeological’ to be widened and made more generic, to apply to any “past human occupation”.⁷⁵ This is certainly desirable, considerably more so than any arbitrary distinction based on an association with a particular ethnic grouping or date range (for example, ‘Aboriginal’ or ‘more than 50 years old’). Such definitions need to be further refined if the focus of the legislation is to be more based in a ‘public good’ conception of heritage conservation. Certainly the nature of the current Northern Territory heritage significance criteria provide scope for archaeological heritage to be conceived of as more than just sites and objects, to ensure there is a transmission of archaeological knowledge to current and future generations. However, achieving this will require different mechanisms from those proposed for expanding archaeological heritage protection in the Discussion Paper⁷⁶ and it remains to be seen if such advice will be incorporated into the reviewed *Heritage Conservation Act*.

The Northern Territory has, in many ways, been at the forefront of indigenous heritage management, due to a large indigenous population with a greater range of enduring cultural associations with specific areas than many displaced Aboriginal populations in other States and Territories. The Northern Territory was the first Australian jurisdiction to enact a form of heritage legislation as well as the first with land rights legislation.⁷⁷ There has been a strong acknowledgement that indigenous heritage is of great relevance to contemporary indigenous people, as well as having a strong appeal for tourism. While some of the legislative efforts have been less than successful in their practical implementation, there has been a definite concern for the public values of heritage. This has not always translated into a balanced concern for the issues, as politics and pragmatism have weighed heavily on conservation efforts, but such concern points the way towards a ‘public good’ framework. This would allow the consideration of these wider social issues in a more transparent manner, providing for different sorts of conservation or community outcomes which can presently be achieved only through political, rather than legislative, means.

⁷⁴ Sullivan, M. and D. Carment (1992). Cultural heritage conservation in the Northern Territory. Canberra, Australian National University: 27. Pp 8-9.

⁷⁵ Ibid. Pg 12. This is one of the models proposed in the 2003 Discussion Paper reviewing the Heritage Conservation Act. See Office of Environment and Heritage (2003). Discussion paper - Heritage Conservation Act Review 2003. Darwin, Northern Territory Government Department of Infrastructure Planning and Environment. Pp 33-34.

⁷⁶ Ibid.

⁷⁷ *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). This was the first legislation that allowed land to be granted to Aboriginal people on the basis of traditional association, as opposed to earlier legislation such as the *Aboriginal Lands Act* 1970 (Vic) and the *Aboriginal Lands Trust Act* 1966 (SA), which allowed Aboriginal reserves to be set up, controlled by trusts on behalf of Aboriginal people, rather than directly by them. See also <http://www.foundingdocs.gov.au/item.asp?dID=57>

6.4 Queensland

Queensland was a relatively early adopter of cultural heritage legislation for indigenous cultural heritage, through the *Aboriginal Relics Preservation Act* 1967. During the period of its operation, the Act was described as ineffective⁷⁸ and Ellis likened it to an exercise in the social control of Aboriginal people.⁷⁹ This Act, now repealed, was replaced by the *Cultural Record (Landscapes Queensland and Queensland Estate) Act* 1987, itself repealed in 2003.⁸⁰ While the *Cultural Record Act* was quite sweeping in its definition of what may be considered the “Queensland Estate”, it had principally been used to protect Aboriginal cultural and archaeological heritage. This was particularly the case following the enactment of the *Queensland Heritage Act* in 1992, which established more generalised heritage protections. The powers with respect to historical archaeological heritage were formally folded into the *Queensland Heritage Act* in 2003.⁸¹ In 2003, the Queensland legal regime for heritage management underwent a comprehensive series of reforms. The *Cultural Record Act* 1987, which managed Aboriginal heritage, was repealed and replaced with the *Aboriginal Cultural Heritage Act* 2003 and the *Torres Strait Islander Cultural Heritage Act* 2003. At the same time, the *Queensland Heritage Act* 1992, which manages non-indigenous heritage, was substantially amended to bring it into line with a range of integrated planning reforms.⁸² The two new indigenous heritage management Acts are administered by the Department of Natural Resources, Minerals and Energy, while the *Queensland Heritage Act* is administered by the Queensland Heritage Council, a part of the Environment Protection Agency.

The *Cultural Record Act* was considered to be a problematic piece of legislation of limited effectiveness,⁸³ prior to its replacement in 2003. One parliamentarian noted, in his support for the changes to the legislation:

[u]nder our existing laws, protection is restricted to evidence of human occupation of the various areas of Queensland which hold some archaeological significance. Any areas that might be significant to Aboriginal or Torres Strait Islander people but that are not purely archaeological cannot be protected.

At the moment the way we deal with Aboriginal and Torres Strait Islander culture might be described as ancient Roman or ancient Greek. It is an approach based on an assumption that a culture is dead. For too long Aboriginal and Torres Strait Islander people have

⁷⁸ Coutts, P. J. F. (1984). A Public Archaeologist's View of Future Directions in Cultural Resource Management. *Archaeology at ANZAAS*. Canberra. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pg 219

⁷⁹ Ellis, B. (1994). "Rethinking the paradigm: cultural heritage management in Queensland." *Ngulaiq* 10. Pp 11-13.

⁸⁰ Hereafter the *Cultural Record Act*.

⁸¹ Parliament of Queensland (2003). Official Reports of the Parliamentary Debates (Hansard). Second Reading Speech for the *Queensland Heritage and Other Legislation Amendment Bill* 2003 by Hon. D. M. Wells (Murrumba—ALP) (Minister for Environment) Pg 1351.

⁸² Environment Protection Agency (2003). *Changes to the Queensland Heritage Act*. IDAS is established under the Integrated Planning Act 1997 (Qld).

⁸³ Parliament of Queensland (2003). Official Reports of the Parliamentary Debates (Hansard). Second Reading Speech for the Aboriginal Cultural Heritage Bill 2003 by Hon. S. Robertson (Stretton—ALP) (Minister for Natural Resources and Minister for Mines). Pg 3179. See also remarks later in the debates by Mr Seeney (Callide—NPA) (Deputy Leader of the Opposition), Pg 4396; Mr Hobbs (Warrego—NPA) Pg 4404; Hon. K. W. Hayward (Kallangur—ALP) Pg 4406; Mrs Desley Scott (Woodridge—ALP) Pg 4422.

been unable to fully document or record their places of cultural heritage significance unless those places are archaeologically significant.⁸⁴

This is a significant observation on the part of the Parliament, as it recognises explicitly the changing conception of indigenous cultural heritage from a purely archaeological conception to one which has broader notions of contemporary significance and a different focus in terms of protection. For the archaeological community, this requires a recognition that arguments about the significance of places will need to be based on a concept of significance to the indigenous community first, with archaeological research considerations secondary.

A quite different approach has been taken with the recently-enacted *Aboriginal Cultural Heritage Act* and *Torres Strait Islander Cultural Heritage Act*. While effectively identical in their provisions, the separation of the Acts was at the request of the Torres Strait Islander people, in recognition of their distinct culture and different circumstances to mainland Aboriginal people. There was a precedent for such action in Queensland, with separate land rights legislation passed in 1991 for Aboriginal people and Torres Strait Islanders.⁸⁵ These new Acts provide a broad “blanket” protection for indigenous cultural heritage, however they rely on a notion of a “duty of care” to prevent harm to indigenous heritage,⁸⁶ rather than through a rigidly-defined approvals process. Declarations may be made through the Government Gazette or through the Regulations⁸⁷ to protect certain items or places and require that protected objects or areas not be disturbed without a permit or a “reasonable excuse”.⁸⁸ In the absence of any rigorous definition of “reasonable”, it is likely that a defence of ignorance would be able to be used in an instance of unauthorised disturbance, provided some level of pre-disturbance due diligence could be demonstrated.

Permits to affect indigenous cultural heritage have been replaced with binding “cultural heritage management plans”.⁸⁹ Legislators have also attempted to resolve elements of the internecine conflicts between indigenous groups by giving priority to ‘speak’ on behalf of identified cultural heritage places to the registered Native Title claimant(s) for the area in question.⁹⁰ Importantly, however, the Acts recognise that cultural heritage values can exist in the absence of a Native Title claim and therefore leave open the ability for indigenous cultural heritage values to be interpreted on a wider basis for the community. While the primary responsibility for such interpretation will rest with an indigenous group, there is a requirement that the assertion of cultural heritage value be consistent with advice from other areas of cultural heritage

⁸⁴ Ibid. Speech by Mr MULHERIN (Mackay—ALP) Pg 4400.

⁸⁵ Ibid. Second Reading Speech for the Torres Strait Islander Cultural Heritage Bill 2003 by Hon. S. ROBERTSON (Stretton—ALP) (Minister for Natural Resources and Minister for Mines). Pp 3180-3181. The Minister is referring to the *Aboriginal Land Act* 1991 (Qld) and the *Torres Strait Islander Land Act* 1991 (Qld) which were largely identical pieces of legislation but established in a manner which recognised there were cultural differences between Aboriginal and Torres Strait Islander people.

⁸⁶ *Aboriginal Cultural Heritage Act* 2003 Section 23 and *Torres Strait Islander Cultural Heritage Act* Section 23.

⁸⁷ Only one such place is currently declared in the *Heritage Regulations* 2003, Section 8(1).

⁸⁸ *Queensland Heritage Act* (1992) Queensland. Sections 47 and 51 respectively.

⁸⁹ Ibid. Section 80.

⁹⁰ Ibid. Sections 34-37.

management, such as archaeology.⁹¹ This is clearly an attempt to balance indigenous, professional and public values for indigenous heritage, however the legislation is still too new to determine if the balance has been struck correctly. This provides a significant role for archaeology (and other disciplines) within this process, in a way which has been perhaps eroded in some jurisdictions over the last 20 years.

During the debates on these bills, the one member of Parliament noted the substantial contribution the indigenous past played to the tourism industry for her region—more so than the remains of the historical, non-indigenous past:

In Cairns we learnt that lesson some years ago when we became an international tourism destination. Many locals had not at that time discovered Aboriginal culture or, for that matter, the culture of Torres Strait Islander peoples. What then transpired was that the world's tourists, in visiting Cairns, found a tremendous fascination not with Caucasian Australia but with Aboriginal Australia and with Torres Strait Islander culture and customs.⁹²

While this could be viewed as exploitative, such an observation provides a substantial motivation for non-indigenous people and governments to take notice of heritage issues and put in place appropriate protective legislation. But in the case of tourism, and its substantial economic influence, such exploitation needs to be sustainable, to allow the presentation of preserved heritage to the (paying) public. This is a very different form of exploitation of the remains of the past than that derived solely from its treatment as an archaeological resource which is excavated and removed. Preservation of cultural heritage under such a model becomes more than an exercise in placing artefacts in museums or keeping places, undertaking academic research or sterilisation of sites for development, but is focussed on presenting and preserving the best elements of the past and making them available into the future.

Such approaches do not seek to preserve everything, even for the sake of tourism. Later in the same speech, the Member for Cairns noted:

One of the things I like particularly about the bills is the flexibility. There might be some items, for example, that could be explored as potentially of significance in terms of Aboriginal culture, but on the best advice of the appropriate Aboriginal people and other experts—archaeologists or the like—it may well be that an agreement can be reached between the developer or the person involved in the land use and the Aboriginal

⁹¹ Parliament of Queensland (2003). Official Reports of the Parliamentary Debates (Hansard). Second Reading Speech for the Aboriginal Cultural Heritage Bill 2003 by Hon. S. Robertson (Stretton—ALP) (Minister for Natural Resources and Minister for Mines). Pp 3179-3180. This provision is held in Section 73 of the two Acts, in the requirements for conducting a cultural heritage study.

⁹² Ibid. Speech by Ms Boyle, Member for Cairns, during the Third Reading debates for the *Aboriginal Cultural Heritage Bill* and the *Torres Strait Islander Cultural Heritage Bill*. Pg 4403. Similar sentiments relating to the value of non-indigenous heritage to tourism were echoed by Hon. D. M. Wells (Murrumba—ALP) in his Second Reading speech for the *Queensland Heritage And Other Legislation Amendment Bill* 2003, Pg 1349.

people not to require the items or the place to be particularly preserved in a formal fashion.⁹³

Here the legislature has explicitly stated that the intent of the legislation is not to preserve everything, but to preserve the most significant elements of the past. By establishing an archaeological protective regime which seeks to consider and balance a range of considerations, rather than opting for automatic blanket protection for archaeological sites, the Queensland legislature has established a good basis for considering archaeological heritage in a wider 'public good' context than that of a scientific, research-driven discipline. This implies a negotiated outcome, which balances a range of interests—those of indigenous people, archaeologists and other specialist professions, developers, landowners and the community generally. A community-focussed conservation outcome becomes the goal of the legislation, rather than a one-off side benefit.

6.5 South Australia

South Australia was one of the first states to set up a legal heritage management regime, with the 1965 *Aboriginal and Historic Relics Preservation Act*.⁹⁴ This Act, long since repealed, was lauded as an exemplar of archaeological heritage legislation in the early days of the Australian heritage movement.⁹⁵ Heritage in South Australia is now managed through two main pieces of legislation: the *Aboriginal Heritage Act* 1988, administered by the South Australian Department for Aboriginal Affairs and Reconciliation and the *Heritage Places Act* 1993, administered by the Department of the Environment and Heritage. The *Heritage Places Act* is a substantially amended and renamed version of the *Heritage Act* 1993, which occurred in 2005.⁹⁶

The existence of separate acts for indigenous and non-indigenous heritage demonstrates a legislative commitment to both realms, as well as an understanding that the issues faced by these diverse categories of heritage are quite different. This legal approach is now the norm in Australian jurisdictions, leaving NSW and the ACT the only jurisdictions where Aboriginal heritage is incorporated within an Act dealing with other matters. Providing separate acts allows the law to cater for different sets of circumstances,⁹⁷ issues or types of heritage, while providing, at a symbolic level, a distinct recognition of these separate types of heritage as important to the community. The enactment of separate legislation for Aboriginal and non-Aboriginal

⁹³ Ibid.

⁹⁴ The Act was finally assented to in 1967. When the *Aboriginal Heritage Act* 1979 was passed, repealing the 1965 Act, similarly there was a delay of three years between ratification by Parliament and assent to the legislation. Clearly there was some considerable reluctance to embrace legislation of this type in South Australia. See also comments by Ward, G. K. (1983). Archaeology and legislation in Australia. *Australian Field Archaeology: A Guide to Techniques*. G. Connah. Canberra, Australian Institute of Aboriginal Studies: 18-42. Pg 23.

⁹⁵ See, for example, contemporary comments in the 1972 Hansard surrounding the debate over the Victorian Aboriginal and Archaeological Relics Preservation Act 1972, as well as comments by McKinlay (1973) Pp 66-68 and in the Hope Report (1974) Pg 176.

⁹⁶ The *Heritage Act* 1993 (SA) was substantially amended and the name changed by the *Heritage (Heritage Directions) Amendment Act* 2005 (SA).

⁹⁷ Such an approach was favoured by O'Keefe and Prott when writing about this issue in more general terms. O'Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. Pg 114.

heritage has the potential to further empower the Aboriginal community, and overcome some of the objections of critics of Aboriginal heritage legislation.⁹⁸

While South Australia was an early adopter of heritage legislation, passage of the legislation was by no means a straightforward process, with the initial heritage legislation taking three attempts to successfully pass through the South Australian Parliament. The *Aboriginal and Historic Objects Preservation Bill*⁹⁹ was introduced unsuccessfully in 1964, however the redrafted *Aboriginal and Historic Relics Preservation Bill*¹⁰⁰ passed successfully in 1965.¹⁰¹ When the *Aboriginal and Historic Objects Preservation Bill* was under debate in 1964, its focus was initially quite narrowly conceived: “[the Bill] seeks to facilitate the preservation of aboriginal [sic] rock carvings...”; significantly, the Bill was viewed as important to both the scientific community and the public, although there was no explicit mention of the importance of protecting sites for Aboriginal people.¹⁰² However, the debates did recognise the importance of protecting heritage for present and future generations.¹⁰³ Much of the debate concerned the broad-ranging definition and nature of the protections proposed in the Bill, the impacts on landowners and the need to protect important Aboriginal heritage items from being sold overseas.

A substantially different Private Member’s Bill was presented late in the debate on the *Objects Bill* and the debate resumed afresh, on the new *Aboriginal and Historic Relics Preservation Bill*.¹⁰⁴ The *Relics Bill* was broadened to cover both Aboriginal and historical archaeological remains,¹⁰⁵ and tightened the definitions of what was and was not a protected object. The responsibility for administering the Act fell to the Minister of Education, with anticipated support from South Australian universities and museums.¹⁰⁶ Parliamentarians expressed a belief that the main purpose of protecting

⁹⁸ E.g. Fourmile, H. (1992). “The need for an independent national inquiry into state collections of Aboriginal and Torres Strait Islander cultural heritage.” *Aboriginal Law Bulletin* 2 (56): 3-4. , Fourmile, H. (1996). “The law of the land : whose law, whose land.” *Tempus* 5 (1996): 9-17. , Jago, M. and N. Hancock (1998). “The case of the missing blanket : indigenous heritage and states’ regimes.” *Indigenous Law Bulletin* 4 (16): 18-21.

⁹⁹ Hereafter *Objects Bill*.

¹⁰⁰ Hereafter *Relics Bill / Relics Act*.

¹⁰¹ McKinlay, J. R. (1973). *Archaeology & legislation : a study of the protection of archaeological sites and material by legislative action*. Wellington, New Zealand Archaeological Association. Pp 66-67.

¹⁰² Parliament of South Australia (1964). Official Reports of the Parliamentary Debates (Hansard). Session of 1964. Third Session of the Thirty-Seventh Parliament. Second Reading Speech for the *Aboriginal and Historic Relics Preservation Bill* by the Hon. C D Rowe (Attorney-General), 1 September 1964, Pg 657. Rowe stated that the preservation of rock carvings was desirable for “scientific examination, education and the tourist trade.”

It is further worthy of note that a lengthy exchange took place during these debates as to whether “Aboriginal” should or should not use a capital ‘A’. See the exchange between the Hon R C DeGaris and the Hon Sir Frank Perry, 22 September 1964, Pp 922-923. DeGaris was strongly opposed to the use of the capital ‘A’.

¹⁰³ Ibid. Speech by the Hon. R R Wilson (Member for Northern) 22 September 1964, Pg 920.

¹⁰⁴ The Hon H K Kemp (Member for Southern) introduced the redrafted *Aboriginal and Historic Relics Preservation Bill* on 21 October 1964 as a Private Member’s Bill, as an alternative to the Government-sponsored *Aboriginal and Historic Objects Preservation Bill* introduced earlier that year. Ibid. Speech by Kemp, Pp 1532-1534. Parliament resolved to suspend discussion of the *Objects Bill* and hold over debate on the *Relics Bill* until the next year’s Parliamentary session, on the basis that the new Bill resolved some of the flaws which had been observed in the *Objects Bill*. Pg 1595. Both Bills lapsed and there was a change of government in the 1964 election. A somewhat modified version of Kemp’s *Relics Bill* was reintroduced to Parliament on 4 August 1965, with Kemp delivering the Second Reading Speech. Parliament of South Australia (1965). Official Reports of the Parliamentary Debates (Hansard). Session of 1965-66. First Session of the Thirty-Eighth Parliament. Pp 800-801.

¹⁰⁵ Parliament of South Australia (1965). Official Reports of the Parliamentary Debates (Hansard). Session of 1965-66. First Session of the Thirty-Eighth Parliament. Speech by Kemp, Pp 800-801. Parliamentarians were in general favourably disposed to the extension of protection to historical as well as Aboriginal relics. See comments by DeGaris on 17 August 1965, Pg 1623; and by the Hon C D Rowe on 31 August 1965, Pg 1335.

¹⁰⁶ Ibid. Kemp, Pg 800.

“relics” was to educate the public, through an unspecified partnership arrangement between archaeologists, museums and educators. This was due to the fact that, at that time, Australian archaeology was in its nascence and commercialised consulting archaeology, as presently practiced, did not exist. In the debate regarding whether to include historic relics, there was a significant element of local pride in the history of South Australia, which led to these relics being protected. Nevertheless, support for blanket protection for relics was mixed and there were statements in favour of allowing the amateur collection of relics, as this was seen as assisting in their preservation, as well as being a legitimate form of recreational activity.¹⁰⁷ Substantial debate revolved around how broadly the definition of “relic” should range, with concerns it could be too all-encompassing,¹⁰⁸ however the Act required the location of relics to be gazetted prior to them becoming protected. The 1965 Act allowed the creation of reserves to protect historic relics,¹⁰⁹ with the Crown taking ownership of any historic relics within declared protected areas, but with a focus on those dating from prior to 1865.¹¹⁰

While the *Relics Act* was repealed in 1982,¹¹¹ the legal approaches established under it have been passed to subsequent heritage legislation in South Australia and, through the influence of the Hope Report,¹¹² to other Australian jurisdictions which drafted legislation in its wake. The *Aboriginal Heritage Act* 1979 seemed to be an attempt to negotiate a middle path between the interests of archaeologists and Aboriginal people. “Relics” from the previous Act were replaced by “items of Aboriginal heritage”, although their main criteria for being items worthy of protection was that they were of “archaeological, anthropological, ethnological, or historic significance relating to the Aboriginal people,”¹¹³ so thereby of interest to heritage professionals and archaeologists, not because of their significance to contemporary Aboriginal people. The Act did recognise that protected items could still be in use by Aboriginal people and this use should not be precluded by the legislation.¹¹⁴ Otherwise, the protections were typical—the Minister could declare “protected areas” containing Aboriginal items¹¹⁵ which were not to be

¹⁰⁷ Ibid. DeGaris, Pg 1622. There was a feeling that relics would be “lost” without the actions of keen amateur collectors. Griffiths reports this as a common attitude amongst non-scientific collectors of archaeological relics in Australia. Griffiths, T. (1996). *Hunters and Collectors: The antiquarian imagination in Australia*. Melbourne, Cambridge University Press.

¹⁰⁸ Parliament of South Australia (1965). Official Reports of the Parliamentary Debates (Hansard). Session of 1965-66. First Session of the Thirty-Eighth Parliament. Speech by the Hon G J Gilfillan (Member for Northern), 18 August 1965, Pg 1083.

¹⁰⁹ *Aboriginal and Historic Relics Preservation Act* (1965) South Australia. Sections 16 and 17.

¹¹⁰ Ibid. Section 21. 1865 was 100 years prior to the passing of the legislation, and was a common age range for early Australian heritage protection legislation. South Australia was first settled in 1836 and had reached its current boundaries by 1861. Docherty, J. C. (1993). *Historical Dictionary of Australia*. Sydney, Franklin Watts Australia. Pp 129-130. Similarly, NSW initially specified that items must date from before 1900 to be protected. This was subsequently changed to a floating date, with protection coming into effect for items more than 50 years old.

¹¹¹ The *Relics Act* was replaced by the *Aboriginal Heritage Act* 1979, however the new Act did not come into effect until 1982, demonstrating legislative reluctance to embrace some of the changes in the new legislation. Ward, G. K. (1983). Archaeology and legislation in Australia. *Australian Field Archaeology: A Guide to Techniques*. G. Connah. Canberra, Australian Institute of Aboriginal Studies: 18-42. Pg 23.

¹¹² Hope, R. M. (1974). *Report of the Committee of Inquiry into the National Estate*. Canberra, Australian Government Publishing Service. Pp 175-176.

¹¹³ *Aboriginal Heritage Act* (1979) South Australia. Section 5.

¹¹⁴ Ibid. Section 6.

¹¹⁵ Ibid. Section 21.

disturbed without a permit.¹¹⁶ While the *South Australian Heritage Act* was established in 1978, its protections were limited to places which had been registered,¹¹⁷ and made no provision for archaeological heritage specifically. With the repeal of the *Relics Act* a lacuna was left in heritage protection for historical archaeological materials, although shipwrecks were protected under the 1981 *Historic Shipwrecks Act* (South Australia).

This gap was filled in part by the Heritage Act 1993 which, in addition to establishing the South Australian State Heritage Register,¹¹⁸ established provisions to protect geological, palaeontological or archaeological places.¹¹⁹ Those provisions were clearly based in a scientific notion of their heritage value, with protections designed to prevent removal of geological or palaeontological “specimens” or archaeological “artefacts” without a permit. The Heritage Act was subject to extensive review and amendment in 2005 and is now known as the Heritage Places Act 1993. The Heritage Places Act has articulated a need for broader goals than conservation alone, adding the need for sustainable development to the objects of the Act:

[the Act] encourage[s] the sustainable use and adaptation of heritage places in a manner consistent with high standards of conservation practice, the retention of their heritage significance, and relevant development policies.¹²⁰

As part of the amendments, the key functions of the Council is to “promote public understanding and appreciation of the State's heritage”.¹²¹ These amendments recognise the need to both provide outreach to the community in heritage conservation efforts, as well as to take into account other social objectives which may exist alongside conservation.

This scientific conception of archaeological heritage continues virtually unchanged in the revised Act, which primarily limits protection to those places listed on the State Heritage Register.¹²² During debate over the Bill, the Leader of the Opposition noted that the archaeological provisions of the Act were to be strengthened, as the original Act was not designed to deal with such matters.¹²³ Later in the same speech, he noted there had never been a prosecution under these provisions of the Act and, in effect, the provisions provide little additional protection from those of the earlier legislation. Sensibly, the Bill was amended to ensure protected archaeological artefacts had to have “heritage significance”, with the Minister for Conservation and the Environment noting the need for a distinction between such objects and

¹¹⁶ Ibid. Section 25. Section 26 in fact allowed the Minister to direct that specific relics be excavated for their protection and could empower people to enter land to undertake such excavation, presumably over the objections of the landowner.

¹¹⁷ *South Australian Heritage Act* (1978) South Australia. Section 11. This Act was repealed by the *Heritage Act* 1993 (SA).

¹¹⁸ *Heritage Act* (1993) South Australia. Section 13.

¹¹⁹ Ibid. Sections 25-27.

¹²⁰ *Heritage Places Act* (1993) South Australia. Section 2.

¹²¹ Ibid. Section 5A.

¹²² Ibid. Section 26.

¹²³ Speech by The Hon. I.F. Evans, 7 April 2005. South Australia House of Assembly Hansard.

“green bottles hanging in the backyard”.¹²⁴ This small amendment constrains those administering the Act from adopting a legalistic interpretation of what may be archaeological, based solely on age, for example. While no specific definition is provided for archaeological heritage significance, it is reasonable to look upon the heritage significance criteria contained in the Act, specifically:

[an object] may yield information that will contribute to an understanding of the State's history, including its natural history.¹²⁵

Such protection is however limited only to objects divorced from their context, rather than addressing archaeological places in a holistic manner. As of mid-2006, only ten archaeological places are listed on the South Australian State Heritage Register,¹²⁶ providing a very limited protective regime for non-indigenous archaeological heritage in the State. The Act provides some “blanket” protection for unlisted archaeological objects, which requires an exercise of due diligence to prevent unauthorised disturbance¹²⁷ however the Heritage Council may develop exemptions from this requirement, for specific types of objects, areas of land or types of disturbance. There is a requirement for notification in the event of an unexpected archaeological discovery and a limited control on the ownership and trade in archaeological objects.¹²⁸ While there was some debate about the need for deterrence in the unauthorised disturbance of archaeological places, the Heritage Places Act takes a very standard approach to historical archaeological heritage, with an overemphasis on individual objects and little consideration of archaeological heritage beyond scientific values.

Much greater effort has been placed into the management of indigenous heritage in South Australia. The second Aboriginal Heritage Act was passed in 1988 with overlapping powers to the 1979 Act, which has never been formally repealed.¹²⁹ The 1988 Act changed direction again, with “items” and “protected areas” in the 1979 Act becoming “Aboriginal objects” and “Aboriginal sites” which can be entered onto the Register of Aboriginal Sites and Objects in the 1988 Act.¹³⁰ These new definitions are interesting for this discussion as, in comparison to earlier legislation, the Act moved archaeological and scientific values to being a second named consideration to the first named Aboriginal cultural values. Aboriginal objects (and sites) are defined as being:

- (a) of significance according to Aboriginal tradition; or
- (b) of significance to Aboriginal archaeology, anthropology or history.¹³¹

¹²⁴ Speech by The Hon. J.D. Hill, Minister for Conservation and the Environment, 24 May 2005. South Australia House of Assembly Hansard. This amendment relates to the protections for archaeological objects under Section 27(1)(a).

¹²⁵ *Heritage Places Act* (1993) South Australia. Section 16, Criterion C.

¹²⁶ Based on a search of the South Australian State Heritage Register, undertaken 23 May 2006. The SA Register is searchable through the Australian Heritage Places Inventory: <http://www.heritage.gov.au/ahpi/index.html>

¹²⁷ *Heritage Places Act* (1993) South Australia. Section 27(1).

¹²⁸ *Ibid.* Sections 27-28.

¹²⁹ *Aboriginal Heritage Act* (1988) South Australia. Notes. While the 1988 Act commenced 1/3/1989, the provision which repeals the 1979 Act remains uncommenced.

¹³⁰ *Ibid.* Section 9(2).

¹³¹ *Ibid.* Section 3.

This reordering of the significance criteria, while relatively minor in appearance and perhaps in practical effect, does however highlight the changing attitude of the South Australian government towards Aboriginal heritage. By establishing Aboriginal community significance as the first significance criterion, this challenges the notion that the primary value of the archaeological heritage is for research or scientific value. The Act still uses the problematic qualifier “traditional” but developments in this area may see such terminology fall out of use in future amendments, more clearly tying significance to the values of the contemporary Aboriginal community. The 1988 Act broadens its protections to encompass certain types of materials which would typically be overlooked in archaeological protection regimes, including a requirement for the central collection and preservation of Aboriginal heritage archives¹³² as well as a requirement to consult with Aboriginal organisations and traditional owners in advance of any decision-making.¹³³ It also moves to a blanket protection for Aboriginal objects and sites¹³⁴ including a stricture against unauthorised sale of Aboriginal objects or their removal from South Australia.¹³⁵

The 1988 *Aboriginal Heritage Act* has attempted to take a less rigid approach to protecting Aboriginal heritage and to prioritising the value of that heritage to the Aboriginal community over value to archaeologists or academic researchers. The Act does however remain principally focussed on the protection of objects and sites, with no clear mechanism for realising the community value of that protected heritage. This remains quite evident in the most serious test of the South Australian heritage regime, the Hindmarsh Island case.¹³⁶ Despite an apparent legislative intent to recognise the significance of “Aboriginal tradition” as a valid reason for cultural heritage protection, such protection was not forthcoming from the court or Parliament. Flood has stated that “the case demonstrated an inability of our legal system to adequately comprehend and respect Aboriginal cultural and spiritual values.”¹³⁷ It is not necessary to fully adopt her feminist reading of the circumstances to acknowledge that her point is a valid one. If the Australian legal system truly wishes to recognise “Aboriginal tradition” as a valid reason for cultural heritage protection, particularly in circumstances where that protection will impose upon the rights of other, non-Aboriginal people, then it is necessary for the courts, legislators and administrators to develop confidence that Aboriginal people are not merely making ambit claims when asserting cultural secrecy, or implement culturally sensitive methods of testing those assertions while respecting that secrecy. The alternative, that Aboriginal people may have to compromise aspects of that secrecy in order to see

¹³² Ibid. Sections 9 and 10.

¹³³ Ibid. Section 13. Section 42 allows for traditional owners (only) to challenge the validity of Ministerial decisions under the Act if there has been a failure to adequately consult the traditional owners in the course of a decision being made.

¹³⁴ Ibid. Sections 21 and 23.

¹³⁵ Ibid. Section 29.

¹³⁶ Simons, M. (2003). *The meeting of the waters: the Hindmarsh Island affair*. Sydney, Hodder.

Bell, D. (1998). *Ngarrindjeri Wurrurarrin: a world that is, was and will be*. North Melbourne, Spinifex.

Simons account is a journalistic history of the Hindmarsh Bridge matter, while Bell's is a feminist anthropological work which examines and articulates the social issues arising for the local Aboriginal people out of the case.

See also Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 271-273.

¹³⁷ Flood, E. (1999). "The Hindmarsh Island Case." *Polemic* 10 (1): 58-63. Pg 63.

protection implemented, is less likely to be accepted by indigenous people. A 'public good' framework which recognises such issues and allows for a more transparent process of regulation may alleviate some of this conflict. Either option is a compromise, but both attempt to balance competing value systems in a way which sees heritage appropriately protected without privileging fully either view.

6.6 Tasmania

Tasmania was one of the last states to implement heritage legislation for either indigenous or non-indigenous heritage protection. Tasmanian archaeological heritage is protected through two pieces of legislation, the *Aboriginal Relics Act 1975*¹³⁸ and the *Historic Cultural Heritage Act 1995*. Some basic protections for Aboriginal heritage previously existed in the *National Parks and Wildlife Act 1970*¹³⁹ which operated concurrently with the *Aboriginal Relics Act* into the 1990s. Some minor powers relating to archaeological sites remain in the *National Parks and Reserves Management Act 2002*,¹⁴⁰ although this is not the primary Act for protecting archaeological heritage. Tasmania has been an interesting location for archaeological work, as it has some of the finest of the Australian convict period archaeological sites (such as the Port Arthur site).¹⁴¹ It has also had some of the biggest controversies over archaeological heritage, through the fraught relationship between Aboriginal people and archaeologists in the 1990s¹⁴² and the Franklin Dam court action.¹⁴³ Until very recently Tasmania had also adopted a rather unusual approach of stipulating a formula for the maximum expenditure which could be required for works to a historical archaeological site, through the Tasmanian Heritage Council's *Practice Note No 2: Archaeological requirements*.¹⁴⁴

¹³⁸ Unfortunately, the Tasmanian Parliament did not keep Hansard transcripts of Parliamentary debates prior to 1979, therefore it has not been possible to examine the depth of Parliamentary discussion of the *Aboriginal Relics Act* however the Hansard for the *Historic Cultural Heritage Act* has been examined for this chapter.

Pers. Comm. Tasmania Parliament Hansard Unit, 7 October 2004. McGowan also laments this lack in her analysis of the *Aboriginal Relics Act*. McGowan, A. (1996). "A view from the castle: administering Aboriginal heritage legislation in a changing policy environment." *Tempus* 6: 301-309. Pg 302.

¹³⁹ Ward, G. K. (1983). Archaeology and legislation in Australia. *Australian Field Archaeology: A Guide to Techniques*. G. Connah. Canberra, Australian Institute of Aboriginal Studies: 18-42. Pg 29. McGowan, A. (1990). "Background to changing cultural heritage legislation in Tasmania." *Australian Archaeology* 31: 61-66. Pg 61. The *National Parks and Wildlife Act 1970* was repealed in 2002 and replaced by the *National Parks and Reserves Management Act 2002*. Protection required the site to be declared a reserve under the Act. Ward, G. K. (1983). Archaeology and legislation in Australia. *Australian Field Archaeology: A Guide to Techniques*. G. Connah. Canberra, Australian Institute of Aboriginal Studies: 18-42. Pg 30. O'Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. Pg 131.

¹⁴⁰ *National Parks and Reserves Management Act* (2002) Tasmania. Primarily Section 59(1).

¹⁴¹ Which is itself protected by special legislation in the form of the *Port Arthur Historic Site Management Authority Act 1987*.

¹⁴² Allen, J. (1995). "A short history of the Tasmanian affair." *Australian Archaeology* 41: 43-48. , Morell, V. (1995). "Who Owns the Past?" *Science* 268 (5216): 1424-1427. , Murray, T. and J. Allen (1995). "The forced repatriation of cultural properties to Tasmania." *Antiquity* 69 (266): 871-877. , Colley, S. M. (2002). *Uncovering Australia: archaeology, indigenous people and the public*. Crows Nest, N.S.W., Allen & Unwin. Pp 60-61
Murray, T. (1996). *Archaeologists, Heritage Bureaucrats, Aboriginal organisations and the Conduct of Tasmanian Archaeology*. Australian Archaeology '95: Proceedings of the 1995 Australian Archaeological Association Conference, St Lucia, University of Queensland.

¹⁴³ Bates, G. M. (1984). "The Tasmanian Dam Case and Its Significance in Environmental Law." *Environmental Planning Law Journal* 1: 325-345. , Colley, S. M. (2002). *Uncovering Australia: archaeology, indigenous people and the public*. Crows Nest, N.S.W., Allen & Unwin. , Du Cros, H. (2002). *Much more than stones and bones: Australian archaeology in the late twentieth century*. Carlton, Vic., Melbourne University Press. Pp 104-116.
Colley, S. M. (2002). *Uncovering Australia: archaeology, indigenous people and the public*. Crows Nest, N.S.W., Allen & Unwin. Pg 71.

¹⁴⁴ Tasmanian Heritage Council (2000). *Practice Note No 2: Archaeological Requirements*. (now revised May 2006)

The *Aboriginal Relics Act* is designed to protect Aboriginal relics, as individual objects,¹⁴⁵ created before 1876,¹⁴⁶ which is taken to be the date that the original Aboriginal Tasmanians were alleged to have been exterminated.¹⁴⁷ While this view of the extermination of the Tasmania Aboriginal people is no longer widely accepted and there are a significant number of Tasmanian people who assert Aboriginality,¹⁴⁸ this date persists in the legislation. The *Aboriginal Relics Act* establishes the Aboriginal Relics Advisory Council¹⁴⁹ and allows for the declaration of protected sites which contain relics¹⁵⁰ as well as establishing general protections for relics.¹⁵¹ The definition of 'relic' does include Aboriginal human remains in some instances,¹⁵² although steps have been taken to return some public collections of human remains to the Aboriginal community.¹⁵³ The Act underwent substantial review and amendment in the 1980s, following a boycott of the Aboriginal Relics Advisory Council by the Aboriginal community, although the amendments did not go as far as predicted.¹⁵⁴ Writing during the middle of the Act's period of operation, in 1990, McGowan noted that the Act had largely been used to control the activities of archaeologists, rather than developers¹⁵⁵ and that the Act was established with the idea of conserving the "scientific" value of Aboriginal heritage, due to the principally scientific membership of the Relics Advisory

¹⁴⁵ McGowan, A. (1996). "A view from the castle: administering Aboriginal heritage legislation in a changing policy environment." *Tempus* 6: 301-309. Pg 302. See also Murray, T. (1996). *Archaeologists, Heritage Bureaucrats, Aboriginal organisations and the Conduct of Tasmanian Archaeology*. Australian Archaeology '95: Proceedings of the 1995 Australian Archaeological Association Conference, St Lucia, University of Queensland. Pg 319

¹⁴⁶ *Aboriginal Relics Act* (1975) Tasmania. Section 2(4).

¹⁴⁷ McGowan, A. (1990). "Background to changing cultural heritage legislation in Tasmania." *Australian Archaeology* 31: 61-66. , Docherty, J. C. (1993). *Historical Dictionary of Australia*. Sydney, Franklin Watts Australia. Pg 134. This was the year of death of Truganini, the purported last "full blood" Tasmanian Aboriginal person. See also Tatz, C. (1999). "Genocide in Australia." *AIATSIS Research Discussion Papers* No 8. Pp 14-16.; See also Colley, S. M. (2002). *Uncovering Australia: archaeology, indigenous people and the public*. Crows Nest, N.S.W., Allen & Unwin. Pp 68-70.; Du Cros, H. (2002). *Much more than stones and bones: Australian archaeology in the late twentieth century*. Carlton, Vic., Melbourne University Press. Pp 73-76; Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 260-261.

¹⁴⁸ Dobb noted that the Commonwealth definition of 'Aboriginality' is based on three factors: racial origin, identification as an Aboriginal person and acceptance by the Aboriginal community. Dobb, R. (1995). Legislation for Aboriginal places of significance. *Cultural conservation: towards a national approach*. S. Sullivan. Canberra, Australian Government Publishing Service. 9: 39-43. Pg 41.

15,773 Tasmanian residents identified as being of Aboriginal or Torres Strait Islander origin in the 2001 Australia Census, 13,873 in the 1996 Census and 8,882 in the 1991 Census. In 2001, indigenous-identified people constituted 3.45% of the Tasmanian population (total population 456,652), as opposed to 2.2% of the general Australian population (410,003 of 18,972,350 total population). While this does not separate out mainland indigenous people who have relocated to Tasmania, it is unlikely this alone could account for the observed trend of increasing Aboriginal-identified people. The indigenous-identified population has nearly doubled in 10 years, however the overall Tasmanian population trends have been quite variable. Total population was 452,837 in 1991, 459,659 in 1996 then decreasing to 456,652 in 2001. Australian Bureau of Statistics (2002). 2001 Census Basic Community Profile and Snapshot - 6 - Tasmania. Canberra, Australian Bureau of Statistics.

This may represent an increased willingness for people to identify as Aboriginal, however further detailed analysis would be required to demonstrate this categorically.

¹⁴⁹ *Aboriginal Relics Act* (1975) Tasmania. Section 3(1).

¹⁵⁰ *Ibid.* Section 7(1). Section 9(1) outlines the nature of prohibited actions to protected sites.

¹⁵¹ *Ibid.* Section 14(1).

¹⁵² *Ibid.* Section 2(3)(c). The section specifically excludes any remains within formal burial grounds or other marked graves.

¹⁵³ Under the *Museums (Aboriginal Remains) Act* (1984) Tasmania. Interestingly, this Act allows Aboriginal people to cremate any returned remains if desired, and exempts such actions from the provisions of the *Aboriginal Relics Act* 1975. See *Museums (Aboriginal Remains) Act* (1984) Tasmania. Section 8(b).

¹⁵⁴ McGowan, A. (1990). "Background to changing cultural heritage legislation in Tasmania." *Australian Archaeology* 31: 61-66. Pp 64-65.

McGowan, A. (1996). "A view from the castle: administering Aboriginal heritage legislation in a changing policy environment." *Tempus* 6: 301-309. Pg 303. *Aboriginal Relics Act* (1975) Tasmania. Table of Amendments—minor amendments in 1984, 1990, 1991, 1994 and 1995.

¹⁵⁵ McGowan, A. (1990). "Background to changing cultural heritage legislation in Tasmania." *Australian Archaeology* 31: 61-66. Pp 62-63.

Council. This was exacerbated during the resignations of the Aboriginal community representatives in the mid-1980s from the Council, as the Council then relied solely on a scientific assessment of the heritage value of a place.¹⁵⁶ McGowan further noted that the goals of the responsible government agency had significantly changed and had moved to protecting both scientific and Aboriginal significance and providing a greater determinative role to Aboriginal people in the management of protected heritage.¹⁵⁷

While Tasmania did consider introducing historic cultural heritage protection legislation in 1979,¹⁵⁸ it was nearly two decades before the *Historical Cultural Heritage Act* 1995 was passed.¹⁵⁹ The *Historic Cultural Heritage Act* established the Tasmanian Heritage Council¹⁶⁰ and the Heritage Register.¹⁶¹ The Act sets out the main purposes of the Tasmanian Heritage Council, which includes as its primary function the protection of historic cultural heritage for the “benefit of the present community and future generations”, as well as to promote public interest, education and tourism.¹⁶² The Act sets out the criteria for heritage significance.¹⁶³ Under a traditional, “research significance” approach to significance, the most relevant criterion for archaeological heritage is criterion (c) “potential to yield information that will contribute to an understanding of Tasmania’s history”, which was recognised in Parliamentary debate as the main criterion related to archaeological heritage.¹⁶⁴ During the preparation of the Bill, the Aboriginal community specifically requested that Aboriginal heritage be excluded from the new Act.¹⁶⁵ While ‘archaeological’ significance is recognised in the generic definition of “historic cultural heritage significance”,¹⁶⁶ the Act does not otherwise provide protection for historical archaeological sites unless they are listed on the Heritage Register, although it does provide generic protection for historic shipwrecks.¹⁶⁷ The definition of heritage significance is somewhat at variance with wider Australian practice, which is itself based on the Hope Report and the Burra Charter. The Tasmanian Parliament chose to exclude “aesthetic significance” as a consideration,¹⁶⁸ and substantial debate ensued as to whether “social significance” should also be excluded from the legislation as a criterion too

¹⁵⁶ McGowan, A. (1996). "A view from the castle: administering Aboriginal heritage legislation in a changing policy environment." *Tempus* 6: 301-309. Pg 306.

¹⁵⁷ *Ibid.* Pp 302-303.

¹⁵⁸ Parliament of Tasmania (1995). Parliamentary Debates (Hansard), House of Assembly, Forty-Second Parliament - Fourth Session. Speech by Mrs Jackson (Member for Denison), 26 September 1995, Pg 3687

¹⁵⁹ *Ibid.* *Historic Cultural Heritage Bill* Second Reading Speech by Mr Cleary (Member for Franklin, Minister for Environment and Land Management), 26 September 1995, Pp 3681-3686.

McGowan notes in her 1990 article that “it is intended that this new legislation [for non-indigenous heritage] be in place by the end of 1990.” McGowan, A. (1990). "Background to changing cultural heritage legislation in Tasmania." *Australian Archaeology* 31: 61-66. Pg 64.

¹⁶⁰ *Historic Cultural Heritage Act* (1995) Tasmania. Section 5

¹⁶¹ *Ibid.* Section 15

¹⁶² *Ibid.* Sections 7(1)(a), (e), (f) and (g) respectively.

¹⁶³ *Ibid.* Section 16.

¹⁶⁴ *Ibid.* Section 16(c). See also comments by Mr Shaw. Parliament of Tasmania (1995). Parliamentary Debates (Hansard), Legislative Council, Forty-Second Parliament - Fourth Session. 21 November 1995, Pg 4827.

¹⁶⁵ Parliament of Tasmania (1995). Parliamentary Debates (Hansard), House of Assembly, Forty-Second Parliament - Fourth Session. Second Reading Speech, 26 September 1995, Pg 3682

¹⁶⁶ *Historic Cultural Heritage Act* (1995) Tasmania. Section 3

¹⁶⁷ *Ibid.* Sections 64-66. The wording is somewhat ambiguous as to whether a shipwreck must be listed on the Heritage Register in order to be protected.

¹⁶⁸ Parliament of Tasmania (1995). Parliamentary Debates (Hansard), House of Assembly, Forty-Second Parliament - Fourth Session. Second Reading Speech, 26 September 1995, Pg 3683.

broad to be applied effectively.¹⁶⁹ This Act has undergone an extensive review in 2005¹⁷⁰, however the recommendations of that review have not yet been implemented.¹⁷¹ Amongst the recommendations of the Review is the amendment of the Act to include aesthetic significance and bring the legislation into broad conformity with heritage management practise across Australia.¹⁷²

Tasmania has, in many respects, shown the greatest reticence towards heritage legislation, despite the State having some of the most intact historic places in Australia. The debates in the Hansard for the *Historic Cultural Heritage Bill* the strongly reflect the view of many parliamentarians that the Act should not be seen to erode property rights or impose unfairly upon property owners. Substantial debate also ensued as to whether property owners should be reimbursed by the government for the cost of engaging heritage professionals.¹⁷³ The debate as a whole provided a fascinating insight into the misconceptions regarding the archaeological profession in Australia. Clearly there was at least some belief within the Tasmanian Parliament that archaeologists existed within the community who would be prepared to undertake compliance-based archaeological work, stipulated by planning authorities, on a voluntary basis. This reflects ongoing misconceptions that archaeologists exist as a part of an academic or philanthropic community, rather than as business-people or workers who can expect to be paid for assisting clients to undertake legislative compliance-based archaeological works. During the debate, other members refuted this view, and felt it essential that work to heritage sites be undertaken by appropriately qualified, and remunerated, professionals.¹⁷⁴

In a recent development, one of the more controversial aspects of Tasmania's archaeological heritage management has been reformed. In the late 1990s, in response to concern over the mounting costs of archaeological excavations in the State, the Heritage Council issued *Practice Note No.2*,¹⁷⁵ which stipulated a mathematical formula for determining the maximum expenditure which could

¹⁶⁹ Parliament of Tasmania (1995). Parliamentary Debates (Hansard), Legislative Council, Forty-Second Parliament - Fourth Session. This debate on the amendment to exclude "social significance" was largely led by Mr Shaw on behalf of the Opposition, who were opposed to the inclusion of "social" as too general a term to be applied with any precision and had the potential, in their view, to allow almost anything to be listed. The amendment was however defeated in the Committee vote. 21 November 1995, Pp 4808-4823.

¹⁷⁰ Godden Mackay Logan P/L (2005). *Tasmanian Heritage Act Review: A report prepared for Heritage Tasmania and the Department of Parks, Tourism, Heritage and the Arts*. Sydney, Godden Mackay Logan P/L.

¹⁷¹ Department of Parks Tourism Heritage and the Arts (2005). Heritage legislation review finalised (Press release 21 September 2005).

<http://www.heritage.tas.gov.au/21-09-05-a.html>. Accessed 15 February 2006.

¹⁷² Godden Mackay Logan P/L (2005). *Tasmanian Heritage Act Review: A report prepared for Heritage Tasmania and the Department of Parks, Tourism, Heritage and the Arts*. Sydney, Godden Mackay Logan P/L. Pg 13.

¹⁷³ Parliament of Tasmania (1995). Parliamentary Debates (Hansard), House of Assembly, Forty-Second Parliament - Fourth Session. This is contained in a lengthy exchange between Mr Schulze and Mr Wilson and others during Committee debates regarding proposed amendments to the bill. 16 November 1995, Pp 4746-4751.

One parliamentarian cited a particular instance where a development proponent objected to the consultant archaeologist's fee for undertaking archaeological work to a development site. The archaeologist's fee was paid by local government due to the landowner's objection. The parliamentarian further indicated that "it was perhaps improper [for the archaeologist's bill] to have been paid at all in respect to that by local government or anyone else".

Parliament of Tasmania (1995). Parliamentary Debates (Hansard), House of Assembly, Forty-Second Parliament - Fourth Session. Speech by Mr Schulze, 16 November 1995, Pg 4747.

¹⁷⁴ Parliament of Tasmania (1995). Parliamentary Debates (Hansard), House of Assembly, Forty-Second Parliament - Fourth Session. See particularly the exchange between Messrs Shaw, Wilson and Fletcher during the Committee debates. 16 November 1995, Pp 4753-4755.

¹⁷⁵ Tasmanian Heritage Council (2000). Practice Note No 2: Archaeological Requirements.

be required for an archaeological excavation mandated through legislative compliance.¹⁷⁶ One of the stated purposes of the *Practice Note* was to “encourage development solutions which minimise disturbance of significant deposits” through a pre-approval assessment and design review phase.¹⁷⁷ However as the costs were set so low, there was little deterrent value. The newly revised *Practice Note No.2*,¹⁷⁸ while still emphasising impact minimisation to archaeological places, has dispensed with the formula. The revised *Practice Note No.2* states that while archaeological sites most commonly have heritage significance due to their ability to provide new information about the past (that is, research significance) they may have other values, including social and associative significance. This represents a great theoretical advance in the administration and management of heritage in Tasmania, although it is too early to know what practical effect this will have in the management of historical archaeological sites in the State.

Tasmania’s heritage management regimes for both indigenous and non-indigenous archaeological heritage have been fraught with controversy, however the policy development and proposed legislative changes identified in the last year are beginning to address these issues. The recent review of non-indigenous heritage legislation has not proposed any radical changes for archaeological heritage management, and is recommending the continued use of listing as the primary tool for protecting archaeological sites.¹⁷⁹ This recommendation is based, in part, on the fact that Tasmania does not suffer from the same development pressure as other parts of Australia,¹⁸⁰ thus there is the opportunity to undertake more up-front research rather than reactive compliance. Such an approach is certainly desirable, and it will be interesting to see if Tasmania takes the opportunity to put such policy and planning tools into place in future. Tasmania has illustrated perhaps the worst of the politics of heritage management in Australia, particularly in relation to indigenous heritage. Moves appear to be underway to broaden the conception of the values of archaeological heritage and treat it as a shared concern for the broader community. Should this prove successful, Tasmania will be in a good position to put ‘public good’ conceptions of archaeological heritage conservation into practice for the future. Such a framework, which allows consideration of wider issues affected by or affecting archaeological heritage, may help to diffuse some of the political concern which surrounds archaeological heritage conservation.

¹⁷⁶ This formula was expressed as the archaeological significance of the site, multiplied by the impact of development works, multiplied again by the footprint (in square metres) of the new development. Under the formula, the maximum expenditure which could be required on archaeological works, irrespective of the significance of the site, was AUD\$100,000. A representative from the Tasmanian Heritage Office contacted during the course of research for this thesis, indicated the formula had been used in the order of 10 times since its inception. Pers. comm. James Puustinen, Heritage Research Officer, Tasmanian Heritage Office (12 October 2004).

¹⁷⁷ Tasmanian Heritage Council (2000). *Practice Note No 2: Archaeological Requirements*. Pg 1–Preamble.

¹⁷⁸ Tasmanian Heritage Council (2006). *Practice Note No 2: Archaeological Requirements (Revised May 2006)*.

¹⁷⁹ Godden Mackay Logan P/L (2005). [Tasmanian Heritage Act Review: A report prepared for Heritage Tasmania and the Department of Parks, Tourism, Heritage and the Arts](#). Sydney, Godden Mackay Logan P/L. Pp 31-32.

¹⁸⁰ *Ibid.*

6.7 Western Australia

Western Australia adopted legislation to protect Aboriginal heritage from a relatively early date, however legislation to protect other forms of heritage did not follow for nearly two decades. Aboriginal heritage legislation was originally proposed in 1968, but the *Aboriginal Heritage Bill* was not introduced into Parliament and passed until 1972.¹⁸¹ Protection for other types of heritage was introduced in 1990, through the *Heritage of Western Australia Act* 1990, which established the Heritage Council of Western Australia¹⁸² and the Register of Heritage Places¹⁸³ as the primary mechanism for protecting non-indigenous heritage places.

The *Aboriginal Heritage Act* 1972 remains the key instrument for protecting Aboriginal heritage, which was established to:

...make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants...¹⁸⁴

The expressed intent of the Act is to protect places and objects of Aboriginal heritage significance “for the community”, including the contemporary Aboriginal community. The Act links significance to custom and tradition rather than scientific value. In this respect, it is similar to the approach of the South Australian *Aboriginal Heritage Act* 1988. During Parliamentary debate, the government stated that its intent was to protect Aboriginal sites and objects principally to support the social practices of Aboriginal people, but also recognised the importance of the archaeological contents of sites to broaden an understanding of the Australian past.¹⁸⁵ By contrast, the Opposition of the day viewed the legislation as primarily focussed on preserving items for museums or for scientific study. There was also a clear view, on the part of the Opposition, that the Act should not delay the progress of other works or development through the protection of heritage sites or objects¹⁸⁶ as well as an expressed fear that the Act could be misused by “unscrupulous Aborigines” to disrupt works.¹⁸⁷ This sentiment was echoed nearly 20 years later during the debates on the *Heritage of Western Australia Bill* in 1990.¹⁸⁸ In order to keep certain projects free from complications arising under the Act, there have

¹⁸¹ Parliament of Western Australia (1972). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Twenty-Seventh Parliament Third Session. Speech by Mr Harman (Member for Maylands), 5 September 1972, Pg 2968

¹⁸² *Heritage of Western Australia Act* (1990) Western Australia. Section 5(1).

¹⁸³ *Ibid.* Section 46(1).

¹⁸⁴ *Aboriginal Heritage Act* (1972) Western Australia. Preamble.

¹⁸⁵ Parliament of Western Australia (1972). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Twenty-Seventh Parliament Third Session. Aboriginal Heritage Bill Second Reading Speech by the Hon W.F. Willesee (Member for North-East Metropolitan, Leader of the House), 11 April 1972, Pp 471-472. These sentiments were echoed in other speeches later in the debate including the Hon W.R Withers (Member for North), 20 April 1972, Pg 837 and Mr Ridge (Member for Kimberley), 5 September 1972, Pg 2969.

¹⁸⁶ *Ibid.* Speech by the Hon G.C. MacKinnon (Member for Lower West), 20 April 1972, Pg 831.

¹⁸⁷ *Ibid.* Speech by The Hon L.A. Logan (Member for Upper West), 4 May 1972, Pg 1245.

¹⁸⁸ Parliament of Western Australia (1990). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Thirty-Third Parliament Second Session. Speech by Mr Lewis (Member for Applecross) 21 August 1990, Pg 3825.

been instances where special legislation has been used to exempt areas from compliance with the legislation.¹⁸⁹

The *Aboriginal Heritage Act* protects “Aboriginal cultural material” as well as “Aboriginal sites”,¹⁹⁰ which have quite extensive definitions¹⁹¹ and focus particularly on “sacred” places and objects which have “important or special significance”¹⁹² to Aboriginal people living in accordance with customary law¹⁹³ or which have historical, archaeological or ethnographic value to the State.¹⁹⁴ Fulcher cites a Western Australian Supreme Court case where a “sacred site” was defined based on Aboriginal tradition rather than on historical records or physical (that is, archaeological) evidence¹⁹⁵ thus within Australian case law and emerging heritage management policy there exists some scope for the primacy of a community view to take precedence over a ‘scientific’, archaeological view of a site’s significance. Excavation of Aboriginal sites is controlled,¹⁹⁶ and sites of particular importance may be designated as protected areas under the Act,¹⁹⁷ while other “Aboriginal cultural material” (such as moveable objects or artefacts) undergo a separate process of assessment to be classified as protected,¹⁹⁸ with all protected sites and objects recorded in a Register.¹⁹⁹ Despite these detailed controls, the Act has been described as “weak” and in the past the Act has been amended to specifically facilitate a development project desired by the government of the day.²⁰⁰

The intention of the *Aboriginal Heritage Act* expressed during debates was that consultation should occur prior to an excavation of a site being authorised. It was also stated that a certain level of “professional standing” would be required before such a permit could be granted:

...I would point out that that the decision to permit an excavation is necessarily based on more than an appreciation of the site itself. The trustees [of the Act] would certainly be expected to seek local Aboriginal opinion before permitting an excavation but the judgement would also depend upon such factors as the professional standing of

¹⁸⁹ A number of areas are exempted from the Aboriginal Heritage Act under the *Aboriginal Heritage (Marandoo) Act* (1992) Western Australia.

¹⁹⁰ *Aboriginal Heritage Act* (1972) Western Australia. Section 4.

¹⁹¹ *Ibid.* Sections 5 and 6 respectively. These definitions elaborate considerably on those initially set out in Section 4.

¹⁹² *Ibid.* Section 5.

¹⁹³ *Ibid.* Section 8.

¹⁹⁴ *Ibid.* Section 5(c).

¹⁹⁵ Fulcher, J. (1999). “Changes proposed to the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and their impact on project developments.” *Australian Environmental Law News* (2): 67-69. Pg 68. The case is *Noonkanbah Pastoral Co Pty Ltd v. Amax Iron Ore Corporation*, Unreported, Supreme Court of Western Australia, Brisden J, 27 June 1979. This case is examined in the context of judicial reasoning on archaeological and heritage matters in Chapter 5.

¹⁹⁶ *Aboriginal Heritage Act* (1972) Western Australia. Section 16

¹⁹⁷ *Ibid.* Section 19. Section 20 allows the declaration of protected areas on a temporary basis.

¹⁹⁸ *Ibid.* Section 40.

¹⁹⁹ *Ibid.* Section 38.

²⁰⁰ In 1980 the Act was amended to facilitate the Noonkanbah mining development. See discussion in Toussaint, S. (1995). Western Australia. *Contested Ground: Australian Aborigines under the British Crown*. A. McGrath. St Leonards, Allen & Unwin: 240-269. Pp 261-262. Similarly the *Aboriginal Heritage (Marandoo) Act 1992* (WA) identified a number of areas associated with various developments which were exempted from the provisions of the Act. This is a similar, though more heavy-handed, legislative approach to that of the 2005 amendments to the NSW *Environmental Planning and Assessment Act 1979*, Section 3A, which allows the Minister to declare certain areas or developments exempt from the heritage provisions of the NSW *National Parks and Wildlife Act 1974* and *Heritage Act 1977*. See also discussion of the *Hindmarsh Island Bridge Act 1997* (SA) earlier in this Chapter.

the institution supporting the work, and the professional competence and character of the individuals who will carry out the excavation. Archaeological sites are a limited commodity and represent a declining resource of our cultural heritage...²⁰¹

The Act clearly privileges Aboriginal people living a “traditional” or “customary” lifestyle, in terms of providing access to sites and objects,²⁰² but such a construction belies at least to some extent the fact that Aboriginal people living “non-traditional” (as defined by anthropologists and ethnographers) lifestyles may well have a legitimate claim to the use and enjoyment of their heritage. This again highlights the concerns of Fourmile and others²⁰³ discussed earlier in this chapter, regarding the fallacies inherent in legally privileging a narrowly constructed anthropological view of the “traditional” Aboriginal in the protection of the remains of the Aboriginal past.

The *Aboriginal Heritage Act* is criticised by Ritter as not being a particularly effectual piece of legislation, which, in his view, is designed to facilitate and legitimate the destruction of Aboriginal heritage, rather than preserving that heritage for the Aboriginal community.²⁰⁴ This is borne out in the composition of the Aboriginal Cultural Material Committee, an advisory body constituted under the Act,²⁰⁵ as there is no requirement that the membership include Aboriginal persons. However there is a requirement that one of the members be an anthropologist with “specialised experience in the field of anthropology as related to the Aboriginal inhabitants of Australia.”²⁰⁶ This leaves open the interpretation that the Act and the Committee are primarily in existence to protect Aboriginal heritage for the scientific (anthropological, archaeological, professional) community rather than for Aboriginal people or the public at large. This is particularly notable as the Committee is the sole arbiter of the importance of Aboriginal heritage places or objects “on behalf of the community”,²⁰⁷ although the Act does direct that primary importance be attached to sacred or spiritual beliefs with respect to significance, above other types of significance, including archaeological significance.²⁰⁸ This granting of primacy to Aboriginal spiritual significance over other values is also recognised in the classification process for objects.²⁰⁹

Protection for non-indigenous heritage in Western Australia was much delayed and the *Heritage of Western Australia Act* was not passed until 1990.²¹⁰ Legislation to protect non-indigenous heritage in Western Australia

²⁰¹ Parliament of Western Australia (1972). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Twenty-Seventh Parliament Third Session. Speech by the Hon W.F. Willesee, 4 May 1972, Pg 1246.

²⁰² *Aboriginal Heritage Act* (1972) Western Australia. Sections 7 and 8.

²⁰³ Fourmile, H. (1996). “The law of the land : whose law, whose land.” *Tempus* 5 (1996): 9-17.

Jago, M. and N. Hancock (1998). “The case of the missing blanket : indigenous heritage and states’ regimes.” *Indigenous Law Bulletin* 4 (16): 18-21.

²⁰⁴ Ritter, D. (2003). *Trashing Heritage: Dilemmas of rights and power in the operation of Western Australia’s heritage legislation. History and Native Title*. C. Choo and S. Hollbach. Crawley, W.A., Centre for Western Australian History University of Western Australia. 23: 195-208.

²⁰⁵ *Aboriginal Heritage Act* (1972) Western Australia. Section 28.

²⁰⁶ *Ibid.* Section 28(3).

²⁰⁷ *Ibid.* Section 39(1)(a).

²⁰⁸ *Ibid.* Section 39(3).

²⁰⁹ *Ibid.* Section 40(a).

²¹⁰ The first discussions by Parliament regarding heritage legislation took place in 1974. Legislation was not introduced for debate however until the Heritage Places Bill 1987 and the Heritage Enhancement and Preservation Bill 1989 (which applied to government-owned property only), neither of which successfully passed

was prompted by a number of incidents of wanton demolition of heritage buildings in other states (particularly Queensland)²¹¹ as well as specific problems with government-sponsored developments in the state capital of Perth, particularly at the Swan Brewery site.²¹² The legislation engendered an enormous amount of debate, perhaps more so than any other Australian jurisdiction,²¹³ particularly around the issue of whether landholders should be compensated if their property was heritage listed. The Act established the Heritage Council of Western Australia,²¹⁴ the Register of Heritage Places²¹⁵ and the criteria for heritage significance.²¹⁶ A permit is required to affect places listed on the Register or subject to a Conservation Order.²¹⁷ The Act does not however specifically protect archaeological sites or objects, unless they are listed on the Register, although the importance of this type of heritage was recognised during Parliamentary debate.²¹⁸ The standard for listing requires not only that a place meets the significance criteria²¹⁹ to be registered but also that the place has significance for present and future generations.²²⁰ While listing procedures for placing items on the Register are similar to those used in other jurisdictions, removal of an item requires a resolution of both houses of Parliament for the removal to take effect.²²¹ The effect of this is as much to limit the listing of places, through the establishment of a high administrative threshold, as it is to prevent their removal once listed. Such a provision requires a great level of commitment at both an administrative and political level in order to see a place listed on the Register.

The Act makes special provision for areas to be listed on the basis of “scientific” significance, including, but not necessarily limited to, archaeological places:

in the case of places of particular scientific or other special interest, the extent to which the place has contributed, or may be likely to contribute, to knowledge or research²²²

This clause appears designed to capture the essence of Bickford and Sullivan’s archaeological significance criteria, for archaeological work to be

through Parliament. Parliament of Western Australia (1990). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Thirty-Third Parliament Second Session. Second Reading Speech by the Hon Kay Hallahan (Member for East Metropolitan, Minister for Heritage), 11 September 1990, Pg 4722. See also comments by the Hon P G Pendall (Member for South Metropolitan), 12 September 1990, Pg 4898.

²¹¹ Fisher, R. (1991). 'Nocturnal demolitions': the long march towards heritage legislation in Queensland. [Packaging the past? Public histories](#). J. Rickard and P. Spearritt. Melbourne, Melbourne University Press: 55-69.

²¹² Churches, S. C. (1992). "Aboriginal heritage in the wild west: Robert Bropho and the Swan Brewery site." [Aboriginal Law Bulletin](#) 2 (56): 9-13.

²¹³ Judging by the sheer volume on Hansard surrounding the Bill during 1989 to 1990, as compared to other debates examined for this thesis.

²¹⁴ *Heritage of Western Australia Act* (1990) Western Australia. Section 5.

²¹⁵ *Ibid.* Section 46.

²¹⁶ *Ibid.* Section 47.

²¹⁷ *Ibid.* Section 64.

²¹⁸ Parliament of Western Australia (1990). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Thirty-Third Parliament Second Session. See, for example, comments by Mr P J Smith (Member for Bunbury), 23 August 1990, Pg 4113. "What is under the ground is also important. Artefacts are buried on many archaeological sites and these sites should be preserved." See also comments by the Hon Kay Hallahan, 18 October 1990, Pg 6298.

²¹⁹ The Western Australian heritage significance criteria are similar to those used across Australia, although somewhat abbreviated.

²²⁰ *Heritage of Western Australia Act* (1990) Western Australia. Section 47(1)(a).

²²¹ *Ibid.* Section 54(7).

²²² *Ibid.* Section 47(2)(c).

tied to places which were able to contribute new knowledge of the past.²²³ Applied appropriately, this criterion should ensure that no site is listed on the basis of dubious scientific value or marginal ability to contribute to knowledge of the past. The very tight nature of this criterion may be reflected in the fact that there is only one place specifically listed as an archaeological site in the Register of Heritage Places,²²⁴ although it is likely other places entered within the Register have archaeological heritage values. During debate on the Act, one parliamentarian indicated there was an expectation that the operators of the legislation would act with discretion in its administration,²²⁵ to avoid the problem of the Act becoming trivialised. The comment appears to anticipate the potential for a legalistic approach to the definition of archaeological heritage, in a manner which leads to outcomes of negligible value. As noted earlier in the chapter, South Australia dealt with this issue through the simple method of requiring an archaeological object to also have demonstrable heritage significance. This principle is inherent in regimes which require listing of archaeological places, in advance (of threat), in order for them to be protected, as is the case in Tasmania.

The legal protections for historical archaeological heritage are considerably less detailed. While much legislation focuses on its protective value for heritage, the *Heritage of Western Australia Act* 1990 is explicit that its goals, while including conservation and enhancement of heritage sites, also include the facilitation of the development of such sites.²²⁶ This stated intent came about through a heated debate regarding the need to protect the property rights of West Australian landowners. Gerus views the statements of intent in the Act as an attempt to strike a balance within the legislation.²²⁷ Concern with property rights in this manner largely revolved around the issue of providing certainty for landowners and developers as to the actual value and potential uses of an area which was heritage listed.²²⁸ These concerns continue into the present day, as can be seen from many of the submissions to the Productivity Commission Inquiry. While the stated intent is to “facilitate development that is in harmony with the cultural heritage values of that area” it is almost impossible to see how such an outcome could be achieved with respect to any archaeological heritage protected under this legislation, particularly if the focus was on the research significance of a site. This may explain why virtually no archaeological sites are listed on the Western Australian Register of Heritage Places.

In some respects, the early West Australian Aboriginal heritage legislation was ahead of its time, as while it recognised the scientific value of

²²³ See discussion in Chapter 2, as well as Bickford, A. and S. Sullivan (1984). Assessing the research significance of historic sites. *Site Surveys and Significance Assessment in Australian Archaeology*. S. Sullivan and S. Bowdler. Canberra, Dept. of Prehistory Research School of Pacific Studies Australian National University: 19-26.

²²⁴ A search of the State Register of Heritage Places on 8 August 2006 identified ten places specifically identified as archaeological sites, out of approximately 1000 places listed on the Register.
<http://register.heritage.wa.gov.au/index.html>

²²⁵ Parliament of Western Australia (1972). Parliamentary Debates (Hansard) Legislative Council and Legislative Assembly. Twenty-Seventh Parliament Third Session. Speech by the Hon W.F. Willesee, 9 May 1972, Pg 1339.

²²⁶ *Heritage of Western Australia Act* (1990) Western Australia. Sections 4(2)-4(3)

²²⁷ Gerus, M. (1993). "The Heritage of Western Australia Act 1990 and culturally sustainable development." *Australian Environmental Law News* 3: 31-39. Pg 32.

²²⁸ James, P. C. and J. Mora (1996). *Australian Mosaic: A handbook for the conservation of the National Estate*. Cairns, Mukkamanna Holdings. Pp 18-19.

archaeological places, it also linked their significance more strongly to the value of the place to the indigenous community. This is commendable, but West Australian governments have shown a great willingness to set such legislation aside when necessary to facilitate a development project. Historical archaeology protection in the State has fared little better, with few places registered and no other protections in place. The political dimension of archaeological heritage and its perceived threat to other legitimate interests further highlights the need for a framework such as ‘public good conservation’ which can accommodate these considerations when determining the appropriate course for managing an archaeological heritage issue.

6.8 Conclusion—Many laws, many approaches

All Australian jurisdictions have, in different ways, recognised the importance of Australia’s archaeological heritage and each provides a protective mechanism which *may* be used to protect that heritage in certain circumstances. The diversity of approaches is quite substantial, painting a rather haphazard picture of the legislative effectiveness of archaeological heritage protection law across Australia. In general, most Australian jurisdictions have favoured the protection of archaeological sites through placing them on a list or register, rather than by establishing blanket protection across the entire jurisdiction.²²⁹ The reason, in large part, is the desire on the part of many Australian legislatures not to unnecessarily burden landowners or the State with the significant unknowns which can arise from the presence of archaeological sites on land. Whereas blanket protection for archaeological sites tends to err on the side of caution for the interests of archaeologists and/or Aboriginal people, the listing approach errs on the side of the property owner. There is a middle ground, supported by appropriate significance frameworks, which would achieve a better balance of competing factors.

Clearly archaeological heritage remains a poor second cousin to built or natural heritage in the eyes of lawmakers. The legislative understanding of the significance of the archaeological heritage is almost exclusively based on a conception of that heritage as having “scientific” significance to the professional archaeological community, or having “traditional” significance to indigenous people. Both of those interests reside in the minority and are unlikely to sway the popular conscience, and thereby the conscience of the legislators, unless archaeological heritage is seen as relevant to the wider community. Certain archaeological sites have been used to construct community identities (for example, Port Arthur Tasmania or Gallipoli in Turkey),²³⁰ and the potential exists for archaeological sites to be significant to the community at a national, state/territory or local level if appropriately presented to the community. Archaeological sites remain difficult to manage in a legal sense without creating an enormously burdensome administrative system. Legal mechanisms continue to focus on the protection of sites and objects first and foremost, as these are the tangible elements of the archaeological heritage and those which the layperson, including legislators,

²²⁹ Although see the NSW and Victorian approaches, addressed in Chapter 7.

²³⁰ Ireland, T. (1996). *Excavating national identity. Sites: nailing the debate: archaeology and interpretation in museums*. C. Paine. Sydney, Historic Houses Trust of NSW: 85-106.

most readily associates with archaeology as a discipline. This, particularly, fails to cater for indigenous or other community values which may attach to a place.

While lawmakers over the last thirty years of debate regarding heritage legislation have often been aware of the need to present the archaeological heritage to the community, the mechanisms for doing so in Australian legislation are not particularly robust. They suffer from a tendency to either assume (rightly or wrongly) that an institution (a museum or a university) will step into the role of presenting the archaeological heritage to the community, or leave the onus on the body administering the Act, but without a specific mandate or mechanism to allow effective transmission of the archaeological heritage to present and future generations. The recognition of the importance of sites to indigenous communities provides a model, albeit an imperfect one, to strive for in future legislation in Australia. With Aboriginal heritage, many jurisdictions do recognise that there is a tangible link between the physical remains of the indigenous past and contemporary identities. If that conception is extended to the wider community in a legal sense, management decisions can begin to be made about how important a site is to the wider community, the ability of a site to present or educate the community about an aspect of its own past or how a site may be used to build links between the community and its heritage.

Such a model, which tests the public qualities of a site on an equal or superior basis to any scientific or research potential begins to lead towards public good conservation outcomes. A few of the regimes analysed throughout this chapter begin to hint at how such a legislative regime may work, by prioritising protective mechanisms around the significance of the site to the community or by giving higher consideration to the community values of a site. But none of the existing legal regimes point to a clear path in recasting the legal protection of archaeological heritage from a focus on scientific value to public good value. In terms of achieving public good conservation outcomes, these regimes provide limited opportunities, save for the ability to specify conditions of consent when a site is authorised to be disturbed, which may be used to direct some public benefit from the project, but only in a post hoc manner. A 'public good' framework which explicitly recognises other legitimate concerns and weighs them against the 'scientific' values for archaeological sites, may lessen some of the political concerns about the importance or value of archaeological heritage conservation and reduce the governmental propensity to establish special legislation to override heritage legislation when politically expedient.

Chapter 7 considers two Australian jurisdictions in more depth, examining the legal mechanisms and approaches of New South Wales and Victoria to archaeological heritage protection. These states, which are the most populous and, in the case of NSW, the longest settled by non-indigenous people, have the most comprehensive archaeological heritage protection legislation in Australia. The approaches between the two states are quite distinct, and analysis will demonstrate that even comprehensive legislation does not lead to better outcomes for Australia's archaeological heritage.

Chapter 7—Legislative case studies: New South Wales and Victoria

Two jurisdictions, New South Wales and Victoria, have been selected for more detailed study and analysis. These two States have the most comprehensive heritage legislation which has been operating uninterrupted for the longest period of time. Additionally, as the two most populous states, they have been the subject of the greatest development pressures, particularly in urban areas, and have the greatest quantity of data for analysis. Each state has a different approach in law to managing its archaeological heritage, however the mechanisms used have many fundamental similarities. Wherever possible, reliance has been placed on published figures of permits and approvals issued (from Annual Reports) and, to a lesser extent, the original records of the authorities and the databases they use to track this type of information. However, during this research, it was noted that there are minor discrepancies between various sets of figures. This seems to relate to a range of factors, including missing or incomplete original records for the early years of administering the legislation, inconsistent reporting practices and errors during transcription of data between manual and electronic systems. Nevertheless, observable trends are evident in the data. Analysis of these jurisdictions demonstrates that, despite the strong scientific emphasis of long-standing compliance regimes such as these, this has not led to a true realisation of the scientific value of archaeological heritage in these States. Additionally, it is possible to observe how the quantity of compliance-based archaeological work has been ever-increasing, however the quality and quantity of the outcomes of compliance have not matched the level of legal and administrative effort which has gone into the management of archaeological heritage. This illustrates that there are fundamental limitations with the scientific protective paradigm, as even in jurisdictions with comprehensive legislation and long-running protective programs, the goal of protecting archaeology for science has had a very limited effect. A change in the protective paradigm, to a 'public good' model, opens up the possibility of a different range of processes and associated outcomes which may better serve both heritage conservation and the public.

7.1 Case Study—Victoria

Victoria is one of two Australian jurisdictions to have implemented specifically archaeological legislation, in the form of the *Archaeological and Aboriginal Relics Preservation Act 1972*.¹ While this was an early date for the legal protection of cultural heritage in Australia, by comparison Victoria had taken legislative steps to protect natural heritage and native species in the nineteenth century.² The *AARP Act* is limited to the protection of Aboriginal archaeological heritage and, while somewhat modified from its original form, continued in force for the protection of Aboriginal heritage until quite recently.

¹ Hereafter *AARP Act*. The other jurisdiction is Western Australia, in the form of the *Maritime Archaeology Act 1973*, however maritime archaeological issues are excluded from discussion in this thesis.

² Seebeck, J. (1995). "The Conservation of mammals in Victoria - development of legislative controls." *Journal of Australian Studies* (45): 53-65.

It will shortly be replaced by the *Aboriginal Heritage Act* 2006.³ Victoria is also the subject of a special section of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984, which gives the Commonwealth the power to protect indigenous places and objects.⁴ This power is delegated back to the relevant Victorian State Minister.⁵ A bill is presently before the Australian Parliament to amend the *ATSHP Act* 1984, to repeal the specific provisions relating to Victorian Aboriginal heritage, as a consequence of the *Aboriginal Heritage Act* which has recently passed through the Victorian Parliament.⁶ As these new arrangements are not yet in place, the following discussion focuses on the management regime which was in existence prior to the passage of the *Aboriginal Heritage Act*. The *Heritage Act* 1995 protects historical archaeological heritage, as well as buildings and other historic sites. The *AARP Act* is administered by Aboriginal Affairs Victoria, with much power delegated to local Aboriginal community groups, while the *Heritage Act* is administered by Heritage Victoria, the government agency which grew out of the amalgamation of the Historic Buildings Commission and the Victoria Archaeological Survey (VAS) in the mid-1990s.

From the early 1970s, Victoria took a very direct approach to managing archaeological heritage, primarily focussed on Aboriginal archaeological materials. When initially proposed in 1972, the Government acknowledged it was drawing its legislative cues from antiquities legislation in the Middle East, and focussed the legislation on “preserv[ing] for posterity knowledge of the traditions of the indigenous peoples...prevent[ing] the plundering of relics...and to protect such relics from the depredation of vandals.”⁷ The acknowledgement of the Middle East as the source of legislative inspiration suggests a particular bias inherent in the Victorian approach to protecting archaeological heritage from the outset. Much of the Classical World and the Middle East had had antiquities legislation for some time, reflecting perhaps a postcolonial determination to protect archaeological heritage from the mass export which had occurred particularly to Europe in from the eighteenth to early twentieth centuries. Greece, Iraq and Iran all had antiquities legislation

³ The *Aboriginal Heritage Bill* passed through the Victorian Parliament in May 2006. Once its administrative structures are in place, including the appointment of the Victorian Aboriginal Heritage Council, it will repeal and supplant the procedures under the *AARP Act*.

⁴ *Aboriginal and Torres Strait Islander Heritage Protection Act* (1984) Commonwealth. Part IIA, Sections 21A to 21ZA. This section of the Act was added under the *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act* 1987 following the referral by Victoria of powers in this area to the Commonwealth. This situation does not exist with other Australian jurisdictions. Smith notes that this resulted from an inability by the Victorian government of the day to successfully repeal the *AARP Act* and give Aboriginal groups direct control over Aboriginal heritage, due to State-level political resistance. This was overcome by enacting special provisions of the Commonwealth legislation, which could override the State legislation if necessary. See Smith, L. (1996). *Prehistorical and Historical Archaeology*. Sydney, University of Sydney. Chapter 8: Victorian Legislation. Note that Dr Smith kindly supplied her thesis to me in electronic form, thus citations of this thesis are to the thesis chapter only, rather than to the page.

Boer, B. and G. Wiffen (2006). *Heritage Law in Australia*. South Melbourne, Oxford University Press. Pp 268-270.

⁵ *Aboriginal and Torres Strait Islander Heritage Protection Act* (1984) Commonwealth. Section 21B.

⁶ *Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill* (2005)(Cth). Introduced to the Federal Parliament on 12 October 2005. Second Reading on 12 May 2006 and still under consideration by Parliament. This Bill, while supported by the opposition parties, has been criticised for not going further in fully implementing the results of the 1996 Evatt Report into the *ATSHP Act*. See speeches by:
Senator Kim Carr (Labor) 11 May 2006 Senate Hansard, Pp 39ff.
Senator Andrew Bartlett (Democrats) 11 May 2006 Senate Hansard, Pp 43ff.
Senator Rachael Siewert (Greens) 11 May 2006 Senate Hansard, Pp 46ff.

⁷ Parliament of Victoria (1972). Hansard, Melbourne: Victorian Government Printer. Second Reading Speech by Mr Hamer, Chief Secretary. 7 March 1972, Pg 3959

from the 1930s, Egypt in 1951 and the balance of the region enacting legislation in the late 1960s through the 1970s.⁸ But the countries of the Middle East faced very different issues from Victoria, in terms of past loss of antiquities to colonial powers and the enormous trade in antiquities from that region, which continues today. By looking to the Middle East for a model, Victorian legislators built certain assumptions into the domestic legislation which may not have been truly relevant to Australia. This can be seen specifically in the elaborate and impractical controls on the trade in Aboriginal artefacts contained in the legislation. These assumptions were further cemented when the protections for historical archaeological sites were passed into the *Heritage Act*, as the Government explicitly adopted a largely identical legal approach to that in the *AARP Act*, with no debate on this aspect of the legislation.⁹

In 1973 the Victorian State Relics Office, later to become the Victoria Archaeological Survey (VAS), was established as a government agency with responsibility for identifying and cataloguing archaeological sites across the State, as well as administering the provisions of the *AARP Act*.¹⁰ Within 18 months, over 1500 archaeological sites had been identified and the Office had established a wide network of site wardens, conducted archaeological field schools, and set about establishing “minimum standards” for the undertaking of archaeological fieldwork.¹¹ VAS later conducted survey and excavation projects for government agencies and the private sector,¹² published *A Planner’s and Developer’s Guide to Victorian Archaeological Sites*,¹³ an early attempt at engagement between the archaeological and development community in Australia, as well as establishing a training program for Aboriginal sites officers.¹⁴ Coutts noted that this relationship between VAS and landowners later soured, due to the politicisation of the issues surrounding Aboriginal sites and a fear that the presence of sites would make the land subject to a claim under Aboriginal land rights legislation.¹⁵ It is clear from the Parliamentary debates in 1972 that the main intent of the legislation was the protection of Aboriginal heritage¹⁶ and the transmission of that

⁸ Greece: Act No 5351 of 24 August 1932, concerning the search for and preservation of antiquities; Iran: *Antiquities Law* 1930; Iraq: *Antiquities Law* 1936; Egypt: *Protection of Antiquities Act* 1951. See O’Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. Appendix I: National Legislation

⁹ Parliament of Victoria (1995). Hansard, Melbourne: Victorian Government Printer. *Heritage Bill* Second Reading Speech by Mr MacClellan, 7 September 1995, Pg 151.

The Bill was further debated by the Legislative Assembly on 14 and 16 November 1995 with no discussion of archaeological issues. Similarly, Legislative Council debate on the Bill on 21, 22 and 23 November 1995 engendered no debate regarding the proposed archaeological provisions.

¹⁰ Coutts, P. J. F. (1975). “Victorian Relics Office.” *Australian Archaeology* 2: 32-33.

¹¹ *Ibid.* Pg 33. See also Victoria Archaeological Survey (1981). *Archaeological excavation: notes on principles and techniques*. *Technical Series*. Melbourne, Victoria Archaeological Survey.

¹² Coutts, P. J. F. (1980). “Report of activities 1978-79.” *Records of the Victorian Archaeological Survey*, (10): 1-39.

¹³ Victoria Archaeological Survey (1977). *A Planner’s and Developer’s Guide to Victorian Archaeological sites*. Melbourne, F D Atkinson, Government Printer.

¹⁴ Bird, C. and J. Gallagher (1992). The Victoria Archaeological Survey’s Site Officer Training Scheme. *Aboriginal Involvement in Parks and Protected Areas*. J. Birkhead, T. De Lacy and L. Smith. Canberra, Aboriginal Studies Press: 319-324.

¹⁵ Coutts, P. J. F. (1984). A Public Archaeologist’s View of Future Directions in Cultural Resource Management. *Archaeology at ANZAAS, Canberra*. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pp 213-214.

¹⁶ This general tenor of the debates is restricted to the discussion of Aboriginal heritage and includes one comment from Mr. Bornstein (Member for Brunswick East): “to all intents and purposes archaeological relics in the continent of Australia are Aboriginal relics.” Parliament of Victoria. 21 March 1972, Pg 4310.

heritage to future generations.¹⁷ However, VAS and the *AARP Act* also held a limited oversight of historical archaeology following a High Court decision in 1981,¹⁸ although this was outside of its main focus and expertise,¹⁹ and protections for historical sites were removed from the *AARP Act* and incorporated into the *Heritage Act* in 1995, as a part of a comprehensive legislative review.²⁰

7.2 Protecting Victorian Aboriginal Heritage

The management of Aboriginal archaeological heritage in Victoria is now largely in the hands of Aboriginal people, through the delegation of powers by Aboriginal Affairs Victoria to a range of local Aboriginal community groups. This was always the original intent of the legislation, with the Minister for Aboriginal Affairs remarking in 1972:

“one of the principal objectives [of the legislation]...is to encourage Aborigines to take part in activities which are based on their pre-history and the preservation of their own standards of values...It is my hope that the Aborigines will become collectors of their own relics and exhibit them for the purpose of educating non-Aboriginal people.”²¹

These sentiments, while high-minded, indicate a belief that Aboriginal people would want to treat their archaeological heritage in much the same fashion as an archaeologist, through developing and exhibiting groups of archaeological objects. And while self-management of indigenous heritage has been supported at the political level, the management of archaeological heritage by the Aboriginal community has not necessarily been welcomed by some archaeologists over the last three decades.²²

¹⁷ Parliament of Victoria (1972). Hansard, Melbourne: Victorian Government Printer. Speech by Mr Edmunds, Member for Moonee Ponds. 21 March 1972, Pg 4317. Although at least one parliamentarian took the view that the Government was attempting to “force” people into being interested in Aboriginal heritage. Speech by Mr Wilkes, Member for Northcote, 21 March 1972, Pp 4320-4321

¹⁸ Heritage Victoria (2003). *Archaeology Administration and Legislation in Victoria: A discussion paper*. Melbourne, Heritage Victoria. Pg 5.

Onus v. Alcoa of Australia Ltd. (1981) 149 CLR 27

¹⁹ Coutts, P. J. F. (1984). A Public Archaeologist's View of Future Directions in Cultural Resource Management. *Archaeology at ANZAAS, Canberra*. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pg 216. Speaking from the Perspective of the mid-1980s, Coutts described the *AARP Act* as ineffective with respect to protecting historical archaeological heritage. Coutts, P. J. F. (1984). A Public Archaeologist's View of Future Directions in Cultural Resource Management. *Archaeology at ANZAAS, Canberra*. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pg 219.

²⁰ As were provisions relating to historical archaeology in the *Historic Shipwrecks Act 1981 (Vic)* and the *Historic Buildings Act 1981 (Vic)*. Heritage Victoria (2003). *Archaeology Administration and Legislation in Victoria: A discussion paper*. Melbourne, Heritage Victoria. Pg 5. This was an outcome of the 'Planning a Better Future for Victorians' Victorian Government policy document. Parliament of Victoria (1995). Hansard, Melbourne: Victorian Government Printer. Speech by Mr MacClellan, 7 September 1995, Pg 148.

²¹ Parliament of Victoria (1972). Hansard, Melbourne: Victorian Government Printer. Speech by Mr Meagher, Minister for Aboriginal Affairs. 11 April 1972, Pg 4798. See also similar comments made during the debates in the Legislative Council by the Hon. D G Elliot (Member for Melbourne Province), 27 April 1972 Pp 5408-5409.

²² Allen, J. (1987). The politics of the past: an inaugural address to the La Trobe University School of Archaeology. Melbourne, La Trobe University: 1-14. Pg 11. Murray, T. and J. Allen (1995). "The forced repatriation of cultural properties to Tasmania." *Antiquity* 69 (266): 871-877. , Murray, T. (1996). "Aborigines, Archaeology and Australian heritage." *Meanjin* 55 (4): 725-735. , Murray, T. (1996). *Archaeologists, Heritage Bureaucrats, Aboriginal organisations and the Conduct of Tasmanian Archaeology*. Australian Archaeology '95: Proceedings of the 1995 Australian Archaeological Association Conference, St Lucia, University of Queensland.

The *AARP Act* provides protections for “archaeological areas”, which must be declared and gazetted,²³ and for “archaeological relics”, which are subject to a limited form of blanket protection across Victoria.²⁴ Declaration of an archaeological area requires the consent of the owner or occupier of the land.²⁵ An early consideration by Victorian Parliament was that access to declared archaeological areas by the public was desirable as was a program of public education regarding Victoria’s archaeological heritage.²⁶ The main effect of declaring an archaeological area is to restrict access, in order to preserve any relics that the land contains. However, limiting the declaration to instances where the owner has granted consent for listing makes the power of limited effectiveness. This provision reflects the familiar, but often unfounded, concern that heritage listing (or indeed any other planning or environmental controls) unreasonably restricts the use of an area of land by its owner. This reliance on concurrence of the owner appears to be an attempt to adopt a conciliatory, rather than coercive, approach to achieving the conservation of archaeological sites, particularly on private land, without the unworkable requirement of compulsory acquisition of the land.²⁷ This sets up a fundamental conflict within the legislation, between the rights of ownership and the desire to conserve tangible elements of Australia’s heritage, as an opt-in approach will not ensure the conservation of sites of importance. In many respects, this is an irreconcilable conflict, if the proposed land uses are antithetical to the desired conservation outcomes. But if the question of ‘public good’ is considered, in some instances the ‘public good’ of retaining physical remains of the past will outweigh the concerns of individual landowners. Such public good considerations would not and should not apply by default to all archaeological sites, but should be part of a rigorous regime for assessing the values of a site at a range of levels.

The protections for archaeological relics are more broadly based than those for sites and the *AARP Act* prescribes a very wide definition of ‘relics’ which includes any aspect of Aboriginal material culture:

"archaeological relic" or "relic" means a relic pertaining to the past occupation by the Aboriginal people of any part of Australia, whether or not the relic existed prior to the occupation of that part of Australia by people of European descent, and without affecting the generality of the foregoing, includes any Aboriginal deposit, carving, drawing, skeletal remains and anything belonging to the total body of material relating to that past Aboriginal occupation of Australia, but does not include a body or the remains of a body interred in a cemetery, burial ground or place of burial after the year 1834, or a handiwork made for the purpose of sale,²⁸

²³ *Archaeological and Aboriginal Relics Preservation Act* (1972) Victoria. Section 2, Definitions. Protected under sections 15 and 16.

²⁴ *Ibid.* Section 2, Definitions. Protected under sections 21 to 23.

²⁵ *Ibid.* Section 15(2)

²⁶ Parliament of Victoria (1972). Hansard, Melbourne: Victorian Government Printer. Second Reading Speech, Pp 3960-3961.

²⁷ This system is similar to that initially proposed by the Productivity Commission in relation to all heritage listings in Australia, however that recommendation was withdrawn in the final report. Productivity Commission (2005). Conservation of Australia’s historic heritage places - draft report. Melbourne, Australian Government.

²⁸ *Archaeological and Aboriginal Relics Preservation Act* (1972) Victoria. Section 2. The year 1834 is the year of the first permanent European settlement in Victoria. Docherty, J. C. (1993). *Historical Dictionary of Australia*. Sydney, Franklin Watts Australia. Pp 141-142.

The lengthy definition in and of itself presents a difficulty in interpretation, as its attempt at comprehensiveness takes a 'shopping list' approach to the nature of relics, without any clear attempt to link them to significance. This remains a common definitional problem in Australian heritage legislation, as a definition based solely on the physicality of an object does not necessarily capture the true nature of its significance. While this may be appropriate in overseas jurisdictions, where archaeological objects are the focus of the art collecting industry, it is not a sensible approach to the Australian situation. The definition is also one clearly founded in archaeological practice, rather than value to the Aboriginal or non-Aboriginal community, and has had only minor modification since the original commencement of the *AARP Act* in 1972.

During initial debate, the Bill was criticised for not protecting "archaeological deposits." There was argument strongly in favour of a blanket protection for archaeological heritage supported by a permitting system for excavation, rather than the approach of requiring the declaration of areas in advance in order for them to be protected, based explicitly on archaeological professional considerations.²⁹ The influence of professional archaeology is still evident within the Act, as protection is extended to "archaeological relics" rather than "Aboriginal relics" or "heritage objects", as has been the case in other jurisdictions. While a limited form of blanket protection for Aboriginal relics was in the end extended by the *AARP Act*, the subtleties between an archaeological "relic", "object" and "deposit" were never articulated in Victorian legislation, nor in any other Australian legislation. The question of "what is a relic?" and "who determines what is a relic?" were questions raised in Parliament yet never satisfactorily resolved.³⁰ This underscores the fundamental difficulty with much archaeological protection legislation, that the need to understand the context of an archaeological object is perhaps of greater significance than the individual object itself.

The Victorian courts have commented on the problematic nature of the definition of archaeological relics within the Act, during the consideration of a case in 1984. The decision, *Walker v. Shire of Flinders and Ors*,³¹ revolved around an application to subdivide a site with both historical and Aboriginal archaeological components, and whether, if the subdivision itself were approved under the planning legislation, a permit to disturb any relics within the land could in fact be legally issued to the landowner. It seems that, due to a deficiency in the Act in force at that time, there was no legal avenue to allow the excavation of any relics within the land, and as a result of the appeal, the Act was subsequently amended. Significantly, however, the Court observed that, even if a relic was not deemed worthy of preservation, it was nevertheless protected under the Act, causing the judge to note that "the purpose of protecting and preserving a relic which is not worthy of

²⁹ Parliament of Victoria (1972). Hansard, Melbourne: Victorian Government Printer. Mr. Bornstein, 21 March 1972. Pp 4311-4312. See also comments by Mr. Bornstein on 11 April 1972 during the committee debates on proposed amendments to the Bill. Pp 4796-4797 and the comments by the Hon D G Elliot in the Legislative Council on 27 April 1972, Pp 5452-5453

³⁰ Ibid. Speech by Mr Mitchell, Member for Benambra. 21 March 1972, Pg 4316. Raised again on 11 April 1972, Pp 4803-4803. Further comments in the Legislative Council by the Hon Murray Byrne, Minister for Public Works, 27 April 1972, Pg 5454.

³¹ *Walker v. Shire of Flinders and Ors* ([1984] V.R. 409). (1984). See also the commentary on this case by Boer: Boer, B. (1985). "Aboriginal heritage in Victoria." *Environmental and Planning Law Journal* 2: 94-97.

preservation is not readily apparent.”³² This observation holds true twenty years later, as much heritage legislation still does not make an adequate differentiation between a “relic” as a thing which meets a legal definition versus an object as a component of a site which may have sufficient heritage significance to warrant legal protection.

In 1980, there was a minor change to the definition, modifying it to refer to archaeological relics from any part of Australia, whereas the previous definition referred only to relics originating from within Victoria.³³ This was to improve controls on trade in ‘portable relics’, defined as “a relic which because of its weight and size is capable of being lifted and removed by hand,”³⁴ by giving the Victorian government the ability to regulate trade not only in relics from Victoria, but also those being brought into Victoria from other States or Territories. How precisely the Victorian government proposed to enforce such a trade restriction is unclear, as it seems unlikely that relics brought into Victoria from other jurisdictions would be sufficiently distinctive to allow their point of origin to be definitively determined to a legal certainty. Nevertheless, it does give Victoria the power to intercede in a particularly flagrant transaction involving Aboriginal relics.

This strong focus on the anti-trade provisions of the Act, which have existed since its inception, may represent some of the legislative “baggage” which came from Victoria looking to the Middle East for legislative inspiration. While there has been, and undoubtedly continues to be, a trade in Aboriginal artefacts from Victoria and elsewhere in Australia, it is nothing like that which exists on the vast scale of the trade in Middle Eastern, Asian or Central American antiquities.³⁵ Discussion in Chapter 4 of the Commonwealth *Protection of Movable Cultural Heritage Act* has indicated only a minimal trade in Aboriginal (or historical) Australian artefacts and thus this strong focus on trade represents something of a missed opportunity for Victorian heritage protection, as the protections are infrequently used and do little to protect Victoria’s heritage in anything other than a theoretical sense.

Currently the Act proscribes trade in any ‘portable relic’ from any jurisdiction, without consent.³⁶ While trade in portable relics is controlled, their collection has always remained uncontrolled. Since its inception, the *AARP Act* has provided an exemption from protection where “a person...picks up or collects a portable relic exposed in or upon the surface of land in Victoria”.³⁷ This is clearly an unsatisfactory situation as it allows the disturbance with impunity of surface-based archaeological sites and the nature of the language used creates an ambiguity with respect to when disturbance is or is not an offence under the Act. The general relics protections proscribe “excavate[ion of] any land for the purpose of uncovering or discovering a relic without consent”³⁸

³² *Walker v. Shire of Flinders and Ors* ([1984] V.R. 409). (1984). At 414, cited in Boer, B. (1985). “Aboriginal heritage in Victoria.” *Environmental and Planning Law Journal* 2: 94-97. Pg 96.

³³ Amended by the *Archaeological and Aboriginal Relics Preservation (Amendment) Act* 1980, No. 9405/1980, commenced 6 October 1980.

³⁴ *Archaeological and Aboriginal Relics Preservation Act* (1972) Victoria. Section 2.

³⁵ Tubbs, K. W., Ed. (1995). *Antiquities: Trade or Betrayed: Legal, Ethical and Conservation Issues*. London, Archtype Books.

³⁶ *Archaeological and Aboriginal Relics Preservation Act* (1972) Victoria. Section 27.

³⁷ *Ibid.* Section 27A.

³⁸ *Ibid.* Section 22.

while the exemption for portable relics allows their collection where they are “exposed in or upon” the ground. This requires interpretation as to how exposed a relic must be before its disturbance is permissible without consent; if a relic is half out of the ground, what is its status, and what of the incidental disturbance the removal of that relic may cause to the archaeological site? Smith attributes some of this ambiguity with respect to the collection of relics to the strong influence that amateur archaeological and collecting societies had on the initial drafting of the legislation in the 1970s.³⁹ This is supported by Griffiths’ general observations on the strength of the Victorian artefact collecting movement in the early- to mid-twentieth century.⁴⁰ O’Keefe and Prott view this particular legislative laxness as unjustifiable, however they note similar weaknesses in the US Federal *Archaeological Resources Protection Act 1979*, where the US Congress “did not want to subject Boy Scouts [collecting artefacts]...to criminal penalties”.⁴¹ Legislators in several instances have clearly taken a view that the collection of artefacts is a legitimate form of recreation, but by effectively facilitating the collection of relics by non-archaeologists or the Aboriginal community, the *AARP Act* offers little assistance in the actual protection of archaeological heritage for the community, as such collection is not guided in any way by the other values of the site or artefact.

By contrast, the Victorian provisions of the *ATSIHP Act* take an approach of focussing on the social value of objects or places to the Aboriginal community. Aboriginal “cultural property” includes folklore, objects and places, all of which must be “of particular significance to Aboriginals in accordance with Aboriginal tradition”, with the definition of folklore encompassing both past and current cultural practices.⁴² Legal protections do not in fact extend to folklore, as this term appears only in the definitions while the protective clauses refer only to places and objects, however Aboriginal “cultural property” including folklore can be the subject of a Cultural Heritage Agreement.⁴³ The inclusion of the term folklore within the legislation points to a legislative commitment to preserving those tangible aspects of material culture which support the intangible aspects such as folklore and other cultural practices.

³⁹ Smith, L. (1996). *Archaeological knowledge and the governance of indigenous material culture in south-eastern Australia. Prehistorical and Historical Archaeology*. Sydney, University of Sydney. Chapter 8.

⁴⁰ Griffiths, T. (1996). *Hunters and Collectors: The antiquarian imagination in Australia*. Melbourne, Cambridge University Press. See Chapter 2 generally, as well as Pp 90-91.

While a slight digression from the main topic, this raises a question as to whether the amateur collecting community have a legitimate interest in the physical remains of the past. Certainly enthusiasts can be the greatest advocates for the value of the past. However the challenge arises when attempting to accommodate their interests without compromising the values of archaeological heritage for either Aboriginal communities or the wider community. Although that question cannot be answered here, the presence of legislation itself implies that unrestricted collection of archaeological materials is not an activity that the community is willing to sanction. The issues do need to be looked at in terms of the significance of the sites being disturbed. On high-value sites, such amateur disturbance is distinctly problematic, as what may be lost, in terms of scientific, social or interpretive value outweighs the interest of an individual collector of objects. On low-value sites, such collection probably causes little harm; the problem is distinguishing between high- and low-value sites prior to their disturbance. While amateur prospectors for precious metals or gemstones are catered for through the establishment of fossicking reserves in some areas, generally requiring an inexpensive license, it would remain quite difficult to establish such a system for archaeological sites and it seems most likely that such activities will continue to occur outside the law, with individuals interested in ‘real’ archaeology as, opposed to collecting, having to confine their interest to acting as field assistants on authorised archaeological projects.

⁴¹ O’Keefe, P. J. and L. V. Prott (1984). *Law and the cultural heritage: Volume 1: Discovery and Excavation*. Abingdon, Professional Books Ltd. Pp 203-204.

⁴² *Aboriginal and Torres Strait Islander Heritage Protection Act* (1984) Commonwealth. Section 21A.

⁴³ *Ibid.* Section 21K

Immediately what this legislative approach does is to link archaeological remains to contemporary Aboriginal local community significance in a manner unique to Australian heritage legislation, and also different from the general approach of the *ATSIHP Act* to areas other than Victoria. The actual protection mechanisms available for Victorian archaeological heritage are similar to those elsewhere in the Act, although they are much more detailed and provide for emergency,⁴⁴ temporary⁴⁵ or permanent⁴⁶ orders of preservation for sites or objects, which are recorded in a Register.⁴⁷ The emphasis within these orders however is on enabling local Aboriginal communities to make the decisions about preservation. Consider the focus of the section of the *ATSIHP Act*, regarding the declaration of a permanent order of preservation:

Declaration of preservation

- (1) *If a local Aboriginal community decides*, whether after an application is made to it or on its own motion, that:
- (a) a place or object in the community area is an Aboriginal place or Aboriginal object; and
 - (b) it is appropriate, *having regard to the importance of maintaining the relationship between Aboriginals and that place or object*, that a declaration of preservation should be made in relation to that place or object;
- the community may advise the Minister that it considers a declaration of preservation should be made.⁴⁸

The emphasised passages indicate the weight given to community values and the focus of the protection is on maintaining a *relationship* with a particular site or object, not just protecting it in an abstract way and is followed up directly by the ability for Aboriginal communities to appoint wardens to manage sites or objects on their behalf.⁴⁹ The legislative protection makes an assumption in favour of there being a continuous link between the community and an item of its heritage; a declaration of preservation does not assume an item of archaeological heritage is either reducible to excavated data nor does it assume that the protected site or object remains static. The relationship between the site or object (which may or may not be archaeological in underlying nature) and the community is ongoing and fluid. This runs strongly counter to most other approaches to archaeological heritage management and protection in Australia, which often pre-emptively assume such heritage will be the subject of a one-off exercise—an excavation—or that a site must be protected by being preserved untouched. When considered in the context of delivering a public good outcome, the acknowledgement of the ongoing relationship between archaeological heritage and the community is a critical one. The active interaction of the community with the archaeological heritage

⁴⁴ Ibid. Section 21C

⁴⁵ Ibid. Section 21D

⁴⁶ Ibid. Section 21E

⁴⁷ Ibid. Section 21V. The Register is only available for inspection by prescribed persons. While not specifically stated, these are likely to be limited to persons authorised under Section 17, Inspectors nominated under Section 21R, honorary keepers or wardens under Section 21T or members of the Aboriginal community.

⁴⁸ Ibid. Section 21E. Emphasis added.

⁴⁹ Ibid. Section 21T

is necessary for that heritage to remain relevant and to have a life outside of an archaeological report. This need not deny archaeologists access to the remains of the past for study. However it will influence the nature of the actions which archaeologists can undertake to the archaeological record and also the outcomes of any archaeological research.

The potential of the mechanisms established for Victorian archaeological heritage under the *ATSIHP Act* is largely untapped,⁵⁰ however these provisions may be repealed in the near future.⁵¹ Significantly, the Act points to a way forward for resolving the past and, to a degree, ongoing, conflicts between Aboriginal and archaeological interests. The Act allows the possibility that, where the community relationship with a site or object has been broken, or where the site or object has no value to contemporary Aboriginal tradition, that site should be accessible for study by archaeologists. Politics and power struggles, more than legal impediments, are likely to be the main source of conflict in this area and it should be possible to draft legislative clauses which allow for the consideration of the community issues first and, where those issues do not exist or can be satisfied, a presumption can exist in favour of managing the site for its values to the archaeological community. Thus the primary consideration is the community value of a site, but where that value is not high or is nonexistent, the secondary values of a site, such as scientific significance, can take precedence.

7.3 Historical Archaeology in Victoria

Victoria's legislation to protect historical archaeological heritage provides for a more active role in the management of such heritage than any other piece of Australian legislation. Since 1995, historical archaeology has been protected under the Victorian *Heritage Act* administered by Heritage Victoria.⁵² Victorian historical archaeology, as with many other Australian jurisdictions, has been largely driven by expanding development. The bulk of that development has been rural, particularly in the in the Victorian goldfields,⁵³ in contrast to New South Wales, where development has concentrated in urban areas. Victoria had quite early and extensive gold mining operations from the mid-nineteenth century, which left substantial archaeological remains.⁵⁴ Changes in technology in the late twentieth century made it profitable to rework many of these 'mined out' areas.⁵⁵ This inevitably meant impacts to the historical remains of previous goldmining operations, as large industrial mines using

⁵⁰ Note that the proposed amendments would remove these powers and all such matters would be dealt with under the new *Aboriginal Heritage Act 2006* (Vic). See *Aboriginal and Torres Strait Islander Heritage Protection Bill* (2006) Commonwealth.

⁵¹ *Aboriginal and Torres Strait Islander Heritage Amendment Bill 2006*

⁵² The *Heritage Act* 1995 replaced the *Historic Buildings Act* 1981 and the *Historic Shipwrecks Act* 1981, as well as adopting the functions of the *Aboriginal and Archaeological Relics Preservation Act* 1972 with respect to non-indigenous archaeological sites. Parliament of Victoria (1995). Hansard, Melbourne: Victorian Government Printer. Second Reading Speech by Mr MacClellan (Minister for Planning), 7 September 1995, Pg 148.

⁵³ For example, one project by Bendigo Mining in the Victorian goldfields, resulted in 40 Consents to Damage and over 12 Consents to Excavate. Pers. Comm. Jeremy Smith, Senior Archaeologist, Heritage Victoria. 14 August 2006.

⁵⁴ Parliament of Victoria (1997). Hansard, Melbourne: Victorian Government Printer. Victoria's mining heritage and the need for protection of its archaeological remains was extensively discussed in the speech by Mrs Shardey (Member for Caulfield) during debate on the Heritage (Amendment) Bill 1997, 9 April 1997, Pp 573-574.

⁵⁵ For example, the 1996-1997 Annual Report of Heritage Victoria indicates that there were 3267 sites recorded on the Heritage Inventory of Historical Archaeological Sites, of which 48% (1567) were mining-related sites. Heritage Victoria (1997). *Heritage Council Annual Report 1996-97*. Melbourne, Heritage Victoria. Pg 31.

mechanical extraction were located on the sites of previous hand-dug small mining operations.⁵⁶

The *Heritage Act* establishes the Victorian Heritage Council,⁵⁷ which is in turn responsible for keeping the Victorian Heritage Register of significant places⁵⁸ and the Victorian Heritage Inventory of historical archaeological sites.⁵⁹ The separation of sites on the Heritage Register from archaeological sites on the Heritage Inventory appears to be an artefact of the transfer of archaeological powers from the *AARP Act*, whereas the Heritage Register was based on the former Historic Buildings Register and the Historic Shipwrecks Register. The Victorian Heritage Register can however include archaeological sites of high significance, while the Heritage Inventory includes all known historical archaeological sites, relics and collections of archaeological objects. The Council has the power to make Interim Protection Orders⁶⁰ if it considers a place to be under threat, as well as authorising permits⁶¹ or exemptions⁶² to undertake works to registered places. The Act also provides for the issuing of consents to undertake works which affect archaeological sites, including their excavation or damage.⁶³

The *Heritage Act* protects archaeological sites and objects, through a fairly well structured definition, although one with certain idiosyncrasies:

"archaeological relic" means—

- (a) any archaeological deposit; or
- (b) any artefact, remains or material evidence associated with an archaeological deposit—

which—

- (c) relates to the non-Aboriginal settlement or visitation of the area or any part of the area which now comprises Victoria; and
- (d) is 50 or more years old—

but does not include the remains of a ship or an article associated with a ship;

"archaeological site" means an area in which archaeological relics are situated;⁶⁴

Archaeological sites and objects can be protected through listing on the Heritage Inventory, a separate list from the Heritage Register, which kept under Part 6 of the Act and are then referred to as "registered" archaeological relics or sites. Powers of protection for registered sites include the erection of

⁵⁶ Ibid. Pg 31.

⁵⁷ *Heritage Act* (1995) Victoria. Section 7. Section 7(2)(a)(iii) stipulates one member of the Council must have skills in archaeology.

⁵⁸ Ibid. Section 18

⁵⁹ Ibid. Section 120

⁶⁰ Ibid. Section 56

⁶¹ Ibid. Section 64

⁶² Ibid. Section 66

⁶³ Ibid. Section 129

⁶⁴ Ibid. Section 3.

notices⁶⁵ to prohibit access to archaeological places, as well as a general prohibition on damaging a registered site without a consent. The Act also protects unregistered archaeological relics (although not unregistered sites) unless those relics can be collected from the surface of the land.⁶⁶ The Act gives the Victorian government the ability to take a more active hand in the protection of archaeological sites, if warranted, through the ability to direct that a certain area be excavated for the recovery of archaeological relics,⁶⁷ and by acquiring recovered relics or erecting structures to assist in their conservation if deemed appropriate.⁶⁸ Additionally, the Act requires that persons undertaking a survey for archaeological sites notify Heritage Victoria *in advance* of the survey taking place as well as notifying of the actual discovery of any archaeological materials.⁶⁹ This puts Victoria in an almost unique position of being involved in the management of the state's archaeological heritage prior to it even being identified. Such a power should theoretically provide Victoria with a strong ability to proactively conserve archaeological heritage, as well as providing for a greater period of time to consider the archaeological values of a site prior to listing it on the Heritage Inventory.

The Act is set up to protect "cultural heritage", which is composed of objects and sites, and the definition of "cultural heritage significance" explicitly includes archaeological significance. Powers exist within the Act to stipulate the methodology and qualifications of those wishing to excavate archaeological sites⁷⁰ and Heritage Victoria has taken the step of issuing detailed guidelines on the management of archaeological materials.⁷¹ The ability to mandate methodology and qualifications for archaeological works is uncommon in Australian legislation, although South Australia may stipulate archaeological qualifications as a condition of consent⁷² and New South Wales has issued guidelines with respect to the qualifications of archaeological investigators.⁷³ The need to go to such a level of detail is due at least in part to the lack of professionalisation of archaeologists in Australia. Australian archaeology has no binding standards or process of professional accreditation, unlike professions such as architecture or engineering. The need for a power such as this was highlighted by a court case in 1993 where a non-archaeologist was granted an excavation permit under the *AARP Act*. The Victorian Administrative Appeals Tribunal held that there was no specific requirement that a person be an archaeologist in order to obtain an excavation permit under the Act.⁷⁴

⁶⁵ Ibid. Section 124

⁶⁶ Ibid. Section 127. Penalties range from 120-240 penalty units, or up to 12 months incarceration.

⁶⁷ Ibid. Section 130

⁶⁸ Ibid. Section 133

⁶⁹ Ibid. Sections 131 and 132

⁷⁰ Ibid. Sections 129(4)(a) and (b)

⁷¹ Heritage Victoria (2001). *Archaeological Artefact Management Guidelines*. Melbourne, Heritage Victoria.

⁷² *Heritage Places Act* (1993) South Australia. Section 29(1)(a)

⁷³ NSW Heritage Office (2004). *Guidelines for the Qualifications of Excavation Directors*. Parramatta, NSW Heritage Office. These are guidelines only however and open to challenge, as the NSW *Heritage Act* does not explicitly give the power to stipulate qualifications.

⁷⁴ In *Panama Downs Pty Ltd v Borough of Queenscliffe*, the Victorian Administrative Appeals Tribunal granted a permit to excavate for alleged buried treasure, in part on the justification that "it would be difficult to find any further historical or scientific evidence [for the treasure] without actual excavation." Anonymous (1993). "Panama Downs Pty Ltd v Borough of Queenscliffe." *Environmental Law Reporter* 12: 153-154.

The “archaeological” qualifier allows a value judgement to be applied to a potential relic or site, when considering whether to apply the protections of the *Heritage Act*. Archaeologists administering the Act through Heritage Victoria therefore have a greater discretion to make a determination as to whether something is or is not protected, on the basis of whether it is truly “archaeological”. Certainly a still better mechanism would be an explicit incorporation of an assessment as to whether the relic or site met the cultural heritage significance criteria. But as one of the criteria is “archaeological significance”, sufficient flexibility exists within the Act to allow a more well-reasoned consideration as to whether the legal protections ought be applied in particular circumstances. The core principles of the Victorian heritage significance regime are set out in the Act and while archaeological significance is not explicitly mentioned, one criterion appears to encompass the typical “scientific” approach to archaeological heritage:

“[the] potential [of a site] to educate, illustrate or provide further scientific investigation in relation to Victoria's cultural heritage.”⁷⁵

The wording of this criterion is broad enough to allow it to apply to all types of heritage, but when considered with the other significance criteria enumerated in the Act, this criterion is the one most clearly designed to apply to archaeological heritage. So while there is increased flexibility in the application of the Act, in accordance with whether a site or object is “archaeological”, the conception of the significance of archaeological heritage is still largely confined to it being scientifically significant. The Act suggests that the realisation of this significance is an active process—through “scientific investigation”—rather than as an inherent quality. Similarly, when considering whether to grant a consent to excavate or damage archaeological relics, Heritage Victoria must consider whether the site can contribute to anthropological, archaeological, ethnographic or historical knowledge.⁷⁶ When the penalties under the Act were increased in 2003, part of the rationale was to deter people from disturbing archaeological sites and causing “loss of information”.⁷⁷

However, when debating the nature of disturbance, discussion focussed on disturbance of objects rather than information or intangible values. In addition, the low number of prosecutions put a cloud over the effectiveness of legislative deterrence.⁷⁸ This indicates that, within the minds of Victorian legislators, archaeologists remain the arbiters of significance under this model, with no clear consideration of the wider significance of archaeological heritage. It also demonstrates the continued preoccupation with both excavation and the archaeological object, to the exclusion of most other considerations. For legislation of this work to advance a ‘public good

⁷⁵ *Heritage Act* (1995) Victoria. Section 8(2)(e)

⁷⁶ *Ibid.* Section 129(3)(a) and (b)

⁷⁷ Parliament of Victoria (2003). Hansard. Second Reading Speech for the *Heritage (Amendment) Bill* 2003 by Ms Delahunty (Minister for Planning), 27 August 2003, Pg 84. These sentiments were later echoed in a speech by Mr Wynne, Member for Richmond, during the same debates. 17 September 2003, Pg 536.

⁷⁸ *Ibid.* Speech by Mr Baillieu (Hawthorn), 16 September 2003, Pp 432-33. The speech refers to 4 prosecutions in the previous year, all with guilty pleas, with one prosecution for archaeological disturbance unresolved at the time. This prosecution is detailed in Minchin, L. (2003). Heritage groups get tough with the raiders of our lost park. *The Age*. Melbourne.

conservation' position, it would need to conceive of the archaeological heritage beyond its scientific qualities. The main barrier to achieving this, is that this notion of the scientific nature of Australian archaeology has become so imbedded in the language and frameworks for archaeological heritage management in Australia, it becomes very difficult to even describe archaeological heritage in other than scientific terms. Lawmakers, heritage managers, the public and archaeological consultants have all been inculcated with this conception that has institutionalised a blindness to other potential values for archaeological heritage. This is not to say that all archaeological sites will have significance beyond their research value to archaeologists, but, given the wider public context in which heritage management is undertaken, even sites with only research value need to demonstrate that value and be weighed against other economic, social and environmental factors which may come to bear on a give site.

Despite these inconsistencies, the definitions of historical archaeological sites and relics in the Victorian *Heritage Act* remain some of the more useful definitions in Australia. The definitions are qualified by referring specifically to "archaeological" relics, objects, deposits or sites, implying that these relics, objects, deposits or sites have different qualities worthy of note and protection, as opposed to the totality of non-archaeological relics, objects, deposits or sites. This is similar to the approach adopted in the 2004 amendments to the South Australian heritage legislation, which linked the definition of archaeological objects to heritage significance, without defining that significance in a highly proscriptive manner.⁷⁹ While this may seem like a somewhat pedantic distinction, other jurisdictions have done without the "archaeological" qualifier in their definitions and have inadvertently cast the net of protection too wide, by encompassing a large range of non-archaeological items within the definition. This has been a particular problem in New South Wales, where a formal legalistic approach to the application of the definition of a relic (without the "archaeological" qualifier) has meant that literal-minded heritage administrators, local governments, consultants and applicants have applied the relics protections in a number of inappropriate circumstances, which are discussed in more detail later in this chapter. Fundamentally, the definition of a protected archaeological object should be based on it having characteristics which make it able to meaningfully contribute to the understanding of the past, whether such characteristics are inherent in the individual object or derived from the position of the object in its context.

The Victorian *Heritage Act* goes a step further than the majority of other Australian heritage legislation by incorporating this distinction, as well as considering the archaeological object in its context, through reference to "archaeological deposits" and "archaeological sites". In this respect the Victorian Act comes closer to meeting the goals of the three archaeological heritage protection principles than most other Australian legislation, through well-defined provisions for archaeological sites and objects. Comments by parliamentarians at various times during the debates over the *Heritage Bill*

⁷⁹ *Heritage Places Act* (1993) South Australia. Section 27(1)(a).

and its subsequent amendments indicate that attention remains broadly focussed on historic buildings over other types of heritage, including the comment “generally, each resident of this great state of Victoria values our heritage, in particular our built heritage. In Parliament House we see the results of the great gold boom of the mid-1800s. Buildings like this add something tangible to the quality of life in this great state”⁸⁰ and again, comments three years later by a different member: “heritage is mainly associated with buildings, and we are very conscious that once a building is destroyed it is destroyed forever...”⁸¹ This indicates that, at the highest levels of government, there is a certain amount of belief that the public is interested primarily in built heritage, over other types of heritage.⁸² Such a perception will colour the effort governments are willing to direct towards conserving other sorts of heritage, including archaeological sites.

7.4 Defining archaeological importance in Victoria

During the 2003 Parliamentary debates on proposed amendments to the *Heritage Act*, one Victorian parliamentarian noted:

Before going on to mention some of the good things about what we are doing in terms of heritage, I simply make the comment in passing that we should not simply retain buildings because they are old. This is an area where there is sometimes debate, but we need to preserve buildings that have some merit and a direct association with our history. There is a tendency at times simply to preserve buildings because they are old, even though they have no intrinsic merit on their own. It is best to err on the side of caution, but over time we have to be able to determine what is worth preserving and what is not.⁸³

This comment, while directed towards historic buildings, holds equally true for archaeological sites and applies to any legal regime for heritage protection. In most cases, the law protects archaeological sites because they are old and below ground; these characteristics alone are enough to make a site “archaeological” in the eyes of the law. With historic buildings the process is generally different, where a more rigorous test is applied as to whether the building is significant and intact. If it is not, often the building will not be protected. But the hidden nature of archaeological sites and their need for specialist interpretation has allowed decision-making to be made not on the archaeological or historic merits of a site, but merely on its physical characteristics and its meeting very broad, arbitrary descriptive characteristics enshrined in law. Unwittingly, perhaps, archaeologists have embraced a form of universal legal protection which does tend to err too far on the side of

⁸⁰ Parliament of Victoria (2000). Hansard, Melbourne: Victorian Government Printer. Speech by Mr Spry, Member for Bellarine during debate regarding the *Heritage (Amendment) Bill 2000*, 25 October 2000, Pg 1131.

⁸¹ Parliament of Victoria (2004). Hansard. Speech by the Hon. J. G. Hilton, Member for Western Port, during the debate on the *Heritage (Further Amendment) Bill 2004*, 13 May 2004, Pg 902.

⁸² Although statement to the opposite effect was made later in the debates by the Hon G D Romanes, Member for Melbourne: “The Bracks government recognises that heritage is not just about big, iconic public buildings but is also about a lot of things that are valued in the community...” Parliament of Victoria (2000). Hansard, Melbourne: Victorian Government Printer. 15 November 2000, Pg 1271.

⁸³ Parliament of Victoria (2003). Hansard. Speech by Mr Maughan, Member for Rodney, 17 September 2003, Pg 540.

caution, founded on a weak argument that “information about the past may be lost” if sites are not always excavated under strict archaeological supervision. The law should not protect sites merely because they are old and buried, any more than it should protect buildings merely because they are old. This legal construction in fact debases the notion of the “archaeological” by implying that all such materials are of equal interest and value, as the use of the term “archaeological” itself should imply that such sites or objects have a value beyond the ordinary. Protective mechanisms need to be predicated on an assessment of the relative merits of archaeological sites, to remain credible to the community. While it is certainly desirable for planning tools such as archaeological management plans to be developed by government authorities in advance, or for broad-scale archaeological surveys to be undertaken, it is unlikely that such tools will exist in all instances. In the absence of such tools there must remain mechanisms for government intercession to protect places of genuine archaeological or community significance. The Victorian Government has noted the community suspicion of the overt professionalisation of heritage management, which has often taken heritage responsibilities away from the community and is looking for ways to address this in the future.⁸⁴

This contrasts sharply with the earliest Victorian approach to protecting historical archaeological sites, following the High Court’s *Alcoa* decision in 1981.⁸⁵ An examination of the Victoria Archaeological Survey *Application for Permit to Excavate Historic Archaeological Sites*⁸⁶ from this period is quite revealing of the prevailing attitudes of VAS towards the protection of archaeological heritage and the key issues. The application form itself ran to 13 pages, 3 pages of which were standard conditions of consent for archaeological excavations. The remaining pages required details clearly designed to elicit the applicant’s competence to undertake archaeological *research* and focussed on the research or scientific significance of sites. Applicants were required to provide, amongst other details:

- Academic qualifications
- Referees of “senior academic standing”
- Research experience
- Publications
- Details of the “research project”
- Details of the “scientific significance” of the project⁸⁷

⁸⁴ Heritage Council of Victoria (2003). *Victoria’s Heritage 2010 - Creating the New Victorian Heritage Strategy*. Melbourne, Heritage Victoria. Pp 16-17.

⁸⁵ *Onus v. Alcoa of Australia Ltd.* [1981] 149 CLR 27, (1981).

⁸⁶ Victoria Archaeological Survey (1981(?)). *Application for Permit to Excavate Historic Archaeological Sites*, Ministry for Conservation (Victoria). While an exact date for publication of this application package cannot be established, it must be after 18 September 1981 (the date of the *Alcoa* High Court decision) and prior to 1993, when VAS was dissolved and its Aboriginal heritage management functions moved to Aboriginal Affairs Victoria. Smith, L. (1996). *Archaeological knowledge and the governance of indigenous material culture in south-eastern Australia. Prehistorical and Historical Archaeology*. Sydney, University of Sydney. Chapter 8, Victorian Legislation, Pg 2. The style and condition of the *Application* document in my possession suggests an earlier date.

⁸⁷ Victoria Archaeological Survey (1981(?)). *Application for Permit to Excavate Historic Archaeological Sites*, Ministry for Conservation (Victoria). Items 5, 6, 7, 8, 13 and 14 respectively on the application form, of 23 total items applicants were required to complete. Pp 6-10.

The purpose of the permit application was to prevent scientifically underqualified or unqualified persons from excavating archaeological sites, in order to protect the research value of the sites. Interestingly, the Application does contain one item regarding whether there has been local community consultation and what the views of the local community were regarding the proposal.⁸⁸ The standard conditions on the Application however did not make any requirement for the active involvement of the community in the project. However, it suggests that VAS took community views into consideration when determining an application. Again, the standard conditions were focussed on the scientific values of an archaeological site “Condition 8(a)—Applicants for Excavation Permits should produce evidence sufficient to satisfy the Minister that: (a) the project has some scientific merit...”⁸⁹ This is a holdover of the attitude inherent in the *AARP Act* in 1972, that archaeology was a science and sites needed to be protected primarily for scientific study. While lessened in contemporary application, this attitude can still prevail, although Heritage Victoria appears to be making an effort to explore the other values of sites more fully, by requiring community involvement and public interpretation.

7.5 Controlling archaeological excavation or disturbance

The Victorian *Heritage Act* requires that a permit be obtained to excavate or damage an archaeological site. The table below summarises the permits issued for archaeological sites under the *Heritage Act* since its inception in 1995.⁹⁰ Data for the period 1981 to 1996, during which historical archaeological sites were protected under the *AARP Act*, was not available.

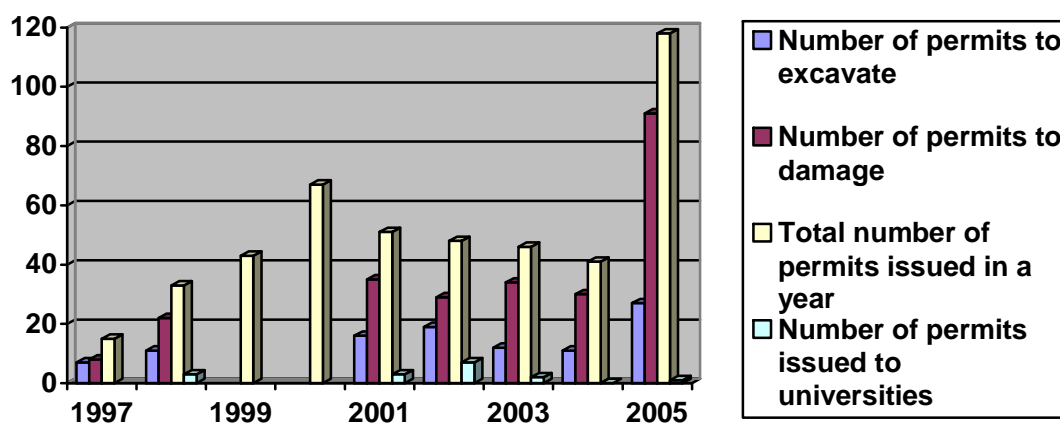


Figure 7.1: Permits issued for archaeological works under the *Heritage Act* 1995 (Vic), 1997-2005.⁹¹

⁸⁸ Ibid. Item 16, Pg 11.

⁸⁹ Ibid. Pg 4.

⁹⁰ Compiled from the Annual reports of Heritage Victoria and data supplied courtesy of Jeremy Smith, Senior Archaeologist, Heritage Victoria.

⁹¹ Aggregated from the Heritage Council Victoria Annual Reports 1997-2005. Reporting methods changed throughout the period, with some years reporting total permits while other years breaking down permits by type and proponent. The 1999 and 2000 Annual Reports record only the total number of archaeological approvals issued in those reporting periods. The 2003 and 2005 Annual Reports do not provide any statistical data

While the time period is short, it appears there is a long-term trend towards a rise in total applications since the inception of the Act, although the greatest rise is in “permits to damage” historical sites rather than permits to excavate. Permission to damage a site in this context includes the monitoring and recording of a site through means other than a systematic archaeological excavation. While the number of university-based research excavations has not been consistently reported, it is evident that such excavations are vastly in the minority. In 2002, the most active year for university-based excavations, such projects still only represented less than 15% of the total number of projects undertaken in the

State and less than 5% of total projects over the period for which data are available.⁹² The majority of excavations are for development-related activities, belying the notion that the Act is protecting archaeological sites for their ability to contribute to knowledge or scientific study. The fact that generally less than half of total approvals issued are for excavation as opposed to damage, and fewer than 10 percent of total approvals are for university-based research excavations suggests that Heritage Victoria is being selective in its interpretation and application of the archaeological requirements under the Act. While the details of each site approved for disturbance have not been investigated, the statistics suggest that, in the majority of instances, a cursory examination of the archaeological remains of a site is acceptable, rather than requiring the full archaeological excavation of every site which contains “relics” as defined under the Act.

Victorian *Heritage Act* archaeological approvals have another unique feature designed to produce a definable outcome from archaeological works, through the requirement for the lodgement of a ‘conservation bond’ as a condition of consent in the approvals process. A legacy from VAS to Heritage Victoria was an archaeological conservation laboratory, set up to conserve archaeological artefacts obtained through the activities of VAS and other authorised excavations. Heritage Victoria now requires applicants to lodge a bond to ensure that artefacts recovered from archaeological sites are appropriately conserved and are then available for use, display or study. Artefacts generally must be lodged with Heritage Victoria at the conclusion of the excavation. Limitations are placed on the amount of the bond, with unused funds returned to the applicant and, if the work goes beyond the value of the bond, the applicant is not required to meet the discrepancy.⁹³ This involves the Victorian government deeply in the detail of the excavation process and, while perhaps it was originally designed to safeguard the archaeological objects recovered from an excavation for scientific study or museum display, the policy now assists in providing some form of public benefit from an archaeological excavation. While only a small portion of recovered and conserved artefacts are ever likely to be placed on display or used for in-depth research, the presence of the conservation bond indicates that Heritage Victoria expects a commitment to archaeological heritage by those who disturb it, beyond the

regarding archaeological permits and missing data was supplied by Jeremy Smith of Heritage Victoria. Pers. comm. Jeremy Smith, 14 August 2006.

⁹² Data are not available on applications rejected under the Act, but it is presumed that university-based excavations are in general as if not more likely to receive approval than a development-driven application.

⁹³ Pers. comm. Jeremy Smith, Senior Archaeologist, Heritage Victoria, March 2004.

immediate excavation project. While this approach serves to reinforce the institutionalised notion of archaeology as both scientific and the preserve of specialists, it does facilitate improved compliance with the original goal of conserving such significance. The presence of a government-back facility which is responsible for post-excavation archaeological conservation holds out greater potential for better quality reporting and a publicly-focussed channel for the dissemination of archaeological information to interested parties and the public.

7.6 Victoria–Conclusion

The Victorian legislation is perhaps the most comprehensive archaeological heritage legislation in Australia, through both the sweeping nature of the issues covered and the depth of consideration it gives archaeological heritage. Initially the Victorian legislation was strongly based in archaeological practice and considerations, but has been applied with a fair amount of flexibility in recent years. The Victorian Government's approach of delegating authority back to the Aboriginal community for decision-making is an interesting one, which will require more detailed examination over a long period of time to evaluate its effectiveness. Similarly, it is too early to know the effect of the new *Aboriginal Heritage Act* 2006. This approach does show a strong acknowledgement of the community value of archaeological heritage and gives precedence to the community value of archaeological heritage over the more traditional professional archaeological view. This is not to say that the community view is necessarily always the best view, but it does provide scope for considering the 'public good' when can be wrought from archaeological heritage. This approach is contrasted with the approach in New South Wales, where a much tighter, more professionally dominated approach to the management of archaeological heritage remains.

7.7 Case Study–New South Wales

Archaeological heritage in New South Wales is principally regulated by two pieces of legislation, the *Heritage Act* 1977 and the *National Parks and Wildlife Act* 1974.⁹⁴ Historical archaeological relics are protected by the *Heritage Act* and Aboriginal archaeological objects by the *NPW Act*. Both acts overlap to a degree in the protection of non-indigenous built heritage and Aboriginal cultural heritage, as many built heritage sites are within National Parks in New South Wales, and complementarily, amendments to the *Heritage Act* in 1998 expanded its brief to include Aboriginal cultural heritage in some instances.⁹⁵ This is discussed at greater length below. Assisting these Acts are overarching pieces of planning and environmental legislation within the State, particularly the *Environmental Planning and Assessment Act* 1979⁹⁶ and the *Local Government Act* 1993.⁹⁷ General protections for heritage

⁹⁴ Hereafter *NPW Act*.

⁹⁵ Under the *Heritage Amendment Act* 1998. References to the *Heritage Act*, unless otherwise specified, are always to the current amended version of the legislation.

⁹⁶ Hereafter *EPA Act*. Heritage is a "matter for consideration" under Section 79C(1)(b) of the *EPA Act* for planning authorities in the determining of development applications.

⁹⁷ *Local Government Act* Section 142. Local councils may not make orders affecting heritage items without considering the issue of heritage significance. In addition, the Heritage Council must be notified and given opportunity to make submissions, unless exempted from this requirement by the Heritage Council.

in these Acts also have implications for non-indigenous archaeological sites, although essentially these Acts refer back to the protections of the *Heritage Act*. On occasion, the provisions of the *Heritage Act* have been overridden by other legislation, to facilitate specific State government development initiatives, without having to consider heritage as an issue.⁹⁸ Historical archaeological sites can also be protected through listing on Local or Regional Environmental Plans⁹⁹ and under State Environmental Planning Policies.

7.8 The Administration of Heritage in New South Wales

The New South Wales Heritage Office, established under the 1996 New South Wales Government Heritage Policy,¹⁰⁰ is responsible for the administration and enforcement of the NSW *Heritage Act*, including its archaeological provisions. While operating as an independent agency for a decade, in 2006 it was reincorporated into the Department of Planning, although it retains a separate identity. The Heritage Office services the Heritage Council of New South Wales, a body of experts constituted under the *Heritage Act*¹⁰¹ to act as a determining authority with respect to that Act. The New South Wales Department of Environment and Conservation¹⁰² administers the *NPW Act* and its provisions related to Aboriginal archaeology. Planning power is vested principally with the Department of Planning, which administers the *EPA Act* and approximately 150 local councils across the State, which administer the *Local Government Act*. In the case of historical archaeology, most administration and enforcement of New South Wales's legal provisions falls to the New South Wales Heritage Office. In some cases this function has been delegated (for example, to the Department of Environment and Conservation for sites within National Parks).¹⁰³ The issue of delegation of powers will be further addressed later in this section.

7.9 Development of Heritage Legislation In New South Wales

New South Wales is one of the first Australian States to introduce comprehensive heritage legislation, as opposed to the quite narrowly focussed legislation in other jurisdictions in the 1960s and early 1970s. The NSW *Heritage Act* was introduced in 1977,¹⁰⁴ partly in response to the introduction of heritage legislation at the Commonwealth level, but also in response to a growing grass roots heritage conservation movement. This movement included such traditional heritage proponents as the National Trust of Australia (New South Wales) and members of the public, including both

⁹⁸ E.g. the *Darling Harbour Authority Act* (1984), which specifically exempted that redevelopment from the *Heritage Act* (see section 23J and Schedule 6). Similarly, the *Walsh Bay Redevelopment (Special Provisions) Act* 1999 ratified the existing Heritage Council approval for this project and removed any right of appeal, unless leave was granted by the Minister for Planning.

⁹⁹ Both Port Macquarie and Richmond NSW have draft Archaeological Sites Local Environmental Plans.

¹⁰⁰ NSW Government Heritage Policy, 1996

¹⁰¹ NSW *Heritage Act* 1977, section 7.

¹⁰² The Department of Environment and Conservation was set up in 2004 and incorporates the former National Parks and Wildlife Service within its structure.

¹⁰³ Under Section 169 of the *Heritage Act* the Minister may delegate the functions of the Act. The Heritage Council itself first received delegated authority to determine applications without reference to the Minister in 1988. Heritage Council of NSW (1988) *Annual Report*. Sydney: NSW Government Printer. Pg 10.

¹⁰⁴ The Second Reading of the *Heritage Bill* took place on 16 November 1977, delivered by Mr. Haight (Maroubra), Minister for Services and Minister Assisting the Premier. Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Pg 9791.

working class residents of areas such as Millers Point and The Rocks in Sydney as well as upper middle class residents in areas such as Hunters Hill.¹⁰⁵ It later drew in the trade unions, particularly the Builders Labourers Federation and union involvement in heritage is reflected through the designation of one Heritage Council seat for a representative of Unions NSW.¹⁰⁶ The previous attempts at heritage protection had been based on local protection mechanisms, of questionable effectiveness.¹⁰⁷ At the time of debate, there was some concern that heritage protection regimes more appropriately belonged within the general planning legislation,¹⁰⁸ however the *Heritage Act* has remained a separate piece of legislation. This separation has been adopted across Australia, emphasising the symbolic value of separate and identifiable heritage legislation to the populace. The New South Wales heritage movement was as much about protecting amenity and controlling the scale of new development in economically booming areas such as Sydney as it was about protecting heritage items themselves. The earliest heritage battles which predated the introduction of heritage legislation are well documented elsewhere and will not be discussed in detail here, however they centred on natural heritage and built heritage, rather than archaeological heritage.

The initial version of the *Heritage Act* included protections for built heritage, heritage precincts (conservation areas) and archaeological relics, although the last mentioned was a later addition to the original bill.¹⁰⁹ Since 1977, the *Heritage Act* has received two major reviews, one in the late 1980s and the other in the early 1990s,¹¹⁰ which led to sweeping amendments and reforms within the Act in 1988 and 1998¹¹¹ respectively. The most significant reforms to come out of the 1998 amendments were the inclusion of natural and Aboriginal heritage in the definition of 'environmental heritage', thus expanding the Heritage Council's brief¹¹², the creation of the State Heritage Register, which replaced the system of Permanent and Interim Conservation

¹⁰⁵ Davison, G. (1984). A brief history of the Australian heritage movement. *A Heritage Handbook*. G. Davison and C. McConville. North Sydney, Allen & Unwin: 14-27.

¹⁰⁶ *Heritage Act* (1977) New South Wales. Section 8(2)(a)(vi).

¹⁰⁷ Including the County of Cumberland Planning Scheme (1951), the City of Sydney Planning Scheme (1971) and the Windsor Planning Scheme (1973), constituted under the *Local Government Act* (NSW). In the period between 1951 and 1977, only 16 properties were protected, due to the requirement that the State compulsorily acquire the property in order to protect it, if the owner insisted. Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Speech by Mr Haigh, 16 November 1977, Pp 9797, 9799. See also NSW Heritage Office (2000). *Heritage Listings in New South Wales: A Brief History*. Parramatta, NSW Heritage Office.

¹⁰⁸ Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Speech by Mr. Rozzoli, Leader of the Opposition. 16 November 1977, Pp 9814-9815. The previous Liberal-Country government had introduced the *Environmental Planning Bill* in 1976, which contained limited protections for historic buildings, but as it was introduced at the end of the Parliamentary term, the Bill did not get seriously considered by Parliament. The new Labor government introduced the more far-reaching Heritage Bill the following year, as separate legislation from the planning legislation. Substantial reform in the planning legislation did not occur until 1979, with the introduction of the *Environmental Planning and Assessment Act*. See also the speeches by Mr. McDonald, Member for Kirribilli, 23 November 1977, Pg 10185 and the final speech in reply by Mr. Haigh on 23 November 1977, Pp 10194-10195. Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament.

¹⁰⁹ Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Speech by Mr. Rozzoli, Leader of the Opposition. 16 November 1977, Pp 9813 and Speech by Mr. O'Connell, Member for Peats. 17 November 1977, Pg 9866.

¹¹⁰ Department of Planning (1992). Heritage system review discussion paper : a summary of the major issues and ideas for improvement identified in the review of the heritage system. Sydney, Department of Planning.

¹¹¹ These amendments were enacted in December 1998 in the NSW *Heritage Amendment Act* (1998) and subsequently came into effect on April 2nd 1999.

¹¹² *Heritage Act*, Section 4.

Orders and provided protection for sites of 'State heritage significance'¹¹³ and the ability to create 'exceptions' from the archaeological provisions.¹¹⁴ These changes, particularly the creation of the State Heritage Register, represented a significant shift in the management of heritage in New South Wales. Part of the notion behind the replacement of Permanent Conservation Orders (PCO) with the State Heritage Register was a notion that the Register should always be a thing in flux—items are added or removed as thinking changes or new or better studies are undertaken, whereas under the PCO system the belief was that once an item had received a PCO, it would be protected in perpetuity. While the concept of the State Heritage Register as a constantly evolving, constantly improving entity was an interesting idea, in practice it has proved very difficult to remove items from the Register¹¹⁵ and there has been recent criticism of the Register being of limited effectiveness and facilitative of development over conservation of heritage values.¹¹⁶

The addition of Aboriginal heritage to the brief of the Heritage Council was also an important step in changing the thinking regarding Aboriginal heritage. Since the first legislative protections for Aboriginal heritage in 1969¹¹⁷ those protections had largely been mired in a 'stones and bones' conception of Aboriginal heritage as archaeological resources, with more limited protection for places of contemporary significance for the Aboriginal community. This matter was brought to a head in the late 1990s, with a proposal to redevelop the Cypress Helene Club in central Sydney. An unremarkable nineteenth century building of no particular architectural merit, it had escaped listing as a heritage building by the Sydney City Council. The building, and the theatre inside, had however been the site of the first Aboriginal Land Rights meeting in Australia in 1938 and was known to the Aboriginal community as the 'Day of Mourning' site.¹¹⁸ It had enormous social significance to the Aboriginal community, through its symbolic value as the birthplace of the Land Rights movement. But at the time of its proposed redevelopment, the only option initially open for its protection was for the site to be declared an 'Aboriginal place' under the *NPW Act*, which until that point had never been used for a site of contemporary significance, particularly for an otherwise unimportant building. This situation prompted the change in the *Heritage Act* and now such sites can be listed on the State Heritage Register.¹¹⁹

¹¹³ *Heritage Act*, Section 31. Prior to the creation of the State Heritage Register, a Permanent Conservation Order provided a permanent statutory protection for a heritage item deemed by the Minister to be under threat. An Interim Conservation Order (PCO) provided protection for up to 12 months for an item deemed to be under threat. After 12 months, the Minister either had to make a PCO or allow the order to lapse.

¹¹⁴ *Heritage Act*, section 139

¹¹⁵ The process for removing an item from the State Heritage Register is the same as the process for listing, including a formal assessment of significance, demonstrating the item does not meet the criteria for State heritage significance, a period for public exhibition and submissions and a formal recommendation by the Heritage Council to the Minister for removal of the items. While employed as the Heritage Manager of the Sydney Water Corporation in 2002, the author underwent this process to remove a number of the Corporation's assets from the Register.

¹¹⁶ Goddard, J. (2004). "Protection? What protection?" *reflections: The National Trust Quarterly* (August-October): 6-8. , Goddard, J. (2004). We can't build the future without properly knowing the past. *Sydney Morning Herald*. Sydney: 15.

¹¹⁷ Under a previous version of the NSW *National Parks and Wildlife Act*.

¹¹⁸ Hinkson, M. (2001). *Aboriginal Sydney: a guide to important places of the past and present*. Canberra, Aboriginal Studies Press. Pp 22-23.

Eggerking, K. (1997). "Revitalising citizenship: lessons from the margins." *Culture and Policy* 8 (3): 77-96.

¹¹⁹ State Heritage Register item #773, protected from 1 November 1996. Note this listing was a conversion from a Permanent Conservation Order under the previous system.

7.10 The Philosophical Approach of the New South Wales *Heritage Act*

The New South Wales *Heritage Act* takes the approach of regulating items of “environmental heritage”¹²⁰ based on their heritage significance. Items of environmental heritage can include built, natural, archaeological, movable and in some cases Aboriginal objects, sites or buildings. Heritage significance is defined in a set of criteria gazetted in 1999, with the goal of being more descriptive and specific about the threshold for heritage significance. These criteria are:

- (a) an item is important in the course, or pattern, of NSW’s cultural or natural history;
- (b) an item has strong or special association with the life or works of a person, or group of persons, of importance in NSW’s cultural or natural history;
- (c) an item is important in demonstrating aesthetic characteristics and/or a high degree of creative or technical achievement in NSW;
- (d) an item has strong or special association with a particular community or cultural group in NSW for social, cultural or spiritual reasons;
- (e) an item has potential to yield information that will contribute to an understanding of NSW’s cultural or natural history;
- (f) an item possesses uncommon, rare or endangered aspects of NSW’s cultural or natural history;
- (g) an item is important in demonstrating the principal characteristics of a class of NSW’s
 - i. cultural or natural places; or
 - ii. cultural or natural environments.¹²¹

This system replaces the previous system of significance assessment of historical significance, aesthetic significance, social significance and technical/scientific significance, supplemented with the ‘degree’ criteria of representativeness and rarity, discussed in Chapter 2 and derived largely from the Burra Charter. The intention with this new approach was to provide greater guidance than the previous criteria, as well as relating significance specifically back to the state of New South Wales. This system also bears much in common with the significance criteria established by the Australian Heritage Commission.¹²²

Archaeological heritage is not specifically addressed in the above criteria, but could arguably be caught by all criteria, it perhaps most clearly relates criteria (a), (e), (f) and (g). These new criteria, however, despite broadening the interpretation of the nature of heritage items in New South Wales has not led to a substantial increase in the number of archaeological sites listed on the

¹²⁰ Derived explicitly from the Commonwealth system. Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Pg 9792.

¹²¹ Established 1999. See <http://www.heritage.nsw.gov.au/docs/criteria.pdf>

¹²² Deliberately so. The Hansard debates make it clear the legislation was seeking to implement the principles espoused by the Hope Report. See Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Speech by Mr. O’Connell, Member for Peats. 17 November 1977, Pg 9865-9866. Scientific, aesthetic and natural significance were originally excluded from the purview of the bill.

State Heritage Register. As at June 2004, there were 26 sites listed on the State Heritage Register primarily for their archaeological heritage significance.¹²³ The establishment of the State Heritage Register was intended to make the Act more forward-thinking and less reactive.¹²⁴ The previous system of Conservation Orders only came into effect once a heritage item or potential heritage item was under threat, rather than actively seeking out and protecting heritage items. Thus by actively seeking to identify and list State significant heritage items, there is an inherent assumption that this will improve the protection of heritage items. The practicalities of heritage listing are such, however, that the full identification and listing of heritage items will take many years and is in fact may never represent the totality of sites of State heritage significance in New South Wales .

In this regard, the New South Wales Land and Environment Court is in step with the intent of the State Heritage Register and heritage listings in general, recognising this as an ongoing process, which inevitably will have gaps. A 1998 Land and Environment Court case highlighted this issue, and concerned the identification and attempted listing of a house as a heritage item by a local council, in circumstances where developers had purchased the house for redevelopment, on the basis that it was unlisted. Justice Talbot observed that “the identification and listing of heritage items is an ongoing process which evolves over time as relevant information is gathered...No matter how laudable the project may be, a council cannot be expected to have adequate resources that would enable it to investigate every building in its area at one time.”¹²⁵ Thus it is recognised by the courts in New South Wales, if not necessarily the general public or the development industry, that the identification of heritage items is an evolutionary, and probably open-ended, process. This is as true for archaeological sites as for historic buildings, and in fact probably more so. The practicalities of identifying archaeological sites require a much greater application of resources than the identification of historic buildings.

Archaeological sites of any nature are eligible to be considered for listing on the State Heritage Register, or in Local Environmental Plans, but in practice very few are in fact listed.¹²⁶ The vast majority of archaeological sites and objects in New South Wales continue to be dealt with under the blanket relics provisions contained in Division 9 of the *Heritage Act*, or, if Aboriginal in nature, the provisions of the *NPW Act*. This dichotomy highlights a problem in this most recent set of legislative reforms. The continued use of the relics provisions of the *Heritage Act* is perpetuating a system which has not always

¹²³ Based on a search of the Heritage Office Database for the Site Type ‘Archaeological-Terrestrial’ undertaken on 18 June 2004. There were also 2 sites listed under the Site Type ‘Archaeological-Maritime’ not included in this figure. The total number of sites on the Register is in excess of 1500. Results confirmed as unchanged on 13 August 2006. Notable sites include the site of the original colonial Governor’s residence (First Government House site—Item # 1309), Sydney’s first water supply (The Tank Stream—Item #636), the site of the first Australian steel production (Lithgow Blast Furnace—Item # 548) and a site of secondary punishment for transported convicts (Newcastle Convict Lumberyard site—Item # 570).

¹²⁴ NSW Government Heritage Policy, Pg 1.

¹²⁵ *Woollahra Municipal Council v Andriotakus & Ors* [1998] Unreported, NSW Land and Environment Court. Talbot J at 7.

¹²⁶ 26 State Heritage Register listings for archaeological sites out of more than 1400 total listings. Of the remaining heritage items, some portion will have associated archaeological deposits or remains, however such remains are incidental to the main reasons for listing the items on the State Heritage Register.

been adequate over the last three decades and fails to provide any of the forward-planning suggested by the creation of the State Heritage Register.

7.11 The *Heritage Act* and archaeology

The general approach in New South Wales to the protection of historical archaeological sites is by reference to the archaeological object, referred to as a 'relic', which is protected from unauthorised excavation. The NSW *Heritage Act* has provided regulation and protection for non-indigenous archaeological sites from its inception, through the 'relics provisions'.¹²⁷ The *NPW Act* has separate provisions for the protection of Aboriginal objects.¹²⁸

In New South Wales, a "relic" is defined as:

any deposit, object or material evidence:

- (a) which relates to the settlement of the area that comprises New South Wales, not being Aboriginal settlement and
- (b) which is 50 or more years old.¹²⁹

Relics are protected under two sections of the *Heritage Act*: section 57 and section 139. The protections are essentially identical, however section 57 applies specifically to relics subject to listing on the State Heritage Register (either in their own right or as a component of another listed item or site) whereas section 139 applies to unlisted, unidentified archaeological relics anywhere in New South Wales .

The main part of Section 139, the 'relics provisions' states:

- 1) A person must not disturb or excavate any land knowing or having reasonable cause to suspect that the disturbance or excavation will or is likely to result in a relic being discovered, exposed, moved, damaged or destroyed unless the disturbance or excavation is carried out in accordance with an excavation permit.
- 2) A person must not disturb or excavate any land on which the person has discovered or exposed a relic except in accordance with an excavation permit.¹³⁰

The relics provisions also allow conditions to be placed upon excavation permits, designate an appeals process arising from a refusal or against conditions, provide a requirement for notification of discovery of a relic and

¹²⁷ *Heritage Act* (1977) section 4. Until 1987, section 4(b) defined relics as objects dating prior to January 1st 1900. This definition was changed to allow for the protection of significant industrial machinery which was under threat but which dated from the first half of the twentieth century. See Mackay, R. and P. James (1986). Provision of statutory protection for artefacts - a review of the provisions of the New South Wales *Heritage Act* in relation to relics, National Trust of Australia (NSW).

Mackay, R. and P. James (1987). "Provision of statutory protection for historic artefacts." *Australian Archaeology* 24: 41-47.

¹²⁸ As a part of a suite of amendments to the *NPW Act* in 2002, the term 'Aboriginal relic' was replaced with the term 'Aboriginal object'. *NPW Act* 1974 section 5 (Definitions). The *NPW Act* archaeological provisions are Part 6 sections 83-91.

¹²⁹ *Heritage Act* Section 4

¹³⁰ *Heritage Act* (1977) New South Wales. Sections 139(1) and (2).

give the Minister the power to direct that a relic be conserved, as well as allowing the Minister to designate a repository for a relic.¹³¹ In the case where such a direction order is made, no compensation is payable. Most of these provisions, except the power to issue excavation permits and impose conditions are rarely, if ever, used. An inspection of Heritage Council records revealed that a Ministerial direction regarding the deposition of an excavated relic has never been made.¹³²

While the original Hansard debates do not dwell at length on the rationale behind protecting archaeological heritage, on the few occasions the issue is mentioned, the focus is on scientific significance and archaeological research. Archaeology was noted as being a component of the significance of other heritage sites¹³³ as well as being acknowledged as significant in its own right: “anthropologists will tell you...sites are as important as buildings”, noted one member of Parliament.¹³⁴ By this stage, laws to protect Aboriginal sites and objects had been in place for a few years.¹³⁵ Significant in that comment however is the perception that it was the anthropologists, and by implication archaeologists, who were the arbiters of that importance; at this early stage of heritage protection, Parliament was protecting archaeological heritage for the sake of these professional heritage disciplines, rather than for the wider community. The general tenor of the 1977 debates around the whole issue of heritage conservation was very focussed on the protection of historic *buildings*, primarily, for the public good, with one parliamentarian remarking “...our heritage should be preserved for the enjoyment of future generations of Australians.”¹³⁶

In 1999, amendments to the Act allowed the Heritage Council to gazette ‘exceptions’ to the relics provisions by declaring certain types of relics, certain parcels of land or certain types of disturbance work to be excepted from the relics provisions.¹³⁷ These were used in a somewhat vain attempt to remove certain types of very common objects from the realm of the relics provisions, such as in-service water and sewer mains, which had been captured in an overly legalistic interpretation of the definition of relics. In 2001, the exceptions powers were further refined through a minor amendment which added the power to except a specific site from the relics provisions on the basis that any

¹³¹ From 1988 to 1998, Section 146B of the *Heritage Act* provided that all relics should go to the Museum of Applied Arts and Sciences (now the Powerhouse Museum). As a matter of policy, however, the MAAS always declined to accept collections (Vanessa Mack, former Powerhouse curator, pers. comm.). The power of direction (section 146B) has never in fact been used. The nomination of the Museum of Applied Arts and Sciences was originally suggested by Mackay and James in 1987. Mackay, R. and P. James (1987). “Provision of statutory protection for historic artefacts.” *Australian Archaeology* 24: 41-47. Post 1998, Section 146B allows the Minister to designate a relic be deposited with anyone deemed to have the “facilities and expertise to conserve the relic”.

¹³² Based on a search of the Heritage Office Database for any orders made under Section 146 of the *Heritage Act*. June 2004. A subsequent confirmation with Heritage Office staff has indicated that power has not been used since that date.

¹³³ Referring to Elizabeth Farm in Parramatta. Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Speech by Mr. Wilde, Member for Parramatta. 17 November 1977, Pp 9880-9881.

¹³⁴ Ibid. Speech by Mr. Lewis, Member for Wollondilly, 17 November 1977, Pg 9883.

¹³⁵ Under the *National Parks and Wildlife Act* (1974) New South Wales.

¹³⁶ Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Speech by Mr. Degen, Member for Balmain, 22 November 1977, Pg 9884.

¹³⁷ *Heritage Act* Section 139(4). These are known as the General Exceptions, the Addisonian Exceptions and the Sydney Water Exceptions. See http://www.heritage.nsw.gov.au/03_subnav_01.htm
The author was heavily involved in the drafting of both sets of initial exceptions and subsequently went on to become the Heritage Manager for Sydney Water Corporation.

relics contained within the site were of little or no significance.¹³⁸ As with the approach to the Victorian definition of archaeological sites, such a “shopping list” approach to regulation inevitably leads to gaps in the protective regime. The exceptions are currently undergoing review for precisely this reason.¹³⁹

7.12 The ‘relics provisions’ considered

On their face, the relics provisions are themselves an extremely strong set of protections for both archaeological sites and individual relics. The definition of a non-indigenous ‘relic’ is an absolute definition—anything older than 50 years, regardless of its heritage significance, is a relic. The qualifying part of the definition “relating to the settlement of NSW” has been interpreted extremely broadly, capturing more within the ambit of the legislation than was originally intended. Section 139, however, only affords protection to relics where land will be excavated. Relics above ground must be listed on the State Heritage Register to receive protection under the *Heritage Act*. In theory, the relics provisions can apply to any non-indigenous item which has been below ground for more than 50 years (for example the footings of a standing building from 1955) although their application in this way would be absurd and contrary to the legislative intent of the *Heritage Act*. The problematic nature of such a far-reaching definition of ‘relic’ was noted by at least one member of Parliament during the 1977 debates, who noted “there would be thousands of relics in the homes of people in this State”.¹⁴⁰

Referring back to the definition of relic as ‘relating to the settlement of NSW’, the definition shows the differences inherent between the legal and archaeological professional views of archaeological heritage. The definition leaves open the question as to whether “settlement” was a process or an event. An archaeologist may reasonably argue that non-indigenous ‘settlement’ is an ongoing process, which commenced in 1788 in New South Wales and continues today. And to an archaeologist, those relics which are only just inside the 50 year limit may be of interest—for example, the Tuscon Garbage Project in Tuscon Arizona, USA,¹⁴¹ which applied archaeological methods to contemporary rubbish deposits in the city dump for experimental purposes. A legal practitioner, however, may argue that settlement was a one-off event, which occurred in New South Wales when non-indigenous people ‘settled’ in a given locale. Thus, for Sydney, a lawyer could argue that settlement took place in 1788 and that later material does not meet the definition of relic and thus is not protected under the provisions of the *Heritage Act*. This is only a theoretical debate, as the relics provisions have never been tested before the courts in New South Wales.

The main substance of the change to the definition of “relic” in 1987 involved the removal of a fixed date for items to qualify as protected relics (1 January

¹³⁸ *Heritage Act* Section 139(4)(d).

¹³⁹ Pers. comm. Yvonne Kaiser-Glass, Archaeologist, NSW Heritage Office. 22 August 2006. The new exceptions are anticipated by the end of 2006.

¹⁴⁰ Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Speech by Mr. Maddison, Member for Ku-ring-gai, Deputy Leader of the Opposition, 22 November 1977, Pg 9992.

¹⁴¹ Rathje, W. L. and C. Murphy (2001). *Rubbish! : the archaeology of garbage*. Tucson, AZ, University of Arizona Press.

1900) and replaced it with a floating age range (greater than 50 years in age). Mackay and James argued at the time that Australian heritage legislation should include provisions for the control of archaeological objects as moveable heritage following excavation, as well as stipulating a repository for excavated materials.¹⁴² While this suggestion was adopted in the 1987 amendments to the NSW *Heritage Act*, the manner of the actual drafting of the Act meant that the proposal was ineffective. Mackay and James argued that there were a large number of items which were dated from the post-1900 time period which were highly significant yet remained unprotected by legislation. This included individual objects as well as collections of artefacts recovered from compliance-driven archaeological excavations. Their approach was to widen the net cast in the definition, to capture items which (at the time of the amendments) dated in the 1901 to 1947 age range, and ensure excavated relics were preserved (preferably in a museum) for future scientific research. This minor change aside, there were no other fundamental alterations to the definition of “relic” nor to the enabling provisions of the *Heritage Act*. This changed definition still stands nearly 20 years after the fact, but administratively is needlessly burdensome, due to its vagueness and lack of qualification. A more effective strategy, and one which Mackay and James themselves hinted at but did not argue for, would be to link the definition of “relic” to the heritage significance criteria. As noted in Chapter 6, this was done in the 2004 amendments to South Australian *Heritage Places Act*, specifically to ensure the scope of the legislation was limited. This small change limits the possibility of highly legalistic interpretations of the nature of a “relic”, in circumstances where the heritage significance of a relic must be demonstrated in order to be protected.

The relics provisions do not, of themselves, place any specific limits on what can be done to a relic once an excavation permit has been obtained. Permits are issued subject to conditions,¹⁴³ which can place various constraints upon what can be done to an archaeological site and which require certain actions to be undertaken. This may include the in situ conservation of certain types of relics or the need to reassess the significance of the site during the course of excavation works. The power to impose conditions also provides the opportunity for conservation outcomes to be negotiated for a site, including the redesign of a development to avoid significant, intact archaeological remains. Relatively standard conditions are imposed on every excavation permit issued in New South Wales and additional conditions are imposed on a case-by-case basis as required. The standard conditions are principally designed to regulate the behaviour of archaeologists (and by implication their clients) with respect to good archaeological practice. By placing these actions in the context of conditions on a legal document, the ‘excavation permit’ the Heritage Office is seeking to bind those who excavate archaeological sites to a certain standard of practice. There is little policing of compliance in this

¹⁴² These ideas were originally contained in a submission to the review of the *Heritage Act* in 1986, on behalf of the National Trust of Australia (NSW). This submission was later reworked into a journal article.

Mackay, R. and P. James (1986). Provision of statutory protection for artefacts - a review of the provisions of the New South Wales *Heritage Act* in relation to relics, National Trust of Australia (NSW). , Mackay, R. and P. James (1987). "Provision of statutory protection for historic artefacts." *Australian Archaeology* 24: 41-47.

¹⁴³ *Heritage Act*, section 141(1)(a).

regard, however, and there has never been a prosecution for breach of permit conditions.

Similarly, the relics provisions do not take into account intergenerational equity. Intergenerational equity is, to a degree, implicit in a listing on the State Heritage Register, as a listing is meant to be a long-term if not permanent protection and provides strict limits as to what may be done to a listed item. However archaeological sites are unrepresented as an item class. The very terminology of the Act—the “excavation permit”—implies that the appropriate way in which to manage archaeological relics is to remove relics when desired. Only in very rare cases are archaeological sites retained in situ when affected by a development and in the majority of cases only in government-funded developments¹⁴⁴ due to the enormous additional expense in situ conservation can require. In some instances, development can be reconfigured to limit disturbance to the archaeological fabric of a place, although the opportunities for this may be minimal on a highly-constrained urban development site. This may also result in a significant impost on the site owner, in terms of direct costs or foregone development opportunities, however present legal requirements do not provide a robust framework for taking such matters into account.

In the absence of a framework or the consideration of wider issues such as those discussed above, the conservation outcomes on individual sites are inevitably negotiated in a manner which excludes the consideration of wider conservation issues. Present regimes can, in some instances, provide for localised public benefit outcomes, confined to an individual site or a defined period of time (such as public programs during the course of excavation). Yet the system remains overly focussed on excavation as the primary management tool for archaeological heritage. There are few opportunities for considering the wider context for archaeological heritage conservation, such as developing conservation strategies for a range of sites or site types across an archaeological landscape. In most cases, it will be difficult to identify and articulate a longer term public good outcome for the conservation of an archaeological site, save for those sites which are self-evidently of high importance. A public good conservation framework which considers broader values of archaeological heritage across a landscape may provide opportunities to transfer the benefits of conservation from one localised site to a broader region. However the current structures within the *Heritage Act* militate against this, relying on a site-by-site based approach with limited flexibility.

7.13 Protecting Aboriginal archaeological heritage

Aboriginal heritage is protected in New South Wales under the *National Parks and Wildlife Act* 1974, which was substantially redrafted from its 1967 incarnation and added protection for Aboriginal archaeological heritage, in

¹⁴⁴ For example the First Government House Site and the Sydney Conservatorium of Music site. See Mulvaney, D. J. and Australian Heritage Commission. (1985). *A good foundation : reflections on the heritage of the first Government House, Sydney*. Canberra, Australian Government Publishing Service.
Casey, M. (2005). The road to controversy. *Object lessons: archaeology & heritage in Australia*. J. Lydon and T. Ireland. Melbourne, Australian Scholarly Publishing: 148-166.

part at the recommendation of prominent Australian anthropologist A. P. Elkin.¹⁴⁵ Amendments in the Act in the late 1990s replaced the previous description of Aboriginal heritage items (Aboriginal relics) with the more neutral, but broader descriptor of “Aboriginal objects”. Aside from the descriptor, the definition attached did not itself change. This change was made to reflect the notion that Aboriginal heritage items were things (potentially) in ongoing use and part of a living culture, rather than the lifeless relics of a dead or dying culture. Aplin notes that, while the inference could be drawn that by including Aboriginal heritage in the same piece of legislation as natural heritage the Aboriginal past is natural rather than cultural, the reality is likely more pragmatic—that large numbers of Aboriginal sites were known to exist within the parks and reserves¹⁴⁶ at the time the legislation was established. Such sites can also be more easily protected and are less subject to direct threats than the even larger numbers of Aboriginal sites off-park. This change in descriptor, from “relics” to “objects”, represents an understanding by those managing Aboriginal heritage that such objects and places are a part of a living indigenous culture. Nevertheless, this did not substantially change the nature of the legal protection for Aboriginal heritage items or places, where again regulation is focussed on the controlled disturbance of such places, rather than any presumption in favour of their conservation. Much as with the *Heritage Act*, the *NPW Act* provides a blanket protection for all Aboriginal objects, whether previously identified or not, anywhere in New South Wales. The Department of Environment and Conservation maintains the Aboriginal Heritage Information Management System which records the locations of all known Aboriginal sites.¹⁴⁷ The Act also provides for the declaration of “Aboriginal places”, which can be places of Aboriginal social significance with little or no physical evidence of the Aboriginal past. Aboriginal places must be declared and gazetted, in the same way as heritage items listed under the *Heritage Act* or a local planning scheme.

The limitations to this approach are very similar to the problems with the *Heritage Act*. Blanket protections provide for sweeping coverage of the entire state and, given the very broad definition of “Aboriginal object”, potentially capture virtually any individual item ever modified or used by an Aboriginal person right up until the present day. The definition of Aboriginal object only excludes “handicrafts made for sale” and thus, theoretically, any item used by a contemporary Aboriginal person, which relates to “indigenous habitation” could be considered a protected object. The *Heritage Act* attempts to get around this issue by stipulating that protected objects must be more than 50 years old, however the problems with that approach have been discussed above. Again, there does not appear to have ever been an attempt to protect a contemporary product of an Aboriginal person in this way, rather protections for moveable heritage items have been used, such as the Commonwealth *Protection of Movable Cultural Heritage Act*.¹⁴⁸ While the likelihood of the

¹⁴⁵ Parliament of New South Wales (1977). Parliamentary Debates (Hansard) Forty-Fifth Parliament. Speech by Mr. Lewis, Member for Wollondilly, 17 November 1977, Pg 9882.

¹⁴⁶ Aplin, G. (2002). *Heritage: identification, conservation and management*. Oxford, Oxford University Press. Pg 24.

¹⁴⁷ Aboriginal Heritage Information Management System data is typically restricted in terms of its release, due to cultural or site security concerns. See the AHIMS website for details:

<http://www.nationalparks.nsw.gov.au/npws.nsf/Content/Aboriginal+Heritage+Information+Management+System>

¹⁴⁸ This has mainly been restricted to Aboriginal artworks by twentieth century artists.

NPW Act being used in this way is minimal, it nevertheless represents a legislative anomaly, which has the potential to distract from the main purpose of the legislation, which is to protect significant indigenous places and objects.

The *NPW Act* makes the assumption that every “Aboriginal object” will be an object of significance to Aboriginal people. While there is no doubt a vast array of material which may be of significance to the Aboriginal community, there would be an amount which was of little or no interest to Aboriginal people or to archaeologists. This can include, at a basic level, isolated finds or minor artefact scatters, which presently are protected under the general protections for Aboriginal objects. The assumption of importance of archaeological objects to the Aboriginal community is a very fine balancing act. Clearly the *NPW Act* was developed with the intention to cast a broad net in terms of protection, and errs on the side of caution by potentially protecting too much rather than too little. This is consistent with an aim of giving a central attention to Aboriginal heritage issues, perhaps in recognition of the past dispossession of Aboriginal people. But the situation may arise where objects protected by the Act are of no interest to the Aboriginal community. However the Act provides no guidance as to how to proceed in such situations.

Such a construction presents a dilemma for heritage managers and raises important public policy questions for indigenous heritage protection. The nature of the present construction is advantageous to indigenous people in terms of providing a statutory avenue for their involvement in management issues for indigenous places and objects. In the absence of such legislation, it is more likely their interests would be overlooked or excluded. What is currently lacking, however, is a transparent framework for identifying what places are more or less important to indigenous culture. As noted in the previous chapter, the ACT has adopted a policy position that all remains of the indigenous past are considered significant by the indigenous community. Such a position, while making a strong political statement, presents many practical difficulties in its implementation. While there is a need to recognise and compensate past dispossession and disempowerment of indigenous people, this is unlikely to be successful if undertaken at the expense of all other legitimate social concerns. Pardoe has referred to this as the balancing of accountabilities between indigenous people and the archaeological community.¹⁴⁹ The accountabilities are however wider than just these two groups and, where such interests are not accounted for, legislation is likely to be perceived as unfair on the interest of other parties. As noted in Chapter 3, the perception of “fairness” is a factor which undermines the effectiveness of environmental regulation. The need, then, is for a framework which allows the explicit consideration and balancing of such competing claims when determining appropriate conservation action.

¹⁴⁹ Pardoe, C. (1992). Arches of radii, corridors of power: reflections on current archaeological practice. *Power, Knowledge and Aborigines*. B. Attwood and J. Arnold. Melbourne, La Trobe University: 132-141.

7.14 What makes a relic in New South Wales? Historical versus Aboriginal definitions.

In New South Wales, differing yet similar definitions apply to archaeological materials depending on whether they are of Aboriginal or historic origin. The definition of historical relics has been discussed at length above. In comparison, the definition of an Aboriginal object is:

any deposit, object or material evidence (not being a handicraft made for sale) relating to indigenous and non-European habitation of the area that comprises New South Wales, being habitation both prior to and concurrent with the occupation of that area by persons of European extraction, and includes Aboriginal remains.¹⁵⁰

The wording of the two definitions is similar, and suggests an attempt at consistency by the legal draftspeople. But looking beyond the overall similarities of the definitions, several distinct differences emerge. Firstly, and perhaps most obviously, is the removal in the *NPW Act* definition of any reference to time frame. Whereas the *Heritage Act* requires relics to be more than 50 years old, the Aboriginal definition is open-ended. This is certainly understandable for the early end of the spectrum, as Aboriginal settlement will never be able to be as precisely defined in time as non-indigenous settlement, however it does not provide a close-off point. It is unclear whether this was just a legislative oversight, or part of an unvoiced assumption that such relics related to “prehistory” rather than contemporary indigenous culture. Arguably, therefore, anything created by ‘indigenous and non-European’ people continues to be an Aboriginal object, provided it is ‘not a handicraft for sale’. This may seem a fallacious point, as in archaeological terms, an Aboriginal object will have certain intrinsic qualities which make it of archaeological interest, however this subtlety is not captured by law.

The *NPW Act* definition includes human remains, a subject on which the *Heritage Act* is silent¹⁵¹, although the Heritage Council has released *Skeletal Remains Guidelines*¹⁵¹ and permits for the excavation of non-indigenous human remains are issued under section 139 of the *Heritage Act* from time to time.¹⁵² It is inherently questionable, however, as to whether the *Heritage Act* does apply to human remains as they are not specified within the provisions of that Act. The notion of human remains, whether Aboriginal or non-Aboriginal, as being ‘relics related to the settlement of New South Wales’ also bears re-examining. While certainly in archaeological terms much can be learned from the exhumation of human remains, there are numerous ethical and cultural issues which arise.¹⁵³ Given this, a more prudent approach may be to deal

¹⁵⁰ *National Parks and Wildlife Act* (1974) New South Wales. Section 5.

¹⁵¹ Heritage Council of NSW *Skeletal Remains Guidelines* 1998.

¹⁵² For example, the excavation of the nineteenth century miners’ graveyard at the Cadia Mine near Orange in 1997-98, or the excavation of the Destitute Children’s Asylum graveyard at the Prince of Wales Hospital in Randwick in 1996-98. Both were excavated with excavation permits issued under section 139 of the *Heritage Act* and the Heritage Council took a substantial role in the management of the sites before, during and after exhumation.

¹⁵³ Briscoe, G. (1990). “The Politics of Archaeology and Prehistory: The Case For and Against Reburial of Human Remains.” *Bulletin of the Conference of Museum Anthropologists* 23: 123-141.

Pardee, C. (1992). *Arches of radii, corridors of power: reflections on current archaeological practice*. *Power, Knowledge and Aborigines*. B. Attwood and J. Arnold. Melbourne, La Trobe University: 132-141.

O’Keefe, P. J. (2000). “Archaeology and human rights.” *Public Archaeology* 1 (3).

with human remains separately from the general accumulated material culture of prehistoric and historic cultures which typically comprises the archaeological record.

The *NPW Act* definition also attempts to deal with 'contact sites' through reference to sites with "habitation...concurrent with the occupation of that area by persons of European extraction [and Aboriginal persons]". Contact sites are broadly defined as sites of interaction between Aboriginal and non-indigenous people and represent the interface, the contact, between two cultures.¹⁵⁴ These sites, depending on their location in Australia, could date from circa 1788 in New South Wales to the early twentieth century for more remote areas of Queensland, the Northern Territory or Western Australia.¹⁵⁵ How contact is actually represented in the archaeological record is a matter of complex debate—is it the physical presence of the two cultures in the same spot, is it a site of transfer of goods, technology or customs, or a site where the non-indigenous archaeological record overlays the Aboriginal record? The notion of 'concurrent occupation' in the legislation is only vaguely defined. And while the *Heritage Act* now provides a broader scope for the consideration and listing of Aboriginal heritage on the State Heritage Register, it does not adequately address the issue of contact sites or sites with multiple archaeological values.

While in some instances Aboriginal people have come to accept, sometimes grudgingly, the contribution archaeology can make to the understanding of their past, and can assist Aboriginal community goals such as establishing the basis for a land claim,¹⁵⁶ the protection of archaeological objects, initially on behalf of the archaeologist, may have elevated their importance in the minds of Aboriginal people. At a minimum, Aboriginal involvement in the management of indigenous places gives Aboriginal people an input into the planning system which they may not have otherwise had available. The same can be said for historical archaeological relics; as they are protected by law, an archaeologist must be engaged to excavate them in accordance with the law, but from a perspective of actual ability of the protected object(s) to provide meaningful information regarding the history of a site or region, the value of the actual relic may be minimal. Both approaches have elevated the status of the archaeological object out of proportion to the value such an object may have had in the absence of protective legislation. In such instances, archaeological heritage protection becomes an end unto itself, with little underlying purpose save legislative compliance. In New South Wales, because of the particularly all-encompassing definitions of archaeological heritage and the blanket protections offered by the legislation, this situation is particularly pronounced.

Paterson, R. K. (2001). "Claiming possession of the material cultural property of indigenous peoples." *Media and Arts Law Review* (3): 193-201.

¹⁵⁴ Torrence, R. and A. Clarke, Eds. (2000). *The archaeology of difference: negotiating cross-cultural engagements in Oceania*. London, Routledge.

Harrison, R. and C. Williamson, Eds. (2002). *After Captain Cook: The archaeology of the recent indigenous past in Australia*. Sydney University Archaeological Methods Series, Archaeological Computing Laboratory, University of Sydney.

¹⁵⁵ This is recognised in the Northern Territory *Heritage Conservation Act* through reference to inhabitation by Macassan people, as discussed in Chapter 4.

¹⁵⁶ Coutts, P. J. F. (1984). A Public Archaeologist's View of Future Directions in Cultural Resource Management. *Archaeology at ANZAAS, Canberra*. G. K. Ward. Canberra, Canberra Archaeological Society: 212-221. Pg 213

7.14 Measuring archaeological outcomes in New South Wales

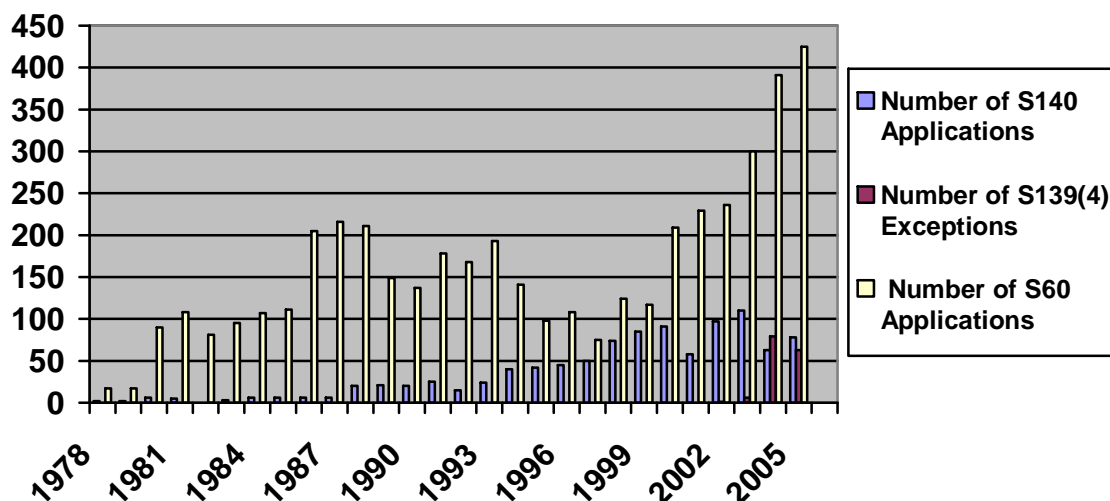


Figure 7.2: Permits issued for archaeological works under the *Heritage Act* 1997 (NSW), 1978-2005¹⁵⁷

The above chart compares the trends in total excavation permit applications under section 140 of the *Heritage Act* with the total number of Section 60 applications issued for works to items on the State Heritage Register or subject to Permanent or Interim Conservation Orders.¹⁵⁸ This data was compiled from the Annual Reports of the Heritage Council of New South Wales. Data for Section 60 approvals between 1994 and 1997, showing an apparent declining trend, is suspect, as during those years, the Annual Reports did not record the total number of Section 60 applications considered by the Heritage Council. This data has been reconstructed using the information held in the Heritage Office Database but it is likely that inaccuracies remain. Similarly, prior to 1987, the reporting of the total number of excavation permits issued under Section 140 was inconsistent. As reporting of archaeological approvals for sites on the State Heritage Register was also inconsistently reported,¹⁵⁹ those approvals for State significant archaeological sites are grouped with the general Section 60 approvals.

What is observable is a steadily increasing trend in the number of Section 140 approvals for unlisted archaeological sites and relics over three decades, with a temporary downturn in 2001, which can be attributed to the post-Olympics slump in the construction and development industry.¹⁶⁰ By comparison, the

¹⁵⁷ Compiled from the Annual Reports of the Heritage Council of NSW.

¹⁵⁸ In the 1998 amendments to the *Heritage Act*, the system of Permanent and Interim Conservation Orders (PCOs and ICOs) was replaced by the State Heritage Register (SHR). All items with PCOs or ICOs were transferred to the State Heritage Register in April 1999. Any reference to the State Heritage Register should be understood as referring to a PCO site prior to 1998. These figures are total applications processed, thus including applications approved, refused or withdrawn in any given financial year (1 July to 30 June).

¹⁵⁹ Reported only in the 1995 and 1996 Heritage Council Annual Reports, as 10 and 16 approvals for State significant archaeological sites respectively.

¹⁶⁰ Sydney hosted the 2000 Summer Olympic Games, which drove a massive construction program for the 5 or so years proceeding 2000.

number of Section 60 applications has remained relatively consistent at 150-200 applications per year since the late 1980s. However since 2000 the number of applications has been consistently over 200 per annum.¹⁶¹ A spike is observable around 1988, the Australian Bicentenary Year, where a great number of heritage conservation projects were undertaken as a part of the Bicentenary celebrations.

Prior to about 1987, the year of a number of substantial amendments to the *Heritage Act*, the Heritage Council's staff archaeologists were much more directly involved in the archaeological work in New South Wales. The majority of archaeological projects undertaken in New South Wales in the first 10 years of the operation of the *Heritage Act* were on government-owned sites and were often funded in whole or in part by a grant from the Heritage Council.¹⁶² The early 1980s saw a number of Sydney's most significant buildings and sites conserved, with accompanying archaeological works, including Hyde Park Barracks, the Royal Mint, New South Wales Parliament House, Sydney Hospital and the site of First Government House. These projects raised the profile of historical archaeology in New South Wales but saw it mainly restricted to publicly-owned sites where there was a reasonable expectation of public access, interpretation and ongoing public benefit from the excavations, with some of the sites, particularly Hyde Park Barracks and the site of First Government House, becoming public museums. It was not until the late 1980s and into the early 1990s before there was substantial engagement of the private sector with the archaeological requirements of the *Heritage Act*.

The growth in archaeological applications has been substantially higher than the growth in applications for other listed heritage sites. While the Heritage Office does not keep records as to the underlying purpose of applications,¹⁶³ in terms of whether they are lodged for the purposes of development works, conservation works or archaeological research, the anecdotal information is that research-based archaeological applications make up an insignificant number of the total—perhaps 1-2 applications per year, particularly since 1998, where there has been the largest growth in the number of Section 140 applications. Such research-based applications are a combination of research projects by doctoral students at Australian universities and long-term research excavations undertaken by Australian academics. This low proportion of research-based archaeological works is not inconsistent with the findings in Victoria, discussed earlier in this Chapter. Clearly the research-based conceptions which underlie the archaeological protections in the New South Wales *Heritage Act* are not being realised in the actual nature of archaeological work being undertaken in New South Wales, the vast majority of which is development-driven or incidental to other conservation works at heritage sites. The main motivation for such work is compliance with legal requirements, rather than any research agenda or underlying desire to

¹⁶¹ From 1999, these figures include applications assessed under the Integrated Development Assessment scheme, established under the NSW *Environmental Planning and Assessment Act* 1979.

¹⁶² See the Heritage Council of NSW Annual Reports for 1978 to 1987. For example, in 1981, the Heritage Council funded excavations at the site of Old Sydney Gaol (1980 Annual Report, Pg 13) and in 1983 Heritage Council staff archaeologists undertook rescue excavations at the Belmore Basins Coke Ovens site (1983 Annual Report, Pg 45).

¹⁶³ Collection of this type of data only commenced in the beginning of 2004.

conserve the archaeological resource. In the absence of a wider conservation philosophy which seeks to derive a 'public good' outcome from such work, there is little motivation for those funding the compliance works to seek any longer term archaeological outputs from compliance-driven archaeological projects.

This issue was noted in the 2000 *Review of Historical Archaeology Planning Systems and Practice in New South Wales*, undertaken by the Heritage Office archaeologists.¹⁶⁴ Since that time, the Heritage Office has been taking steps to see some benefit derived from the vastly increased quantity of archaeological work being undertaken in New South Wales. Some of this has been aimed at improving the standard of archaeological work undertaken in the State, by establishing criteria for Excavation Directors to obtain approvals to excavate archaeological sites.¹⁶⁵ Other efforts have been aimed at deriving a degree of public benefit from archaeological works, by imposing approval conditions requiring archaeological interpretation, public programs during and after excavation programs and in situ conservation of archaeological remains, particularly on State significant archaeological sites.¹⁶⁶ This has been particularly observable in such major developments such as the Walsh Bay Wharves redevelopment in Millers Point, Sydney, the Sydney Conservatorium of Music renovation and conservation works, the development of the new Westpac Bank headquarters in the Sydney Central Business District (the KENS Site) and the Quadrant apartment complex in Ultimo, Sydney.¹⁶⁷ Each of these sites saw a range of public programs and in situ conservation options implemented, to provide a visible and prolonged benefit to the wider community during and following the archaeological excavation programs. Of course, not all sites lend themselves to public interaction, nor may they have other values which warrant such participation.

Irrespective of these efforts in public interpretation and presentation, there remain a number of fundamental problems with the New South Wales legislation, which continues to require a large number of archaeological approvals with little definable benefit and which remain conceived of, at least in a legal sense, as an archaeological research issue. The projects cited above, while certainly best practice examples, remain clearly in the minority of total projects approved and much of the benefit that has been delivered to the public has been due to the fact that these were large developments with multi-hundred-million dollar budgets; they were certainly not the typical development-driven archaeological projects. Fundamental reform of this most rigid of heritage legislation is still required to ensure that resources can be appropriately directed towards presenting the archaeological past to present

¹⁶⁴ Allen, C. and M. North (2000). *Review of historical archaeology planning systems and practice in NSW*. Parramatta, NSW Heritage Office: 62. The thesis author was a co-author of that study, but left the Heritage Office in late 2000 prior to the implementation of the recommendations. In late 2004, the Heritage Office commissioned Dr Tracy Ireland to conduct another independent review of archaeological practice and administration in NSW. As of mid-2006, this review has not been finalised or made publicly available.

¹⁶⁵ NSW Heritage Office (2004). *Guidelines for the Qualifications of Excavation Directors*. Parramatta, NSW Heritage Office.

¹⁶⁶ Heritage Council of NSW (2005) *Annual Report*. Pp 53-55.

¹⁶⁷ Vinton, N. (2002). *Interpretation and public archeology: the home of archeology lies in the heart of modern communities*. Parramatta, NSW Heritage Office. Unpublished report, available through the NSW Heritage Office. http://www.heritage.nsw.gov.au/docs/archaeology_interpretation1.pdf Accessed 13 July 2006.

and future communities, rather than limiting such presentation to extremely large and primarily urban development projects.

7.15 Conclusions—Different approaches, differing results

Victoria and New South Wales have the most comprehensive legal regimes for archaeological heritage protection in Australia, but with substantially different approaches. Victoria, while bedded firmly in its archaeological professional roots has attempted to refine archaeological heritage protection through a tighter definitional approach than that of New South Wales. This approach seeks to make some distinction between objects which meet definitional criteria as opposed to those which meet some level of additional qualitative criteria, a subtlety which has not as yet worked its way into the New South Wales legislation for either historical or Aboriginal heritage. Victoria has also maintained a list of identified archaeological sites for both historical and Aboriginal heritage, although New South Wales only maintains a list of Aboriginal sites. In Victoria, at least, such lists can give a better impression as to the extent and nature of the archaeological resources of the state, in a way not possible in New South Wales. Despite this, it is evident that true research-oriented archaeological projects are vastly outnumbered by compliance-based archaeological work.

The New South Wales regime for both types of archaeological heritage has relied primarily on a tight definitional regime, backed up with a rigorous permitting process. The number of permits issued for the excavation of historical sites, for example, is substantially higher than that of Victoria, yet it does not appear that the quality of archaeological work done in New South Wales under this regime is inherently better. Both regimes remain focussed on excavation of archaeological heritage as the primary management technique and do not take into account in any meaningful way the non-scientific values of archaeological heritage. The Victorian attempt at indigenous community management of Aboriginal archaeological heritage is an interesting approach which will warrant examination in the future to judge its effectiveness. What will be particularly interesting will be to see what values the indigenous heritage managers take into account when making management decisions about the treatment of Aboriginal archaeological sites.

Comprehensive legislation and extensive compliance-based archaeological programs exist in both jurisdictions but the results of this vast quantity of archaeological work are not readily apparent. From a public policy point of view, it is necessary to consider what good is derived from all of this effort, as it has not necessarily led to a better understanding of the heritage of these states, particularly for the general public. Further research into the effectiveness of past public programs and in situ conservation efforts, while beyond the scope of this thesis, would facilitate the development of more effective 'public good' conservation frameworks for Australian archaeology. If the two most populous states with the largest compliance-based archaeological programs are not necessarily achieving any public good from the archaeological work which is undertaken, serious thought must be given to reconsidering these heritage protection regimes at a more fundamental level.

Basing future legal change in public good principles, as opposed to questionable scientific benefit will be the first step in achieving this.

Chapter 8—Archaeology and the Australian courts: a review of the case law

8.1 Archaeology and the courts

The preceding chapters have examined in some detail the history, development and philosophy behind Australian archaeological heritage protection legislation. They argue for a change of focus in that legislation from protection of notional scientific significance, to protection and expression of the value of this heritage to the wider community, through implementation of ‘public good’ principles in legislation. What this analysis has demonstrated is that the motivation for those who sought the introduction of legislation was a range of principles of archaeological heritage protection, which have not necessarily been considered by Australian legislators during the drafting or enactment of legislation. This has created a disjunction between what archaeologists and their supporters were seeking in heritage legislation and what is actually being protected. Much legislation focuses on only portions of these principles, to the limited benefit of Australia’s archaeological heritage and the community more broadly. Most existing legislation also fails to recognise the emerging trends in indigenous heritage management and the significance this heritage has to living indigenous communities.

The final element in this analysis is the consideration by Australian courts¹ of archaeological heritage, the protection principles and archaeological heritage legislation. The utility and ongoing relevance of legislation of any type is guided to a large degree by its examination through the courts. In such circumstances, the mechanisms within the law are tested, which may highlight the strengths or demonstrate the weaknesses of a particular law. This process of testing and challenge may lead to the setting of legal precedents, which will guide future judicial decision-making and influence future legislation. It may also lead to the amendment or repeal of legislation where that legislation is demonstrated to be significantly flawed. With respect to Australian heritage legislation, there have been few instances where issues have been brought to the courts and a miniscule number of court cases centred on the consideration of archaeological issues.

This in itself is interesting, as it begs the question why archaeological issues tend not to feature in litigation. During research for this thesis, a search of CaseBase, an electronic database of Australian case law, returned fewer than half a dozen cases which related to archaeological heritage throughout Australia.² With such meagre pickings, it is difficult to draw firm conclusions regarding how the Australian courts view the protection of archaeological heritage. Perhaps the existing archaeological heritage legislation has been acting as an appropriate deterrent or moral example, as suggested in Chapter 4, thus limiting the number of court cases through a high level of compliance. From the perspective of business and government, the issue of legislative compliance should be a principle of good corporate or organisational governance generally. Therefore these entities should be seeking to comply

¹ A term used here interchangeably with tribunal.

² CaseBase contains primarily reported decisions.

with the letter of existing legislation, if not necessarily seeking to further the protection of archaeological heritage. This level of compliance at the corporate level in environmental matters more broadly has become a normal part of doing business and heritage should fall within that broad environmental compliance requirement. It is therefore more likely that breaches of legislation resulting in court action will be through the actions of individuals or smaller legal entities which lack strong governance and compliance procedures. Across the board breaches may occur through ignorance (which may be defensible depending on the jurisdiction) or circumstances where the protection of the archaeological heritage may be part of a larger political or legal agenda, as is seen more strikingly with Aboriginal heritage.³

The courts can only consider those matters brought before them, suggesting that there has been a lack of will amongst potential litigants including government, interest groups, land owners, archaeologists and their clients or the general public, to bring cases to court. This may be simply that the costs of court action are too high to justify, or it may mean that there have been few breaches of archaeological protection legislation. This latter proposition seems unlikely, given the age and breadth of the legislation across Australia. It may also be the case that legislative breaches are resolved through out of court negotiation and settlement, although there is no empirical data. Cases brought by or on behalf of Aboriginal people in different areas of Australia are the exception, where archaeological issues relate to broader indigenous concerns of cultural sovereignty, recognition of traditional practice, traditional ownership and social significance. Several cases of this nature are discussed in this chapter.

This chapter analyses four groups of cases in detail, considering how they relate to the principles of archaeological heritage protection, and whether the outcomes of the cases support a 'public good' consideration for archaeological heritage management. The cases considered are:

- A Western Australian decision—The WA Dinosaur Footprint cases (*Latham v R* (2000)⁴)
- A Victorian decision—The Panama Downs case (*Panama Downs Pty Ltd v Borough of Queenscliffe* (1993)⁵)
- And two New South Wales decisions: The Histollo cases (*Director of National Parks & Wildlife Service v Histollo Pty Ltd* (1995-1999)⁶)
- The Sandon Point cases (various litigants v NSW Department of Environment and Conservation and Stockland (Constructors) Pty Ltd, 2000-2005, NSW)⁷

³ For example, at Sandon Point in New South Wales, which is discussed further below.

⁴ *Latham v The Queen* (2000) WASCA 338. Hereafter *Latham*.

⁵ *Panama Downs Pty Ltd v Borough of Queenscliffe* (1993) Unreported. Hereafter *Panama Downs*.

⁶ *Director of National Parks & Wildlife v. Histollo Pty Ltd ACN No 003 054 100* (1995) NSWLEC 132

Histollo Pty Ltd v. Director-General of National Parks and Wildlife Service (1996) NSWCCA Unreported.

Histollo Pty Ltd v. Director-General of National Parks and Wildlife Service (1997) NSWLEC 209.

Histollo Pty Ltd v Director General of National Parks and Wildlife Service (1998) Unreported.

(Hereafter *Histollo* (1995), (1996), (1997), (1998).

⁷ There have been a series of cases regarding the Sandon Point site at Bulli, NSW, with applicant parties including variously Allan Carriage, Roy Kennedy, the Wadi Wadi Coomaditchi Aboriginal Corporation and the Sandon Point Aboriginal Tent Embassy for the Aboriginal community with the NSW Department of Environment and

In the discussion of these cases, the archaeological investigations which underlay the cases are not re-examined in detail. For the purposes of the discussion in this chapter, the validity of the conclusions of the original archaeologists, the exact nature of their findings and methodologies of investigation are not at issue; there is no attempt to review and pass judgement on the “correctness” of the archaeological work. Rather analysis is focussed on the issues as presented to and interpreted by the courts, which have not in general sought to adjudicate on the archaeological issues. Rather, judicial attention is concentrated on the protective and administrative mechanisms under the heritage legislation. This issue is returned to in the concluding section of this chapter.

8.2 Background to the cases

These cases, while not providing a comprehensive picture, do begin to allow some conclusions to be drawn about the weight given archaeological matters by the courts. They also identify some serious drawbacks to various legislative approaches, which make gaining convictions or demonstrating the credibility of the legislation as a protective mechanism difficult without further amendment. The first two cases, *Latham* and *Panama Downs*, go to the heart of the ‘public good’ question, as they both relate directly in substance and impact to consideration of the archaeological heritage in a public sense. The third case, *Histollo*, relates more fundamentally to the protective mechanisms which exist for archaeological sites and objects and their effectiveness in protecting archaeological heritage from unauthorised impact. The *Sandon Point* cases highlight the conflicts between indigenous and non-indigenous people which can arise over the established or purported presence of Aboriginal archaeological materials, as well as highlighting some of the difficulties which can arise within current legal mechanisms for protecting archaeological heritage.

In a legal sense, none of these cases are precedent setting, as none broke fundamental new ground in the jurisprudence surrounding the protection of archaeological heritage. That said, as the only Australian cases to consider archaeological issues they provide the only data which can be drawn upon for analysis of judicial perspectives on the issues. As was done in Chapters 5 and 6, this chapter relies on the written records of the court cases, as expressed in the judgement delivered by the presiding judicial officers.⁸ Unlike Hansard, which is a written record of the spoken debates of Parliament, and may therefore not always contain well thought through commentary, judgements are in the main prepared by judicial officers in a considered manner, following the conclusion of the evidence and submissions of all parties, allowing time for research and careful thought on the issues at hand. They represent a more

Conservation and/or Stockland (Constructors) Pty Ltd as the consent authority and developer respectively. These cases will be referred to via the applicant’s name and the year of decision but all cases relate to the same site.

⁸ Referred to as “case law”. Cases can be “reported” or “unreported”. Reported cases appear in a published volume of law reports and are generally those cases which establish precedent through new legal interpretation. Unreported cases are those which, as a general rule, break no new legal ground but rely on established precedent. Unreported cases, while unpublished, are sometimes available through various legal databases or direct from the court.

crafted thought process than is necessarily found in the Hansard records, and therefore can be considered a more reliable and authoritative source. There is a counter argument to this position, that the views of legislators should be given greater weight, as they are the individuals charged by the citizenry with creating legislation; under this view, it is the role of judges to interpret law only within the parameters set by the legislature. In this particular instance, as there are no definitive statements by legislatures around Australia on matters archaeological, giving greater weight to judicial reasoning in this instance seems appropriate. The cases outlined above, and others, are considered from the starting point of the judgements delivered by the court, as well as any external commentary (e.g. published articles) which may relate to the case.

8.3 The courts, archaeology and public interest

8.3.1 *Latham v the Queen* (2000)

The Latham case involved the theft of several fossil specimens from two areas near Broome in Western Australia. Latham and a compatriot, Illingworth, entered a protected Government-owned reserve in 1996 and, using power tools, cut a fossilised dinosaur footprint from the rock in one area and two fossilised human (presumably Aboriginal) footprints from another area. These footprints were in the rock shelf adjacent to the shoreline and, in the case of the dinosaur footprint, was the only known footprint of that species (stegosaurus) in Australia. The motive of the thieves was to sell the fossils for profit, at one point seeking \$AUD250,000 for the footprints.⁹ Latham subsequently pled guilty to the charges in 2000¹⁰ while his compatriot, Illingworth, was tried and acquitted of the theft, on the basis that he had no “intent” to sell the item.¹¹ This question of “intent” was a key element behind the ultimate acquittal on appeal in the *Histollo* case discussed later in this chapter. As will be demonstrated, the open question of “intent” in a case such as *Latham* and *Histollo* highlight some fundamental weaknesses in the protective mechanisms available for archaeological and fossil heritage.

The issue of “intent” is a key consideration in most criminal proceedings. “Intent” is an element of most crimes. The accused must be demonstrated not only to have committed to crime but to have done so with intent. The *Latham* case was a criminal proceeding where intent was required to be proven “beyond a reasonable doubt”. Latham pled guilty so his intent was never tested against this standard. Latham’s compatriot in the removal of the footprints, Illingsworth, pled not guilty and was not convicted of a crime. By comparison, in civil (non-criminal) proceedings, the standard of proof of intent is the much lower “on the balance of probabilities” standard. The third type of matter is where an offence is a “strict liability” offence, where intent is not a consideration. Under the strict liability standard, only the commission of the

⁹ Long, J. (2002). *The Dinosaur Dealers*. Crows Nest, N.S.W., Allen & Unwin. Pg 42.

¹⁰ *Latham v The Queen* (2000) WASCA 338. Parker J at paragraphs 1 to 5. Latham was subsequently sentenced separately to an additional seven years’ imprisonment for drug-related charges. See also Long, J. (2002). *The Dinosaur Dealers*. Crows Nest, N.S.W., Allen & Unwin. Pp vii-viii and Long, J. (2002). *The Dinosaur Dealers* (TV documentary), SBS.

¹¹ AAP/Reuters media report 21 December 2000, quoted in Long, J. (2002). *The Dinosaur Dealers*. Crows Nest, N.S.W., Allen & Unwin. Pp 16-17.

offending act need be demonstrated; what the perpetrator's intent was is not a relevant consideration.¹²

The theft in *Latham* was of property considered to be owned by the State of Western Australia, however the reserve was managed by its traditional Aboriginal owners, who professed a spiritual association with the footprints. The dinosaur footprint was recovered by police, however the Aboriginal footprints were not recovered, and there was some speculation they may have been dumped into the ocean to break an Aboriginal "curse" on the thieves.¹³ Latham applied for leave to appeal against the severity of his sentence (two years imprisonment) to the WA Court of Criminal Appeal in 2000. A major element of the defence's application for leave to appeal was that, given the nature of the offence and the unlikelihood that it would be repeated, the sentence should have been suspended.¹⁴ Ultimately the appellate judges were not persuaded by the arguments advanced, influenced, it would appear, by the fact that Latham had a number of other criminal convictions for thefts of different nature, albeit no other offences involving fossils. While the technical legal arguments related to whether the sentence should or should not have been suspended are not particularly relevant to this thesis, the authors of the judgement¹⁵ made a number of significant comments about the importance of the fossil remains to science, the Aboriginal people and the wider community. The major relevant issues which the judges touched on were the commercial exploitation of the fossils, the importance of the fossils in their context, the need for deterrence and the importance of the fossils to science and the Aboriginal community.

In the judgement, Justice Parker seemed quite aware of the value of the fossils primarily in their context and of the fact that the act of removing them to turn them into a tradable commodity removed a vast amount of their scientific and social value. A key element of this significance was the value of the footprints to the Aboriginal community, in connection with local creation myths.¹⁶ The Judge felt that Latham had been aware of these factors and had proceeded with the removal of the footprints nonetheless: "the applicant [Latham] was well aware of the cultural significance of the footprints to Aboriginal people, and that this importance was for the footprints when *in situ*."¹⁷ From a legal point of view, Latham then did have *mens rea*¹⁸ or intent to steal when the theft occurred. This wilful removal of the footprints from their context was seen as one of the particularly egregious aspects of Latham's act:

The value of the footprints in dollar terms, when removed from their natural location, cannot readily be determined...The notion of seeking to ascribe to these artefacts a dollar value, while of some relevance to

¹² A good example of a strict liability offence is a speeding fine, where whether a driver intended to speed or not is irrelevant. Being found exceeding the speed limit is sufficient to trigger a penalty.

¹³ *Latham v The Queen* (2000) WASCA 338. Parker J at 6.

¹⁴ *Ibid.* Pg 9, paragraph 25.

¹⁵ Parker J, with whom Wallwork and McKechnie JJ concurred.

¹⁶ (2005). The spirit of Lake Mungo *Sydney Morning Herald*. , Macey, J. (2005). Fossilised footprints hark back to Ice Age (radio story). *The World Today*. , Smith, D. (2005). A step back in time *Sydney Morning Herald*. , Webb, S., M. L. Cupper, et al. (2005). "Pleistocene human footprints from the Willandra Lakes, southeastern Australia." *Journal of Human Evolution* XX: 1-9.

¹⁷ *Latham*, Parker J at 29.

¹⁸ Latin for "guilty mind".

the applicant's motivation for his conduct, does distort and trivialise the true significance of what occurred.¹⁹

This act of removal constituted a key element of the diminution of the significance of the footprints through the destruction of their context. From the perspective of legal principle, the same argument would apply to any other archaeological item removed from its context without authorisation. The comments by the judge suggest that, where the item draws at least some of its community significance from its context, this heightens the impact of removal unless removal occurs with the support of the relevant community. Damage to the heritage item or archaeological site is a damage done to the community, not just to a physical object. This distinguishes Latham's crime from one where the object did not have community significance (for example, a car) or where the damage was of a relatively trivial and reversible nature (such as vandalism). Long, a West Australian palaeontologist who had studied the footprints prior to the theft, also noted the key value of the footprints to science was for the information held by their context.²⁰

On this basis, the Judges agreed that a strong deterrent message was required in the sentencing of Latham and would be expected by the community at large: "by the seriousness of the conduct...[there is]...need for general deterrence and what the community would regard as appropriate punishment for the type of behaviour in question."²¹ As later in the judgement it is noted that incarceration should be the punishment of "last resort"²² the fact that a custodial sentence was imposed highlights the seriousness with which both the original trial and appeal courts viewed the acts of theft. While certainly this sentence must have been influenced by Latham's past criminal conduct involving theft, the custodial sentence belies any notion that theft of artefacts or fossils from public land is a victimless crime. This case represents one of the very few, if not the only instance, where a person has been incarcerated in Australia for the theft of *in situ* antiquities.²³ Other factors in favour of a strong deterrent message were the isolated and vulnerable nature of the footprints, the presence of similar items in the jurisdiction and the potential for commercial exploitation for such items once removed from their context.²⁴

The case considered the dichotomy between scientific and community significance of the fossils and their rarity. Justice Parker noted that the "disturbance and removal [of the footprints] significantly adversely affected a great deal of their scientific value and uniqueness"²⁵ but went on to state that the footprints could not be considered "truly unique" as there were other, less well preserved, examples of similar footprints elsewhere in the vicinity, mainly

¹⁹ *Latham v The Queen* (2000) WASCA 338. , Parker J at 5.

²⁰ Long, J. (2002). *The Dinosaur Dealers*. Crows Nest, N.S.W., Allen & Unwin. Pg 9. This did not however prevent Long from removing the dinosaur footprint, which was on a loose slab of rock, from its context and transporting to the Museum of Western Australia in 1994 for study, setting something of a double standard for scientists, even if he did take pains to return the slab to its original location due to its significance to the Aboriginal community. Ibid Pg 6.

²¹ *Latham v The Queen* (2000) WASCA 338. Parker J at 8.

²² Ibid. Parker J at 18.

²³ Long, J. (2002). *The Dinosaur Dealers*. Crows Nest, N.S.W., Allen & Unwin. Pg 16.

²⁴ *Latham v The Queen* (2000) WASCA 338. Parker J at 30.

²⁵ Ibid. Parker J at 28.

in poorer condition below the high water mark. The Judge felt that for the footprints to be considered truly unique, no other examples could exist and that this was a mitigating factor taken into account during the original determination of Latham's sentence. Had the fossils been "truly unique", a harsher penalty may have been warranted, under the judge's reasoning, but given the significance of the fossils to the community, the question of their uniqueness should not have been a key consideration. Despite no direct evidence before the court of the traditional owners' distress at the removal of the footprints,²⁶ the appellate judges accepted the significance of the footprints to science and, more importantly, the Aboriginal community.²⁷ Whether the footprints were unique as physical objects was not relevant—the footprints figured into the local creation mythos and were irreplaceable in terms of their value to community identity and, it could be argued, wellbeing. In terms of detriment to the community, the social significance of the fossils came most strongly from their immediate association with a living community which held them to be sacred. The removal of a sacred item in these circumstances is devastating to that community, regardless of whether other examples exist elsewhere in the immediate vicinity or in the world. The theft represented not just a theft of property but the desecration of a space sacred to the community.

The *Latham* case, while unique in Australian jurisprudence for imposing a custodial sentence, does serve to illustrate the seriousness with which courts are prepared to view the theft of archaeological or geological artefacts. The contribution of the fossils to the 'public good' was taken as a given by the presiding Judges, as noted through their comments on the high value of the fossils for both science and the local Aboriginal community. At no time did the Judges focus on the fossils merely as property which had been stolen, but as a semi-public resource of which the community had been unfairly deprived by Latham and Illingworth's actions. It is perhaps unfortunate that the Judges were not willing to accept the community value of the fossils as the primary area of significance, preferring to rely on the scientific value of the fossils, but the recognition of the public value of this type of heritage is clear. The Judges took a public policy stance on the need to protect this type of heritage for the community, a view which differs markedly from the treatment of archaeological issues in the *Panama Downs* case.

8.3.2 *Panama Downs Pty Ltd v Borough of Queenscliffe (1993)*

The 1993 *Panama Downs* case was the latest episode in a tale of treasure hunting on the Victorian coast which extended back to the nineteenth century. Due to the establishment of heritage legislation, what had become a well established traditional pursuit of the mythical treasure became caught up in the legal and administrative realm of archaeology. Local legend in Queenscliff, Victoria holds that the pirate Benito Bonito stole several life size golden statues and other treasure from a cathedral in Lima, Peru in the nineteenth century. He then supposedly travelled to Australia and buried the treasure in a cave along the Queenscliff coast, blew up the entrance to the cave to conceal

²⁶ Ibid. Parker J at 29.

²⁷ Ibid. Parker J at 28.

the treasure from an approaching British warship and fled. Bonito and his crew were subsequently captured and executed, save for a cabin boy who was supposed to have escaped to Tasmania and become the source of the local legend, inspiring many efforts to locate the cave and unearth the treasure. Byron notes that, despite there being no records which support this story, and it appearing that the legend may have been the result of several other treasure stories being “garbled” into the Queenscliff myth, there had been “scores” of attempts to excavate for Bonito’s treasure at Queenscliff.²⁸ The Victorian Administrative Appeals Tribunal decision in this case outlined at least ten previous officially sanctioned attempts to find the treasure between 1931 and 1989²⁹ and it is reasonable to assume that other, illicit excavations were carried out throughout this period. No tangible evidence for the existence of the treasure has ever been presented.

Efforts in search of the treasure had caused such disruption to the Queenscliff coastal area that various responsible planning authorities had, since the early 1970s, generally sought to discourage attempts to locate the treasure, although sporadic attempts had been authorised formally or informally through state and local authorities.³⁰ The other factor which intervened in the searches was the passage in 1972 of the *Aboriginal and Archaeological Relics Preservation Act*, as the treasure objects themselves, if extant, fell under the definition of relics under that Act³¹ and therefore a permit would be required in order to search for them. Despite scanty evidence, Bonito’s Treasure had been identified as an “archaeological feature” in the management plan for the area, which was a coastal reserve.³² This identification of the treasure as “archaeological”, while doubtless well-meaning and perhaps intended to inspire tourism to the area, gave heightened legal status to the treasure despite no firm evidence of its existence. Legal status should have provided protection but instead lent an air of legitimacy to future efforts to find the treasure, transforming them into archaeological expeditions rather than treasure hunts.

As archaeologists are used to working under conditions where historical evidence is scant or absent, excavating solely on the basis of local mythology is not completely unusual. In this circumstance, the excavations were proposed as a commercial venture by a treasure hunting syndicate, rather than an archaeological project with scholarly or scientific motivations. The sheer number of excavations which had been undertaken over the preceding hundred or more years in search for the treasure provided reasonable evidence, from an archaeological perspective, that the treasure did not exist, at least not in the area where searches had been concentrated. This record of failure did not appear to deter commercial treasure-seeking syndicates, the

²⁸ Byron, K. W. (1964). *Lost treasures in Australia & New Zealand*. Sydney, Ure Smith. Pp 62-71.
See also Rule, A. (2005). X marks the spot. *Sydney Morning Herald Good Weekend Magazine*. Sydney: 49-51.
for a more recent account of the legend and the continuing efforts to locate the treasure. Also pers. Comm. Cath Snelgrove (18 January 2005), former archaeologist for the Victoria Archaeological Survey, who gave evidence at the tribunal hearing for the Panama Downs case.

²⁹ *Panama Downs Pty Ltd v Borough of Queenscliffe* (1993) Unreported. Pg 5.

³⁰ *Ibid.*

³¹ *Archaeological and Aboriginal Relics Preservation Act* (1972) Victoria. Section 22.

³² Swan Bay Marine and Wild Life Reserves—Proposed Management Plan 1991 cited in *Panama Downs Pty Ltd v Borough of Queenscliffe* (1993) Unreported.

difference now being that they were obliged to treat the endeavour as an archaeological one, as opposed to a commercial excavation project. Significant professional and ethical issues also arise for archaeologists participating in treasure hunts for private gain, however these factors did not seem to deter the syndicate.

Panama Downs Pty Ltd, the private syndicate created to fund and undertake the 1993 excavations, applied for a permit to excavate for a “buried metal object” in a public reserve, which required a planning consent under the *Planning and Environment Act* (Vic) 1987 from Queenscliffe Council. The syndicate had engaged a consultant archaeologist³³ well known to the Victorian heritage authorities to supervise the proposed works. This gave what was fundamentally a treasure hunting expedition a veneer of respectability, as an “archaeological” endeavour. Despite this, the local planning authorities refused to issue a permit, on the basis that the expedition was not a true archaeological project and went against the objectives of the Plan of Management for the reserve, which stated that no additional search for the treasure should be undertaken unless new “historical or scientific” information came to light. Given the degree of disturbance to the coast line over many decades of searches for the treasure, the local council’s view was that the continued quest for Bonito’s Treasure would not be in the public interest. This was despite, as the Tribunal members noted, the Council actively promoting Bonito’s Treasure as a part of the tourism strategy for the area.³⁴ Panama Downs Pty Ltd appealed this refusal to the Victorian Administrative Appeals Tribunal in 1993.³⁵ The Tribunal noted that key amongst the initial grounds for refusal of the permit were:

1. That there is insufficient additional historical or scientific evidence presented...
4. That the proposed works will cause an undesirable precedent.³⁶

These grounds for refusal were consistent with the objectives of the Plan of Management for the reserve. The AAT did not find these grounds compelling, and ordered the Council to issue a permit for the excavation under the *Planning and Environment Act* and required Panama Downs Pty Ltd to also obtain a permit under the *AARP Act* from Aboriginal Affairs Victoria.³⁷

It is interesting to note the main appeal issue in this case was not in fact the Victorian heritage authorities refusing to issue a permit under the *AARP Act*, but rather the local government authorities refusing general planning consent. Ms Cath Snelgrove, a former staff archaeologist for Aboriginal Affairs Victoria (AAV) (who appeared for that body at the hearing) recalled that contacts from treasure hunters seeking permits under the *AARP Act* were not uncommon. AAV generally tried to discourage such endeavours, which were viewed as

³³ Mr (now Dr) Iain Stuart, who had previously worked for the Victoria Archaeological Survey.

³⁴ *Panama Downs Pty Ltd v Borough of Queenscliffe* (1993) Unreported. Pp 4-5.

³⁵ *Ibid.*

(1993). “Panama Downs Pty Ltd v Borough of Queenscliffe.” *Environmental Law Reporter* 12: 153-154.

³⁶ *Panama Downs Pty Ltd v Borough of Queenscliffe* (1993) Unreported. Grounds of Refusal, Pg 2. Emphasis added.

³⁷ *Ibid.* Pp 10-11.

archaeologically dubious. In the *Panama Downs* case, AAV decided to issue a permit due to the AAT's decision in favour of the syndicate.³⁸ This may be because AAV believed it was likely to lose an appeal against a refusal. Due to this, the provisions of the *AARP Act* remain untested by the courts.

Nevertheless, the reasoning by the Tribunal members in this case is interesting, as it elucidates the attitudes and understanding of judicial officers to archaeological issues. The judgement is itself written in a rather jocular style, and the Tribunal members appear more interested in the possibility of discovering the treasure than in the consideration of the actual issues raised in the refusal of the permit. The Tribunal members remarked:

More recently, of six bore holes drilled under the supervision of Mr I Stuart, Archaeologist, on the appeal site, two of them established contact with some buried object. It is apparent that the only conclusive way of finding what is below the surface and whatever it is is by excavation. Even if Benito's treasure was being sought, we consider it would be difficult to provide the archaeological evidence referred to in the Management Plan without first excavating. All other forms of testing only prove the existence of an object.³⁹

Essentially the Tribunal was prepared to ignore the question of whether additional "historical or scientific" evidence had been presented as a basis for the excavation, rather than mere speculation. The Tribunal members were also prepared to ignore the management objectives for the coastal reserve, which included the revegetation of degraded areas. While some physical testing was itself undertaken, as the Tribunal noted, there was no discussion as to whether that testing was, from the perspective of archaeological methodology, appropriate to the circumstances. Neither was their consideration as to whether the results of the testing were in fact conclusive enough to warrant further physical investigation of the "buried object" which, in the absence of more detailed information, was more likely to be a rock than a piece of Bonito's Treasure. What this demonstrates is the Tribunal's misunderstanding of the purpose of archaeology, essentially viewing it as no different to treasure hunting. This in itself denies the notional scientific value of archaeology as articulated in heritage legislation.

What is perhaps more worrying about this case is the failure of the Tribunal to address the public policy issue of allowing the excavation to proceed. The local council had noted that allowing the excavation would establish an "undesirable precedent", a notion that the Tribunal rejected, stating that "Each application of a similar nature will be and must be judged and considered on its own merits."⁴⁰ The Tribunal had itself however already established that excavation could proceed in the absence of any new scientific or historical information, and that essentially the tenuous identification of a "buried object" was sufficient justification for allowing the excavation to proceed. This was despite the Tribunal itself noting that the area proposed for excavation fell

³⁸ Pers. Comm. Cath Snelgrove (18 January 2006).

³⁹ *Panama Downs Pty Ltd v Borough of Queenscliffe* (1993) Unreported. Pp 7-8.

⁴⁰ *Ibid.* Pg 8

within the boundary of an old rubbish tip site, again significantly reducing the likelihood that the “buried object” was in fact part of the treasure. Given the Tribunal’s findings, which directed the local council to issue a consent for the excavation, the obtaining of an excavation permit under the *AARP Act* became a mere formality.

From a ‘public good’ perspective, this case seriously calls into question whether the Victorian authorities viewed the purposes of the archaeological protection legislation as anything more than a relatively trivial administrative process. By essentially ignoring firstly the outlandish story surrounding the treasure and secondly the question as to whether further evidence of the existence of the treasure was required, the Tribunal invalidated the “scientific” consideration of the excavation work, despite its veneer as an archaeological project. By setting the threshold so low, essentially the Tribunal allowed a circumstance where any person who believed in the presence of a “buried object” should be granted a permit to excavate for that object, despite lack of other evidence or other considerations, such as management objectives for a place or public policy. It is perhaps fortunate to the discipline of archaeology in Australia that this case was so little remarked upon at the time and that there has been no attempt to use it as a basis to justify further pseudo-archaeological excavations in Victoria or elsewhere.

The authorisation of the search for Bonito’s Treasure in circumstances where evidence for the treasure was at best tenuous, was counterproductive for ‘public good’ heritage conservation efforts. The court chose to prioritise the potential financial gain of the treasure hunters over the interests of either archaeology or any community good. It could in fact be argued that in circumstances such as these, the ‘public good’ is best served by the treasure not being found; the legend of the treasure continues to contribute to the identity and character of the Queenscliff area and, if found or conclusively proven not to exist (an admittedly unlikely circumstance), it may diminish the value and significance of the place in the eyes of the community. The presence or absence of Bonito’s Treasure at Queenscliff is largely moot; to date it remains unlocated. The ongoing hunt for the treasure and its elevation in stature to an archaeological mystery is problematic in terms of the true purpose of legislative protection for archaeological heritage.

8.4 The Histollo Cases—flawed mechanisms for protection

In the framing of archaeological protective legislation, there is a general principle to protect against unauthorised disturbance of archaeological materials; this has been established in previous chapters. This may be to prevent unauthorised archaeological excavation (as a form of regulation of the profession), to prevent looting of archaeological sites by amateurs or collectors, or to prevent unauthorised damage to sites whether deliberate or accidental. This last circumstance is relevant in the matter of *Histollo Pty Ltd v Director-General of NPWS* and the litigation which followed. This series of New South Wales cases ran between 1995 and 1998 in the New South Wales Land and Environment Court and the New South Wales Court of Criminal Appeal. In the original case the defendant, Histollo Pty Ltd, was convicted and

received a large fine for unauthorised disturbance of Aboriginal archaeological materials under the NSW *National Parks and Wildlife Act* 1974 (NSW) in the Land and Environment Court. This conviction was challenged and the Court of Criminal Appeal remitted the matter to the Land and Environment Court who again confirmed its earlier decision. Ultimately when the matter was again appealed to the Court of Criminal Appeal the conviction was quashed. The case is notable for the judicial consideration of whether a person needed to have knowledge of and intent to damage archaeological heritage in order for the protective mechanisms to operate and a criminal sanction result.

8.4.1 Background to the *Histollo* cases

In the *Histollo* cases, the main question was initially whether a landowner had disturbed an Aboriginal quarry site (or Aboriginal objects) without first obtaining approval. However, the subsequent appeals dealt with the question of whether the landowner had deliberately, or knowingly (with *mens rea*) damaged the Aboriginal archaeological quarry site. The landowner had purchased the land from the New South Wales government, which had sold it subject to a 'voluntary conservation agreement'⁴¹ which provided protection for the Aboriginal quarry site on a part of the land. The quarry had been identified during the time the land was in the ownership of the New South Wales government and an archaeological assessment undertaken over 1985-86 had indicated the quarry was of sufficient scientific significance that it should not be disturbed by the government's proposal to build a waste disposal depot on the site. Due to the identification of the quarry, the NSW Waste Management Authority entered into a voluntary conservation agreement with the Minister for the Environment, which established a conservation zone on the site (containing the quarry) which was not able to be developed without consent. Subsequently the Waste Management Authority determined the site was unsuitable for their purposes and put the land up for sale in 1991, with the conservation agreement in place on title and attached as a condition of sale. The background facts referred to by the Court of Criminal Appeal suggested that the land subsequently sold to *Histollo Pty Ltd* at approximately three quarters of the value it would have had it not been subject to the conservation agreement.

In 1992 staff of the NSW National Parks and Wildlife Service, who were responsible for administering the voluntary conservation agreement on behalf of the Minister, observed earthworks being undertaken on the site. Subsequent site inspections revealed that work had been undertaken without approval within the conservation zone and damage was done to the quarry site and stone artefacts.⁴² The whole of the quarry area was protected under the conservation agreement, while the individual artefacts were protected under the general protection for Aboriginal artefacts in Part 6 of the NSW *National Parks and Wildlife Act*.⁴³ In the initial Land and Environment Court case, the judge found that damage had indeed occurred, and this was

⁴¹ Under section 69B of the *NPWS Act*.

⁴² Note that, at the time of the original incident and these cases, the NPW Act referred to "Aboriginal relics" rather than the present wording of "Aboriginal objects". The definition attached to these two descriptors was identical. See discussion of this Act in Chapter 7.

⁴³ *National Parks and Wildlife Act* (1974) New South Wales. Sections 83-91.

sufficient for a conviction and fine. The conviction was challenged in the NSW Court of Criminal Appeal and the matter remitted to the Land and Environment Court. The decision was confirmed.

A further appeal was made to the New South Wales Court of Criminal Appeal in 1998 which subsequently overturned the conviction and ruled that no offence was committed. The Judge held that, as the landowner was not aware of the precise location and nature of the Aboriginal relics, despite being aware of the conservation agreement, he did not have the capacity to know if relics were being disturbed.⁴⁴ He thus had no *mens rea* or intent to disturb the archaeological materials of the quarry site, which the Judge deemed necessary for the landowner to have committed an offence. The question of whether the disturbance was good or bad for the scientific, Aboriginal or wider communities, in terms of impact to that archaeological resource, was never considered by the Court of Criminal Appeal. The fact that the site had effectively been destroyed permanently, to the detriment of these affected communities, did not hold any weight in the decision as the *NPW Act* was not constructed in such a way as to direct consideration of such an issue. The end result was however that despite the archaeological site having been destroyed, there was no remedy and no penalty, limiting the deterrence value of the legislation in such circumstances.

This decision exposed a serious limitation within the *National Parks and Wildlife Act*, which has not yet been remedied, and continues to place Aboriginal heritage in jeopardy. As the Court of Criminal Appeal found that the act of destruction needed to be an *intentional* act to breach the legislation, the National Parks and Wildlife Service sought amendment to their legislation to establish the destruction of Aboriginal relics as a “strict liability” offence. In this context, a strict liability offence is an offence for which it is not necessary to prove intent. Such offences require no standard of proof, as the legal question resolves solely around whether the prohibited act took place, rather than whether the perpetrator was aware of the consequences of their actions or intended to commit the offending act. In 2001, a suite of amendments to the *NPW Act* were passed by the New South Wales Parliament to address some of the deficiencies identified in the *Histollo* cases, however these amendments remain uncommenced as of this writing.⁴⁵

The *National Parks and Wildlife Amendment Act 2001* amended the section 90 (consent to destroy) provisions, among other changes, to remove the question of intent from the legislation. The *NPW Act* currently still contains the intent-based clause:

90 Destruction etc of Aboriginal objects or Aboriginal places

(1) **A person who**, without first obtaining the consent of the Director-General, **knowingly destroys**, defaces or damages, or knowingly causes or permits the destruction or defacement of or

⁴⁴ *Histollo Pty Ltd v Director General of National Parks and Wildlife Service* (1998) Unreported. Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Sperling and James JJ at 42-44.

⁴⁵ *National Parks and Wildlife Amendment Act* (2001) NSW.

damage to, an Aboriginal object or Aboriginal place is guilty of an offence against this Act.⁴⁶ (emphasis added)

The uncommenced 2001 amendment to this clause reads, by comparison:

(1) **A person must not destroy**, deface, damage or desecrate, or cause or permit the destruction, defacement, damage or desecration of, an Aboriginal object or Aboriginal place.⁴⁷

This amended clause would resolve the main issue raised by the *Histollo* cases by removing the notion of “knowing destruction” and making the question one of unauthorised impact alone. To further cement this notion, the 2001 amendments remove the wording of an approval for “consent to destroy” Aboriginal heritage objects and refer to a “heritage impact permit”.⁴⁸ While the current Act does not itself refer to “consents to destroy” by name, any permit issued under section 90 has been referred to in that manner by the consent authority. The use of the term “heritage impact permit” is predominantly psychological and would tend to standardise the language of the *NPW Act* with the language of the NSW *Heritage Act* for impacts to heritage places. The difficulty with the generally accepted terminology for a section 90 consent as a “consent to destroy” is highlighted in a judicial remark in relation to the Sandon Point cases, which are discussed later in this chapter.

Unfortunately the NSW Government has not chosen to commence these amendments for reasons which have never been made public. Yet three years prior, in 1998, the NSW *Heritage Act* had its archaeological provisions amended to remove the question of “intent to disturb” archaeological relics from that Act.⁴⁹ Thus NSW Aboriginal archaeological heritage remains subject to the risks posed by an intent-based protection regime rather than a strict liability protection regime. This situation further serves to highlight the limitations inherent in any legislative approach to heritage protection, where the wording of the actual legislation may be in the furtherance of heritage conservation goals, but the absence of political will to commence the legislation hampers a more proactive approach to the issue. In circumstances such as these, the actual construction of the existing legislation hampers the implementation of any ‘public good’ considerations in the protection of Aboriginal archaeological heritage.

8.4.2 Consideration of archaeological issues by the courts in *Histollo*

In the initial Land and Environment Court case, the judge was principally focussed on whether the landowner had been aware of the voluntary conservation agreement, whether he had disturbed an area within the conservation zone and whether the disturbance of this area had damaged the Aboriginal quarry site or individual Aboriginal objects. All courts considering

⁴⁶ *National Parks and Wildlife Act* (1974) New South Wales. Section 90(1).

⁴⁷ *National Parks and Wildlife Amendment Act* (2001) NSW. Schedule 3, Clause 3.

⁴⁸ *Ibid.* Schedule 3, Clause 4. A “heritage impact permit” is rather unhelpfully defined as “a heritage impact permit issued under section 90.”

⁴⁹ *Heritage Amendment Act* (1998) NSW. Amendments to section 139 removed the requirement that a person must “knowingly” excavate, damage or otherwise disturb an archaeological relic to be guilty of an offence.

the matter accepted, almost without question, that the site could be of “significant archaeological interest”,⁵⁰ despite conflicting evidence on the archaeological significance of the site given by a second archaeologist engaged to assess the site.⁵¹ Similarly, the cases focussed on the site being of scientific significance solely—there was never any consideration of the value of the site to the Aboriginal community, nor the potential for the site to be of interest to the wider community, although the original conservation agreement did envisage that access to the conservation zone could be granted for “non-destructive educative purposes”.⁵² This suggests that the original conservation agreement was predicated on a belief that the ongoing conservation of the site and its use for educational purposes served a ‘public good’ function. This was however never a consideration for any of the trial judges, who focussed solely on the commission of the damage and the intent of the landowner.

In the view of the appeal judges, there was a need for a person undertaking an activity (in this case, earthworks) to have specific knowledge as to whether that activity could damage archaeological relics. It was not enough for the landowner to have general knowledge of the nature and location of the archaeological materials; he was required to have specific knowledge of both the location and nature of the archaeological materials which were protected under the terms of the conservation agreement. Under cross-examination, the principal defendant indicated he had a general understanding that there were “stones of importance” on the site and their general location.⁵³ The Supreme Court held that it was not possible for the defendant, as a layperson, to be able to ascertain which stones were the “stones of importance” as this was specialist archaeological knowledge. While a trained expert was able to provide the court with an understanding of the nature of the Aboriginal artefacts (“core stones”), the Court felt it was not a reasonable expectation that a layperson could make this identification on their own. Given this, it was not possible for the defendant, in the Court’s opinion, to have sufficient knowledge to be aware the actions of the Company’s agent would damage significant archaeological heritage. As the defendant lacked knowledge, he did not have ‘intent’ to commit the offence, which led to the court ultimately overturning his conviction. This observation calls into question the ability of much archaeological, or indeed environmental, protective legislation to function effectively if it requires specific knowledge of what is protected to prevent illegal damage. This is particularly problematic in circumstances where Aboriginal people may wish to keep the precise location of significant

⁵⁰ *Histollo Pty Ltd v Director General of National Parks and Wildlife Service (1998) Unreported*. Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Sperling and James JJ at 40-41

⁵¹ *Ibid.* at 18-19. Dr Jo McDonald provided the original 1985 assessment of the site. The site was reassessed as being of lesser significance by Mr Neville Baker in 1996.

While the *Histollo* case hinged largely on the question of criminal intent of the landowner and accepted the archaeological value of the site despite differences of archaeological professional opinion as to its significance, other cases have shown a propensity for the courts to make decisions regarding archaeological significance without seeking the input of archaeological specialists. In *A Hoggett v Willoughby Municipal Council*, Unreported NSW Land and Environment Court, 1988, Cripps J, at 4, the court ruled that a “few oyster shells” did not constitute an Aboriginal archaeological site and therefore did not constitute grounds to refuse a subdivision application, without seeking the input of an archaeologist or member of the Aboriginal community.

⁵² *Ibid.* Unreported, NSW Court of Criminal Appeal, Spigelman CJ, Sperling and James JJ at 40-41.

⁵³ *Ibid.* at 42-44.

sites restricted, either to prevent unauthorised access and damage or due to cultural restriction, for example sites associated with a particular sex.

On the face of it, this case is disastrous for the protection of archaeological heritage. The specialist nature of the skills required to determine whether something forms part of the archaeological heritage, let alone whether it is of social significance to a community, are the hard-won skills of trained archaeologists. In most circumstances, it is unlikely that a layperson would ever have sufficient knowledge to make this determination, which would ground a finding of deliberate intent to disturb the materials. At a level of general principle, this indicates that, at a minimum, legal protections for archaeological heritage need to be based on a strict liability principle rather than one requiring intent to cause damage to protected materials (such as is contained in the uncommenced amendments). Lesser protection might be offered by a statutory recognition that knowledge of the existence of a conservation agreement constitutes sufficient knowledge to ground intent. Other options include statutory recognition of reckless indifference, or wilful blindness as a basis for a finding of intention to damage, destroy or disturb.

It also serves as an enjoiner to those administering such Acts to ensure that, wherever possible, protected places or objects are appropriately identified and landowners are given sufficient information to minimise the chances of accidental or deliberate disturbance of archaeological heritage. The likelihood of this latter proposition being put into widespread effect is minimal, due to the vast number of possible sites and landowners across the country. Nevertheless, for highly significant places there is a clear need to make greater efforts in identification of significant archaeological elements and education of the public in order to ensure protection. Additionally, in circumstances where the protecting authority contemplated that the site was significant enough to have educative value, it was unlikely that this value could be realised without further assistance being rendered to the landholder.

8.5 The Sandon Point Cases—consultation and community value

The Sandon Point series of cases is one of the longest running legal controversies in New South Wales affecting Aboriginal heritage. At one level, the case is fundamentally about a clash of cultures and the failure of scientific archaeological values to protect a place which has high social and symbolic value to the indigenous community. It is also about differing expectations in terms of what level of consultation should occur with Aboriginal communities when there may be an impact to known or suspected Aboriginal archaeological sites.

Sandon Point itself is a promontory of land in the town of Bulli, approximately 100kms to the south of Sydney, NSW. The land at Sandon Point has been the ongoing subject of housing development and legal action since the late 1990s. The land itself was, depending on the perspective, either an industrial wasteland ripe for redevelopment, or a meeting and burial place for local Aboriginal people which had been mistreated for the last 200 years. There has

been ongoing resistance to the development from both the Aboriginal community and elements of the wider community since the 1990s.⁵⁴

8.5.1 Background to the Sandon Point cases

Sandon Point was used as an industrial area servicing the local coal industry from the 1860s onwards and included a steam tram line for transporting coal. The land had become disused by the late twentieth century and was earmarked for rezoning for residential development in the early 1990s. Sandon Point borders the coast in part, was within the traditional lands of the Wadi Wadi Aboriginal group⁵⁵ and local tradition held that there had been numerous discoveries of Aboriginal burials throughout the site's post-contact history.⁵⁶ The land at Sandon Point was sold as surplus by the NSW Government in the 1990s and by 2001, the developer, Stockland (Constructors) Pty Ltd had received development consent through the NSW Land and Environment Court to build over 400 houses on the site. Since that time, there has been a series of court cases relating to the presence and protection of Aboriginal archaeological and social values at Sandon Point. None of these court cases has been particularly successful in protecting the heritage of the place due to the limited archaeological evidence on what was a highly disturbed site and the lack of legal mechanisms to adequately consider the social rather than archaeological values of the place and how they might warrant protection. Nevertheless, these court actions did raise judicial consideration of several interesting issues.

The Sandon Point site was the subject of several studies by professional archaeologists, including subsurface test excavation via a permit issued under section 90 of the *National Parks and Wildlife Act* 1974.⁵⁷ This permit uncovered nearly one thousand stone tools, the vast majority of which were described by the archaeologists as “waste flakes” (from stone tool manufacture), which the Land and Environment Court subsequently accepted were of “limited diagnostic value” from an archaeological perspective.⁵⁸ Following these excavations, the archaeologists' findings were provided to the local Aboriginal community (some of whom had established an encampment on site in 2000—the Sandon Point Aboriginal Tent Embassy or SPATE) to elicit “meaningful contributions” regarding the significance of the site. The judgement cites the accompanying correspondence to the Aboriginal community, which sought views on the “cultural significance” of the site, as well as the statutory application under section 90 of the *NPW Act* to destroy the site during development, the future storage and disposition of the recovered artefacts and the future conservation of portions of the site. Mr Kennedy, the applicant in the initial court action, requested additional time to prepare a response and indicated a desire to inspect the recovered

⁵⁴ See for example the Save Sandon Point community website: <http://www.sandon-point.org.au/main.htm>

⁵⁵ Ridge, K. and A. Seiver (2005). “Carriage: An elder's journey through the courts.” *Indigenous Law Bulletin* 6 (9): 4-7.

⁵⁶ Anonymous (2002). The Sandon Point: A Community Bulletin for the Protection of Sandon Point. 1: 4. http://www.sandon-point.org.au/pdf/the_sandon_%20point.pdf. Accessed 20 December 2005.

⁵⁷ *Kennedy on behalf of the Sandon Point Tent Embassy v The Director-General of the National Parks and Wildlife Service and Another* (2002) NSWLEC 67. at 7-9.

⁵⁸ *Wadi Wadi Coomaditchi Aboriginal Corporation v Stockland (Constructors) Pty Ltd* (2002) NSWLEC 105. at 7.

artefacts.⁵⁹ After a period of several months with no response forthcoming from Mr Kennedy or the group he represented as to the significance of the site or artefacts, the NSW National Parks and Wildlife Service issued a section 90 consent to the developer to destroy the site. Mr Kennedy sought to have the permit declared invalid, claiming he had been denied procedural fairness by not having provided the NSW National Parks and Wildlife Service with his group's views on the significance of the site. The court noted that responses had been received from at least three other Aboriginal community groups. On the basis of the test excavations and these community responses, the archaeologists had determined they had adequate information to assess the likely presence and importance of any archaeological deposits on the site.⁶⁰ Due to this, the court held that Mr Kennedy had been given adequate opportunity to provide a response and that any failure to do so on his part was not a failure of the process used to determine the section 90 consent.⁶¹

The court essentially put the local Aboriginal community on notice that if they did not articulate the significance of artefacts to the consent authorities, the consent could legitimately be granted based on the scientific, archaeological findings. This contrasts with the position in *Latham*, where the defendant conceded the significance of the fossils to the Aboriginal community. Such a circumstance highlights an inherent conflict within the legislation, as it raises the question for whom is the archaeological heritage being protected—the archaeologists or indigenous people? A strict application of the precautionary principle, applied to these circumstances, would suggest that in cases where the identification was uncertain the court should err on the side of caution⁶² and prevent destruction or damage to the archaeological place until further research had been undertaken. That said, while we have seen that courts in some circumstances do recognise the primary value of Aboriginal archaeological sites as being for the indigenous community, courts are not generally prepared to accept Aboriginal assertions of significance uncritically. Maddock noted that Aboriginal law and custom had been largely ignored following colonisation,⁶³ and attitudes towards recognising Aboriginal traditional knowledge are slow to change. The most dramatic example of this is the disputed nature of 'secret women's business' at Hindmarsh Island in South Australia.⁶⁴ While courts have been prepared to accept that some information is culturally sensitive and must be kept confidential, they have still required a limited disclosure of information, through closed hearings or similar, in order to demonstrate the significance of the place.⁶⁵

⁵⁹ *Kennedy on behalf of the Sandon Point Tent Embassy v The Director-General of the National Parks and Wildlife Service and Another* (2002) NSWLEC 67. at 43.

⁶⁰ *Ibid.* at 53.

⁶¹ *Ibid.* at 57-66.

⁶² Stein, P. and S. Mahony (1999). Incorporating sustainability principles in legislation. *Environmental Outlook No 3: Law and Policy*. P. Leadbeter, N. Gunningham and B. Boer. Annandale, NSW, The Federation Press: 57-75. Pp 68-69.

⁶³ Maddock, K. (1984). Aboriginal customary law. *Aborigines & the law*. P. Hanks and B. Keon-Cohen. Sydney, George Allen & Unwin: 212-237.

⁶⁴ Simons, M. (2003). *The meeting of the waters: the Hindmarsh Island affair*. Sydney, Hodder.

Taubman, A. (2002). "Protecting Aboriginal sacred sites : the aftermath of the Hindmarsh Island dispute." *Environmental and Planning Law Journal* 19 (2): 140-158.

Flood, E. (1999). "The Hindmarsh Island Case." *Polemic* 10 (1): 58-63.

⁶⁵ Choo, C., Christine (2002). Historical narrative and Native Title. *Through a smoky mirror: history and Native Title*. Canberra, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit: 11-22.

There is no evidence in this case to suggest that Mr Kennedy's failure to articulate the significance of the Sandon Point finds was due to the finds relating to secret cultural business. Mr Kennedy was undeterred by this loss in court and several other court actions were brought by Mr Kennedy and other members of the Aboriginal community over the next few years. Shortly following the initial court action by Mr Kennedy, the Wadi Wadi Coomaditchi Aboriginal Corporation⁶⁶ initiated separate action against the developers, over the alleged presence of Aboriginal objects within excavated soil dumped on part of the Sandon Point site.⁶⁷ These subsequent excavation works had been proposed due to the presence of "sub-surface artefact scatters"⁶⁸ predicted by the archaeologists, based on the earlier test excavation work noted above in the initial court action by Mr Kennedy. The Wadi Wadi CAC sought to restrain any further earthworks on the site until such time as the soil stockpiles had been thoroughly investigated for the presence of Aboriginal objects. The court noted that the section 90 permit issued for this work was essentially archaeological in nature and involved a series of scrapes of the surface soil and the collection of artefacts revealed within the disturbed soil through a combination of visual inspection and selected wet sieving of samples of soil from each scrape.⁶⁹ These actions represent a typical archaeological testing and sampling methodology one which had been approved by the NSW Department of Environment and Conservation.⁷⁰ Subsequent to this work being undertaken, a member of the Wadi Wadi CAC undertook a separate inspection of the excavated soil and claimed to have discovered a large range of Aboriginal artefacts which had been overlooked by the archaeological works, including "stone axe heads, blades, many small flakes, Bondi points and other materials".⁷¹ The community member, Mr Paggett, who was not an archaeologist, used these claimed finds as a basis for describing the site as an "ancient and significant tool making site."⁷² Had Mr Paggett's claims been verified, the archaeologists who undertook initial testing would have appeared to have overlooked much more important archaeological evidence than the undiagnostic toolmaking waste flakes previously identified in archaeological reports.

It is interesting that Mr Paggett used an archaeological term like "Bondi points" in his description of the finds on the site, as this describes a particular type of stone tool with specific diagnostic characteristics. Clearly these and other archaeological terms used in the Wadi Wadi CAC's application to the court were adopted into the language of the local Aboriginal people, as they are technical terms derived from the archaeological literature. This adoption of pseudo-archaeological language may therefore be a defence mechanism by Aboriginal people seeking to have their heritage recognised and protected by the scientific paradigm imbedded in heritage legislation. Such language may

⁶⁶ Hereafter Wadi Wadi CAC.

⁶⁷ *Wadi Wadi Coomaditchi Aboriginal Corporation v Stockland (Constructors) Pty Ltd* (2002) NSWLEC 105.

⁶⁸ *Ibid.* at 4-6.

⁶⁹ *Ibid.* at 8.

⁷⁰ The NSW National Parks and Wildlife Service was absorbed within the newly created Department of Environment and Conservation (DEC) in 2003. DEC became the consent authority for Aboriginal heritage matters and the government party involved in all subsequent legal action.

⁷¹ *Wadi Wadi Coomaditchi Aboriginal Corporation v Stockland (Constructors) Pty Ltd* (2002) NSWLEC 105. at 11.

⁷² *Ibid.* at 11-12.

have been required to get the court to accept that their claim had any basis, as essentially the Wadi Wadi CAC was alleging damage to scientific values. Given the previous three decades of heritage management practice in NSW has been driven by this scientific paradigm, no descriptive language exists within the framework of heritage administration to deal with questions about the nature and significance of artefacts, *other than the scientific language of archaeology*. Ellis observed this problem in Queensland, where the use of archaeological language for site description effectively denied other, social values. He also cites examples of archaeological evidence being used to discredit Aboriginal claims for the social significance of various places.⁷³ This can be seen within the administrative guidelines governing Aboriginal heritage issued by the NSW Government⁷⁴ which, while recognising that communities may have different values from archaeologists, provides no framework under which those community values can be articulated, assessed and adjudicated upon by those administering the heritage legislation.

In this instance, the court noted that the permit issued was for impacts to a "sub-surface artefact scatter" and that specific consultation had not occurred with the local community regarding the destruction of a tool making site. Interestingly, the court did not seek to resolve the difference of opinion between the consultant archaeologists and the Wadi Wadi CAC as to the exact nature of the archaeological site being destroyed. In archaeological terms, loose artefacts in unstratified spoil which had been removed from their context were unlikely to be considered particularly significant, yet members of the Wadi Wadi CAC were prepared to assert that these artefacts did have cultural value. What exactly this cultural value was to the Wadi Wadi CAC, if articulated to the court, does not feature in the judgement and may have been as simple as the symbolic value that Aboriginal people had inhabited the Sandon Point long before white settlement. Under the current administrative regime for Aboriginal heritage, however, the scientific values (or lack thereof) are likely to prevail over Aboriginal community values, particularly in circumstances where the community may lack the descriptive language needed to compete with the scientific assessment of a place. This difference in values for artefacts was, in the end, irrelevant to the court as the judge took the view that, as the section 90 permit authorised the destruction of artefacts in the specified area, the exact nature of those artefacts did not matter as a question of law.⁷⁵ The court indicated that, essentially this was an administrative question to be dealt with by the National Parks and Wildlife Service as the consent authority, and the Wadi Wadi CAC's action was subsequently dismissed.

This reaction by the court, essentially one of indifference to the nature of the artefacts and interest only in the question as to whether proper administrative procedure has been followed, calls into question the effectiveness of the *NPW*

⁷³ Ellis, B. (1994). "Rethinking the paradigm: cultural heritage management in Queensland." *Ngulaig* 10. Pp 14-15 and 20-21.

⁷⁴ NSW Department of Environment and Conservation (2004). National Parks and Wildlife Act 1974: Part 6 Approvals. Interim Community Consultation Requirements for Applicants. http://www.nationalparks.nsw.gov.au/pdfs/interim_consultation_guidelines.pdf

⁷⁵ Accessed 4 April 2006. Note while marked as "interim" Guidelines, they remain in effect as of mid-2006. *Wadi Wadi Coomaditchi Aboriginal Corporation v Stockland (Constructors) Pty Ltd* (2002) NSWLEC 105. at 15-16.

Act in actually protecting archaeological heritage in circumstances where the Act provides only vague definition of that heritage. In this case, the court took the view that, as both sides advanced the premise that stone objects found on the site were “Aboriginal objects” of some type, their exact nature and significance was in fact irrelevant. Inherent in that thinking is an assumption that Aboriginal heritage significance is tied solely to the nature of the physical objects protected by the Act, rather than what they may represent. The Judge reasoned that as Aboriginal objects, they were subject to the Act, but administrative permission had been given for their destruction, thus ending the legal involvement with the objects. Tied up within this decision is the conflicting view of the Aboriginal community member professing special knowledge and the professional archaeologist rendering a scientific/objective opinion on the nature of the site and its contents. This is in stark contrast to the *Latham* case, where the Judges found the Aboriginal community views regarding the stolen footprints to be highly compelling evidence and a significant factor in confirming a custodial sentence. From the analysis in previous chapters, it is clear that initial legislative intent had been for professional archaeologists to be the gatekeepers of what was significant and should be protected, within the scientific paradigm. Under such a structure, it becomes incumbent upon the archaeological community to objectively exercise their professional opinion as to the nature and significance of protected objects, from a scientific and social perspective, to guide the legislative and administrative response. While in the absence of clear professional standards for exercising this professional judgement there may be differences in professional opinion and quality of assessment, the archaeological industry in Australia has developed around these administrative procedures over the last thirty years.

But such a system leaves little room for non-scientific significance to be considered, excluding almost any consideration of the ‘public good’ value of archaeological heritage. This circumstance is particularly problematic when it impacts upon the ability of indigenous communities to exercise any level of decision-making or control over the remains of their past. A reductionist view of scientific significance implies that the significance of any site can be conserved through its excavation, translation into scientific “data”, leading ultimately to its final destruction. In the case of indigenous archaeological heritage, such a legal construction furthers the disempowerment of Aboriginal people, by notionally requiring their involvement in the legal heritage management process, but then leaving them no tools or mechanisms through which they can reasonably exercise that power, or express the value of heritage places to them in a way which will be accepted by the wider community. To address this lack, changes in both legislation and administrative practice are required, to balance the scientific and community values of archaeological heritage.

Sandon Point raises the question as to whether it is essential to know the nature and significance of archaeological resources before they are impacted upon or destroyed. From the archaeological perspective, the answer to that question should certainly be “yes”, as the initial intent of legislation was to see appropriate mitigation undertaken where significant archaeological places

were to be impacted upon. Both cases represent a sort of victory of administrative process over conservation goals, where significance becomes irrelevant in an instance where proper process has been followed, or where cultural barriers do not facilitate the consideration of significance in a broader sense than the rather reductionist views which are enshrined in heritage legislation. The case also reflects a wider reluctance to recognise Aboriginal community connection and customary practices for Aboriginal people who are not viewed as living a “traditional” lifestyle, particularly Aboriginal people living in an urban context.⁷⁶ If we return to the original intent of most heritage regulation, it is to protect places and objects which have value for both scientific enquiry and for the community. This places a moral onus upon the administrators of heritage legislation to take both views into account, without necessarily giving precedence to one over the other.

A recent case New South Wales Land and Environment Court highlights precisely this principle. *Anderson v Ballina Shire Council* (2006)⁷⁷ is a case where local Aboriginal people sought to overturn a development approval for a project which would affect a place of high significance to the local indigenous community. Ballina Shire Council sought to rely on the fact that it had considered an archaeological report stating that sandmining in the area, over an extended period of time, would have destroyed any traces of past activities. The Court held that taking into account the archaeological values of a place was not a substitute for taking into account the indigenous cultural values. Decision-makers were obligated to take both sets of values into account as a part of the process of determining whether a development could proceed which would impact upon a place.⁷⁸ But in circumstances where legislation narrowly confines the consideration of the issues, as is the case with the NSW *NPW Act*, it is almost impossible for anything other than scientific values to be adequately considered. The symbolic and political values of archaeological sites in these circumstances cannot be ignored, where artefacts may act as symbolic surrogates for other values which cannot be adequately protected with existing legislative mechanisms.

8.6 Conclusion

The consideration of archaeological issues by Australian courts has been, at best, mixed. Few cases have been brought and the issues have been limited in their scope. It was remarked during the Sandon Point cases, that there had been no definitive statement even on what constituted a “relic”, leaving large gaps in our knowledge as to how such issues may be treated by the courts in future. With the small number of cases available for study, it is apparent that, while the courts may be aware of broader public issues surrounding archaeological heritage, above and beyond scientific concerns, their ultimate approach will be constrained by the boundaries of existing legislation and the specific circumstances of the individual cases. This has not left a rich field for consideration by this thesis.

⁷⁶ Maddock, K. (1984). *Aboriginal customary law. Aborigines & the law*. P. Hanks and B. Keon-Cohen. Sydney, George Allen & Unwin: 212-237. Pp 216-217.

⁷⁷ *Anderson v Ballina Shire Council* [2006] Unreported, NSW Land and Environment Court. Cowdroy J.

⁷⁸ *Anderson v Ballina Shire Council* at 140-147.

These cases, while fundamentally quite different in terms of both the archaeological heritage at issue and the legislative provisions protecting that heritage, highlight a number of key themes. First among them is that the courts, while accepting archaeological heritage as a serious matter warranting protection are limited in their ability to engage deeply with the nature and significance of that heritage. The courts have not shown themselves to be particularly concerned with the technical aspects of archaeological heritage, either from a scientific or social value perspective.⁷⁹ This attitude, which has tended to accept on face value the sometimes conflicting assessments regarding the importance of a place, indicates that it cannot be assumed the courts are ever likely to consider the archaeological merits of an issue brought before them. What the courts are able to do is consider whether the legislation, as it stands, has been correctly applied and that the processes for protecting archaeological heritage have been appropriately followed. Thus it is incumbent upon archaeologists, rather than the courts, to be determining what appropriate conservation outcomes may be for archaeological heritage. This places the onus back onto the profession to engage with the legislation and policy, or, in the absence of such engagement, to accept the legal provisions as they stand.

In such a circumstance, it is imperative that legislation is drafted in a manner which allows the consideration of issues which will achieve conservation outcomes. It seems clear that the underlying principles of archaeological heritage conservation identified earlier in the thesis have not had a strong influence in the judicial reasoning in the cases analysed above. If archaeological heritage is to be appropriately conserved in accordance with conservation principles, it is necessary that they are more explicitly expressed in Australian law. By limiting the nature of the issues with which heritage legislation deals, or providing definitions of archaeological heritage which are overly broad or vague, the future consideration of these principles by the court is effectively barred. This limitation curbs both consideration of scientific issues as well as consideration of the broader public good. Future amendments to heritage legislation which broaden the conception of the nature and value of archaeological heritage would facilitate the consideration of these issues by the courts.

The corollary which emerges to this is the need for the value of archaeological heritage to be clearly articulated when such matters are brought before the courts. Of the cases discussed above, only in the case of *Latham* did the

⁷⁹ This was particularly highlighted in the case of *Plimer v Roberts* where an academic geologist (Plimer) had taken a private court action in the Federal Court of Australia against a fundamentalist Christian (Roberts), who had claimed that a particular geological formation in Turkey was the actual fossilised remains of Noah's Ark. Plimer alleged Roberts' actions to raise money to fund the dissemination of his theories amounted to false and misleading conduct under the *Trade Practices Act*. The case hinged on the question as to whether Roberts' activities were deemed to be "business" within the scope of the *Trade Practices Act*. While Plimer's action was unsuccessful, both in the Federal Court and in his application for special leave to take the matter to the High Court of Australia, the initial trial judge, Justice Sackville, remarked of the dispute over the nature of the geological formation itself that "there are some things it is better for courts to not decide". See *Ian Rutherford Plimer v Allen Roberts & Anor [1997] 1361 FCA (5 December 1997) (1997)*. *High Court of Australia Transcripts - Plimer v Roberts and ANOR S144/1997 (19 June 1998) (1997)*. See also Sackville J's commentary on this and a related case, as to whether Roberts had infringed copyright in one of publications. Sackville J (1997). Summary of David Fasold & Anor v Allen Roberts & Anor [1997] 439 FCA (2 June 1997).

judgement reflect a detailed understanding of the nature and significance of the archaeological heritage by the Court. Both the scientific and cultural values of the footprints were articulated in a clear, credible manner which led the court to confirm an unprecedented gaol term. In the remaining cases, the evidence either indicated conflicting scientific views on the value of the archaeological heritage or poorly articulated and ultimately unresolved community views on the value of that heritage. In such circumstances, the outcomes were overwhelmingly negative from the perspective of conservation. Where conflicting values existed, the courts felt justified in glossing over those conflicts and focusing principally on the underlying protective mechanisms within the legislation. This again highlights the need for protective mechanisms to be appropriately focussed on the outcomes, rather than on the process of administration. In the absence of clear desired outcomes, the courts are likely to continue to support the processes allowed for under existing heritage legislation, which primarily provide for an orderly, legal process for the removal of archaeological heritage rather than its use for either scientific or community purposes. Here it is argued that these outcomes need to be those which consider the 'public good' value of archaeological heritage, rather than maintaining the largely illusory position that current legislation and compliance-based archaeological practice are facilitating research into the Australian past.

Archaeological issues are unlikely to ever make a substantial appearance on any court list in Australia. Most issues will be resolved administratively or through negotiation. But in those circumstances where issues cannot be easily resolved, or where illegal acts have occurred, it is desirable that archaeological heritage legislation proves to be effective when presented to the courts. The 'public good' value of archaeology is recognised to some extent in the judgements in these cases, but it is clear the courts are constrained from producing either good deterrence or driving 'public good' outcomes in circumstances where flawed legislation provides few avenues for considering a broader range of issues. It is also unwise, if not impossible, to ignore the broader social or political issues which may underlie certain types of archaeological issues, particularly those involving indigenous heritage, as this leads to further dispossession and disempowerment. In the final chapter this thread is continued and a range of options canvassed as to how archaeological heritage legislation in Australia can be reformed to provide 'public good' outcomes.

Chapter 9—Implementing ‘public good’ principles in Australian archaeological protective legislation

The preceding chapters have analysed existing legal frameworks for archaeological heritage protection in Australia, revealing a dichotomy existing between the original intent in formulating protective regimes and their subsequent implementation in law. This represents the first such comprehensive analysis of these issues on a nation-wide basis. Heritage legislation has failed to keep pace with changes in disciplinary thinking for archaeology and heritage conservation generally. The earliest discussions in Australia on archaeological heritage protection were led by archaeologists seeking to formalise protections for their research material, and lobbying governments accordingly. From the time of the Hope Report in the early 1970s, heritage progressively became a part of the mainstream of public debate. The focus of lawmakers has been on heritage as a collective patrimony and a collective responsibility. The tension between the “professional” and the “public” value of heritage has been an ongoing one since that period. Certain aspects of heritage were readily adopted as public issues, particularly the conservation of prominent buildings and remnant natural areas. These had strong publicly-focussed advocates such as the National Trust. And while certain aspects of the heritage debate have been dominated by professional value—particularly archaeology and architecture—nothing in the legal research for this thesis has suggested that the legislative intent was to protect archaeological heritage primarily for professionalised heritage values. The heritage movement in Australia now generally accepts the need for public participation in heritage conservation, and that conservation is primarily for the benefit of the public. The area of archaeology however tended to remain the preserve of the expert, in the form of the scientifically-oriented archaeologist. Over the more than thirty years of heritage legislation, the whole spectrum of heritage conservation has shifted more and more towards the public value of heritage rather than viewing it as the preserve of experts. Archaeology has been an area which has lagged behind in this regard, allowing old scientific paradigms to be perpetuated in contemporary law and policy.

But if heritage conservation, including archaeological heritage conservation, is to continue to be valued by the Australian public, it must be made more relevant and responsive to public concerns. These include the provision of the “useable past”, which Little has argued for,¹ as well as other environmental, social and economic concerns which may legitimately intersect with archaeological heritage conservation. The ‘public good’ protective paradigm argued for in this thesis is predicated on the issue of public relevance and is in line with observations by policy- and law-makers, as well as some archaeologists, throughout the history of Australian heritage legislation that heritage belongs to the public. The archaeological record should not be viewed as a “representation of past regularities” but rather as containing

¹ Little, B. J. (2002). Archaeology as a Shared Vision. *Public Benefit of Archaeology*. B. J. Little. Gainesville, University Press of Florida: 3-19.

“traces of potentiality”² which help us to understand ourselves, the past and the present. The question then becomes how this “potentiality” can be maintained and protected legislatively, in a manner which recognises the potential for multiple interpretations. Just as those meanings of the past are subject to reinterpretation to maintain relevance,³ so must the law which protects the past be reinterpreted and reformed to keep pace with contemporary values, societal changes and evolutions in disciplinary theory. This final chapter of the thesis identifies a number of areas of law and policy reform necessary to effect meaningful change in archaeological heritage protection regimes, and sets out a possible future direction for archaeological heritage management in Australia.

It is not the role of this thesis to identify specific legal changes which should be made in order to implement the model of “public good conservation” discussed here. That would be as presumptive as a legal draftsman attempting to rewrite heritage legislation without consultation. What follows, therefore, is not a schedule of suggested legislative amendments or model clauses and definitions for a new generation of archaeological protective legislation. Rather, the thesis seeks to establish that future legislative reform which emphasises the ‘public good’ rather than the ‘scientific’ value of archaeological heritage, or at least which better balances these competing concepts, will provide improved outcomes from compliance-driven archaeological work and ensure that the conservation of archaeological heritage is both relevant and valued by wider Australian society.

9.1 Archaeology and the public good

The examination of underlying documents of principle and law, such as the Burra Charter and the World Heritage Convention⁴ and the consideration of statements by legislators and the judiciary in subsequent chapters, provide a strong basis for the argument that heritage conservation is something undertaken for the public good. Archaeological heritage conservation can be situated within this ‘public good’ paradigm. Whether that is in the form of improved civic amenity, the building of national or local identity, or for some other reason, heritage conservation is perceived by most to be an activity which improves the lives of people and helps to educate them about their past. But it is equally true that heritage conservation is not seen as an absolute, which must be achieved at any cost. Society needs a reasonable balance of conservation and change to prosper and evolve. Thus a moral duty exists to make conservation decisions which are in the best interests of the public, taking into account both heritage conservation ideals and other social objectives such as development. This is the essence of ‘public good conservation’.

² Jones, A. (2002). *Archaeological theory and scientific practice*. Cambridge, Cambridge University Press. Pp 179-180.

³ Little, B. J. (2004). Is the medium the message? The art of interpreting archaeology in US National Parks. *Marketing Heritage: archaeology and the consumption of the past*. Y. Rowan and U. Baran. Walnut Creek, CA, AltaMira Press: 269-286.

⁴ See discussion in Chapter 4.

This idea of balancing competing factors is already in use internationally and at various levels within Australia, in the form of the sustainability principles.⁵ 'Public good' conservation can therefore be thought of as a specific application of the sustainability principles to questions of heritage conservation. Whereas the sustainability principles are concerned with high-level conservation and balancing of economic, social and environmental objectives, 'public good' conservation should examine the specific considerations associated with a conservation project. Here the relevant considerations will vary with the significance of the place and the scale of the project, thus the 'public good' test can be applied to both local, project-based conservation questions as well as to larger scale issues of conservation policy. Such 'public good' tests can apply to archaeological heritage conservation as well as to the conservation of elements of the built or natural environment.

Chapter 3 identified three key principles of archaeological heritage conservation:

- Protection of the archaeological site;
- Protection of the archaeological object and its context;
- Transmission of archaeological knowledge to present and future generations.

These principles remain relevant to 'public good' conservation considerations, but must be tempered with additional 'public good' values. While not meant to be an exhaustive list, these considerations, which are further explored below, should include:

- Protection of places or objects with the greatest significance to local or national value systems;
- Conservation of places which have the potential to be meaningfully interpreted or presented to the public;
- Identification of trade-offs which assist both location-specific and wider conservation efforts and objectives.

These 'public good conservation' principles are more flexible and less absolutist than the principles identified earlier in the thesis. They are designed to take into account both the public and the archaeological values of places, but in a manner which requires a balance to be struck between those values rather than inherently asserting that one value system necessarily dominates over another. But such a consideration cuts both ways. While some Australian legal regimes, such as in the Australian Capital Territory, have established frameworks for indigenous heritage protection which give pre-eminence to the indigenous values of a place,⁶ they do not require the next step of tempering those values with wider social concerns. These may include competing social values for a place, or more mundane concerns of the ability of a place to be used or redeveloped. But even if this is a well-intentioned mechanism

⁵ See discussion in Chapter 4.

⁶ See discussion of ACT heritage legislation in Chapter 6.

designed to account for past wrongs or the previous overlooking of indigenous concerns, it does not solve the inevitable management problems, of how much change may occur to a place, which will arise for archaeological places in the future. Legal protections implemented for archaeological heritage are not merely theoretical considerations. The form and shape of the legislation will ultimately translate into real world decisions about what is, or is not, conserved. Thus for archaeological heritage conservation to be seen as a credible undertaking, and for supporting legislation to be perceived as fair,⁷ reforms must be both relevant and realistic⁸ in terms of their desired outcome.

What any good law reform program should aim to do is identify and address real problems which exist due to legislative gaps or ineffective or outmoded legislation. Now more than ever, law reform will be guided by a desire to balance the interests of multiple groups within the community. Thus reform to archaeological conservation legislation must take into account both the real-world problems the legislation is attempting to address and the potential impact that legislation will have on the public at large, as well as on community and interest groups and individuals. Archaeology as a discipline is certainly a matter in which the public is interested. However the legislation for archaeological heritage conservation must be fair⁹ in its impact on the community. This is because some members of the community will have a deep interest in archaeological matters, and have a desire to maximise conservation efforts. Such individuals act as advocates, supplying the “enlightened moral criticism” to which Hart referred.¹⁰ But many other segments of the community will have little or no interest in archaeological conservation. At best, they may be indifferent and, at worst, actively opposed to conservation efforts due to perceived expense, loss of opportunity or philosophical position. Their interests are however relevant, as much of Australia’s archaeological heritage is on privately-owned land and the legislative compliance regime affects those landowners. If archaeological conservation legislation is constructed in a fair manner, this reduces the potential for both unintended negative consequences and opposition to archaeological conservation. The final report of the Productivity Commission has already pointed to the need for such wider issues to be taken into account in heritage conservation. True ‘public good conservation’ will need to consider, and ideally balance, competing or differing interests within the community. A key aspect of this will be clear identification of the nature of the public significance of places and the ability to make trade-offs in conservation.

⁷ Knetsch, J. L. (1990). Property and environmental values. Property rights and environment protection. B. Boer and D. James, Environment Institute of Australia, Inc.: 1-15.

⁸ O’Keefe, P. J. and L. V. Prott (1984). Law and the cultural heritage: Volume 1: Discovery and Excavation. Abingdon, Professional Books Ltd. Pg 109.

⁹ Knetsch, J. L. (1990). Property and environmental values. Property rights and environment protection. B. Boer and D. James, Environment Institute of Australia, Inc.: 1-15.

¹⁰ Hart, H. L. A. (1994). The Concept of Law. Oxford, Clarendon Press. Pp 64-68.

Hart, H. L. A. (1983). Social solidarity and the enforcement of morality. Ethics and Public Policy: an introduction to ethics (second edition). T. L. Beauchamp and T. P. Pinkard. Englewood Cliffs, Prentice-Hall: 62-75.

9.2 Issues with present legal regimes for archaeological heritage protection

Current legal regimes for archaeological heritage protection continue to be problematic for archaeological heritage management. This may be because they rely on outdated concepts of archaeological significance, based in the scientific paradigm (as in New South Wales¹¹ and Victoria¹²) or require prior listing of an archaeological place in order for it to be protected. Even those regimes which have sought to be progressive about heritage management, such as the recent legislation in the Australian Capital Territory¹³ and Queensland¹⁴, have tended to promote the recognition of indigenous values for archaeological heritage in a manner which does not reduce the vagueness or uncertainty associated with other protective regimes. These instances of progressive focus on indigenous values have ignored the lessons to be learned from management of non-indigenous archaeological sites, that treating all heritage places as equally significant does not necessarily equal better conservation outcomes. Definitional vagueness is endemic within the legislation. Remedying all of these problems would require the type of broad-scale law reform which is unlikely to happen quickly or uniformly across jurisdictions. Thus a range of legislative and non-legislative reforms are argued for here in the shorter term, with additional long-term reform strategies suggested below. Key to any future reform will be the influence of “soft law” instruments such as the Burra Charter and other policy-level tools which can forge new directions for archaeological conservation, in the absence of legislative reform.

The intangible aspects of culture are almost, by definition, the things that will not be left behind in a physical sense, even if a cultural practice is discarded or falls into disuse by the originating culture. Heritage legislation can specify what aspects or what methods are used to protect the ephemeral aspects of the past in an archaeological sense, but the law cannot mandate the reestablishment of lost cultural practices, nor indeed ensure that those analysing the ephemeral remains found in the archaeological record provide any particular kind of insight into the intangible aspects of past culture.¹⁵ This is not to say that scientific- or research-driven archaeology should be abandoned or has fundamentally failed at a disciplinary level. Rather, archaeological heritage management, as fostered through heritage legislation, has been inadequate to the task of fomenting a research-based discipline as envisaged by those advocates of scientific archaeology in the 1960s and 1970s. The empowerment of communities, be they select communities such as indigenous people, groups of local residents or wider portions of society, to participate and be informed of the management of environmental and planning issues is a trend which is likely to continue if not accelerate. Therefore archaeological heritage protection needs to be adapted to deal with

¹¹ *Heritage Act (1977)* New South Wales.

¹² *Archaeological and Aboriginal Relics Preservation Act (1972)* Victoria.
Heritage Act (1995) Victoria.

¹³ *Heritage Act (2004)* ACT.

¹⁴ *Aboriginal Cultural Heritage Act (2003)* Queensland.
Torres Strait Islander Cultural Heritage Act (2003) Queensland.

¹⁵ Leiboff, M. (1999). "The embodiment of culture: the Protection of Movable Cultural Heritage Act 1986 (Cth)." *Australian Feminist Law Journal* (12): 3-19.

this into the future. Some archaeologists may continue to be inclined to mistrust non-professional interpretations of the archaeological past, but must be prepared to relinquish the roles as gatekeepers of that past if more meaningful management outcomes are to be achieved outside of the discipline. Heritage legislation is already causing this to occur, though primarily for indigenous heritage places. This requires the recognition and understanding of community values and goals in the decision-making process, which occurs in some explicitly community-focussed archaeological projects.

To achieve this, a broader conception of archaeological value needs to be introduced to archaeological heritage management at a legal and policy level, which allows for decisions to be made outside of a rigid framework. Scientifically-framed definitions of the archaeological past, such as those contained in the New South Wales and Victorian *Heritage Acts*, need to be reworked, to recognise that the need for an object to be protected is rarely inherent in its age or location, but comes from the other values which are ascribed to it. At the same time, the threshold for what is “significant” needs to be re-evaluated. One of the invidious consequences of the language of heritage significance is that the use of the word “significant” itself is a value judgement. In lay parlance, the use of the term “significant” is often equated with something which must be conserved. The subtlety between degrees of significance and the appropriate conservation response is not necessarily self-evident and represents a major area where heritage professionals generally make decisions in the absence of an understanding of wider community issues or values. But ‘public good conservation’ requires the evaluation of a range of options and values when considering the conservation or fate of a heritage place or possible heritage place. Not all such places are of equal significance and therefore trade-offs can be made. This already happens to an extent, with the “scientific” investigation of an archaeological place often seen as the mitigation measure designed to conserve the significance of the place. However this assumes a simplistic translation of heritage value into recorded data. Yet most legal protections stop at this point and do not ensure a further outcome beyond data recovery.

More detailed definitions or more widely-cast blanket protections for archaeological heritage are not the answer either. What is required is a conceptual framework which allows the consideration and evaluation of a range of values for a place, which may include the professional values of the archaeological profession, the social, cultural and spiritual values of indigenous groups or other interested members of the public¹⁶ and the other non-heritage values which may be ascribed to the place by the lay public. This requires both a legislative and a policy response.

¹⁶ Byrne, D. (2002). An archaeology of attachment: cultural heritage and the post-contact. *After Captain Cook: The archaeology of the recent indigenous past in Australia*. R. Harrison and C. Williamson. Sydney, Archaeological Computing Laboratory, University of Sydney. 8: 135-146.
Byrne, D., H. Brayshaw, et al. (2001). Social Significance: A discussion paper. Hurstville, NSW National Parks and Wildlife Service: 161.

9.3 The role of 'soft law' and policy

Evans has highlighted the important role of 'soft law' instruments in establishing guiding principles for environmental and heritage law.¹⁷ Discussion of the Burra Charter¹⁸ has highlighted the key role that document has played in the formulation and development of Australian heritage law, even in circumstances where a jurisdiction has not adopted all underlying aspects of the Charter's principles.¹⁹ The Burra Charter shares characteristics of the soft law instruments which Evans favours, as essentially a document of principle which while not legally binding has become the de facto standard for the consideration of heritage significance in Australia. The Burra Charter itself has been revised on two occasions since its initial drafting, and it is reasonable to believe that Australia ICOMOS sees the Charter as a living document which will continue to change and evolve, in line with movements in heritage conservation philosophy in Australia. The Burra Charter therefore is a key vehicle for the integration of a 'public good' conservation philosophy into the Australian heritage movement. As a non-legal document and, perhaps more significantly, as a largely private-sector document, the Burra Charter presents an opportunity to lead heritage conservation practices in Australia in new directions. This is particularly the case as the Charter is the accepted standard for conservation practice by governments and heritage professionals across Australia. No other non-legal document has this level of status, however informal that status may be.

The 1999 revisions to the Charter hint at how this can occur, independently and in advance of government reforms.²⁰ The 1999 amendments introduced the concept of 'spiritual' significance to Australian conservation practice, recognising that there were aspects of the significance of places which may not be embodied in their fabric, nor recognised within the professional-objective criteria traditionally applied to the assessment of heritage significance. While there had been limited recognition of such values for indigenous sites, where such values were asserted they had a tendency to be overridden by other non-heritage concerns and special legislation.²¹ Certainly part of the rationale for undertaking these changes was to make the Burra Charter more applicable to indigenous heritage, although it is still very much a fabric-focussed document, poorly suited to managing indigenous heritage.²² It would certainly be more desirable for there to be an indigenous framework for heritage conservation and protection. However in the absence of such an agreed-upon position by a broad spectrum of the indigenous community, the

¹⁷ Evans, M. (2000). *Principles of Environmental & Heritage Law*. St Leonards, Prospect Publishing.

¹⁸ See Chapter 4.

¹⁹ E.g. Tasmania's rejection of aesthetic significance as a heritage criterion. See discussion of the Tasmanian legislation in Chapter 6 and Godden Mackay Logan P/L (2005). *Tasmanian Heritage Act Review: A report prepared for Heritage Tasmania and the Department of Parks, Tourism, Heritage and the Arts*. Sydney, Godden Mackay Logan P/L.

²⁰ Such as the recent reforms in the ACT and Queensland, discussed in Chapter 6.

²¹ E.g. the *Hindmarsh Island Bridge Act 1997* (Cth), which overrode the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), briefly discussed in Chapter 5.

²² Sullivan, S. (2004). "Aboriginal sites and the Burra Charter." *Historic Environment* 18 (1): 37-39.

Burra Charter remains the central instrument of conservation principle for all types of Australian heritage.²³

In some respects, this was the codification of a notion which had existed, however weakly or ill-defined, in some Aboriginal “sacred sites” legislation since the 1970s. But while the “sacred sites” legislation was restricted to indigenous groups with a demonstrable continued association with a place, the manner in which ‘spiritual’ significance has been integrated into the Burra Charter allows for a wider application than that of “sacred sites” legislation. The Burra Charter notion of “spirituality”, while still largely untested, is broadly constructed. ‘Spiritual’ significance is described by the Charter as a part of the associations people have with a place which gives the place its significance.²⁴ The ‘spiritual’ significance of the place should be one of the drivers for involving the community in its conservation²⁵, as that type of significance is derived from community association. This moves considerably away from the professional-objective framework for significance which previously dominated the Charter.

By establishing ‘spiritual’ significance as a general community concern rather than one restricted to a particular community group (such as indigenous people with traditional associations) the Charter opens up a much broader framework for the interpretation, and future protection and regulation, of heritage based on this significance criterion. This is advantageous for all cultural groups which may wish to assert spiritual association with a place as a basis for its protection in future, particularly in the absence of any generally-agreed position amongst indigenous Australians on the conceptual framework for heritage protection. As of this writing however, spiritual and intangible heritage protections have not been widely adopted within heritage protection frameworks, although in certain policy areas there has been some move towards the incorporation of intangible values such as spiritual significance into the management framework for cultural heritage. It is not possible at this stage to say with any certainty whether this principle or indeed any intangible heritage principles will find their way into Australian heritage legislation. Such a move would likely be highly politicised and will not occur quickly. The status that intangible heritage has been given within the Charter provides the greatest potential tool for seeing such values incorporated into Australian legal frameworks, particularly in the absence of Australian ratification of the UNESCO Intangible Heritage Convention.

The Burra Charter remains an influential instrument within Australian heritage conservation practice due to its broad acceptance at most government, heritage practitioner and community levels. If Australia ICOMOS were to recognise the notion of ‘public good conservation’ as an important element of future Australian conservation practice, this has the potential to be incorporated into future versions of the Burra Charter. As ‘public good

²³ Natural heritage is principally managed under the principles of the Natural Heritage Charter. IUCN and Australian Heritage Commission (2002). Australian Natural Heritage Charter for the conservation of places of natural heritage significance (Second edition).

²⁴ Australia ICOMOS (1999). The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. Burra Charter. Pg 3, Article 1.15 Explanatory Notes.

²⁵ *Ibid.* Pg 5, Article 12.

conservation' is however only an emerging concept in heritage conservation, it is unlikely such recognition and incorporation would occur for many years. But this does not discount the power of such 'soft law' tools from influencing the shape of Australian heritage legislation in the future, nor does it negate the possibility of policy tools being developed within specific jurisdictions to advance the implementation of spiritual significance or other emerging heritage values in the future.

9.4 Redefining archaeology in law

A major carry-over within the bulk of Australia heritage legislation is the use of scientific terms to describe archaeological heritage in legal definitions.²⁶ This has particularly manifested itself in a focus on archaeological objects, often to the exclusion of recognition of their context. The exception has been in cases where archaeological sites have been specifically listed on a heritage register. Yet this focus on the object overlooks the fact that archaeological sites gain much of their significance and meaning from both the context of the individual site and their relationship to each other. Archaeological sites form a part of the landscape, as a layer or series of layers which underlie and overlap each other, and the contemporary, visible landscape. Parts of the archaeological landscape may be incorporated into contemporary landscapes, developing new layers of meaning as the places are used and reinterpreted in contemporary ways.

In order to truly conserve the archaeological values of places, it is necessary to understand this wider landscape context when making decisions about the conservation, protection or destruction of such places. In contemporary Australian legal practice, the focus has largely been on individual sites and their immediate locale, rather than this wider archaeological landscape context. To draw example from natural environment conservation, conservation efforts do not focus solely on the protection of an individual species at an individual site. Rather efforts are made to protect the habitat and range of an ecosystem, as well as individual species and specific sites which may be highly important for species survival.²⁷ Conservation efforts may involve actions to reduce threats or actively conserve and improve both the non-living and living environments for species ranges, such as the removal of weed species which compete with food plants or protection of significant habitat elements such as fallen trees or rock formation used as living sites. Protective intervention may also focus on specific sites of biological importance, such as breeding or spawning sites, or may focus on a species or range of species themselves, through propagation or captive breeding programs. Legislative tools exist to facilitate these conservation efforts at a range of scales, in the acknowledgement that the conservation of biodiversity is greater than the sum of its parts. The archaeological landscape

²⁶ See discussion in Chapters 5 and 6, regarding the definitions of archaeological heritage in the State and Territory-based heritage legislation.

²⁷ The *Convention on Biological Diversity* defines this as: "the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems." *Convention on Biological Diversity* 1992, Article 2.

can also be viewed in this manner, with individual sites forming parts of a greater whole that provides information and meaning to the past.

While there have been limited attempts to develop protective frameworks for the historical archaeological landscape in Australia, none has been particularly effective as a conservation instrument. A variety of policy- and planning-based tools have been used in individual cities to attempt to provide this overview, such as the Archaeological Zoning Plans or Archaeological Management Plans for central Sydney and Melbourne, as well as similar efforts for regional centres such as Newcastle, Richmond and Liverpool in New South Wales or local efforts such as the Archaeological Management Plan for Port Arthur Historic Site in Tasmania. Even more recent attempts to break out of the traditional site-based methodology, such as the Parramatta Historical Archaeological Landscape Management Study, which attempted to identify and make recommendations for the various overlapping archaeological landscapes of an early colonial Australian city, still failed to rise above site-based recommendations and did not provide protective or conservation strategies for archaeological landscapes. The effectiveness of tools such as these has been recently investigated elsewhere²⁸ and it is beyond the scope of this thesis to consider such instruments in detail. Yet policy and planning tools will always be fundamentally limited by their overarching protective legislation. Reform cannot be effective if it is at the level of policy alone.

New South Wales continues to focus on the legal protection of individual archaeological objects. Victorian legislation is in a better position to manage archaeological places as entities. But both States continue to have difficulty with legal recognition of the relationship between site and object and the broader landscape context. This is a problem of both the legislation and the heritage policy and planning tools, which do not assist. For such tools to move beyond site-based decision-making and protection, archaeological heritage legislation must give recognition to the wider archaeological landscape. Effective decision-making must recognise that the relationships between sites and groups of sites can be as, if not more, important than individual sites themselves. Such recognition will require a move away from the focus on protection of individual archaeological objects. With built heritage, the concept that the wider heritage values of a place can be greater than the sum of their parts, is commonplace. "Conservation areas" have long been used as tools for conserving built heritage, recognising that, while individual elements (such as houses, structures or other historic features) may be of little significance individually, collectively these elements have a greater value as an historic landscape, where the relationships between elements are perhaps more important and more deserving of conservation than individual elements alone. The use of legislative tools to establish archaeological areas or indigenous areas has been much more limited in scope, although the relisting of Kakadu and Uluru World Heritage areas for indigenous values demonstrates that

²⁸ Iacono, N. Z. (2002). "Beyond the breach: advancing strategies for archaeological management plans." *Australasian Historical Archaeology* 20: 39-47.

Iacono, N. Z. (2006). *Managing the Archaeology of the Modern City*. Department of Archaeology. Melbourne, La Trobe University. Ph D. thesis (unpublished).

social values across a large landscape can be taken into consideration for protection. Where Australian archaeological landscapes and their component sites can meaningfully contribute to the understanding of an area, they should be protected in a manner which ensures archaeological places can be made available to the public and presented in a manner which illustrates their contextual relationships.

What this requires, in legal terms, is a shift in focus from archaeological *objects* to archaeological *landscapes*.²⁹ In 'public good' terms, individual objects have little archaeological relevance or significance beyond curiosity value, although they may have financial value to collectors. But when understood as a part of a wider archaeological landscape, which has a range of historical, social and scientific meanings, it becomes possible for a member of the public to understand their position within the archaeological landscape and what it means in terms of the development of contemporary society. Legislation therefore should refocus both its definitions and its protective mechanisms away from object- or site-based controls to a landscape concept that emphasises the spatial and temporal relationships between sites. This would require the identification of a board range of sites across a landscape and understanding how their linkages form a basis for their significance, as much if not more that the activities that occurred at each place. There is little evidence to suggest that the theft or trafficking in archaeological objects is a major problem for heritage conservation in Australia, yet there is a disproportionate emphasis on object-based protections in both Commonwealth and State/Territory legislation. Protective legislation for specific, individual archaeological objects may be important in certain, limited circumstances, and thus may need to be retained within legislative structures, but should be subsidiary protective mechanisms whose primary function is to limit illegal trade or to repatriate significant objects to appropriate custodians, particularly indigenous groups.

Legislation will also need to be backed up with policy and planning tools which expand upon this 'public good' concept and emphasise the conservation of places which make a meaningful contribution to the understanding of the archaeological landscape. In the past, the emphasis has been on regional research frameworks, and, while their continued relevance has been questioned,³⁰ efforts persist in some areas to promote them as useful tools for archaeological decision-making.³¹ Yet such documents have never been produced in Australia, with localised Archaeological Zoning Plans serving as the closest analogue. The utility of such an approach is questionable, in any case, due to the difficulty in establishing with certainty that a protected placed

²⁹ The World Heritage Centre is particularly working to advance the recognition of cultural landscapes, defined as the "combined work of nature and man" under the World Heritage Convention. See UNESCO World Heritage Centre (2005). *Operational Guidelines for the Implementation of the World Heritage Convention*. Paris, UNESCO World Heritage Centre. Pp 83-85.

³⁰ Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London, Routledge. Pp 62-70.

³¹ In 2006, the NSW Heritage Office, Department of Planning, revised its *Archaeological Code of Practice* document, which sets out the relationships between different parties undertaking compliance-driven archaeological work in NSW. The revised draft document continues to suggest that the NSW government will, at some future stage, produce regional research frameworks to guide archaeological work undertaken under the NSW *Heritage Act*. It is anticipated that this revised *Code of Practice* will become publicly available in late 2006. The author reviewed this document as a member of the Archaeology Advisory Panel to the Heritage Council of NSW in June 2006.

would be relevant to such a strategy, as well as the difficulty in ensuring those undertaking the compliance-based archaeological work could in fact produce useful research within the strategic framework. This is exacerbated by the lack of clear professional standards and post-degree training, as well as the necessity to operate within a commercial context with attendant time and money pressures. Less prescriptive tools may be useful, such as local or regional interpretive strategies which have been formulated using public consultation, to develop an understanding of issues relevant to communities which have associations with the archaeological heritage to be protected.

In addition to policy-level tools such as local interpretive frameworks, the use of other legal tools, such as local planning instruments, are critical to the successful protection of archaeological heritage and provide a framework for the consideration of local heritage issues. Environmental, heritage and archaeological matters have become progressively integrated into local planning frameworks, as has been discussed in Chapters 6 and 7. All States and Territories have some form of planning legislation, which generally provides a framework for the consideration of local environmental issues at both a strategic and a project-specific level. Often this will include a schedule of locally significant heritage places, which provide information and guidance on heritage issues for both property owners and local officials in a decision-making role. Local heritage planning instruments have tended to have a focus on built heritage, due to its high visibility and relative ease of identification. Archaeological sites, particularly those lacking obvious aboveground elements, are generally overlooked. In New South Wales, which has the greatest number of Archaeological Zoning Plans prepared, the documents act as guiding documents only, and have not generally been converted into statutory protections and listings on a local heritage planning schedule³². Victoria has taken a different approach, where due to the statutory reporting of all archaeological discoveries, local Heritage Overlays³³ have been prepared by central heritage and planning authorities, which do include archaeological sites. These are however often based on opportunistic discovery, rather than systematic survey of areas for the purpose of identifying and listing significant archaeological sites.

While there are distinct limitations on protective legislation that relies solely on the prior identification and listing of archaeological sites, schedules of identified, if not necessarily protected, sites remain useful tools. In circumstances where systematised survey of a local or wider area has been undertaken, it is critical that identified sites are adequately analysed to make a decision as to whether they should be specifically protected and listed within a planning scheme or other environmental protection instrument. This has the distinct advantage of providing a greater deal of certainty in terms of the

³² The original intent of the Parramatta Historical Archaeological Landscape Management Strategy (PHALMS) was that its results would be incorporated into a planning instrument. While both the *Parramatta Local Environmental Plan (Heritage and Conservation)* 1996 and the *Sydney Regional Environmental Plan 28–Parramatta* include some archaeological sites in their heritage schedules, they do not include all the places identified in PHALMS study. See *Parramatta Local Environmental Plan (Heritage and Conservation)* 1996 Schedules 1 and 2 and *Sydney Regional Environmental Plan 28–Parramatta* Schedule 6.

³³ Heritage Overlays on the Heritage Victoria website (<http://www.heritage.vic.gov.au/page.asp?ID=132>). Accessed 26 June 2006.

nature of the archaeological place or places, and allows decisions to be made based on relationships between such places. In a case where a large number of sites are identified across a region, it may be possible to categorise these within their overlapping archaeological landscape contexts, and thereby determine which sites are critical, desirable or marginal in terms of their need for statutory protection. In the past, where this has been done this decision-making has tended to rely on a scientific assessment of the scientific potential of such sites, rather than other considerations. For New South Wales where protection is based merely on the presence of archaeological materials, rather than the specific merit of those materials, statutory protection has been applied universally to all potential sites. There has been no further step of undertaking further analysis to understand relationships between sites, to facilitate choices as to what sites should be protected and why. The following section suggests a possible methodology for making such decisions, in a context which examines more than the scientific “potential” of archaeological materials, and takes into account wider values including the ‘public good’ and community interest.

9.5 A framework for ‘public good’ consideration of archaeological issues

If the scientific idiom is to be removed from its pre-eminent determinative status within Australian archaeological heritage law, it will need to be replaced with a robust framework which provides an alternative method for determining the significance of archaeological places. In ‘public good conservation’ terms, a key issue will be to determine what value is imbued in an archaeological place in the eyes of a local or wider community, or indeed what other issues the community may hold in priority above archaeological conservation. This is not necessarily an easy task to undertake, particularly in circumstances where the archaeological values of a place have not been previously investigated in any detail, or where cross-cultural conflict may act as a barrier to understanding significance, as may be the case with indigenous sites. It is strongly suggested here that any such framework should include the ability to develop trade-offs, or offsets for impacts to archaeological heritage places, as already occurs with impacts to natural heritage places. A key criticism of this approach may be that “archaeological potential” represents an unknowable state for archaeological places, requiring their full investigation before significance is revealed, thus rendering trade-offs unacceptably risky in archaeological conservation terms. While certainly this may be the case in some instances, in the vast majority of compliance-driven archaeological work in Australia, there is a reasonable amount known about archaeological places (particularly non-indigenous places) prior to excavation occurring. And even with indigenous places, if sufficient consultation with the relevant communities has been undertaken up front, it should be possible to develop an understanding of the values of a place without excavation. The Sandon Point case, discussed in the previous chapter, illustrates that even in circumstances where the values of a place are in dispute between archaeologists and indigenous peoples, the court is quite willing to accept the judgement made by heritage authorities as to whether a site ought be excavated or destroyed. Thus establishing an explicit framework for trade-offs concerning

archaeological sites does not present a significantly greater risk than presently exists with respect to administrative decisions made on poor, incorrect or limited information or where archaeological materials are discovered unexpectedly. What a tradeoff framework would allow however is some certainty about outcomes and about what value will be placed on archaeological heritage by the stakeholder groups and communities.

With respect to this process of shifting focus from scientific to community significance, it is not suggested that traditional scientific value assessments be abandoned. Rather, scientific significance becomes one of a range of factors in the decision-making process. Other factors should certainly include, for example:

- Community value or values for the archaeological place—these may range from little to no knowledge or interest, to very strong associations for historic, cultural or intangible reasons. This may change over the course of a project, due to publicity or to what the project uncovers.
- Ability of the place to be presented and interpreted—does the site lend itself to interpretation, is there a commitment to undertake interpretation and is the story relevant and meaningful?
- Context of the place in the archaeological landscape—is this place one which is unique and plays a significant role in understanding the archaeological landscape, or is it a common type of site or one with limited ability to contribute to the understanding of the surrounding context?³⁴

These categories are by no means meant to be exhaustive, and will vary in application on a site-by-site basis, but do go beyond the present archaeological assessment regimes, and are directed in a different manner than the scientifically-minded criteria suggested by Bickford and Sullivan in the 1980s.³⁵ Thus the focus on archaeological heritage conservation is no longer on a binary presence or absence of items, objects or traces of past activity which could be described as archaeological, but rather one which is focussed on the meaning and value of archaeological places in a wider sense. Such an assessment framework also needs to take into account other non-heritage factors that may be relevant to given circumstances, in a more sophisticated manner than the cost formula formerly used for Tasmanian archaeological heritage.³⁶ Having an explicit framework for trade-offs based on this aggregate of values will allow for more sophisticated decision-making by communities, property owners, heritage professionals and those administering heritage legislation, and may increase support for the objects and goals of the legislation.

The table overleaf sets out how such a framework could look.

³⁴ This has been characterised as the “representativeness” or “rarity” of a site, but is often used in a way which assumes all similar sites are equally significant.

³⁵ Bickford, A. and S. Sullivan (1984). Assessing the research significance of historic sites. *Site Surveys and Significance Assessment in Australian Archaeology*. S. Sullivan and S. Bowdler. Canberra, Dept. of Prehistory Research School of Pacific Studies Australian National University: 19-26.

³⁶ Tasmanian Heritage Council (2000). Practice Note No 2: Archaeological Requirements.

Within a ‘public good conservation’ archaeological tradeoff framework, there would be five broad types of sites:

Significance	Values	Expectations	Management/mitigation	Trade-offs
Very high significance	<ul style="list-style-type: none"> • Central to identity or character of an area • Central position in the archaeological landscape and critical to its understanding • Potential to produce unique or new and meaningful contributions to the understanding of the past • High degree of intangible significance to one or more communities 	<ul style="list-style-type: none"> • Retain in situ • Keep secret if fragile, culturally sensitive or likely to attract vandalism or unwanted attention 	<ul style="list-style-type: none"> • Avoidance • No or very minimal impact from any proposals • Archaeological investigations (if any) to be guided by community values and undertaken as research exercises, rather than compliance-driven archaeological works • List on an appropriate heritage register (but confidentially if necessary) 	<ul style="list-style-type: none"> • No or minimal trade-offs • Any trade-offs require strong community support
High Significance	<ul style="list-style-type: none"> • High degree of significance to one or more communities • Prominent position or well known site within the community • Strong association with the character of an area • Major site in the archaeological landscape • Potential to produce significant new understandings about the past 	<ul style="list-style-type: none"> • Retain in situ • Conserve • Guided investigation • Interpret • Celebrate 	<ul style="list-style-type: none"> • Avoidance • Minimal impact from any proposals • Archaeological investigations (if any) to be guided by community values • List on an appropriate heritage register 	<ul style="list-style-type: none"> • Limited trade-offs, which will ensure important public, community and scientific values are protected
Moderate significance	<ul style="list-style-type: none"> • Some importance to one or more communities, but not a site with a central community focus • Known to the community • Typical site in the archaeological landscape • Investigation will contribute to the understanding of the past 	<ul style="list-style-type: none"> • Investigate • Interpret • Retain in modified form or remove • Interpret, as a component of wider the archaeological landscape 	<ul style="list-style-type: none"> • Substantial or complete removal of fabric • Archaeological fabric may be removed from the place • Archaeological investigation should be guided by the site’s position in the archaeological landscape • List on an appropriate heritage register, if retained 	<ul style="list-style-type: none"> • Some opportunities for trade-offs, if there is a substantial return to the community • Trade-offs should be directed to other conservation-based projects which will benefit the community
Low significance	<ul style="list-style-type: none"> • A site of past activity, but lacking any strong continued community association • Unlikely to be known to the community • Indicative of a past activity that may be common or well-investigated archaeologically • Limited scope to meaningfully add to an understanding of the past 	<ul style="list-style-type: none"> • Limited investigation, possibly only basic site recording or monitoring • Little scope for meaningful interpretation 	<ul style="list-style-type: none"> • Complete removal of archaeological fabric • Archaeological work likely to provide basic data only, with little or no scope for conclusions to be drawn from the individual site • Note existence for the purpose of trade-offs, but do not list on a heritage register 	<ul style="list-style-type: none"> • Good scope for trade-offs • Trade-offs can be directed to conservation or other community-based projects (e.g. environmental conservation, community facilities)
Minimal significance	<ul style="list-style-type: none"> • A site of transient activity only or in a fragmentary state • Unlikely to be observable to anyone but a specialist • Contains material of little social value or trivial scientific significance • Provides little information about the past—indicative of a general past activity only 	<ul style="list-style-type: none"> • Little or no investigation • Record site type and basic characteristics, little or no other intervention • No scope for interpretation 	<ul style="list-style-type: none"> • Complete removal of archaeological fabric • Do not list on a heritage register 	<ul style="list-style-type: none"> • Trade-offs should be the default position

What this framework establishes, is that the significance of archaeological places is tied to a range of values. Some will be scientific-archaeological. Others may be community-related. Additionally, archaeological places will be affected by or will affect a range of other social, environmental and economic issues. Given the fact that the need for, and value of, heritage conservation is a moral value adopted by the community, rather than inherent in societal morality,¹ these other non-heritage concerns are legitimate. Where places are at the higher end of the spectrum of heritage value, the presumption should be in favour of the conservation. Indeed, for those places of very high significance, there should be no debate that such places need to be conserved. This is certainly what the Hope Report envisaged when it recommended that, in some circumstances, heritage values should override other concerns.² There should also be a strong presumption that such places are being conserved for the benefit of the community, and there will be a direct benefit to the community from conservation efforts. This may be a symbolic or intangible benefit, or something more concrete, such as a useable public space or an economic drawcard.

For places of lesser significance, there should be the ability to recognise the limits of that significance, and establish trade-offs for allowing impacts to those places. This already occurs with biodiversity conservation, where impacts in one area may be offset by conservation efforts elsewhere. Having a transparent framework for such trade-offs in place allows other legitimate interests to be recognised and accommodated, in a way which directs a benefit back to the community. For places at the lower end of the spectrum, which are often captured by heritage legislation with a low threshold for scientific significance, there is no mechanism for ensuring any benefit flows back to the community. The archaeological work represents an exercise in technical compliance only. Such work is that which only establishes the “potential” significance of an archaeological place,³ with little scope for ever seeing that potential realised. Recognising this inherent limitation in compliance-based archaeological work and establishing a mechanism for transferring those benefits to something else of value to the community—conservation at another site, contribution to a public heritage initiative, or providing a community-based facility, for example—allow archaeological sites at the lower end of the significance spectrum to provide something of genuine value back to the community.

While this is not meant to represent a framework which must be rigidly applied in order to implement ‘public good conservation’, it suggests a manner in which different interests—those of the present scientifically-driven archaeology and of ‘public good’ conservation—can be balanced in a manner which is more outcomes-focussed than process-focussed. Such an approach has long been taken to conservation of natural areas, and New South Wales is establishing the first transparent scheme for such conservation trade-offs for natural

¹ See discussion in Chapter 3.

² Hope, R. M. (1974). Report of the Committee of Inquiry into the National Estate. Canberra, Australian Government Publishing Service. Pp 24-26. See also discussion in Chapter 4.

³ Murray, T. (1984). Relativism, conservation philosophy and historical archaeology. Historical archaeology and conservation philosophy. Papers from the Historical Archaeology Session of the ANZAAS Conference, Sydney 1982. M. Pearson and H. Temple. Sydney, Heritage Council of NSW: 2-17.

areas.⁴ The advantages of this approach are numerous. Firstly it creates an explicit requirement to draw non-indigenous and indigenous communities into the discussion and evaluation of the importance of archaeological heritage. While no doubt in many instances there will be little community knowledge and perhaps limited interest in archaeological issues, this will begin to embed a process which requires the public to be both better informed and involved in decisions made about heritage conservation. This seems much closer to the intent behind Australian heritage conservation, as expressed in the Hope Report and the parliamentary debates on heritage matters across Australia.

In New South Wales there have been efforts made to better involve indigenous groups in decision-making about archaeological sites,⁵ although the processes involved are less than transparent at present, and do not provide for reconciling disputes regarding significance within the indigenous community, let alone considering the wider social or environmental conservation issues which may arise. But a framework which explicitly seeks communities to identify which sites are the most significant, the most socially relevant, and prioritises this at the same level as environmental or economic considerations, begins to provide a credible basis for 'public good' conservation. It allows communities to nominate places which, due to their significance, must be conserved, while providing a framework for some return to the community for those sites which are not conserved. While ideally this should be done in a proactive fashion, any such scheme need to have in place sufficient protections to ensure places which are currently unknown can be protected once identified. It is worth noting that, in this context, one of the communities that can (and no doubt would) make a claim on the value of archaeological places, is the professional archaeological community. But rather than the current circumstance which gives the archaeological community the option of nominating a place to be of "potential" research or scientific significance, it requires the archaeological community to engage and identify why such places are actually important and how their significance can be realised and interpreted for the entire community.

Such a framework begins to build a method for the recognition and protection of the intangible values of archaeological places. It establishes conceptual boundaries around the types of sites which are desirable to conserve, and relates this back to what is perhaps the most important of the three key principles of archaeological conservation, that of transmitting the archaeological heritage into the future. The conservation of archaeological heritage cannot itself be viewed as an absolute—it serves some necessity. While for many years that necessity was scientifically-focussed archaeological work, it is clear that, firstly, scientific archaeological work has not delivered the

⁴ Referred to as "bio-banking". This scheme will allow for environmental impacts in one area to be traded off against conservation efforts in another area. This is ultimately to be undertaken through an exchange, not unlike to sale of greenhouse gas abatement credits. Note this scheme has only been operating as a pilot and there is no data, as yet, on its effectiveness. The enabling legislation, the *Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006* (NSW), was introduced to Parliament in June 2006 and is still under consideration.

⁵ NSW Department of Environment and Conservation (2004). National Parks and Wildlife Act 1974: Part 6 Approvals. Interim Community Consultation Requirements for Applicants. Similar processes will be reinforced in Victoria, once the *Aboriginal and Torres Strait Islander Heritage Amendment Bill 2006* (Cth) passed through Federal Parliament and the *Aboriginal Heritage Act 2006* is commenced.

insights into the past that were initially anticipated through the legislative process, and secondly and more importantly, the legislative intent behind the conservation of archaeological heritage was to see it conserved of the benefit of the entire community. By moving to a 'public good' framework which focuses on outcomes which will be beneficial to the community, it moves archaeological heritage conservation away from being a technical compliance exercise, to an exercise which has a wider benefit than the recording of archaeological data of questionable value. It also opens the door for greater community participation in the conservation of archaeological places, particularly by indigenous communities, to determine what sites are important and how they should be conserved. A 'public good' conservation framework allows communities to insist on the conservation of their most significant places, while offering something in return for the loss of those places of lesser or marginal value. It is fair to note that such a system would continue to provide a privileged place for archaeologists, as their knowledge would allow them to easily engage with any new frameworks. But by requiring a consideration of issues wider than the discipline of archaeology, it is argued that greater balance will be brought to archaeological conservation.

9.6 Implementing 'public good' archaeological heritage protection

Implementing 'public good' archaeological heritage conservation in Australia requires an open debate between archaeologists, heritage managers, lawmakers, interest groups and community members. It requires a recognition that heritage conservation is itself a public good, one that, if undertaken, must bring a broad benefit to the community, not just to specific interests or individuals. It must also recognise the limitations of scientifically-focussed archaeological practice within compliance-driven heritage conservation. If these points can be conceded, then the opportunity and political will may exist to evolve Australian archaeology into a truly public discipline. Disciplinary evolution in the direction of 'public good' conservation will mitigate to some extent the potential for legislative roll-back from critics of heritage conservation who presently perceive that little is being gained,⁶ in a real sense, from present legal regimes. Existing legal tools which provide the scope of the protection of archaeological heritage at a landscape level should be put to better use. This should include high-level initiatives to recognise significant archaeological landscapes and nominate them for the World or National heritage lists, as these provide the most effective tools for protecting and managing large areas. With a more sophisticated approach to archaeological conservation, it will be possible to conserve a range of archaeological places, their relationships and their contexts, rather than disconnected sites and objects, or see archaeological heritage merely fortuitously protected as a secondary consideration.

At the State and Territory government level, legislative reform is required which balances the scientific and research values of archaeological heritage with the 'public good' values argued for in this thesis. Definitions must be redrafted to focus on archaeological places in a manner which protects the

⁶ See discussion in Chapters 2 and 3, particularly regarding the Productivity Commission process and certain public submissions.

totality of the place and its context, rather than individual components which are of little significance individually. These legislative changes need to be backed up by significance frameworks, ideally driven by higher-level reforms from the Burra Charter or a similar instrument, which explicitly recognises the public, social, historical and spiritual values of archaeological places. This will require changes in the interpretation and application of legislation to focus on the 'public good' value of archaeological heritage, while leaving space for scientific- or research-based archaeological investigations, where there is a real prospect of discovering meaningful information about Australia's archaeological past.

The changes called for here will no doubt be confronting to certain elements of the archaeological profession and heritage conservation advocates but will lead to a stronger conservation ethic within Australian archaeology, with more tangible benefits to the Australian public. It will move archaeological practice in Australia away from being a technically-focussed compliance exercise to one which endeavours to provide meaning to the archaeological past for present and future generations. The existing legislation has received little judicial scrutiny. Appropriately, the courts have shown themselves uninterested in sites with minimal archaeological significance. With more significant places, they have recognised the public aspects of archaeological heritage.⁷ This should provide an indication of the direction for future legal reforms, in order to ensure their enforceability. Reform also provides a further opportunity to recognise the Australian indigenous past as something with contemporary value and relevance, rather than a scientific resource whose conservation is inherently contestable. Ideally reforms in indigenous archaeological heritage conservation will be constituted in separate legislation, giving indigenous heritage greater status and breaking away from the conceptualisation of indigenous heritage as a part of nature, or as something archaeological. This will require honest engagement on the part of both the indigenous and wider communities, to create an opportunity for Australia's pasts to be meaningfully shared and conserved for the benefit of the Australian public.

9.7 Conclusion

Colley described archaeology as "a tool which can be used to investigate, create, claim or reclaim history" which is neither good nor evil.⁸ Australian archaeology was conceived of and developed as a tool of anthropology and later a tool of science. Its purpose was cast in terms of being able to distil new insights about the Australian past from the physical remains found in Australian soil. Had it not become enshrined in heritage legislation, it may have remained a pure tool for academic enquiry and discovery, with only a distant relevance to the public at large. But in seeking for formal protective mechanisms of the law, Australian archaeology was changed and has become an end unto itself, rarely linking back to its original purpose and goals of providing meaningful insights into the Australian past. Notwithstanding this

⁷ See discussion on the *Latham* case as well as *Anderson v Ballina Shire Council* in Chapter 8.

⁸ Colley, S. (1996). "Caught in the web: Cultural policy, cultural places and Australian archaeology." *Culture and Policy* 7 (2): 141-154. Pp 150-151.

situation, archaeology, like heritage conservation more generally, has become a mainstream issue and a very public concern. Given this, it is only reasonable that a certain reflection take place, to determine how the discipline will develop into the future.

Archaeology continues to capture the public imagination, whether it is indigenous rock art in remote places or early colonial remains amongst the footings of an urban office tower or something more exotic elsewhere. The public is interested and, perhaps unknowingly, has significant responsibilities under existing legal regimes. Given both this interest and this responsibility, it is desirable that Australian archaeology serve an important and valuable public purpose, in a manner which gives the public an opportunity to feel a meaningful connection and a moral ownership of archaeological heritage conservation as a 'public good' endeavour. This thesis points the way to resolving some of the structural, legal and disciplinary problems which presently militate against these 'public good' outcomes, in a manner which will make Australia archaeology relevant to all Australians into the future.

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