

STATUTORY CONTROL AND PROTECTION OF CULTURAL MATERIAL WITHIN AUSTRALIA

Discusses protection afforded to indigenous sites and relics, non-indigenous (colonial) relics and sites, the Heritage Act in NSW and shipwrecks.

Responsibility for the protection of movable cultural material is shared between Federal and State Governments. This fragmentation of jurisdiction could well have resulted in widely diverse approaches being taken in different areas of the Australia, but in fact, different governments have adopted remarkably similar methods. For the most part, the legislation provides protection for aboriginal works and objects but does not offer the same protection to non-aboriginal material.

(i) ABORIGINAL SITES AND RELICS

All States have legislation controlling the preservation of aboriginal sites and relics. Each legislative scheme has the same major characteristics, although, of course, their details are significantly different. The following discussion is intended only as introductory and further reference must be made to the relevant Acts.

These statutes include: Western Australia: Aboriginal Heritage Act 1972-1980; Northern Territory: Native and Historical Objects and Areas Preservation Act 1980; South Australia: Preservation of Aboriginal and Historic Relics 1965; New South Wales: National Parks and Wildlife Act 1975; Queensland: Aboriginal Relics Preservation Act 1967-1976; Tasmania: Aboriginal Relics Act 1975; Victoria: Preservation of Archaeological and Aboriginal Relics 1982;

(a) Aboriginality

The schemes are concerned specifically with aboriginal cultural heritage and with protecting the physical manifestations of that heritage from abuse and neglect. The key provisions of each statute authorise government action to be taken for the protection of "relics" and with one exception, "relics" are defined as the product of aboriginal culture. Only in South Australia does the legislation include cultural material relating to early European settlement.

Most States exclude from their definition of a relic, work that has been made for the purpose of sale.

(b) The Vesting of Property of Relics in the Crown

All Acts contain provisions by which the legal title to relics will be owned by the Crown in certain circumstances. For example in New South Wales, South Australia and Victoria the Crown will own all relics found in certain designated historic or archaeological areas. Queensland takes a more expansive view and is empowered to appropriate relics found anywhere within the State.

The approach taken by Tasmania is quite different. There, appropriation is not automatic. A person who owns a relic, has custody or control of a relic, or even has knowledge of a relic, must

within six months from that time, inform the director of the National Parks and Wildlife Service of that fact. The director then can impose conditions and the Minister may order the acquisition of the relic. (Note that with respect to relics found upon Crown Land, the property in the relic automatically vests in the Crown).

(c) Declaration and Control of Protected Sites

All Acts provide the power to declare certain areas within the State to be of particular significance and thus protected. In the majority of States, (namely Queensland, Tasmania, South Australia and Victoria), this power is considerably weakened if the site happens to be on privately owned land. In such cases, the consent of the land owner is necessary before such an order can be made. By way of contrast, in New South Wales no such consent is necessary. The midway house position is represented by Western Australia, where the landowner may object to the declaration and have those objections formally considered. Moreover, in that State the landowner is guaranteed compensation.

(ii) **The Protection of Non-Aboriginal Relics and Sites**

Only two jurisdictions have attempted to do this: South Australia explicitly defines "relic" to include "any trace or remains of the exploration and early settlement" and the Northern Territory defines a "prescribed object" as including "an object relating to the Territory which is of archaeological or historical interest of value".

(iii) **The Heritage Act 1977 (NSW)**

The Heritage Act establishes the Heritage Council of NSW and sets out its functions. It also establishes the system of interim and permanent conservation orders as well as loan schemes to promote heritage conservation and an array of powers and defences to persuade the recalcitrant. The Act is concerned with "environmental heritage" which is defined as meaning "those buildings, works, relics or places of historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance for the State" (s. 4). Aboriginal sites and relics are specifically excluded.

The Act is essentially concerned with those aspects of cultural heritage that are attached to the land. While conservation orders upon buildings or upon gardens, are common place, the Act actually enables conservation orders to be placed upon a much wider range of property: these include a building, work, relic or place. It is the view of the Heritage Council that no provision is made in the Heritage Act for the protection of artefacts or objects which are not fixed to a site or building and which are not "relics" (that is, pre-dating 1900). Thus, "WYEWURK", a small Thirroul seafront cottage is protected by a conservation order because D.H. Lawrence lived and worked there. Whilst the house is protected because of its association with that famous visitor, the writing table upon which he worked, is totally without protection.

In fact, the statute does not limit its powers to works and relics fixed to realty. That attitude is adopted basically because of the difficulty of enforcing a conservation order made upon a chattel. It is probably also a question of resources, for a wider interpretation of the Council's power would also involve considerable expenditure upon enforcement.

Given the limited interpretation adopted by the Heritage Council, works of art and objects of cultural significance that are non-aboriginal, are largely unprotected in NSW.

(iv) **Historic Shipwrecks**

The purposes of the Historic Shipwrecks Act 1976 are set out in the recitals to that legislation. They provide a fine example of the grammatical depths plumbed by legislative draftsmen: it is to

"protect those wrecked vessels and articles, and the remains of, and any articles associated with, other ships of historic significance, being remains or articles that are situated in, or have been removed from, Australian waters or waters above the continental shelf of Australia".

If the murder of the English tongue carried the death penalty, that draftsman would surely die.

The need for this Act arose from the 1972 agreement entered between the Netherlands and Australia concerning old Dutch shipwrecks off the Western Australia coast. The Act incorporates the terms of that agreement. Thus, a

"historic shipwreck means (a) the remains of a ship situated above the continental shelf of Australia or in Australian waters, which are of historic significance; a "Dutch relic".

The minister has the power to declare shipwrecks and associated articles to be of historic significance and thus a "historic shipwreck" or "historic relic". Further, he may declare areas which contain historic shipwrecks or relics, to be a "protected zone".

Persons who come in to possession, custody or control of such material must notify the minister within 30 days. Similarly, discoveries of shipwrecks and relics must be notified.

Pursuant to the regulations, nobody without a permit may:

- (a) bring into a protected zone, equipment constructed or adapted for the purpose of diving, salvage or recovery operations, or any explosives, instruments or tools the use of which would be likely to damage or interfere with a historic shipwreck or a historic relic situated within that protected zone;
- (b) use within a protected zone, any such equipment, explosives, instruments or tools; or

- (c) cause a ship carrying any such equipment, explosives, instruments or tools to enter, or remain within a protected zone;
- (d) trawl, dive or engage in any other underwater activity, within a protected zone;
- (e) moor or use ships within a protected zone.

An extensive array of powers and offences have been created by the Act in an attempt to provide this material with protection. To effect these, inspectors are given an armoury of powers that exceed even those given to the police. For example, these include boarding a ship, opening and searching cargo holds, compartments or containers, and being able to require people to answer questions. These inspectors may seize any ship, equipment or article that is reasonably believed to have been used to be involved in the commission of an offence under the act and prosecutions may be laid.