Protecting the past for the public good: archaeology and Australian heritage law

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Abstract

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Archaeological remains have long been recognised as fragile evidence of the past, which require protection. Legal protection for archaeological heritage has existed in Australia for more than thirty years but there has been little analysis of the aims and effectiveness of that legislation by the archaeological profession. Much Australian heritage legislation was developed in a period where the dominant paradigm in archaeological theory and practice held that archaeology was an objective science. Australian legislative frameworks continue to strongly reflect this scientific paradigm and contemporary archaeological heritage management practice is in turn driven by these legislative requirements. This thesis examines whether archaeological heritage legislation is fulfilling its original intent. Analysis of legislative development in this thesis reveals that legislators viewed archaeological heritage as having a wide societal value, not solely or principally for the archaeological community. Archaeological heritage protection is considered within the broader philosophy of environmental conservation. As an environmental issue, it is suggested that a 'public good' conservation paradigm is closer to the original intent of archaeological heritage legislation, rather than the "scientific" paradigm which underlies much Australian legislation. Through investigation of the developmental history of Australian heritage legislation it is possible to observe how current practice has diverged from the original intent of the legislation, with New South Wales and Victoria serving as case studies. Further analysis is undertaken of the limited number of Australian court cases which have involved substantial archaeological issues to determine the court's attitude to archaeological heritage protection. Situating archaeological heritage protective legislation within the field of environmental law allows the examination of alternate modes of protecting archaeological heritage and creates opportunities for 'public good' conservation outcomes. This shift of focus to 'public good' conservation as an alternative to narrowly-conceived scientific outcomes better aligns with current public policy directions including the sustainability principles, as they have developed in Australia, as well as indigenous rights of self-determination. The thesis suggests areas for legal reforms which direct future archaeological heritage management practice to consider the 'public good' values for archaeological heritage protection.

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Protecting the past for the public good: archaeology and Australian heritage law

Introduction – The protection of the past

This thesis is concerned with how and why we protect the remains of the past for the present and future. It sits at the nexus of archaeology and law, and perhaps can best be described as a work of archaeological heritage management. The intersection of law and archaeology is not something that may be immediately apparent to either archaeologists or lawyers, but for the past thirty or more years in Australia, and for more than a hundred years in the United States and Europe, the law has been used as a tool to protect archaeological heritage.[1] The very first (and largely ineffective) heritage legislation in Australia was the 1955 *Native and Historic Objects Heritage Protection Ordinance* (Northern Territory), while the bulk of Australian heritage legislation dates from the 1970s.[2] With such laws in place, it might be easy to think that the goals of protecting archaeological heritage have been achieved, that it was possible to get on with the business of archaeology and heritage management, leaving the laws do the job for which they were created. But the discipline of archaeology has been constantly evolving and the questions, places and things which interested previous generations of archaeologists may no longer be relevant. Additionally, the emerging empowerment of indigenous and minority peoples across the globe has challenged the authority of the archaeological discipline[3] and the wider community has also exhibited an increased desire to be involved in the management of the remains of their past.[4] Archaeologists have been forced to evaluate who are the owners or the custodians of the past and what relevance, if any, the interests of archaeologists may have for indigenous or wider communities.

These changing perspectives on archaeological practice should, one hopes, be reflected in the protective regimes which exist for archaeological heritage around the world. But unlike archaeology, which can shape its own path forward through debates within the discipline, the law is a more monolithic institution. Laws are often slow to enact and slow to change. They are subject to the political and social priorities and pressures of the day, which shift rapidly. The establishment and amendment of legislation requires input from the populace, the interest groups, the politicians, the legal profession and the judiciary, creating at best a complicated path to change. At the international level new agreements are debated and brokered which may have influence on the shape of domestic legislation. In Australia, it is fair to say that while all Federal, State and Territory jurisdictions have enacted some degree of legal protection of archaeological heritage, those legal protections have not kept pace with changes within the archaeological discipline nor with the interests of the wider community in its

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

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

4 O'Keefe, P. J. (2000). "Archaeology and human rights." Public Archaeology 1(3)

heritage. But as this legislation is still on the books, it continues to have enormous influence over the outcomes of archaeological heritage protection, even if its intent or effect may be somewhat anachronistic.

I was drawn to write this thesis following my own experiences administering archaeological heritage legislation for historical archaeological places in New South Wales, Australia. In the late 1990s I worked for the New South Wales Heritage Office as one of the staff historical archaeologists charged with administering the archaeological provisions of the New South Wales *Heritage Act*. I became concerned that while vast amounts of historical archaeological work were being undertaken within the purview of the Act, the outcomes were in general very poor or limited to technical reports or short duration "public archaeology" events such as open days and public brochures. Historical archaeology appeared to have been driven in a very specific direction in response to the requirements of the New South Wales *Heritage Act*, requirements which had been framed in the 1970s and had had very little re-examination. My concern was that historical archaeology in New South Wales had become a process-focussed exercise which was bureaucratic, expensive and time consuming. I found myself in the role of having to act as a defender of legislation and practice I found outmoded and which, in many cases, produced poor outcomes. Many questions were levelled at me by developers (as the primary archaeological clients), senior planning bureaucrats and the occasional politician as to why compliance-driven archaeological work was relevant, let alone necessary. These experiences led me to commence the investigations which became this thesis.[5]

What I have done is gone back to first principles, to see what it was which led to the enactment of legislation, but also Australian society originally set out to achieve through legislation. What was archaeological heritage legislation originally set up to protect? Were there specific goals in mind in terms of what benefits archaeological heritage protection had for the discipline or the community? I also sought to position archaeological heritage protection within the wider regime of environmental law, as I believed there were lessons which could be learned from the environmental arena which might help shape the future direction of archaeological heritage protection. In legislative terms, archaeology fits within the scope of what may be considered an environmental concern.[6] Archaeological heritage, whether it is individual sites or entire landscapes, exists within the spectrum of environmental matters which must be taken into consideration. It sits alongside tradition 'green' environmental considerations such as protection of flora and fauna, or endangered habitat, as well as with 'built' environmental issues such as amenity and urban planning. Like these other environmental disciplines, archaeology, and heritage management more generally, has become a public issue. This is due both to the interest of some

[5] This included a very early attempt at a comprehensive review of the situation in New South Wales which, while completed, did not see any of its recommendations implemented. Allen, C. and M. North (2000). Review of historical archaeology planning systems and practice in NSW. Parramatta, NSW Heritage Office.

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

segments of the public, as well as the legislative regimes which affect the whole of society.

The act of placing archaeology within the legal realm drew in a range of parties which previously would have had little or no involvement with it. Archaeological heritage legislation was not enacted with the principle aim of regulating the archaeological profession, by controlling which academic archaeologists had access to which sites, but rather with the aim of establishing a set of legal compliance requirements which affected the entire populace. In such circumstances, it is reasonable to assume that some broader public purpose should be derived from this legislation. Archaeology as a discipline has long engaged with the public, through the practice known broadly as "public archaeology".[7] But this engagement has often focussed on short-term public benefits, through facilitated access to, and information about, archaeological heritage. Outside of a research-driven academic framework, archaeology can become an entertainment, a distraction for the interested laity, with little consideration of what wider good, if any, may exist from the undertaking of archaeological works. More positively, in some circumstances, archaeological heritage may contribute to a sense of community identity,[8] or well-being.[9] Within the environmental field, there is an emerging concept of 'public good conservation' which suggests that conservation should not merely be for its own sake, but should be undertaken in recognition of community needs and desires and explicitly seek to deliver a 'public good' outcome in its practice.

It is my view, as explored though this thesis, that the original intent of archaeological heritage protection in Australia was to deliver just such 'public good' outcomes. The manner in which archaeological heritage legislation has been framed and administered has tended to take a more legalistic and reductionist view of archaeology, thus excluding the wider 'public good' considerations. Through an investigation of heritage legislation and case law from across Australia, it is possible to demonstrate that, while a greater and greater quantity of archaeological work is being undertaken due to legal compliance requirements, the 'public good' outcomes are few and far between. This is largely due to limitations within existing legislation which is overly focussed on the scientific or research value of archaeological heritage, to the exclusion of any consideration of social values. To a certain extent, this is due to the archaeological theoretical paradigms which were in place during the period when much Australian heritage legislation was enacted. As the majority of the legislation has not been fundamentally revisited since this period, this outmoded emphasis persists.

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7 Little, B. J. (2002). "Archaeology as a Shared Vision." *in* Public Benefit of Archaeology. B. J. Little. (ed.). Gainsville, University Press of Florida: 3-19.
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8 Ireland, T. (1996). "Excavating national identity." *in* Sites: nailing the debate: archaeology and interpretation in museums. C. Paine. (ed.). Sydney, Historic Houses Trust of NSW: 85-106.

9 Byrne, D. (2002). "An archaeology of attachment: cultural heritage and the post-contact." *in* After Captain Cook: The archaeology of the recent indigenous past in Australia. R. Harrison and C. Williamson. (ed.). Sydney, Archaeological Computing Laboratory, University of Sydney. 8: 135-146.

This is not to deny the importance of archaeological heritage to the academic, scientific or research communities.[10] Compliance-driven archaeological projects can and do produce direct, or indirect, 'public good' outcomes at a range of scales. Indeed, of all the possible parties bound by heritage legislation, the research archaeologists' motives for impacting upon archaeological heritage are the least concerning. But it is also clear that archaeologists and archaeological projects in this category are vastly, vastly outnumbered by the day-to-day archaeological heritage management projects driven by legislative compliance. This is true for both the historical and Aboriginal archaeological subdisciplines in Australia, and I would suggest, is a common pattern worldwide in countries which have highly developed and well enforced environmental law regimes. The task I have set for myself, given this, is to articulate ways in which Australian heritage legislation can be changed to achieve better 'public good' outcomes for compliance-based archaeological work. I believe it is possible to achieve this, but it does require some rather fundamental changes in the way in which archaeological heritage protection functions within Australian environmental law.

This position is not without controversy, but it is timely in circumstances where the validity and function of heritage protection more generally in Australia is being questioned at both Federal and State levels. The recent Australia-wide Commonwealth Productivity Commission *Inquiry into Historic Heritage Protection*,[11] while largely silent on the issue of archaeology, has recommended that legal protections for historic heritage needs to take other non-heritage factors, principally economic factors, into account when deciding whether to ascribe legal heritage protection to a place. On the other hand, government entities such as the New South Wales Department of Environment and Conservation are adopting explicit policy positions for Aboriginal heritage which state that indigenous people should be the primary determinants of the significance and disposition of that heritage. Victoria has just passed a new *Aboriginal Heritage Act*[12] with a greater emphasis on social and community significance as opposed to scientific significance. All of these activities are evidence of the erosion of the position of archaeologists as the primary arbiters of what happens to Australia's archaeological heritage; other players are storming the field. Some of the questions put to me early in my career which challenged the need to undertake archaeological work are now receiving serious consideration at the highest levels of government. If heritage legislation is felt by the public at large to be irrelevant or unfair, this undermines its ability to protect heritage or deliver any 'public good' outcomes except in the most limited of circumstances.

Given these pressures, I believe the analysis in this thesis charts a way forward for legal reform which focuses archaeological heritage protection on delivering

[10] Smith, L. (2004). Archaeological theory and the politics of cultural heritage. London, Routledge.

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

[12] Passed May 2006 but still uncommenced, as of August 2006.

'public good' conservation outcomes. The time has come to face up to the reality of how archaeological practice has developed in Australia. Broad compliance requirements have created a huge range of opportunities for archaeological work but in that context we need to be doing better archaeology delivering better outcomes, rather than merely more compliance based work of minimal archaeological or community merit. This will require the cooperation of the archaeologists and the lawyers to shape a positive new direction for Australian archaeological heritage law and management for the next thirty years.