
A history of Aboriginal heritage protection legislation in South Australia

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In recent decades changes in the administration and organisation of Aboriginal heritage protection have left this area in control of bureaucrats with problematic policy and practice. By retrospectively examining Aboriginal heritage protection in South Australia, with a focus on the Aboriginal and Historic Relics Preservation Act 1965 (SA), the Aboriginal Heritage Act 1979 (SA) and the Aboriginal Heritage Act 1988 (SA), this article discusses how a lack of government will and poor administration policies have led to the inadequate management of Aboriginal heritage. It concludes that whilst the State Government continues to push for new protective legislation for Aboriginal heritage, without the appropriate administration policies and procedures, any new Act will continue to fail in its protective mechanisms and its hope of self-determination for South Australia's Aboriginal population.

WARNING

Various terms used to describe Aboriginal people within this article may cause offence. These terms have been used in their historical context to illustrate the attitudes of non-Aboriginal people towards Aboriginal people.

INTRODUCTION

Alongside more general shifts in Aboriginal rights since the 1967 referendum, Aboriginal heritage protection processes in South Australia have undergone substantial changes in recent decades. South Australia became one of the first of the Australian states to enact legislation to protect Aboriginal cultural heritage; however, the *Aboriginal and Historic Relics Preservation Act 1965* (SA) (AHRPA 1965) proved inadequate and was eventually replaced by the *Aboriginal Heritage Act 1979* (SA) (AHA 1979). Despite the new Act, an unprecedented series of events relating to its proclamation resulted in a confused protection regime for Aboriginal heritage between 1979 and 1988. The failed 1979 Act was optimistically replaced by the innovative *Aboriginal Heritage Act 1988* (AHA 1988), which is still in effect today. Amidst calls for this Act to be reviewed with the aim of introducing yet another Aboriginal heritage protection Act – which would make an unparalleled fourth such Act within a similar number of decades of operation – it seems timely to reflect on the history and political context of Aboriginal heritage protection legislation in South Australia and its administration and organisation. In this article we argue that while the AHA 1988 (SA) might have failed to (yet) deliver the control, self-determination and protection it promised during its drafting process, this has largely been the result of a lack of government will and poor administration, rather than owing to any inherent flaws in the legislation itself. We question whether what might be needed is a greater tangible

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commitment to protecting Aboriginal heritage rather than further rhetoric about the concept of heritage protection, coupled with a substantial overhaul of the policies and practice of the bureaucrats in charge of heritage administration.

THE BIRTH OF HERITAGE LEGISLATION IN SOUTH AUSTRALIA

As a condition of the settlement of South Australia in 1836, King George issued a directive – the Letters Patent – that was used to enable provisions under the *South Australian Act 1834* (UK) to establish the province of South Australia and precisely define its boundaries. This directive included a significant guarantee to the rights of “any Aboriginal Natives” or their descendants to land they “now actually occupied or enjoyed”, and appeared to guarantee land rights with the proviso all land surveys in the new settlement were to exclude areas of Aboriginal occupation (especially burial grounds), and land was to be purchased for use if the local inhabitants were willing to sell. Despite this, the *South Australian Act 1834* (UK), which declared the Province to be “waste and unoccupied Lands ... fit for the Purposes of colonization”, is claimed to have had precedence over the Letters Patent,¹ and for more than a century, Aboriginal places of heritage significance were left with no protection from the effects and activities of the non-Aboriginal settlers.

During the first few years of South Australia’s colonisation, little provision was made for the welfare of Aboriginal people apart from the occasional issue of biscuit, flour and blankets.² Additionally, the conversion of Aboriginal people to Christianity was high on the agenda of the new colonialists, which resulted in the setting up and operation of mission stations, schools and homes throughout the state.³ In 1844, the first legislation relating to Aboriginal people, *Ordinance No 12 1844* (SA), was introduced for the “protection, maintenance, and upbringing of orphans and other destitute children of the Aborigines”, and by 1911 the State Children’s Council was actively involved in the removal of Aboriginal children from their parents.⁴ That same year saw the introduction of the *Aborigines Act 1911* (SA) intended to “protect” Aboriginal people who were seen as a “dying race”, but this Act simply segregated many Aboriginal people onto reserves away from non-Aboriginal people. In 1934, a new *Aborigines Act 1934* (SA) was introduced that brought more controls and restrictions for Aboriginal people and also established an Aborigines Department. Subsequently, by the 1940s, one of the primary objectives of Aborigines Department was the conversion of Aboriginal people on government stations into “self-supporting” members of the community.

It can be argued that this emphasis on Aboriginal independence was to cover for a fiscal agenda on the part of the South Australian Government to keep expenditure on Aborigines to a minimum ... The explicit policy of assimilation which came later can similarly be seen as the covering ideology for the primary objective of reducing the financial burden on the State in its administration of Aboriginal people.⁵

Through the 1950s, several attempts were made by the State and Commonwealth Government to have Aboriginal people assimilate into white society, which included the introduction of a new policy of assimilation in 1951. The Commonwealth Government introduced the *Social Services Consolidation Act 1959* (Cth) to extend social services to Aboriginal people, except those living a “traditional” lifestyle. This was to encourage Aboriginal people to move away from reserves to assist in the implementation of assimilation. By mid-1962 the *Aboriginal Affairs Act 1962* (SA) was introduced to abolish “all restrictions and restraints” on Aboriginal people.⁶ This new Act established an Aboriginal Affairs Board and reference to “controlling” Aboriginal people was dropped, but the Act still contained many measures to facilitate continued control.

¹ Foster R, “An Imaginary Dominion: The Representation and Treatment of Aborigines in South Australia, 1834-1911” (PhD thesis, Department of History, University of Adelaide, 1993) p 28.

² Cameron R, *A Little Flour and a Few Blankets: An Administrative History of Aboriginal Affairs in South Australia, 1834-2000* (State Records of South Australia, 2002) p 8.

³ Cameron, n 2, p 14.

⁴ Cameron, n 2, p 35.

⁵ Cameron, n 2, p 50.

⁶ *South Australian Parliamentary Debates*, 25 October (Government Printer, South Australia, 1962) p 1722.

By mid-1963, concerns were raised during a conference convened by the Department of Lands regarding the preservation of Aboriginal rock art sites located at Cave Hill and Panara-mitte in South Australia. Representatives from the Lands Department, the Aboriginal Affairs Department, the Flora and Fauna Advisory Committee, the South Australian Museum (SA Museum) and the University of Adelaide met later that year to discuss the issue. The well overdue need for Aboriginal heritage protection was thus recognised, and a recommendation from this meeting to draft a heritage Bill was submitted to Cabinet.⁷ The *Aboriginal and Historical Objects Preservation Bill* was introduced into the Lower House in August 1964, though it lapsed after protracted debate in the Legislative Council; members were convinced that clauses affecting the rights of private landowners were unacceptable and could not easily be rectified with simple amendments.⁸ Part of the concern appears to have been from members who reputedly had relatives who liked to collect stone artefacts⁹ – under the proposed Act, such “fossickers” were deemed to be breaking the law. These concerns echoed those being voiced elsewhere in Australia, such as in New South Wales where arguments several decades earlier for the instigation of heritage legislation in that State were opposed by stone artefact collectors on the basis that such acts would restrict their “scientific activities”.¹⁰ Ultimately, the South Australia Bill was rewritten in a short timeframe by a group of private Council members acting without advice from the Parliamentary draftsman. With few amendments, the new draft successfully passed without argument through both houses of Parliament to become the AHRPA 1965.

There is no evidence to suggest that during either the initial or re-drafting process any consultation was conducted with Aboriginal people regarding the proposition; rather, non-Aboriginal “experts” took it upon themselves to lobby for Aboriginal heritage protection and determined for what, by whom and how such protection should be afforded. This process of excluding Aboriginal people from decision-making about their own culture – having been perpetuated so many times in the past as to have become standard practice – was underpinned by the idea that such people were unable to look after themselves or any of their affairs.¹¹ Even more concerning is the indication that, according to contemporary logic, there could be no interest from Aboriginal people in their own heritage or any proposed legislation that might affect it, owing to the expressed viewpoint that, “all the people we are referring have been dead for some time”.¹²

FEATURES OF THE ABORIGINAL AND HISTORIC RELICS PRESERVATION ACT 1965

As proclaimed on 3 August 1967, the AHRPA 1965 was the first piece of heritage protection legislation in South Australia. As its title suggests, the Act was concerned with “relics” – defined as “any trace or handiwork of an Aboriginal” excluding those made specifically for the purposes of sale – as well as “any trace or remains” relating to post-1836 European exploration and settlement of the

⁷ Edwards R, “Legislation for the Protection of Aboriginal Relics in South Australia”, in McCarthy FD (ed), *Aboriginal Antiquities in Australia: Their Nature and Preservation* (Australian Institute of Aboriginal Studies, 1970) p 160; Fitzpatrick P, “A Brief History of Aboriginal Legislation in South Australia” (Paper presented at a Heritage Working Group organised by Australian Archaeological Association of Consulting Archaeologists Inc and the Anthropology Society of South Australia, 1997).

⁸ Edwards, n 7, p 160.

⁹ Fitzpatrick, n 7; *South Australian Parliamentary Debates*, 22 September (Government Printer, South Australia, 1964) p 921.

¹⁰ McCarthy FD, “Aboriginal Relics and Their Preservation” (1938) 2 *Mankind* 120. See also, Moser S, “Archaeology and Its Disciplinary Culture: The Professionalisation of Australian Prehistoric Archaeology” (PhD thesis, Department of Prehistory and Historic Archaeology, University of Sydney, 1995) p 89; Mulvaney DJ, “Human Factors in the Deterioration and Destruction of Antiquities and their Remedy”, in McCarthy FD (ed), *Aboriginal Antiquities in Australia: Their Nature and Preservation* (Australian Institute of Aboriginal Studies, 1970) p 115.

¹¹ Hemming S, “The Problem with Heritage: Translation, Transformation and Resistance”, in Worby G and Rigney LI (eds), *Sharing Space: Indigenous and Non-Indigenous Responses to Story, Country and Rights* (Australian Research Institute, Curtin University, Perth, 2006) p 316.

¹² *South Australian Parliamentary Debates*, 11 August (Government Printer, South Australia, 1965) p 1022; See also, Kijas J, *An Historical Overview of Aboriginal Heritage Legislation in South Australia* (Aboriginal Studies Graduate Diploma, South Australian College of Advanced Education, 1986) p ii.

State,¹³ thereby negating the need for a second piece of legislation to cover non-Aboriginal heritage. The adoption of the term “relic”, coupled with the past tense when describing aspects of the Aboriginal occupation of South Australia further implied that “authentic” Aboriginal heritage was part of a “dead past” and no longer connected to contemporary Aboriginal people – an idea underpinned by an Aboriginalist construction of cultural extinction.¹⁴

The AHRPA 1965 provided a limited style of “blanket protection” for relics including stone and wooden artefacts, skeletal remains, carved trees, rock paintings and engravings, stone structures and arranged stones, for any of which it was an offence to “(knowingly) conceal, destroy, deface or damage”.¹⁵ Importantly, the definitions under the Act excluded natural features of cultural significance, “sacred sites” and post-contact sites (such as missions) from protection. Some of the mechanisms to achieve protection included reserving land on which Aboriginal relics occurred,¹⁶ controlling access to that land, preventing the illicit trade in relics,¹⁷ and removing items found to be under “threat” from persons committing an offence against the Act for “safe storage”,¹⁸ along with maintaining a Register of Aboriginal Sites and Objects. Unfortunately, artefacts on land beyond the boundaries of an Historic Reserve or Prohibited Area, or those not seized for “safe storage” received little protection under the Act and hence the Act was somewhat restricted in its usefulness.¹⁹

Nevertheless, the hope was voiced that the new legislation would allow the preservation of the “remaining relics of the Aboriginal Cultures of South Australia ... [to] survive for generations to come”,²⁰ but one can ask for which generations was it hoped the relics would survive? Although the AHRPA 1965 recognised Aboriginal interests in their relics,²¹ it excluded Aboriginal aspirations and perceptions, and gave them no specific role in protection, control or consultation.²² In contrast, non-Aboriginal interests were well-accounted for. Consent from landowners was needed to make declarations of an Historic Reserve or Prohibited Area within their property²³ and there was provision for payment of compensation to landowners for any disturbance or damage done to their property arising from actions taken under the Act.²⁴ At a time when the fledgling archaeological discipline was establishing itself in Australia, the AHRPA 1965 seemingly “had very little to do with the preservation of Aboriginal heritage as such, and more to do with the preservation of archaeological access to

¹³ *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 3(1).

¹⁴ See Fourmile H, “Aboriginal Heritage Legislation and Self-determination” (1989) 7 *Australian Canadian Studies* 50; Hemming, n 11; Hemming S and Trevorrow T, “Kungun Ngarrindjeri Yunnan: Archaeology, Colonialism and Re-claiming the Future” in Smith C and Wobst M (eds), *Indigenous Archaeologies: Decolonizing Theory and Practice* (Routledge, 2005); Kijas, n 12, p 3; Ritchie D, “Australian Heritage Protection Laws: An Overview” in Finlayson J and Jackson-Nakano A (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1996) p 29.

¹⁵ *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 23.

¹⁶ Under s 16 of the *Aboriginal and Historic Relics Preservation Act 1965* (SA) the Minister can proclaim an area to be an Historic Reserve or a Prohibited Area in order to protect relics located within their designated boundaries. Historic Reserves are areas considered not to be endangered by the presence of visitors, and no permission is required to enter one. Prohibited Areas require the permission from the Minister to enter to prevent or control the entry of all persons who could interfere, expose and threaten the preservation of relics.

¹⁷ Under the *Aboriginal and Historic Relics Preservation Act 1965* (SA), it is an offence for anyone in South Australia, including indigenous peoples, to sell an artefact without Ministerial permission (s 27(2)).

¹⁸ *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 12 and 24.

¹⁹ Ward GK, “Archaeology and Legislation in Australia” in Connah G (ed), *Australian Field Archaeology: A Guide to Techniques* (Australian Institute of Aboriginal Studies, 1983) p 24.

²⁰ Edwards, n 7, p 165.

²¹ Section 4(1) of the *Aboriginal and Historic Relics Preservation Act* states that Indigenous people shall not be denied free access to and enjoyment of relics of their ancestors, as is sanctioned by their customary law.

²² Kijas, n 12, p 13.

²³ *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 18(b).

²⁴ *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 25(1).

data”.²⁵ The new Act allowed researchers the freedom to collect artefacts and allowed them greater access to areas. In order to appease the members’ initial concerns about the rights of individuals to collect artefacts, such activities had not been made an offence under the revised Act, providing that the collector did not lose or damage the artefacts and did not sell them without the Minister’s permission.²⁶ Although consent was required from the Protector of Relics to carry out archaeological excavations or remove objects within an Historic Reserve²⁷ or to enter a Prohibited Area,²⁸ anyone could survey, make surface collections and excavate anywhere outside such areas provided they reported their discoveries.²⁹ There were no requirements for anyone to consult with Aboriginal communities about their intentions, research-driven or otherwise. Thus, it might be concluded that the Act intended to provide for lawful sanction of “professional” research while preventing destruction of the archaeological record by “amateurs”; it emphasised the protection of tangible artefacts and sites based on their scientific and aesthetic value to non-Aboriginal people, rather than objects and places considered important to Aboriginal people.³⁰

ADMINISTERING THE ABORIGINAL AND HISTORIC RELICS PRESERVATION ACT 1965 (SA)

It had been determined during the drafting of the AHRPA 1965 that the SA Museum – with its already substantial knowledge and experience in the area of Aboriginal heritage – was the most logical institution to take administrative responsibility for the new legislation. Initially, the AHRPA 1965 was statutorily administered through the Director of the SA Museum (who was also required to serve as the Protector of Relics)³¹ and the Minister of Education. They were assisted in their duties by an honorary Aboriginal and Historic Relics Advisory Board made up of one Minister-nominated representative from each of the Council of the University of Adelaide, SA Museum, Department of Aboriginal Affairs and Pastoral Board,³² but not including any Aboriginal people. The Advisory Board began operation in 1967 under the supervision of Robert Edwards – a Curator in Anthropology at the SA Museum – who was nominated to serve as Secretary to the Board. During the Board’s first meeting, suggestions were made to substantially amend the Act; even in its earliest years of operation the Act was repeatedly referred to as “vague”, “bad” or “badly drafted”, reflecting its inexperienced drafting and rapid passage through Parliament.³³ The opinion was expressed by the Advisory Board that the situation was so irretrievable that an entirely new Act was probably required to overcome its inherent problems rather than an attempt to amend it.³⁴ Despite holding ongoing discussions with Parliamentary draftspeople, no action was taken, owing to either the unpalatable nature of the suggested amendments or the fact that Parliament was said to be “not able” to “deal” with the Act during their current session.³⁵

²⁵ Smith LJ, “A History of Aboriginal Heritage Legislation in South-east Australia” (2000) 50 *Australian Archaeology* 113.

²⁶ *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 27(1) and (2).

²⁷ *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 24(1).

²⁸ *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 22(1).

²⁹ *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 28(2).

³⁰ Kijas, n 12, p iii.

³¹ *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 7(1).

³² *Aboriginal and Historic Relics Preservation Act 1965* (SA), s 6(1) and (2).

³³ Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 12 September 1968* (South Australian Museum Archives, AA861/1) p 1; Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 3 June 1970* (South Australian Museum Archives, AA861/1) p 2; Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 26 June 1970* (South Australian Museum Archives, AA861/1).

³⁴ Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 18 June 1970* (South Australian Museum Archives, AA861/1) p 1.

³⁵ Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 6 December 1968* (South Australian Museum Archives, AA861/1) p 1; Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 7 August 1970* (South Australian Museum Archives, AA861/1), p 4.

The Advisory Board's first year of operation was financed through the Anthropology Section at the SA Museum, the work of the latter reportedly suffering as a result.³⁶ Nevertheless, the Board and Protector had been active in the administration of the Act and had achieved some positive results. By March 1968, six Inspectors and 24 Wardens had been appointed under the AHRPA 1965 Act, with further appointments made in April and May including the appointment of several Aboriginal people.³⁷ As demonstrated in Table 1, Historic Reserves and Prohibited Areas were slowly being declared throughout the state, but interestingly, in recognition of the enormity of the task with which they had been endowed, the Protector of Relics noted that:

Because of the large number of Aboriginal sites known to occur in South Australia it is impractical to declare them all as special sites but it is essential that the best of the selected for protection [sic]. Such selection can best be made after all major sites have been surveyed so that they can be compared. It is, therefore intended to carry out surveys and research studies on known Aboriginal sites of potential importance, area by area, to give a basis on which to select the sites, which should be declared as Prohibited Areas or Historic Reserves.³⁸

Unfortunately, the proposed proactive and systematic investigation of sites of Aboriginal importance made it no further than the suggestion stage, owing to an apparent lack of resources, and sites continued to be reported in a slow and ad hoc fashion. In 1969, the South Australian Government Treasury allocated funds to the SA Museum to employ Bob Ellis from late 1970 in the newly-created position of Curator of Relics, along with a secretary to support the Advisory Board. Ellis' vision was to:

establish a heritage agency which would promote heritage related activities and in particular, would sponsor Aboriginal run and managed regional/local centres that would support a range of cultural activities – language recording and teaching etc and sponsor locally run Aboriginal cultural tourism throughout SA.³⁹

Ellis prepared submissions to the Commonwealth Government and bodies such as the then Australian Institute of Aboriginal Studies (AIAS) for funds to support desperately-needed field programmes and to increase staffing in the newly-formed Aboriginal and Historic Relics Unit.⁴⁰ Non-government individuals such as PhD candidate Roger Luebbers were encouraged to conduct archaeological research to identify sites and therefore support the Unit, rather than expecting this task to be carried out by the few Unit staff members themselves.⁴¹ The external and therefore independent nature of such funding allowed Ellis a “fair degree of freedom” in how he administered the Act, coupled with the fact that “nobody in the Department had much idea about what we should do – particularly as our projects and policies included the full range of heritage activities – shipwrecks, engineering, Aboriginal, vernacular architecture etc”.⁴² Moving beyond the intended boundaries of the Act, Ellis⁴³ explicitly aspired to also protect natural features and Creation places of importance to Aboriginal people, particularly those in the north of the state.

Yet despite the small gains being made, Ellis saw the overwhelming failure of the Act as being the lack of involvement of Aboriginal people in its administration, a situation he tried to rectify during

³⁶ Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 28 June 1968* (South Australian Museum Archives, AA861/1) p 1.

³⁷ *South Australian Government Gazette* (21 March 1968) p 965; *South Australian Government Gazette* (11 April 1968) p 1198; *South Australian Government Gazette* (23 May 1968) p 1556.

³⁸ *South Australian Government Gazette* (14 March 1969) p 1.

³⁹ Ellis B, as cited in Wiltshire K, “Unfinished Business: The Lower Murray Lakes Archaeology Study within an Historical and Political Context” (BArch Hons thesis, Department of Archaeology, Flinders University, 2006) p 169.

⁴⁰ Aboriginal Heritage Section, *Aboriginal Heritage Newsletter* (Adelaide, September 1981) p 1.

⁴¹ Edwards R, *South Australian Museum Memorandum 9 June 1972* (South Australian Museum Archives, AA861/1).

⁴² Ellis B, as cited in Wiltshire, n 39, p 169.

⁴³ Ellis RW, “South Australia: Existing Legislation and its Implementation” in Edwards R (ed), *The Preservation of Australia's Aboriginal Heritage: Report of National Seminar on Aboriginal Antiquities in Australia, May 1972* (Australian Institute of Aboriginal Studies, 1975) p 9.

heritage assessments:

In the early stages of impact assessment the reports were semi-academic descriptions of the archaeology of the impact areas. I felt that Aboriginal people should be more directly involved and that archaeologists were preoccupied with their own concerns – which were not about “culture” but about “things”. Anthropologists didn’t understand heritage concerns and didn’t want to get their hands dirty. I tried to ensure that teams of Aboriginal custodians made the decisions about impact amelioration and that they considered things like food plants etc as well as artefacts.⁴⁴

Ellis, an active and seemingly tireless political, social and moral crusader for Aboriginal rights, harboured visionary aspirations, his ultimate goal being:

to put Aboriginal custodians squarely in control of their own heritage ... [to] extend protection to all places/items regardless of whether they were formally listed/identified [and] to provide for prosecution to be initiated by Aboriginal people, not the Minister.⁴⁵

In addition to the lack of Aboriginal involvement, other problems soon began to emerge with the AHRPA 1965. The Register of Aboriginal Sites and Objects, which had been intended to function as an aid for the protection of sites, provided no confidentiality regarding the location of sites and thus became little more than an archaeological research tool.⁴⁶ The greater fear was that:

the register we established could be misused in the future – as it is now – to exclude Aboriginal custodians from decision-making about those places. I planned for it to be repatriated to the various Aboriginal groups away from government/bureaucratic control.⁴⁷

In acknowledgment of the increasing problems, a policy regarding the implementation of the legislation was drawn up and revised several times.⁴⁸ This document included a list of “constraints” that were seen to restrict the effective implementation of the Act and, amongst other issues, advised administrators to consider: the large area encompassed by the Act and the restricted resources available to manage it; the confusion between the function of the Relics Unit and that of the SA Museum; and constant complaints that the Act was badly drawn up. Further problems soon emerged in regards to inconsistencies in who was being granted permission to enter declared Prohibited Areas and under what conditions.⁴⁹ Experience demonstrated that once permission was granted to enter a Prohibited Area, protection generally ceased to have effect with limited means by which to control actions thereafter.

By February 1971, a shift in portfolios saw responsibility for the administration of AHRPA 1965 transferred to the Minister for Environment and Conservation, but despite the increasing awareness of the inherent problems with the Act, no amendments were made to it. Two years later, a new Bill intended to expand the responsibility and strengthen the power of the Act was drafted, but owing to the fact that Parliament was “exceptionally busy” it was never introduced into the Lower House;⁵⁰ Relics Unit staff and the Advisory Board continued to do the best they could with the fundamentally problematic Act.

⁴⁴ Ellis B, as cited in Wiltshire, n 39, pp 170-171.

⁴⁵ Ellis B, as cited in Wiltshire, n 39, p 171.

⁴⁶ Ellis RW, *Rethinking the Paradigm: Cultural Heritage Management in Queensland* (Aboriginal and Torres Strait Islander Studies Unit, University of Queensland, 1994) p 15; Kijas n 12, p 13.

⁴⁷ Ellis B, as cited in Wiltshire, n 39, p 170.

⁴⁸ Aboriginal and Historic Relics Advisory Board, *Policy on Relics Administration 1971* (South Australian Museum Archives, AA861/1).

⁴⁹ Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 23 November 1970* (South Australian Museum Archives, AA861/1); Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 26 February 1971* (South Australian Museum Archives, AA861/1) p 6.

⁵⁰ Aboriginal and Historic Relics Unit, *Aboriginal and Historic Relics Preservation Act 1965 Newsletter 1973* (South Australian Museum Archives, AA861/1) p 1.

ROCKING THE BOAT: MOVES TO SEPARATE ABORIGINAL AND NON-ABORIGINAL HERITAGE PROTECTION

Meanwhile trouble was brewing in terms of how other government departments were starting to view the increasingly expansive operations of the Relics Unit. During its time based within the SA Museum, the Relics Unit had justifiably become actively involved with monitoring development and mining activities, much to the displeasure of the mining companies involved and the State Government.⁵¹ Consequently, from 1977 a representative from the Mines Department was allowed to observe all Advisory Board meetings, though they quickly moved to take over the running of the Board, contrary to the specifications of the Act.⁵²

By April 1977, the Relics Unit was seen to have “outgrown” the SA Museum and was transferred to premises in the newly-formed Department of Environment,⁵³ which caused a dispute between the two agencies over related issues of recording and documenting of Aboriginal sites, and the employment of an Aboriginal Site Specialist by the Department of Environment.⁵⁴ Robert Edwards later recommended that for greater co-ordination of Government agencies involved in Aboriginal research in South Australia the Aboriginal Relics Unit should be transferred back to the SA Museum.⁵⁵ At this time the Relics Unit was still relying heavily on external support from bodies such as AIAS, in addition to the Australian Heritage Commission, the Department of Aboriginal Affairs and the state Unemployment Relief Scheme.⁵⁶ When the Unit moved to employ architects to help deal with their responsibilities for built heritage, the Government saw a clear way “to separate Aboriginal heritage from non-Aboriginal built heritage” and focus their attention on the latter.⁵⁷ Consequently, the latter half of the 1970s saw the enactment of the *Heritage Act 1978* (SA), an Act specific to European heritage and which, in contrast to AHRPA 1965, was supported by a large and well-funded Heritage Unit for its administration, sending a clear signal about government priorities and commitment to action, regardless of any other rhetoric being touted.

The newly-proclaimed *Heritage Act 1978* (SA) overlapped in some areas with AHRPA 1965, and hence a new *Aboriginal Heritage Bill 1979* was introduced in order to eliminate the areas of intersection, having been drafted by the Department of Environment reputedly without consultation with staff from the Relics Unit or any Aboriginal people about its contents.⁵⁸ It has been argued that the decision regarding this new legislation was an afterthought, with the drafting process completed in just days, borrowing heavily from interstate legislation and without attention to the recommendations already made by the Advisory Board about the failings of the existing Act.⁵⁹ On the day Des Corcoran became State Labor Premier he announced that the new heritage Bill was necessary to give “greater recognition to the unquestionable right of Aboriginal people to have a say in what happens to their heritage”.⁶⁰ This was undoubtedly a more positive approach that sounded – superficially at least – as though it would allow the possibility of involving Aboriginal people more directly in the heritage process and Ellis’ visions for the Relics Unit to be realised. Significantly, Corcoran stated that the new Bill would recognise:

⁵¹ Ellis B, as cited in Wiltshire, n 39, p 168; Fitzpatrick, n 7.

⁵² Under s 6(2) of the *Aboriginal and Historic Relics Preservation Act 1965* (SA), the Act specifies where the members of its board should come from and this did not include a representative from the Department of Mines. Fitzpatrick, n 7.

⁵³ Aboriginal Heritage Section, n 40, p 1.

⁵⁴ Cameron, n 2, p 66.

⁵⁵ *South Australian Museum Study: First Interim Report Findings and Recommendations June 1979* (State Records of South Australia, GRG 46/7).

⁵⁶ Ellis B, *Personal Correspondence*, 29 March 1977 (South Australian Museum Archive, AA681/1).

⁵⁷ Ellis B, as cited in Wiltshire, n 39, p 169.

⁵⁸ Fitzpatrick, n 7; Kijas n 12, p 38.

⁵⁹ Fitzpatrick, n 7.

⁶⁰ *South Australian Parliamentary Debates*, 15 February (Government Printer, South Australia, 1979) p 2695.

that Aboriginal cultural traditions are not dead with only the remains to be protected, but are alive traditions which Aboriginal communities themselves must play the major part in conserving, preserving and passing on for the benefits of their future generations.⁶¹

Corcoran pointed out the lack of Aboriginal representation on the Advisory Board and proposed an Aboriginal Heritage Committee be established, of which at least three members should be Aboriginal. He also recognised the lack of protection for sacred sites and double standards now apparent with the newly introduced *Heritage Act 1978* (SA), bringing attention to the fact that a landowner's consent was required for the declaration of an Historic Reserve or Prohibited Area under AHRPA 1965, but was not required under the former:

Indeed it would be derogatory to the Aboriginal people if such consents were required in relation to their heritage and not in relation to our European heritage.⁶²

This was not a popular notion amongst some non-Aboriginal groups. During the second reading of the *Aboriginal Heritage Bill 1979*, Liberal members claimed the idea that Aboriginal people had a right to have a say in their heritage was an "illogical and westernised concept".⁶³ According to Liberal member Allison,⁶⁴ "experts" had made it clear that Aboriginal South Australians were concerned with land rights rather than preservation of artefacts. Furthermore, Allison also argued that any future Aboriginal Heritage Committee could not be comprised of Aboriginal people as it needed to incorporate people with skills in anthropology and archaeology, thereby reiterating the notion that only non-Aboriginal people could be "experts" in Aboriginal heritage. During parliamentary debate, Liberal member De Garis expressed the opinion that the AHRPA 1965 should be amended rather than repealed:

De Garis: As I have said, if I had to choose between the 1965 Act and the new Bill I would prefer the provisions of the 1965 Act.

Cornwall: Of course you would.

De Garis: Why does the honourable member say that?

Cornwall: I adopt a completely paternalistic attitude as did the member who drew it up.⁶⁵

FEATURES OF THE ABORIGINAL HERITAGE ACT 1979

As promised by Corcoran, the 1979 Bill was broader in its definition of Aboriginal heritage than was its predecessor, allowing for the protection of sites and items which were of "sacred, ceremonial, mythological or historical significance". Nevertheless, despite this expansive definition, in many other key aspects it was not substantially different to AHRPA 1965. Legislative provisions still protected the interests of landowners and artefact collectors, with ultimate control and responsibility for protecting Aboriginal sites and objects being vested solely with the Minister for Environment and Conservation. Although the new Act allowed for Aboriginal representation on the Aboriginal Heritage Committee, the committee's role remained only advisory and there were still no requirements for anyone to consult with Aboriginal people in regards to actions that might affect their heritage.

Despite opposition from some corners, the new AHA 1979 was enacted on 15 March 1979, with its date of commencement to be fixed by proclamation. The AHRPA 1965 Advisory Board held its last meeting one week later and was suspended pending the proclamation of the new Act. Existing Board members were not appointed to the new Aboriginal Heritage Committee, a deliberate action seen retrospectively by Ellis as "a means of slowing down the number of Historic Reserves and Prohibited Areas we were declaring" by bringing in a new array of people with no experience in the area.⁶⁶ The new Act delegated the previous responsibilities of the Protector of Relics to the Minister, effectively

⁶¹ *South Australian Parliamentary Debates*, n 60, p 2695.

⁶² *South Australian Parliamentary Debates*, n 60, p 2696.

⁶³ *South Australian Parliamentary Debates*, 21 February (Government Printer, South Australia, 1979).

⁶⁴ As cited in Kijas, n 12, p 31.

⁶⁵ *South Australian Parliamentary Debates*, 28 February (Government Printer, South Australia, 1979) p 3071.

⁶⁶ Ellis B, as cited in Wiltshire, n 39, p 168.

writing the SA Museum out of Aboriginal heritage protection processes within the State and placing them firmly within a bureaucratic space under tighter government control. In an important turn of events, state elections were called and on the 18 September 1979 Corcoran's Labor Government subsequently lost power before the date of commencement could be proclaimed on the AHA 1979. The new Liberal government, under the leadership of David Tonkin, quickly announced that it would not proclaim the AHA 1979 but would instead draft an entirely new Act following consultation with Aboriginal communities.⁶⁷

A PERIOD OF INSTABILITY AND UNCERTAINTY

Despite this confident and assertive start, Tonkin's Liberal reign was characterised by incompetent and under-qualified ministers claimed to be acting in the best interests of external lobby groups.⁶⁸ While the Tonkin Government wished to maintain a neutral position on Aboriginal heritage during this period, staff from the Relics Unit had other ideas and refused to shy away from advocating for the protection of Aboriginal heritage.⁶⁹ Relics Unit staff became strongly opposed to many of the activities the Government was allowing on the grounds that such activities did not take into account heritage protection, creating considerable internal tensions between the Unit and other government departments and developers; at one stage staff from the Relics Unit camped outside their own offices over a weekend in order to prevent the Minister of Mines gaining access to the Site Register. Nevertheless, the constant struggles eventually took their toll on Unit staff – on 28 February 1980, after 10 years of service a frustrated Ellis resigned, describing the Unit as having become “stultified and self preoccupied”, his visions for Aboriginal control over heritage all but lost.⁷⁰

In anticipation of the new Act, a series of organisational changes were implemented within the Unit in 1981 after six months of operation with no effective head. The formerly separate Departments of Environment and Planning combined into a single department (DEP), and after their short period of separation reflecting the existence of separate Acts the administration of Aboriginal and built heritage were reunited, with the Relics Unit becoming the Aboriginal Heritage Section (AHS) within the Heritage Conservation Branch, part of the Conservation Programmes Division of the new DEP.

Staff from the AHS continued to be vocal about administrative problems in Aboriginal heritage management such as the lack of consultation with Aboriginal people and the need to expand the staffing levels and develop appropriate policies for heritage protection.⁷¹ Of particular concern during this time was the impending redrafting of the AHA 1979 (which had still not been proclaimed and therefore its status was somewhat ambiguous at best)⁷² and for which consultation with communities had been publicly promised. Accordingly, the AHS renewed their efforts to initiate regular liaison with Aboriginal communities, which included the production and distribution of the *Aboriginal Heritage Newsletter*.⁷³ In addition, a series of consultative meetings (interestingly, including SA Museum staff despite the fact that they no longer had any official role in heritage protection) were held throughout the state, revealing Aboriginal communities' general displeasure regarding research and actions undertaken in relation to Aboriginal heritage, Ministerial control over their heritage and his/her power

⁶⁷ Fitzpatrick, n 7.

⁶⁸ Fitzpatrick, n 7.

⁶⁹ Fitzpatrick, n 7.

⁷⁰ Ellis B, as cited in Wiltshire, n 39, p 171.

⁷¹ Aboriginal Heritage Section, *Aboriginal Heritage Newsletter* (Adelaide, December 1981) p 2.

⁷² Since a commencement date for the *Aboriginal Heritage Act 1979* (SA) had never been set, the *Aboriginal and Historic Relics Preservation Act 1965* (SA) was technically still law even though it had been repealed by the former. Even if this was the case the situation was untenable because its Advisory Board had been suspended and never reinstated. During this period, the confused status of the legislation led to a series of usual events and at one stage the Relics Unit staff were directed not to consult with Aboriginal people. Fitzpatrick, n 7; Kijas, n 12.

⁷³ Fitzpatrick, n 7.

to appoint members to the Aboriginal Heritage Committee.⁷⁴ A summary of recommendations from the meetings was sent to Minister of Environment and Planning for approval, after which the proposed amendments were incorporated into the *Aboriginal Heritage Act Amendment Act 1981* (SA). This was subsequently introduced and debated in Parliament during which time further amendments were added including the establishment of an Aboriginal Heritage Fund to support the administration of the Act.⁷⁵ Nevertheless, the new Bill did not pass the last session of Parliament with the Government stalling in order to reconsider again the legislation.⁷⁶ They eventually decided there should be an entirely new approach to Aboriginal heritage protection and new legislation would be introduced to repeal both the 1965 and 1979 Acts.⁷⁷

During 1984, while waiting for the new Act to be drafted, the AHS underwent an internal review of its role, organisational structure and operation. Recommendations arising from this review included the creation of a new Aboriginal Heritage Branch (AHB) independent from the State Heritage Branch (which would continue to be responsible for non-Aboriginal heritage), the employment of more staff, increased funding, greater involvement of Aboriginal people and more consultation with regional Aboriginal communities.⁷⁸ The Branch subsequently employed an Aboriginal manager, Bob Ware, whose first priority was to guide the upcoming legislation through Parliament.⁷⁹ Unfortunately, despite the efforts of Ware, arguments erupted over the drafting of the new Act and the AHB was eventually excluded from involvement in the process.

The person subsequently allocated the job of writing the new Act was famously quoted as saying he was highly qualified to write such an Act because he “knew absolutely nothing about Aboriginal heritage and was, therefore, completely neutral”. This gentleman was responsible for most of the complex clauses ... written into what had begun as a simple and straightforward piece of legislation.⁸⁰

A “PIONEERING” NEW ACT: THE ABORIGINAL HERITAGE ACT 1988 (SA)

In 1987 Cabinet finally approved the new Aboriginal heritage draft Bill. While the AHB advocated publicly that the proposed Act represented a “very workable piece of legislation”,⁸¹ government interests were firmly with those of developers, and pastoral and mining companies, rather than with Aboriginal people.⁸² The AHA 1988 was enacted on 17 March 1988 and the AHB was reorganised at this time to administer it.⁸³ As with its predecessors, within months it became apparent that some provisions in the new legislation did not work and the AHB began to draft regulations to address the areas of concern including the classes of sites and objects that could be declared, research procedures, requirements for consultation with Aboriginal peoples, and applications for determinations under the Act;⁸⁴ these regulations were never enforced and the Labor government did not move to review the Act.

⁷⁴ Bramley J and Potezney V, “Meetings at Point McLeay and Meningie” (1983) 7 *Aboriginal Heritage Newsletter*, p 4; Fitzpatrick P and Coulthard D, “Meetings at Wamikata (Ernbella), Coober Pedy, Maree and Oodnadatta” (1983) 7 *Aboriginal Heritage Newsletter*, pp 5-6.

⁷⁵ Aboriginal Heritage Section, *Aboriginal Heritage Newsletter* (Adelaide, March 1982) p 1; Aboriginal Heritage Section, *Aboriginal Heritage Newsletter* (Adelaide, March 1983) p 1; Aboriginal Heritage Section, *Aboriginal Heritage Newsletter* (Adelaide, June 1983) p 1.

⁷⁶ Aboriginal Heritage Section, *Aboriginal Heritage Newsletter* (Adelaide, December 1982) p 3.

⁷⁷ Aboriginal Heritage Section, *Aboriginal Heritage Newsletter* (Adelaide, March 1983) p 1.

⁷⁸ Aboriginal Heritage Section, *Aboriginal Heritage Newsletter* (Adelaide, June 1984) p 1.

⁷⁹ Aboriginal Heritage Branch, *Aboriginal Heritage Newsletter* (Adelaide, September 1985) pp 1-2; Fitzpatrick, n 7.

⁸⁰ Fitzpatrick, n 7, p 6.

⁸¹ Aboriginal Heritage Branch, *Aboriginal Heritage Newsletter* (Adelaide, September 1987) p 1; Aboriginal Heritage Branch, *Aboriginal Heritage Newsletter* (Adelaide, December 1987) p 24.

⁸² Fitzpatrick, n 7.

⁸³ Aboriginal Heritage Branch, *Aboriginal Heritage Newsletter* (Adelaide, June 1989) p 1.

⁸⁴ Aboriginal Heritage Branch, *Aboriginal Heritage Newsletter* (Adelaide, June 1988) p 1.

The AHA 1988 afforded a greater recognition of the role of Aboriginal people and Traditional Owners in the identification and protection of heritage. For the first time the Act included full blanket protection for Aboriginal heritage, meaning that individual sites do not need to be registered in order to be protected, although the Register is still maintained, with the Minister determining what items are placed on it. In contrast to the previous Acts, under the current legislation it is now an offence for an owner or occupier of land to fail to report the discovery of an Aboriginal site, objects, or remains to the Minister.⁸⁵ Perhaps the most significant provision in the AHA 1988 is its progressive definition of Aboriginal heritage, encompassing “traditions, observations, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation”. Unlike either of its predecessors, the AHA 1988 provides some provisions for confidentiality of information about sites, objects, remains or about Aboriginal culture;⁸⁶ however, this concession is ultimately overruled by the authority given to the Minister to divulge such information.⁸⁷ The Act also establishes an Aboriginal Heritage Committee, comprised entirely of Aboriginal people from throughout the state appointed by the Minister,⁸⁸ though there are no statutory criteria for nomination or selection. Unfortunately, despite its full Aboriginal membership, the Committee functions in an advisory capacity only and the Minister is not bound to follow its recommendations.

In an attempt to overcome some of the fundamental resourcing issues apparent under the earlier acts, the AHA 1988 establishes an Aboriginal Heritage Fund⁸⁹ administered by the Minister and which can be used for a variety of purposes that relate to the protection and preservation of Aboriginal heritage. Unfortunately, recent enquiries to the Aboriginal Affairs and Reconciliation Division reveal there is no money in the fund – a situation which has been the case for some time – and hence this provision appears to be pointless.

For the first time, it is mandatory for researchers to undertake consultation with Aboriginal communities prior to their carrying out any heritage survey or excavation,⁹⁰ and similarly they must gain permission – albeit from the Minister – to “excavate, damage or interfere” with an Aboriginal site or object.⁹¹ While one might argue about whether this in itself is a useful clause or not given the responsibility being vested in the Minister rather than with Aboriginal communities, a far greater threat to Aboriginal heritage has always been posed by development, yet the AHA 1988 contains no statutory obligation for developers to consult with Aboriginal communities or submit applications prior to development. If a developer wishes to proceed with an activity that is likely to disturb, interfere or damage Aboriginal heritage, they can apply for permission from the Minister to proceed.⁹² In such a situation, the Minister is required to take all reasonable steps to consult with Aboriginal people who, in the opinion of the Minister, have particular interests in the matter,⁹³ after which in nearly all cases he/she gives permission for development to proceed regardless. Therefore, despite its initial purpose, the AHA 1988 has become a mechanism to actually authorise and facilitate the destruction of Aboriginal heritage rather than to protect it.⁹⁴ Interestingly, in other states, when similar processes of consultation with Aboriginal communities are engaged with, all costs of said consultation

⁸⁵ *Aboriginal Heritage Act 1988* (SA), s 20 (1).

⁸⁶ *Aboriginal Heritage Act 1988* (SA), s 35(1).

⁸⁷ *Aboriginal Heritage Act 1988* (SA), s 35(2).

⁸⁸ *Aboriginal Heritage Act 1988* (SA), s 7.

⁸⁹ *Aboriginal Heritage Act 1988* (SA), s 19.

⁹⁰ *Aboriginal Heritage Act 1988* (SA), s 42.

⁹¹ *Aboriginal Heritage Act 1988* (SA), s 21 and 23.

⁹² *Aboriginal Heritage Act 1988* (SA), s 23.

⁹³ *Aboriginal Heritage Act 1988* (SA), s 13.

⁹⁴ Fitzpatrick, n 7. A similar situation used to exist in the now repealed *Land (Planning and Environment) Act 1991* (ACT) in the Australian Capital Territory, where the only way for a developer to proceed in light of an Aboriginal site was to have the site entered into the ACT Heritage Register with provisions to allow for its destruction; hence that Act also served as a mechanism to legalise heritage destruction rather than preservation.

are met by the developer in a “user pays” approach. In South Australia, the peculiar situation has developed whereby costs for consultation are met by the State, and there is little political will to enter into negotiations. The costs of the Heritage Branch “consulting” with communities on behalf of the Minister in order to ascertain whether places or objects should be placed on the Register of Sites and Objects is also met by the government and hence, despite there having been hundreds of sites reported to the Branch over the past decade as a result of development driven heritage clearances, almost none of these have ever been registered, under the proviso that the Act provides “blanket protection” for all places and hence registration is not really required.

Although the AHB underwent organisation changes in 1989 so to better administer the AHA 1988, further structural changes were made again just a few years later. In October 1992, the Department of State Aboriginal Affairs (DoSAA) was established by amalgamating the Office of State Aboriginal Affairs with the Aboriginal Works Division of the Department of Housing and Construction (SACON). The Aboriginal Heritage Branch also became a part of DoSAA, and the Department’s Culture and Site Services Unit continued to administer the AHA 1988.⁹⁵ As a result of these changes many of the Aboriginal Heritage Branch’s staff were forced to take separation packages, causing a loss in corporate knowledge and experience.⁹⁶ The AHA 1988 was formally committed to the Minister of Aboriginal Affairs on 14 April 1994 from the Minister of Environment and Natural Resources, who had been responsible for the Acts administration prior to the establishment of DoSAA.⁹⁷

During this period, a lack of political will and poor administration processes saw DoSAA withdraw into a protective shell, only dealing with issues once they reached crisis level and doing nothing that might cause expense to the government.⁹⁸ Despite the apparition of the Aboriginal Heritage Fund, resourcing became even more limited than it had been previously, and consequently research activities were discontinued, a situation which exacerbated the negative impact on Aboriginal heritage protection within the State.⁹⁹ All of these mounting difficulties with Aboriginal heritage management in South Australia together with mounting developmental pressure were to collide disastrously in the Kumarangk (Hindmarsh Island) Affair in the mid-1990s.

THE KUMARANGK AFFAIR

In 1990 the State Government and Alexandrina Council proposed to build a bridge from the mainland at Goolwa to Kumarangk (Hindmarsh Island) to accommodate increased water traffic. In October 1993 the Lower Murray Aboriginal Heritage Committee requested protection of the proposed development area as it was an Aboriginal site under the AHA 1988. The following year, the State Minister for Aboriginal Affairs, Michael Armitage, granted a s 23 authorisation to the developer to allow the bridge to be built (as was usually the case with such requests). Exasperated with the repeated failure of State heritage legislation to achieve its intended purpose – ie the protection of Aboriginal sites in the face of development – Ngarrindjeri people appealed for the site in question to be protected under the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (hereafter ATSIHPA 1984).¹⁰⁰ A s 9 emergency declaration was made by the then Federal Aboriginal Affairs Minister, Robert Tickner, in order to allow claims by Ngarrindjeri women about the heritage significance of Kumarangk to be investigated;¹⁰¹ Tickner subsequently made a declaration to prevent the development of the bridge for 25 years. Consequently, Tickner was then taken to court by the

⁹⁵ State Aboriginal Affairs, *Annual Report 1992-1993* (Government Printer, South Australia) p 8.

⁹⁶ Fitzpatrick, n 7.

⁹⁷ State Aboriginal Affairs, *Annual Report 1993-1994* (Government Printer, South Australia).

⁹⁸ Fitzpatrick, n 7.

⁹⁹ Roberts A, “Knowledge Power, Voice: An Investigation of Indigenous South Australian Perspectives of Archaeology” (PhD thesis, Department of Archaeology, Flinders University, Adelaide, 2003) p 291.

¹⁰⁰ Trevorrow T and Hemming S, “Conversation: Kunggun Ngarrindjeri Yunnan – Listen to Ngarrindjeri People Talking”, in Worby G and Rigney LI (eds), *Sharing Spaces: Indigenous and Non-Indigenous Responses to Story, Country and Rights* (Australian Research Institute, Curtin University of Technology, Perth, 2006) pp 295-304.

¹⁰¹ Draper N, *Kumarangk (Hindmarsh Island, South Australia): Aboriginal Heritage Assessment* (Unpublished report prepared for the South Australian Department of Aboriginal Affairs, Adelaide and the Ngarrindjeri Traditional Owners of the Lower

bridge developers where it was found that he had made his declaration without considering “in any sense at all” the details of the Ngarrindjeri women’s claim.¹⁰² Meanwhile, a State Royal Commission into Ngarrindjeri heritage, cultural and spiritual beliefs was established by the State Liberal government under Premier Dean Brown. The Commission concluded that Ngarrindjeri women had fabricated their traditions to stop the construction of the bridge, an outcome that was characterised by the belief that Aboriginal culture in southern South Australia was no longer “traditional”, with the only “real” Ngarrindjeri culture existing in museum collections and archaeological sites.¹⁰³ Later in 1996, the Federal election saw a new Minister for Aboriginal Affairs appointed and the Liberal government introduce a Bill¹⁰⁴ to exempt the Kumarangk area from the purview of the ATSIHPA 1984.

Following the Royal Commission, developers were essentially given an “open ticket” to do what they wanted in the State with little regard to the provisions of the AHA 1988.¹⁰⁵ The latter is perceived by development interests as being complex and unworkable, perhaps due to the potential power it has to prevent development were the State government was willing to administer and resource it in line with the spirit in which it was drafted. When development work at Goolwa uncovered the burial of a Ngarrindjeri woman and child in September 2002, work ceased under the AHA 1988. Having attempted to use legislation to protect heritage in the Kumarangk case and failed, Ngarrindjeri people were understandably wary about attempting to use the AHA 1988 for the purpose of heritage protection again. Instead they used the opportunity to develop a landmark agreement – “Kungun Ngarrindjeri Yunnan” – with the Alexandrina Council, thus going beyond the limitations of legislation to achieve their heritage protection aspirations.¹⁰⁶

RECENT SHIFTS IN ADMINISTERING THE AHA 1988

During the last decade numerous changes have occurred relating to management of Aboriginal Affairs in South Australia, though the legislation has remained constant. In September 1997, the responsibilities of DoSAA transferred to the newly-formed Department of Environment, Heritage and Aboriginal Affairs, with Division of State Aboriginal Affairs taking charge of Aboriginal heritage within the state. In February 2000, this Division was transferred to the Department of Transport, Urban Planning and the Arts, and in October that same year the Division was upgraded to an independent Department re-adopting the DoSAA title.¹⁰⁷ In May 2003, the Department for Aboriginal Affairs and Reconciliation (DAARE) replaced DoSAA,¹⁰⁸ an event coinciding with the implementation of the South Australian Government’s *Doing It Right* policy for collaborative approaches and action to Aboriginal issues. With regards to the ongoing protection of Aboriginal heritage DAARE stated:

Recognising that lore, culture and language are fundamental to identity and esteem, the Aboriginal heritage functions of the former DoSAA are to be maintained and enhanced within DAARE. In

Murray Region, 1996); Fergie D, “Federal Heritage Protection, Where to now? Cautionary Tales from South Australia”, in Finlayson J and Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1996); Saunders C, *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Significant Aboriginal Area in the Vicinity of Goolwa and Hindmarsh Island (Kumarangk)* (Unpublished report prepared for Aboriginal and Torres Strait Islander Affairs, Canberra, 1994).

¹⁰² *Chapman v Tickner* (1995) 55 FCR 316; 37 ALD 1; 133 ALR 74.

¹⁰³ This finding was overturned by a later decision by Judge Van Doosa. Bell D, *Ngarrindjeri Wurrurarrin: A World That Is, Was and Will Be* (Spinifex Press, 1998); Hemming and Trevorrow, n 14.

¹⁰⁴ *Hindmarsh Island Act 1996* (SA).

¹⁰⁵ Hemming, n 11, p 318; Trevorrow and Hemming, n 100, p 301.

¹⁰⁶ Hemming and Trevorrow, n 14, pp 247-248; Trevorrow and Hemming, n 100, p 303.

¹⁰⁷ Cameron, n 2, p 70.

¹⁰⁸ Department for Administration and Information Services, “New Name for Department Leading Agenda for Change” (July 2003) 6 *Talkabout* 3.

identifying and anticipating any potential risks to the protection of Aboriginal heritage DAARe will be vigilant and vigorous in driving concerted action to safeguard sites as cultural icons.¹⁰⁹

Yet there has been little tangible evidence of either “vigilance” or “vigour” in heritage protection in the State in recent years – places are still not being added to the Register, there is no proactive strategy for site recording across the state or indeed any active field programs into identifying Aboriginal heritage, the Branch is severely under-resourced and staffed, and sites are destroyed to facilitate development literally every day without a single prosecution for site destruction under the AHA 1988 having occurred. Another government reshuffle during 2006 has seen DAARe downgraded from Departmental status to become the Aboriginal Affairs and Reconciliation Division (AARD) within the Department of the Premier and Cabinet, again complete with rhetoric about commitment to the protection of Aboriginal heritage. The continual structural reorganisation causes widespread frustration amongst Aboriginal communities:

here we have our Aboriginal Department in Adelaide been shifting around and changing the rules all the time, and we haven’t been able to keep up, build a proper relationship with anybody in that area, in that department to be able to fully complete something. One minute you’ve got “this is the officer in charge of heritage”, the next minute you find out that that person’s gone and then there’s another person in charge and that person comes in and “what were you talking about? Can you tell us?” and we end up sounding like cracked records, repeating ourselves to all the new people that come along.¹¹⁰

The problems of inadequate consultation with Aboriginal communities in the State have re-emerged, though it appears that no-one in the statutory body responsible for Aboriginal heritage management has bothered to notice. One of the formerly successful means of keeping Aboriginal communities up-to-date with what was happening in regards to heritage management, the *Aboriginal Heritage Newsletter*, was discontinued in 1991 owing to a lack of funding¹¹¹ and none of the subsequent incarnations of the Heritage Branch have seen fit to reinstate it. Problems of communication have been increasingly exacerbated by the widespread uptake of the world wide web by government agencies – their website is promoted by AARD as a “one stop shop” for people about heritage, however many Aboriginal communities and individuals lack the capacity to access the web, and the AARD website (and its predecessors) is rarely, let alone regularly, updated. While other Aboriginal organisations such as Aboriginal Legal Rights Movement recognise this and instead choose to distribute regular hard copy newsletters as their preferred means of communication, AARD fails to make any effort along these lines. Furthermore, the AARD offices are located within the State Administration Centre, a building with elaborate security systems, and anyone wishing to meet with AARD staff must make an appointment well in advance. Within this space, the staff working in AARD are effectively “cut-off” from any interaction with Aboriginal people, and are becoming increasingly marginalised from carrying out their fundamental responsibilities under the Act.

EXPOSITION

By examining Aboriginal heritage administration retrospectively within South Australia, it becomes clear that those individuals who initially worked within this space in the early decades stood opposed to the hegemonic power of the State Government when the actions of various Departments, developers or individuals threatened Aboriginal heritage. Today, those in charge of the AHA 1988 have effectively been absorbed into the bureaucratic system and have a limited proactive role in heritage management:

I think that those responsible for the *Aboriginal Heritage Act 1988* did not have a vision and became ultra bureaucratic in their behaviour. Once “heritage” became accepted, people forgot what we had been fighting for. I find that most Aboriginal people are disillusioned with the current legislation and its application.¹¹²

¹⁰⁹ Department of Aboriginal Affairs and Reconciliation, *The DAARe Charter* (Unpublished charter prepared for the Department of Aboriginal Affairs, Adelaide, 2003).

¹¹⁰ Trevorrow T, as cited in Wiltshire K, “Unfinished Business: The Lower Murray Lakes Archaeology Study within an Historical and Political Context” (BArch Hons thesis, Department of Archaeology, Flinders University, 2006) p 183.

¹¹¹ Aboriginal Heritage Branch, *Aboriginal Heritage Newsletter* (Adelaide, 1991), p 1.

¹¹² Ellis B, as cited in Wiltshire, n 39, p 171.

The administration of heritage legislation cannot be separated from its political context.¹¹³ Individuals working within the realms of heritage administration who are not politically aware fail to understand the wider context within which they operate. The position in which Aboriginal people sit at the heritage table is often unequal in terms of the power relationships with developers, researchers and the State.¹¹⁴ This situation of colonial power relations needs to be clearly understood by those administering heritage legislation, along with the political agendas of their work, and heritage administrators must deliberately fight against it rather than perpetuate the situation. The model of “cultural loss” that underpins heritage discourse severely limits an understanding of changes that have occurred in Aboriginal cultures since colonisation and does not allow for the recognition of adaptability and survival.¹¹⁵ By denying a contemporary Aboriginal cultural identity and relying on archaeology at the expense of Aboriginal knowledge to determine the significance of Aboriginal heritage, those responsible for the administration of Aboriginal heritage have chosen to effectively disengage with Aboriginal communities in South Australia. Disengagement with Aboriginal peoples in this manner perpetuates an attitude that assumes a certain degree of ownership of the archaeological record, which establishes a system that becomes embedded into institutional practice.¹¹⁶

When examining the emergence of Aboriginal heritage legislation in South Australia, an Aboriginalist attitude was evident in the clear lack of engagement with Aboriginal peoples in the drafting of the first two Acts, and successive Parliamentary debates in 1965 and 1979 that claimed Aboriginal South Australians had either “died out” or were disinterested in their own heritage. Additionally, the protection, preservation and management of Aboriginal material remains were left in charge of non-Aboriginal “experts”. Only since the 1980s have the interests and opinions of Aboriginal people in the drafting of legislation and, to a lesser degree, in planning and management been considered, but then only in an apparently cursory manner. With the current situation, whereby decisions regarding Aboriginal heritage are in the hands of non-Aboriginal Ministers, heritage administrators, experts and the courts and there is a lack of control afforded to Aboriginal peoples in the heritage process, we are experiencing a mirroring of assimilationist policies that originally denied Aboriginal identity. Heritage discourse has served to normalise, govern and deny a contemporary Aboriginal cultural identity, which has effectively created a “double dispossession” for Aboriginal peoples.¹¹⁷ Furthermore, the lack of resourcing, funding and support heritage administrators afforded to Aboriginal communities to initiate their own heritage protection programmes contributes little to help Aboriginal people realise any self-determination about their heritage. Since the implementation of policies of assimilation in the 1940s, the State has operated under the rhetoric of reducing Aboriginal peoples’ financial burden on the State, thus it is not surprising that there is very little funding afforded to Aboriginal communities for their heritage aspirations.

In its current form, through a disengagement of its political and theoretical context, Aboriginal heritage administration within South Australia has created a space that allows little room for self-determination. Heritage administration that aims to merely “manage” Aboriginal heritage underestimates the complex relationship that Aboriginal people maintain with their land and waters, and their future aspirations for their own cultural heritage.

¹¹³ See Cleere H, “Introduction: The Rationale of Archaeological Heritage Management”, in Cleere H (ed), *Archaeological Heritage Management in the Modern World* (Unwin Hyman, 1989) p 12; Kristiansen K, “Perspectives on Archaeological Heritage: History and Future”, in Cleere H (ed), *Archaeological Heritage Management in the Modern World* (Unwin Hyman, 1989) p 27; Smith L J, *Archaeological Theory and the Politics of Cultural Heritage* (Routledge, 2004).

¹¹⁴ Roberts A, Hemming S, Trevorrow T, Trevorrow G, Rigney M, Rigney G, Aguis L and Aguis R, “Nukun and Kungun Ngarrindjeri Ruwe (Look and Listen to Ngarrindjeri Country): An Investigation of Ngarrindjeri Perspectives to Archaeology in Relation to Native Title and Heritage Matters” (2005) 1 *Australian Aboriginal Studies* (Canberra) 47.

¹¹⁵ Hemming S, “River Murray Histories: Oral History, Archaeology and Museum Collections”, in Greenwood E, Nuemann K and Sartori A (eds), *Work In Flux* (History Department, University of Melbourne, 1995); Hemming and Trevorrow, n 14; Hemming S, Wood V and Hunter R, “Researching the Past: Oral History and Archaeology at Swan Reach”, in Torrence R and Clarke A (eds), *The Archaeology of Difference: Negotiating Cross-cultural Engagements in Oceania* (Routledge, 2000).

¹¹⁶ Smith LT, *Decolonising Methodologies: Research and Indigenous Peoples* (University of Otago Press, 1999) p 56.

¹¹⁷ Ellis RW, n 46; Hemming, n 11; Hemming and Trevorrow, n 14.

CONCLUSION

Heritage administration in South Australia continues to be a colonising process; however, through engagement with the political and theoretical context in which this discourse operates, heritage could be used as a tool for Aboriginal self-determination, survival and resistance as was originally anticipated in the early days of the heritage movement. The failure of legislation to protect Aboriginal cultural heritage can usually be reduced, according to Parrot, to a:

lack of political will or even worse, political whim, inadequate public support, poor policy analysis and inadequate policy implementation. The inadequacy in legislative protection ... may well reflect these issues far more than they reflect a problem with the mechanism of legislation itself.¹¹⁸

On the verge of another call to review Aboriginal heritage protection legislation in South Australia, Parrot's statement is particularly pertinent. Four decades of on-the-ground experience and repeated consultation with Aboriginal communities reveal the same concerns regardless of the specifics of the actual Act, that is in effect: insufficient Aboriginal involvement; inadequate funding and resourcing; a lack of dedicated and committed staff; continual restructuring; a failure by white "experts" to understand the holistic nature of Aboriginal heritage; short-sighted "quick-fix" approaches; and ultimate control being vested in a government Minister whose interests lie firmly with developers and re-election rather than heritage protection and Aboriginal people. This article suggests that bureaucrats consider the possibility that a large contributor to the on-going problems with Aboriginal heritage might well be the policy and administration of the *Aboriginal Heritage Act 1988*, rather than in the Act itself, and that they look to addressing these issues rather than reinventing the wheel a fourth time in as many decades previously.¹¹⁹

TABLE 1 Summary of declaration of Prohibited Areas and Historic Reserves under the *Aboriginal and Historic Relics Preservation Act 1965*.

Year	Number of Prohibited Areas	Number of Historic Reserves
1968-1969	4	12
1970	4	23
1973	6	49

¹¹⁸ Parrot H, "Legislation to Protect Australia's Material Cultural Heritage: Guidelines for Cultural Resource Professionals" (1990) 31 *Australian Archaeology* 81.

¹¹⁹ Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 14 March 1969* (South Australian Museum Archives, AA861/1) p 1; Aboriginal and Historical Relics Advisory Board, *Meeting Minutes 3 June 1970* (South Australian Museum Archives, AA861/1) p 1; Aboriginal and Historical Relics Unit, *Aboriginal and Historic Relics Preservation Act 1965 Newsletter* (South Australian Museum Archives, AA861/1, 1975) p 1.