The Legal Protection of Indigenous and Historic Cultural Heritage in South Australia: A Comparative Study

Cassandra Philippou

Thesis submitted in the partial fulfillment of the requirements for the Degree of Bachelor of Arts with Honours in Archaeology in the School of Cultural Studies Flinders University of South Australia.

November 1998
This is my own work, containing to the best of my knowledge and belief, no material published or written by another person except as referred to in the text.

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ABSTRACT

This thesis has reviewed eight statutes enacted by the Commonwealth and South Australian governments for the protection of cultural heritage. It has examined the definitions and looked at the operations of the Acts, illustrated by three case studies. The study suggests a number of reform requirements for each Act so that Australia’s cultural heritage can gain better protection.

The results indicate that terrestrial historic heritage is currently well protected by legislation and community attitudes, however better protection is needed for Indigenous heritage sites in South Australia. Underwater cultural heritage requires improved protection, best achieved through community education. Penalties under some Acts are also in need of review.

Despite good intentions when implementing most legislation, without adequate political backing, including administration and resources, Australia’s cultural heritage will gradually diminish to the extent that archaeologists may not have a sufficient sample of sites to research in the future. It is recommended that further study of current cultural heritage legislation in Australia be undertaken, perhaps by a legal professional working with heritage professionals to attain a better understanding of all heritage issues.
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CHAPTER ONE

1. Introduction

1.1 Reasons for research

This impetus for this study arose from several sources. One was a keen interest in the development of early society in Australia, both prehistoric and historic. A second was a curiosity in the operations of the law. Another was the number of cases that have recently been exploited by the media about cultural heritage sites, particularly Hindmarsh Island/Kumarangk. Living in Adelaide, often referred to as a ‘large country town’ with its numerous colonial buildings, fostered an interest in the differences between how Indigenous and historic cultural heritage are protected by legislation. Hence this study aims to discover whether these two types of heritage gain different treatment by the law and whether this situation is justified.

South Australia has had a very good record when dealing with Indigenous access to land, both public and private, ever since settlement in 1836 (Sarre 1994:19). The rights of Indigenous people to use land for their enjoyment extended to their descendents. Sarre comments that, at March 1994, Aboriginal Land Trusts in South Australia held 23% of the state including other inalienable Aboriginal title. This Indigenous-owned land amounted to more than the other States combined, excluding the Northern Territory (Sarre 1994:19). However, SA’s good record for Indigenous rights and heritage protection has diminished in recent years, most notably with the Kumarangk case, but also with other cases such as Coorlay Lagoon in the State’s north and Red Ochre Cove on the Fleurieu Peninsula (Evatt 1996; Draper 1996).

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1 The topic of Indigenous land rights (or native title) is currently one of the most controversial in Australian politics and 1998 has been yet another bumper year (in a long history of them) for media attention in this area. Many changes in this field have occurred during the 1990s, beginning with the High Court’s Mabo decision in 1992; this lead to the Commonwealth’s Native Title Act 1993 (NTA). In the last two years amendments have been made to the NTA due to the Wik decision in the High Court and the resulting Wik Ten-point Plan put in place by the Howard Liberal government in 1998. Although native title is part of the huge issue that is cultural heritage in Australia, it must not detract from the other issues in this paper. For the sake of simplicity this paper will deal with these issues with little reference to native title.
It was the combination of factors outlined above, in conjunction with the common perception that historic heritage is very well protected by legislation in Australia, particularly in South Australia, that prompted the research for this paper. This was also a subject that had not been researched specifically from a South Australian perspective and as such a topic that deserved some attention from a profession that often takes the existence of sites for granted.

1.2 Background and Objectives

Archaeology as a discipline relies on the protection of places and sites of cultural heritage value in an era of continuous change and increasing populations. Changes in land-use and exploitation of environmental resources result in development occurring in more places than ever, from redevelopment within cities to remote rural sites. Human intervention and development are the largest threats to the existence of archaeological and other cultural heritage sites. Heritage protection legislation is society’s way of regulating the developments and attempting to preserve important places and objects for future generations.

The protection of cultural heritage in Australia has been debated throughout the 1980’s and 1990s. Cultural heritage protection is based on legislation that has been implemented at Commonwealth and State level. This thesis will look at statutes that the Commonwealth and South Australian governments have introduced that currently provide the legislative basis for the protection of Indigenous and historic cultural heritage in South Australia.

There are many things that could be covered in a thesis on heritage legislation. Questions such as ‘What is preserved? Why do we preserve it? Who are we trying to protect it from?’ come most easily to mind. What is preserved will be covered in terms of what can be preserved. Reasons for preserving heritage are based around the concept of heritage itself: things that are inherited by present and future generations. These come under the significance and heritage value criteria. Whom are we trying to protect it from? We are trying to protect it from damage and destruction by all the things that can have such an affect.
Limits must be placed on this thesis, and as such eight pieces of legislation have been chosen. Five are Commonwealth statutes, and three South Australian. The main objective is to find inadequacies in the legislation by comparing how each Act deals with Indigenous and historic cultural heritage, and to see how these Acts can have an affect upon archaeology now and in the future. This study will review the current legislation and compare what places and objects they can protect. It will also look at what they can’t protect due to the width of the definitions and the limitations of the legislation. Not all of the Acts have a great affect upon the activities of archaeologists, but to only look at the Acts in this way would not do justice to this study.

Archaeology has worked its way into this study in several ways. Firstly, by a site being designated as of archaeological significance. Secondly, the ability of archaeology to contribute to a site’s significance. Thirdly, that without cultural heritage protection legislation, sites that can be used to answer archaeological questions may not exist. Finally, legislation regulates the excavation of sites by archaeologists, and in some Acts, developers are required to employ experts (archaeologists or anthropologists) to undertake pre-development surveys.

Where ‘historic’ cultural heritage is mentioned, this refers to non-Indigenous (usually post-1788) heritage. Only in the cases of early exploration and shipwrecks does ‘historic’ mean pre-1788. This includes the use of the north coast by Macassans for the collection and processing of Trepang between 1700 and 1900 and the occupation of various bays along the coast by sealers and whalers during the late 18th Century (Connah 1988:8 & 19).

The history and basis of cultural heritage protection in Australia will be reviewed, from pre-legislation status and Common Law through to international treaties and conventions. The roles that legislation plays in the protection of cultural heritage sites will be outlined, and then each of the eight statutes will be looked at individually. An analysis of the relevance of the Commonwealth legislation to South Australia will be presented, followed by comparisons between the legislation.
Finally, three South Australian heritage cases will be examined. Only one, *Kumarangk*, has direct relevance to archaeology. The others illustrate how the legislation has been used. In conclusion, legislative reform issues will be discussed and research problems associated with the topic outlined.

1.3 Commonwealth Legislation

Cultural heritage protection is directly addressed in at least five different Commonwealth Acts, each of which will be discussed. Under s51 (xxvi) of the Australian Constitution, the Commonwealth has the power to legislate for ‘the people of any race for whom it is deemed necessary to make special laws’. This is an amended sub-section that prior to 1967 specifically excluded Aboriginal people from being legislated for. This alteration, whilst not removing the power from the States, allowed the Commonwealth to make laws regarding Aboriginal people. This came after the Constitutional Referendum of 1966 in which Aboriginal people were given equal rights to those of non-Indigenous Australians. In terms of cultural heritage law, this new power was not used until 1984 and the introduction of the *Aboriginal and Torres Strait Islander Heritage Protection Act (ATSIPA)*.

The Commonwealth has implemented legislation that protects historic and Indigenous cultural heritage. The protected cultural heritage can be terrestrial, underwater or portable. Much of the legislation primarily deals with historic sites and objects but all have the ability to apply to Indigenous cultural heritage as well. Several heritage registers are maintained under the Acts, however the majority of sites represented are of historical significance. Therefore, most Commonwealth cultural heritage legislation deals with some combination of historic and Indigenous sites and objects.

Only two Commonwealth Acts deal primarily with Indigenous heritage. One of these, the *World Heritage Properties Conservation Act 1983 (WHPCA)*, affects natural and cultural heritage, but currently has minimal affect on historic heritage. The other, the *ATSIPA* protects only Indigenous cultural heritage. This Act is currently under review.
1.4 South Australian Legislation

South Australia was one of the first States to implement legislation to protect the cultural heritage of the European and Indigenous communities in the State. This was with the *Aboriginal and Historic Relics Preservation Act* 1965. The late 1970’s saw a re-evaluation of the State’s cultural heritage legislation firstly with the new *South Australian Heritage Act* 1978, followed shortly after by the *Aboriginal Heritage Act* 1979. This Act was passed but never proclaimed. By 1981 South Australia had also ratified the Commonwealth’s *Historic Shipwrecks Act* 1976 (HSA (Cth)) and then introduced its own shipwreck legislation (*Historic Shipwrecks Act* 1981 (HSA (SA))) to cover the State waters. The current *Aboriginal Heritage Act* was introduced in 1988 (AHA), and the present *Heritage Act* in 1993 (HA) in conjunction with the *Development Act* 1993 (DA).

These current Acts which are most relevant to cultural heritage protection and archaeology will be discussed below; numerous other Acts have an impact upon cultural heritage in the State, but not to the same degree. These include the *City of Adelaide Development Control Act* 1976 (SA), *Environment Protection (Impact of Proposals) Act* 1974 (Cth), the *History Trust Act* 1981 (SA), the *National Parks and Wildlife Act* 1972 (SA), the *National Parks and Wildlife Service Act* 1975 (Cth) and the *Native Title Act* 1994 (SA). These will be referred to in passing. The relevant sections of the DA will be mentioned briefly.

The various State governments have jurisdiction over the environment and development, which explains why two of the South Australian Acts that will be discussed control changes to the land. All of the State Acts are relevant to archaeological and other types of excavation. Only the HA works specifically in conjunction with the DA. There are no references in the other two Acts to the DA, even though the Department (now Division) of State Aboriginal Affairs (DOSAA) was involved in the negotiations for the Bill when it was proposed (Cooke 1998, pers.comm., 17 June). The three State Acts implement application procedures for permits to excavate, interfere with, damage or destroy sites that appear on any of the registers. These requirements affect archaeologists and developers and, in some circumstances, the public.
CHAPTER TWO

2. History of Cultural Heritage Legislation in Australia

Cultural heritage protection is a relatively new concept in many parts of the modern world. Despite the long prehistory of human activity evident in Australia, the protection of Indigenous and historic cultural heritage only began to be specifically formulated as laws of this country within the last 35 years. Many of these laws have not been amended significantly since their adoption, with the earliest piece of Commonwealth cultural heritage legislation introduced in 1975\(^2\). These laws have been reviewed by numerous legal and heritage professionals at various times since their inception, often with a view towards a more consistent and integrated approach to cultural heritage protection throughout the nation.

2.1 History of Cultural Heritage Protection

The protection of cultural heritage of various European countries in previous centuries made sporadic appearances by imperial and papal powers, although much of this protection was not legislated. Tay (1985) reviews the history of cultural heritage protection, from Europe in 1425, when new buildings that were liable to cause damage to ancient monuments were ordered to be demolished by Pope Martin V (Tay 1985:108), to Pope Paul Ill’s *Antiquities Commission* (est. 1534) and Cardinal Pacca’s edict in 1802. This edict allowed the Holy See the ‘option of purchasing excavated objects or returning them to the finder [who] still had a duty to protect the objects as listed items’ (Tay 1985:109). Two Roman emperors, Marjorian and Theodosius, both expressed their disapproval of modern architectural additions to ancient monuments. Theodosius went as far as legislating against these new works (Mulvaney 1990:262).

2.2 Common Law

Britain’s Common Law was first established in 1066 after the Norman Conquest. As a British colony, Australia adopted the common law principles of Britain upon settlement in 1788. Australia’s legal system is based upon many Common Law principles, such as property, trespass and equity. Since 1986 the principle of legal precedent allows appeals only as far as the High Court of Australia (HCA).

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\(^2\) The *Australian Heritage Commission Act 1975*
Treasure trove was one of the first Common Law concepts to deal with antiquities. Originally this was only for the deliverance of gold or silver objects to the Crown, indicating that this was probably not for the benefit of any historical interest in the objects (Tay 1985:111; Tan 1994:507).

Common law principles are also applied to wrecks that, until the invention of SCUBA diving, did not generally include shipwrecks underwater due to their inaccessibility. SCUBA added objects discovered underwater to the definition of ‘wreck’, and the ownership of abandoned objects resided with the Crown. If the wreck was not abandoned ‘title’ or ‘salvage’ rights resided with the owner, as is the case with shipwrecks in Australian waters, or could be claimed by the insurance company (this has rarely happened in Australia) (Staniforth 1998). Salvage is a Common Law concept that refers to the ‘recovery of goods at sea which are in danger of being lost’ (Prott & O'Keefe 1984:117).

### 2.3 Non-specific legislation

Although specific cultural heritage legislation was not introduced by the Commonwealth of Australia until the 1970’s, some control over cultural heritage was exerted through other Acts, such as laws applying to libraries, museums, art galleries and customs (Tay 1985:124). These pieces of legislation dealt with the collection, sale and exportation of Australian cultural property. Other Acts, for instance the **Crimes Act 1901** or the **Summary Offences Act 1953** could be used for some offences such as theft of cultural property.

The protection of cultural heritage within each State is left mainly to the State governments. The Commonwealth provides ‘back-up’ legislation, and various forms of legislation that affect the nation, such as the **Protection of Movable Cultural Heritage Act 1986** (PMCHA). The Commonwealth government has passed cultural heritage legislation affecting the whole of Australia to fulfill international treaty and convention obligations.
CHAPTER THREE

3. Heritage Conventions and Agreements affecting Australia

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) have held various international conventions, some of which have dealt with international obligations towards cultural heritage. Some of these conventions have specifically covered cultural heritage, often with special relevance to archaeological sites and objects. These conventions have helped to foster the idea that cultural property is of inherent interest to all nations, including future generations, and should be preserved with this in mind (McLennan 1998:245; Boer 1995). The conventions have illustrated that the ‘international community has an interest in cultural progress and in the security of social institutions’ (McLennan 1998:245). Failure to preserve existing traditions and evidence of the past puts a society at risk of stagnation, loss of skills and cultural degeneration. (McLennan 1998:241)

3.1.1 UNESCO Conventions

The first convention of importance to cultural heritage was the Convention for the protection of cultural property in the event of armed conflict, held in 1954 (Prott & O’Keefe 1984). This convention assessed the problems associated with cultural heritage protection during WWII in an effort by the UN to emphasise the importance of cultural property even during times of war.

The second was the Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property (1970). Australia did not ratify this convention until 1989, three years after it had introduced legislation to meet the agreements of the Convention. The third convention was for the Protection of the world cultural and natural heritage (the World Heritage Convention) held in 1972. Australia became party to this convention in 1974 and ratified it in 1976. This Convention formed the basis of the Commonwealth government’s case against the Tasmanian government when it used the external affairs power (s51 (xxix) of the Australian Constitution) to prevent the damming of the Franklin River in Tasmania in 1983. This is arguably Australia’s most famous Constitutional law case (the Tasmanian Dams Case: The Commonwealth v Tasmania 158 CLR 1). The Commonwealth Government implemented legislation to meet the requirements of this
convention in 1983, shortly after the case was closed, with the World Heritage Properties Conservation Act (WHPCA).

The implications of Australia’s ratification of these conventions are that in order to fulfill their obligations as members of the United Nations, the Commonwealth is required to enact legislation that can allow legal proceedings to take place in the event of a breach of the convention. Boer notes that, according to the World Heritage Convention, ‘signatory countries are obliged, as far as possible, to adopt general policies with the aim of giving cultural and natural heritage a ‘function in the life of the community’ and to integrate heritage protection into their planning programs (1995:17-18). Such countries are also under obligation by the convention to protect, conserve and present the World Heritage places, and also to take appropriate legal, administrative and financial measures to facilitate this obligation (Boer 1995:18). Even without direct ratification, as a UN Member State, Australia has a duty to abide by the decisions made at a convention.

3.1.2 UNESCO Recommendations
UNESCO has made a series of recommendations that are of importance to cultural heritage, although these do not require the same extent of legislative action as conventions (see Prott & O’Keefe 1984:75-7). These cover areas such as:

- *International Principles applicable to archaeological excavations* (New Dehli1956)
- *Safeguarding the beauty and character of landscapes and sites* (Paris 1962)
- *The Preservation of cultural property endangered by public or private works* (Paris 1968)
- *The Safeguarding and contemporary role of historic areas* (Nairobi 1976)

Other recommendations have been made (Costin 1993:55) and some were later adopted as subjects of International Conventions.

3.2 ICOMOS and the Burra Charter
UNESCO established the International Council on Monuments and Sites (ICOMOS) in 1965. The Australian chapter (a non-government organization) was established in 1976. ICOMOS takes an interest in urban and rural cultural heritage, major international monuments, more modest settlements
and environments of significant local and regional character (Biornstaad 1989:70). However, the conservation of buildings, including archaeological remains (mainly large monuments and buildings) predominates. ICOMOS sees the largest threats to archaeological heritage as the ‘accelerating pace of change in society, large-scale exploitation, new technological systems and changes in land use, as well as lack of knowledge and awareness concerning values inherent in archaeological heritage’ (Biornstaad 1989:70-71). Biornstaad also identifies the solution to these inherent problems of ignorance of the value, scientific and cultural, of archaeological heritage: the mobilization of opinion at all levels, through politicians, urban and regional planners, landowners and the public (1995:71).

Venice was the host in 1966 of an international conference on the preservation and restoration of historical monuments, which involved a variety of conservation professionals. This became known as the Venice Charter, and after assessing its relevance to this country, Australia ICOMOS held a conference in the historic South Australian town of Burra, where the Venice Charter was reviewed. They decided to adopt it as the Australia ICOMOS Charter for the Conservation of Places of Cultural Significance. It is known simply as the Burra Charter.

Although not legally enforceable, the Burra Charter establishes guidelines for professional conservation work in Australia and these have been adopted by most State heritage conservation agencies and local government authorities (Australia ICOMOS 1996:7-9). Numerous professional heritage organizations, such as the Australian Archaeological Association (AAA) and the Australian Association of Consultant Archaeologists (AACA) have incorporated the Burra Charter into their Code of Ethics, ensuring that work carried out by their members adheres to basic heritage conservation policies. The Charter has been revised intermittently to ensure that the guidelines remain at the forefront of the heritage conservation profession in Australia (Australia ICOMOS 1996:4). It is currently under review again to bring it up to date.

ICOMOS has held numerous International Conventions that relate to archaeological sites and objects (see Prott & O’Keefe 1984; Costin 1993). Most recently, the Charter for the protection and management of archaeological heritage was produced (1990) followed in 1996 by the Charter for the protection and management of underwater cultural heritage (see Stanley-Price 1997:35-38).
3.3 The ANCODS Agreement

Australia has a treaty with the Netherlands that was ratified in 1972, known as the Agreement between Australia and the Netherlands Concerning Old Dutch Shipwrecks (ANCODS), or the Australia-Netherlands Agreement. This is enforced by the Commonwealth’s HSA protecting shipwrecks and relics that are of Dutch origin but were wrecked in what are now Australian waters. Several Dutch shipwrecks lie off coast of Western Australia, although only the Batavia (see fig. 1), the Vergulde Draeck, the Zuytdorp and the Zeewyk have been located. The Act allows the Commonwealth to declare Dutch shipwrecks and relics historic, and to protect them as they would other historic shipwrecks. ANCODS also gives the Commonwealth government the authority to vest ownership of Dutch shipwrecks or relics in itself, any other government department or authority, the Western Australian government or the Kingdom of the Netherlands.

![Figure 1: Anchor of the Batavia (courtesy Flinders University Slide Library)]
CHAPTER FOUR

4. The Roles of Legislation in the Protection of Cultural Heritage and Archaeology

4.1 What is legislation?

Legislation is a reflection of the things that are held to be of importance to the public: a reflection of the public will. This is why legislation is open to change, to enable it to be up to date with community beliefs. The Judiciary is able to give interpretations of the legislation in cases before them, thereby changing or expanding the laws. This keeps the law more up to date than is possible at the parliamentary level. In most circumstances, the courts will attempt to interpret a clause, definition or section the way that was intended when the legislation was enacted, although on rare occasions these interpretations work against what was intended. In some Acts, sections are deliberately left open to interpretation so as not to limit the extent of the legislative cover. Examples of this can be seen in some heritage protection legislation (i.e. ss (4)(1A) of the *Australian Heritage Commission Act 1975* (AHCA); ss (7)(2) of the *PMCHA*).

Gurney quotes from an anonymous source, succinctly describing the role of legislation generally, and applying specifically to resource management. It is easily transferred to the archaeologist, especially in the role of cultural heritage manager.

> Legislation expresses the community’s expectations with respect to the management of our resources. Enforcement is about ensuring compliance with the legislation. To ensure compliance does not simply mean detecting and prosecuting people found offending. Implicit in this role is the need to educate and inform those people about the wise and proper use of the resources. (1994:51)

4.2 Legislation defines heritage

Cultural heritage protection legislation aids in defining what can be considered to be heritage to the Australian community, and hence what can be protected by that legislation. Some Acts also supply penalties to be imposed upon people who chose to offend against the various terms and conditions of them. What the legislation does not supply is the means to detecting offenders, and ways to prevent others from committing offences against the Acts, namely, education. Enforcement and education
come under the umbrella of the administrative bodies, and rely on resources (economic and otherwise) that are at the disposal of those delegated with the authority to put the legislation in force in the community. This forces the administration and implementation to be at the whim of the current politics of the State, therefore changes become ‘highly politicized, slow and complicated by other policy issues’ (Boyd & Ward 1993:112).

Administrative policies are also subject to alteration according to the resources allocated through the various grant schemes, such as National Estate Grants\(^3\), managed by the State and Commonwealth governments. Changes to the legislation will usually be closely aligned with the government of the day’s basic policies, often reflecting one of two views: pro-development, anti-heritage governments, and those concerned with the preservation and conservation of culture and heritage, although not necessarily anti-development.

### 4.3 Site significance and Legislation

Legislation is the guide to what makes up a site’s significance. If the criteria for legislative significance are too narrow, some significant sites under heritage significance guidelines may not come under the protection of the legislation. If a site does not fit into the legislation, it can be seen as insignificant, even though from other perspectives, such as Aboriginal, it is significant. If the criteria are not specific enough, judicial interpretation (upon review) may prevent a site from gaining protection (see section 12). Tainter & Lucas (1983 in Lees & Noble 1990:10) refer to the United States National Register of Historic Places as ‘the standard against which archaeological significance is measured in Cultural Resource Management and [therefore], by extension, in American Archaeology’. They claim that the criteria set out in the (US) Register ‘do not provide an adequate working definition of site significance for Cultural Resource Managers and should not be adopted as a means of assessing the significance of archaeological sites’ (Lees & Noble 1990:10).

This problem is not entirely reflected in Australian legislation.

The site significance criteria in Commonwealth and South Australian Acts are generally very broad. Boyd (1996:296) follows two anonymous sources, commenting that although cultural significance is

\(^3\) This program is currently not operating.
difficult to define, it is ‘frequently enshrined within legislation protecting cultural heritage and thus becomes prescriptively defined’. This is the case to an extent. While cultural significance is referred to within legislation, it is not defined in any way in the Acts; instead, its definition is intentionally avoided so as not to limit the meaning. Therefore, legislation in Australia does not give heritage managers a system of heritage protection (Sullivan 1993). McDougall (1990) notes that while ‘cultural significance’ is defined ‘in many places and in varying degrees, [the definitions] require the assessor to make some judgement as to the actual value and significance of a place’ (p32).

The HA contains seven sub-sections for definitions of heritage value (s16). ‘Importance’ and ‘cultural significance’ are referred to in four of the sub-sections (a, b, d & g). Neither of these terms are defined by the Act, and as such are left open to both objective and subjective opinions of the State Heritage Authority. The AHCA has eight sub-sections as part of the significance criteria (ss4 (1A)) and a deliberately general section on what can form part of the national estate (ss4 (1)). The HSA (Cth) refers to the remains of a ship that are ‘of historic significance’ according to the opinion of the Minister (s5). The blanket declaration under this Act means that a wreck or relic more than 75 years old need not be of ‘historic significance’ and hence subject to a set of significance criteria in order to gain the protection of the Act.

Most places on the Register of State Heritage Items (RSHI) and the Register of the National Estate (RNE) belong to the post-contact period, and as such the conservation techniques used can be based on the Burra Charter guidelines, reducing the problems apparently encountered by Cultural Resource Managers in the United States.

The Illustrated Burra Charter (Marquis-Kyle & Walker 1996:19) provides definitions of cultural significance that can be adopted for Indigenous sites as well as the post-contact sites at which it is primarily aimed. The Charter elaborates upon the definitions of aesthetic, historic, scientific and social value, all of which are covered in many of the heritage protection Acts (1996:73-74). Therefore, while the legislation defines what areas can be considered of value, it is left to a non-legally binding document to expand on the definition of cultural significance.
4.4 Archaeological Significance

As site significance criteria are broad, there are various criteria in which archaeology can contribute to the heritage value. It is necessary to discuss what can be meant by archaeological significance, which can be seen as a determinant for value. Bowdler & Sullivan (1984) have done this from both Indigenous and historical perspectives in Australia. Bowdler suggests that archaeological significance is also scientific significance, and as such significance can be assessed in terms of specific research questions or representative qualities (1984:1). She suggests three questions to aid in the assessment of the archaeological significance of sites:

- Can this site contribute knowledge which no other site can?
- Can this site contribute knowledge which no other resource, such as documents or oral history or previous research, can?
- Is this knowledge relevant to specific research or general questions about human history or behaviour or some other substantive subject? (Bowdler 1984:1-2)

By basing archaeological significance on research, the archaeological significance of a site will always be in a state of flux according to the current knowledge about the past (Bowdler 1984:8). Therefore archaeological significance must play a part in the significance assessment process, however other factors must also contribute.

Often Indigenous sites that are of archaeological significance will have cultural values attached to them. Clegg identifies these as the linkage between objects and people, noting that without these linkages, for instance stories, the significance of a site may be reduced (1984:11). He also notes an important requirement of archaeological significance since there are numerous sites with which to compare and connect each site.

Pearson notes that one problem with establishing significance for historic sites is the need to put them into a regional perspective, particularly to aid research into settlement patterns (1984:30). Blanket protection, or even very broad significance criteria, can therefore aid in taking an archaeological approach in researching a site (Clegg 1984:13). Conversely, narrow criteria may prevent adequate
archaeological research from being undertaken. This does not mean that unique sites are less important and should not be protected. It is better that the majority of sites gain legislative protection.

Bickford & Sullivan (1984:21) also address the issue of archaeological significance and identify two possible meanings. The first is archaeology as the ‘method of investigation to demonstrate heritage significance’. For instance, excavations to determine where a site is and whether it has heritage significance. The second is the potential of a site for solving research problems using archaeological methods, being problems relating to the methodology itself, or to answer questions covering ‘society, technology or culture’ (Bickford & Sullivan 1984:21).

4.5 Site Management and Legislation

Boyd & Ward (1993:103) state that in Australia not only does the law provide a foundation for site management, but also for the management of visitors to the sites. They are principally referring to high-tourism sites such as Uluru and Kakadu National Park. Therefore, this ‘foundation’ does not seem to be reflected in the South Australian legislation in terms of tourist management generally, only by permission to enter upon protected sites and offshore protected zones. Whether this can be seen as a form of ‘visitor management’ is debatable. This is especially the case for remote Indigenous sites. Unless the site is within a National Park or similar region where cultural and natural resources are managed, for example at sites such as Dalhousie Springs in northern South Australia, it is generally not going to enjoy the benefits of ongoing site management.

In some ways, however, the legislation does provide a starting point from which site management can develop. These are in the specific values that are important to the cultural significance of the site; management should therefore aim to maintain the integrity of this value (Pearson et. al. 1998:12). As certain heritage values and criteria must be met for a site to gain protection by the legislation, these values can be expanded upon in order to establish a management plan for the site. Sullivan takes up this point, stating that it is necessary to clearly state the significance values of a given place so that they are available for planners who may need to make decisions that will affect the place, and also to formulate a successful conservation plan (1993:21-22). The significance values she refers to need to be beyond the significance criteria required for the place to be eligible for protection.
Some traditional owners and custodians work in consultation with non-Indigenous heritage professionals to formulate management plans to maintain their sites. These are normally in cases where separate legislation has been enacted for particular groups of Indigenous people, such as the *Pitjantjatjara Land Rights Act 1981* where the Anagu Pitjantjatjara people control development on their land and may also prosecute under the *AHA* (Evatt 1996:324). Privately owned property, whether it is Indigenous or historic, is not necessarily managed to any degree under legislative provisions, only to the extent that the site is treated in accordance with the relevant Act or where Aboriginal Heritage Agreements have been entered into.

Ward (1983) and Boyd & Ward (1993) accurately note that since the first forms of heritage legislation were introduced, archaeological remains were their main focus, particularly Aboriginal heritage. Mulvaney (1979 in Mulvaney 1990:266-267) also alludes to later legislative protection for the built environment. Legislation now protects many types of places of significance, of which archaeological sites do play a part, especially in relation to Indigenous sites. Much of this change is due to the greater importance placed upon sites of cultural significance that are of a sacred or religious nature (Creamer 1980 in Boyd & Ward 1993:105). This is in accordance with the opinions of Aboriginal people, who are more concerned with the cultural significance of sites rather than their archaeological value, although this still interests them to a large degree (Boyd & Ward 1993:107). Aboriginal people believe that in terms of cultural resource management, the body of legislation and formal policies that govern the management of their sites are inadequate and in need of review (Fourmile 1992:28).

### 4.6 Indigenous cultural property rights?

In discussing the cultural property rights of Indigenous people, McLennan (1998:245) notes that these rights are limited by inadequacies of protective legislation and are incompatible with other types of property rights established by the legal system. Rather than being true ownership rights, by a comparison with common law property rights, she concludes that the protective legislation makes cultural property more of a privilege for Indigenous people bestowed upon them by the government. As such, they are not real ownership rights in any meaningful sense.
These ‘privileges’ become apparent when one looks at the provisions for Aboriginal consultation that are legislated in the AHA. Whilst the consultation clauses ensure some input from the Aboriginal community, a commitment from the Minister to follow recommendations that result from these consultations is lacking. Evatt (1996:325) notes this inadequacy in the case of *ALRM v State of SA and Stevens*, Supreme Court of SA, unreported, 28 August 1995. It is therefore interpreted that although the Minister is required to accept views of traditional owners and relevant recommendations of the Aboriginal Heritage Committee, he or she is not required to adhere to them; Ministerial discretion can be applied and the consultation becomes a farcical process. This is indeed the interpretation that came down to DOSAA (Knight 1998, pers.comm., 3 November).
CHAPTER FIVE

5. The Cultural Heritage Protection Statutes

What follows is an outline of each of the eight Acts that potentially deal with or has a substantial effect upon the protection of cultural heritage in South Australia. The Commonwealth Acts are relevant for when South Australian Acts do not cover the various areas of protection; they also apply to other States and Territories.

The Acts will be dealt with in chronological order, first Commonwealth and then State. The long title of each Act is stated before the history and discussion. Outlines of the relevant sections of each Act to this paper and the penalties that exist under them are available in Appendix B.

5.1 Australian Heritage Commission Act 1975

An Act to establish the Australian Heritage Commission

5.1.1 History

NSW was the first State to introduce cultural heritage legislation in the form of the National Trust of Australia (New South Wales) Act 1960 (NSW). The Trust had been operating since 1945. The Commonwealth followed suit 15 years later by establishing the Australian Heritage Commission (AHC) through the AHCA. Other States had already established their own National Trust Branches along the same lines as New South Wales, however these were voluntary organizations with limited funds available to them. The AHC was set up to act as an advisory body to State and Federal departments and authorities with respect to heritage properties.

The Commission administers the National Estate at a federal level and cooperates with the National Trust at State level. The primary roles of the AHC are to keep a Register of the National Estate (RNE) and to administer the National Estate Grants Program (a later amendment). The State branches of the National Trust have separate registers from the RNE, and historically were concerned primarily with the preservation of the homes and other built heritage associated with the various States’ elite and bourgeoisie (Simpson 1994:161). This has influenced the RNE.
5.1.2 What does it protect?
The *AHCA* protects everything that is on the RNE from damage by Commonwealth entities. These items can be places that have aesthetic, historic, scientific, social or other special value to the community, both present and future. The places can be natural (such as wetlands, national parks and bushland regions), Indigenous sites (including sacred sites, art sites, campsites and archaeological sites), or historic sites (including buildings, industrial sites, shipwrecks and modern structures) of particular importance in Australia’s history. Section 4(1A) lists other aspects that can contribute to a place’s importance. The RNE contains 19,033 items. Table 1 below shows the number and status of the various types of sites Australia wide.

<table>
<thead>
<tr>
<th>Status</th>
<th>Indigenous</th>
<th>Historic</th>
<th>Natural</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indicative Place (nominated)</td>
<td>241</td>
<td>4305</td>
<td>905</td>
<td>5451</td>
</tr>
<tr>
<td>Interim Listed</td>
<td>29</td>
<td>232</td>
<td>237</td>
<td>498</td>
</tr>
<tr>
<td>Registered</td>
<td>870</td>
<td>9294</td>
<td>1851</td>
<td>12015</td>
</tr>
<tr>
<td>Other</td>
<td>43</td>
<td>801</td>
<td>228</td>
<td>1072</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1183</strong></td>
<td><strong>14632</strong></td>
<td><strong>3221</strong></td>
<td><strong>19036</strong></td>
</tr>
</tbody>
</table>

5.1.3 What doesn’t it protect?
The *AHCA* only protects places that are listed on the Register or on the Interim List. A place does not need to be fully registered in order to receive the full protection of the Act; interim listing provides sufficient protection. No time limit is specified for a place to remain on the Interim List. Items listed as ‘Indicative places’ are nominated places that have not been Registered or Interim Listed. The ‘other’ category includes sites that have been destroyed, rejected or are duplicated on another register. Therefore, the ‘total’ includes places that are no longer part of the RNE or were only nominated, warping the figures to a small degree (Esdaile 1998, pers.comm. 27 August) (see Table 2).
The AHCA doesn’t protect items or places that are only listed on State or Local Heritage Registers or only on the Register of the National Trust\(^4\). They must specifically be on the Register or Interim List of the National Estate. Places on the Register are not protected from alteration or development by non-Government agencies or authorities, unless they are protected under another Act, such as the HA.

**Table 2: Register of the National Estate: South Australia**

<table>
<thead>
<tr>
<th>Status of Sites</th>
<th>Indigenous Sites</th>
<th>Historic Sites</th>
<th>Natural Sites</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Indicative Places</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Registered Place</td>
<td>145</td>
<td>1080</td>
<td>378</td>
</tr>
<tr>
<td>Removed from Interim List</td>
<td>1</td>
<td>17</td>
<td>9</td>
</tr>
<tr>
<td>Interim Listed</td>
<td>0</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Destroyed</td>
<td>1</td>
<td>26</td>
<td>0</td>
</tr>
<tr>
<td>Rejected</td>
<td>2</td>
<td>30</td>
<td>33</td>
</tr>
<tr>
<td>Identified Place</td>
<td>1</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Duplicate Record</td>
<td>2</td>
<td>16</td>
<td>11</td>
</tr>
<tr>
<td><strong>Total number of places on database</strong></td>
<td><strong>209</strong></td>
<td><strong>2164</strong></td>
<td><strong>503</strong></td>
</tr>
</tbody>
</table>

\(^{4}\) South Australia’s National Trust is the only State that does not have a current register.

**5.2 Historic Shipwrecks Act (Cth) 1976**

An Act relating to the protection of certain shipwrecks and relics of historic significance

**5.2.1 History**

The nature of seafaring and shipwrecks historically meant that the circumstances surrounding the decision to legislate for the protection of historic shipwrecks and their associated relics was somewhat different to other types of cultural heritage protection legislation. During the early 1970’s few shipwreck sites had been identified and with SCUBA becoming so popular in the community the ability to control ‘treasure-hunting’ divers from pilfering artefacts from sites was limited, as it still is today.
Without specific legislative controls in place to alert divers of the illegal nature of their activities, the ‘finders keepers’ attitude was prevalent. The discoveries by Western Australian divers in 1963 of the *Vergulde Draeck* (1656) and the *Batavia* (1629) forced this issue to be dealt with by the Western Australian government (Jeffery 1998:4). They declared both vessels historic shipwrecks under the *Museum Act Amendment Act 1964* (WA). The *Vergulde Draeck* was the first shipwreck to be protected by legislation.

The *HSA (Cth)* was the first piece of Commonwealth cultural heritage legislation to impose penalties for breaches involving damage to cultural heritage. It was introduced soon after the Australia-Netherlands Agreement was signed to protect Dutch vessels (Jeffery 1998:4; Staniforth 1998:3).

Western Australia had legislation in place for 12 years to protect these shipwrecks. The original Act was amended and became the *Museum Act 1969* (WA). In 1973 further amendments were made and the Act was again renamed, this time called the *Maritime Archaeology Act 1973* (WA). The later legislation ‘sought to remove the emphasis on the act of wrecking’, and focussed instead on the ‘concept of the historic ship’ (Kenderdine 1997:15). This later Act therefore protected all types of maritime archaeological sites, including those located on land as well those still submerged (Jeffery 1998:5).

The Commonwealth decided to introduce legislation to protect all shipwrecks of historic significance in, or removed from, Australian territorial waters (Jeffery 1998:17). The *HSA (Cth)* originally applied only to Commonwealth and Territory waters, including the external territories. The States had to individually request that the Act be proclaimed in their State; all of the States had done so by 1982 (Jeffery 1998:8).

**5.2.2 What does it protect?**

The Act protects all shipwrecks and associated relics of historical significance in Australian territorial waters\(^5\) that are more than 75 years old. In 1985 amendments were made to introduce blanket

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\(^5\) These waters consist of the territorial sea {12 nautical miles}, the contiguous zone {a further 12 n.m.} and the continental shelf {200 n.m. from the territorial sea baseline} (Jeffery 1998:1). Jeffery outlines the case which
protection for these shipwrecks, relics and articles, so that they did not individually have to be declared historic by the Minister (s4A). The amendments were not proclaimed until 1993. The change to blanket declaration increases the number of protected shipwrecks in Commonwealth waters from 150 to over 5000 (MacIntyre 1992, in Kenderdine 1997:16). However, the blanket declaration only affects Commonwealth and Territorial waters, not State waters. The State waters are left to those governments unless they request that a proclamation be made to include their waters (ss2 (1) and (3)) that are protected by other sections in the Act. All State governments have made this request, as has the Northern Territory. There are 96 wrecks protected under the blanket declaration provision in South Australia, and another 13 that have been protected and inspected.

The Act allows for areas in which historic shipwrecks, relics or articles are situated to be declared ‘protected zones’ preventing ‘certain activities’ (s14) from taking place in those zones in order to give the wrecks and articles the maximum protection possible. Although blanket protection only applies when the remains of a ship become 75 years old, the Minister can declare the remains of a ship to be of historic significance if less than 75 years old. Relics or articles that can be protected are described as any remains or articles that were associated with an historic shipwreck.

5.2.3 What doesn’t it protect?

The HSA (Cth) does not protect shipwrecks that are less than 75 years old if the remains have not specifically been declared historic. The Act does not protect remains in State waters in certain parts of South Australia. This is due to the limits of jurisdiction of the State that were established at settlement.

Although the Act purports to protect all shipwrecks and relics under the blanket protection provision, the protection can only essentially cover those sites and relics that have been identified, although it states otherwise (s4A, s6 and s7). This is due to the logistics of any cultural heritage protection legislation that only the items whose existence is known of can effectively be protected. Kenderdine’s State of the Environment study on shipwrecks reports that the number of wreck sites located in State

caused the coastal waters adjacent to the States to be ‘returned’ to them after the Commonwealth claimed jurisdiction under the Seas and Submerged Lands Act 1973. The result of this is that, for a distance of 3 n.m. from the coast, the waters come under State sovereignty, unless they request that the Act applies to this area too. While all of the States have done this, South Australia is treated slightly differently, as will be illustrated below.
and Territory jurisdiction is just 15% of the total shipwreck resource that has been historically recorded (1997:11).

5.3 World Heritage Properties Conservation Act 1983

An Act relating to the protection of certain property, and for related purposes

5.3.1 History

This Act was the result of the pressure from conservationists, construction workers and the general public following the Tasmanian Government’s plans to dam the Franklin River in the southwestern region of Tasmania for use to power an Hydroelectric power plant. The dam would have flooded an untouched wilderness area, and also destroyed Kutikina Cave, an ancient Aboriginal campsite. Physical evidence of the previously unknown activities of a species of ancient wallaby would also be destroyed (McBryde 1995; Department of Environment, Sport and the Territories 1995; Mulvaney 1990).

The western Tasmanian wilderness area was waiting to be accepted as a World Heritage property after having been nominated by a previous Tasmanian Premier before plans for the construction of the Franklin Dam became known. The Act was produced as part of Australia’s obligations under the World Heritage Convention of 1972. So although some places had already been World Heritage Listed before this Act came into force, the WHPCA clearly stated the Commonwealth government’s powers in this area. This was also the third piece of Commonwealth legislation that was produced to fulfill international obligations.
Table 3: World Heritage Properties in Australia

<table>
<thead>
<tr>
<th>World Heritage Property</th>
<th>Location</th>
<th>Year Inscribed</th>
<th>Cultural/ Natural value</th>
<th>Reason for listing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australian Fossil Mammal Sites</td>
<td>Riversleigh, Queensland; &amp; Naracoorte, South Australia</td>
<td>1994</td>
<td>Natural</td>
<td>Natural</td>
</tr>
<tr>
<td>Central Eastern Rainforest Reserves</td>
<td>SE Queensland and NE NSW</td>
<td>1986, East coast temperate &amp; subtropical extended 1994</td>
<td>Natural</td>
<td>Natural</td>
</tr>
<tr>
<td>Fraser Island</td>
<td>Queensland</td>
<td>1992</td>
<td>Natural &amp; cultural</td>
<td>Natural</td>
</tr>
<tr>
<td>The Great Barrier Reef</td>
<td>Queensland</td>
<td>1981</td>
<td>Natural</td>
<td>Natural</td>
</tr>
<tr>
<td>Lord Howe Island Group</td>
<td>NSW</td>
<td>1982</td>
<td>Natural</td>
<td>Natural</td>
</tr>
<tr>
<td>Shark Bay</td>
<td>Western Australia</td>
<td>1991</td>
<td>Natural</td>
<td>Natural</td>
</tr>
<tr>
<td>Tasmanian Wilderness</td>
<td>Tasmania</td>
<td>1982, extended 1989</td>
<td>Natural &amp; cultural</td>
<td>Natural &amp; cultural</td>
</tr>
<tr>
<td>Uluru – Kata Tjuta National Park</td>
<td>Northern Territory</td>
<td>1987 (natural) 1994 (cultural)</td>
<td>Natural &amp; cultural</td>
<td>Natural &amp; cultural</td>
</tr>
<tr>
<td>Kakadu National Park</td>
<td>Northern Territory</td>
<td>1981 (Stage 1) 1987 (Stage 2) 1992 (Stage 3)</td>
<td>Natural &amp; cultural</td>
<td>Natural &amp; cultural</td>
</tr>
<tr>
<td>Wet Tropics of Queensland</td>
<td>Queensland</td>
<td>1988</td>
<td>Natural</td>
<td>Natural</td>
</tr>
<tr>
<td>Willandra Lakes</td>
<td>NSW</td>
<td>1981</td>
<td>Natural &amp; cultural</td>
<td>Natural &amp; cultural</td>
</tr>
</tbody>
</table>

5.3.2 What does it protect?

The WHPCA protects all properties, in Australia and the external territories that are on the WHL, those that have been nominated and also properties that are under inquiry as to whether they should be nominated. Natural sites such as geological formations, habitats of endangered species (flora or fauna), physical or biological formations and areas of natural beauty (of outstanding universal value) can all be protected by under the definition of natural heritage. Monuments (architectural and sculptural), paintings, buildings and archaeological sites (of outstanding universal value) can all be protected as cultural heritage.

Properties can include large expanses of land, such as the southwestern wilderness area in Tasmania and Kakadu National Park in the Northern Territory. Areas underwater, for instance the Great Barrier Reef Marine Park can be protected, as can properties surrounded by water, such as Lord Howe Island. Interestingly, as illustrated by Table 3 above, most of the sites that are World Heritage Listed...
in Australia have been listed for their natural heritage value. Some of these properties, like Fraser Island, do contain sites or objects that can be classed as being of cultural heritage value, but they are not listed for these reasons.

5.3.3 What doesn’t it protect?
The WHPCA doesn’t protect a place that has had a proclamation revoked or a place for which a proclamation has lapsed or failed to be laid before Parliament before the specified time (s15). The Act seems to be primarily aimed at land-based heritage, although the provisions are available for underwater cultural heritage to be listed. However, the working guidelines for the Convention excludes immovable items that are likely to become movable (Cleere 1993:26). These guidelines have no legal force. After the ICOMOS Convention for the Protection of Underwater Cultural Heritage in 1996, calls were made for this resource to be included in the World Heritage List (WHL) (Cleere 1993).

Further developments have been made this year with the planning of the Jabiluka Uranium Mine in Kakadu National Park. The mine has received abundant media attention due to the controversial nature of uranium mining, and also because the mine is in a World Heritage Area. It is questionable whether the WHPCA does protect the property against all interference and destruction or whether it is only able to protect these sites fully when the Government allows it to.

5.4 Aboriginal and Torres Strait Island Heritage Protection Act 1984

An Act to preserve and protect places, areas and objects of particular significance to Aboriginals, and for related purposes

5.4.1 History
This Act was the Commonwealth’s first piece of Indigenous heritage protection legislation, and the aim was originally very different from what was produced. In the early 1980’s the Hawke Labor government and a selection of legal professionals held discussions with Indigenous leaders about putting in place legislative protection for their sites and artefacts. However, the intention was for the government to introduce Land Rights legislation to work in conjunction with the ATSIHPA or to later override it with more comprehensive legislation, and in this way totally take control over the area of
Indigenous heritage protection (Goldflam 1997). As such, the Act was originally the *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act* and it had a sunset clause to end in 1986 so that Land Rights legislation could be established. The Land Rights legislation never eventuated and the sunset clause was repealed. Consequently the *ATSIHPA*, now 14 years old, is not a particularly strong piece of legislation.

In 1995 The Hon. Elizabeth Evatt was commissioned to review the Act (the Evatt Review). The review was very detailed and many recommendations for reform were made. At present they have not been implemented. The *ATSIHPA* has received considerable attention from lawyers and Indigenous associations in the past few years, mainly due to its failure to protect Indigenous heritage at Hindmarsh Island (Kumurangk), the Old Swan Brewery in Perth (*Goonininup*) and the Broome Crocodile Farm Case in Western Australia.

### 5.4.2 What does it protect?

The more appropriate heading here would be ‘what can it protect?’ because the *ATSIHPA* does not protect very much. At present only one long-term declaration is active, at Junction Waterhole (Niltye/Tnyere-Akerte) in the Northern Territory. According to the Evatt Review (1996:266), 131 applications for protection had been made since the introduction of the Act. These were made under sections 9, 10 and 18 (emergency declarations by Authorized Officers)\(^6\). Of these applications, only sixteen led to declarations; four were for objects.

Areas that can theoretically be protected are physical sites such as campsites, burials, middens, rock shelters and fishtraps as well as mythical or dreaming sites. Contact-period sites can also be protected under the Act.

### 5.4.3 What doesn’t it protect?

The wording of the Act is so broad that it is *possible* to protect almost anything of significance to Aboriginal people. However, as stated above, there is not actually very much that is protected under the legislation. Of five section 10 declarations that have been made, two were overturned by the
Federal Court (Kumarangk/Hindmarsh Island and Goonininup/Old Swan Brewery), one withdrawn (Broome Crocodile Farm), one declared for 20 years (Junction Waterhole) and one application is still pending (Boobera Lagoon, NSW) (Evatt 1996:267).

5.5 Protection of Moveable Cultural Heritage Act 1986

An Act to protect Australia’s heritage of movable cultural objects, to support the protection by foreign countries of their heritage of movable cultural objects, and for related purposes

5.5.1 History

This Act was another that was introduced to address the issues highlighted at an UNESCO convention. It was written not only to protect the movement of Australia’s cultural heritage objects out of the country, but also those of other countries into and out of Australia, in line with the Convention. As noted earlier, although this legislation was written in 1987, Australia did not ratify the Convention until 1989.

5.5.2 What does it protect?

The Act applies to both Class A and Class B objects listed under the National Heritage Control List. Class A objects are those that can only be exported with a certificate. The object must have been held outside of Australia before being imported and then later exported. A Certificate cannot be issued for a Class A object that has been in Australia since the introduction of the Act. Class B objects may be exported with a permit or certificate.

Jamieson writes that the only objects that come under the Class A section are Aboriginal and Torres Strait Islander objects. These include:

- sacred and secret ritual objects;
- bark and log coffins used as traditional burial objects;
- human remains;
- rock art; and
- dendroglyphs (Jamieson 1995:218)

\[^6\text{It is noted in the Review that some data on the number of applications was missing and so could not be}\]
This year Victoria Cross medals awarded to Australian soldiers have been added to the list of Class A items (DCA 1998). Objects protected Class B items can come under a variety of fields that are listed in the Schedule to the Regulations. They include fields listed in ss7 (1) of the Act (see Appendix B).

5.5.3 What doesn't it protect?

The PMCHA has the ability to protect almost anything of importance to Australian cultural heritage. Numerous limitations are placed upon the fields of Class B objects, such as monetary thresholds at which the objects become protected, and the age of the object (e.g. documents more than 75 years old that were made in Australia). Therefore, any object that is younger than those dates, or valued at less than the specified amount for those types of objects (this refers to decorative artworks) are not protected under the Act.

5.6 Historic Shipwrecks Act (SA) 1981

An Act relating to the protection of certain shipwrecks and relics of historic significance

5.6.1 History

This Act is almost identical to its Commonwealth counterpart. It was written by following the 1976 Act, except that it did not include protection for Dutch or Papua New Guinea shipwrecks. South Australia was trying to make the laws regarding historic shipwrecks and relics uniform for State and Commonwealth waters. When blanket declaration was brought in for Commonwealth waters, South Australia did not follow suit, consequently shipwrecks and relics in state waters have to be individually declared historic. As the two Acts are very similar, in this section only the differences will be outlined. For the rest of the basic parts of the Act, the HSA (Cth) can be referred to.

5.6.2 What does it protect?

The HSA (SA) is able to protect wrecks and relics in the State waters of South Australia. Only the waters above the low water mark and the internal waters, including the landward side of the closing lines of bays and joining islands come under the jurisdiction of the State governments (Jeffery 1998:1-
2). This means that where the mouth of a bay is narrower than at its broadest point within the bay, it is designated as State waters. South Australia has six other bays and gulfs that needed State protection, and the simplest way to do this was to enact its own legislation. These are Spencer Gulf, Gulf St Vincent, Anxious Bay, Encounter Bay, Rivoli Bay and Lacepede Bay (see fig. 2 below).

![Map of South Australian coast showing location of historic gulfs and bays.](image)

Figure 2: Map of South Australian coast showing location of historic gulfs and bays.  
(Courtesy Bill Jeffery, Maritime Heritage Unit, Heritage SA)

The jurisdiction of State waters has been contested in court on numerous occasions. Two notable court cases in the 1970’s questioned the limits of the South Australia waters. The first, the *Sea’s and Submerged Lands Act Test Case* extended the Commonwealth’s sovereignty to the territorial sea and internal waters. The second, a case brought by fishing company A. Raptis and Sons against South Australia (CLR 1976-77 366) tested the State’s sovereignty within the three nautical miles adjacent to
the coast. *Raptis* forced members of the High Court to indicate where the State waters ended and Commonwealth waters began. The Court decided that Investigator Strait was not within State waters; Kangaroo Island was also excluded (Prescott 1986). The South Australian authorities submitted a claim in 1982 for nine historic bays to be declared as State waters. The State’s jurisdiction was not extended to include them.

The *HSA* (SA) can protect any wrecked or abandoned vessel, and any remaining part of one, as well as articles associated with a wreck. As with the Commonwealth Act, ‘historic shipwreck’ applies to the remains of a ship that has been declared historic; the vessel need not have come to the end of its use-life due to a wrecking event.

Heritage SA administers both *HSA’s*, as well as the *HA*, and therefore the two Registers established by them. The wrecks listed are also recorded on National Shipwrecks Database. The figures for the breakdown of the SA Historic Shipwrecks Register are on Table 4 below.

**Table 4: Breakdown of shipwreck status on National Shipwrecks Database (SA)**

<table>
<thead>
<tr>
<th>Shipwreck Status/Location</th>
<th>Figures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protected Zone</td>
<td>1 <em>(Zanoni)</em></td>
</tr>
<tr>
<td>Wrecks in SA waters (total)</td>
<td>54</td>
</tr>
<tr>
<td>Wrecks in SA waters (inspected)</td>
<td>42</td>
</tr>
<tr>
<td>Wrecks in SA water (not located)</td>
<td>11</td>
</tr>
<tr>
<td>Total Shipwrecks protected in SA (Cth jurisdiction included)</td>
<td>163</td>
</tr>
<tr>
<td>Total Shipwrecks for SA waters on NSD</td>
<td>782</td>
</tr>
</tbody>
</table>

**5.6.3 What doesn’t it protect?**

The *HSA* (SA) doesn’t protect wrecks and relics that have not been declared historic in waters within the jurisdiction of the State; most wrecks are actually protected by the Commonwealth Act. Wrecks or relics in the State internal waters, such as those in the Murray River, are un-protected until they are declared. Only one River Murray wreck in SA, the *Waterwitch*, is protected under the legislation.
Wrecks in the Victorian or NSW part of the river are protected by blanket declaration provisions in the respective State Acts.

The combined effect of the two HSA’s is that all shipwrecks in Australian waters can be protected under legislation, the only exception being if they are within the limits of SA or less the 75 years old and in Commonwealth waters, they must be declared historic.

5.7 Aboriginal Heritage Act 1988

An Act to provide for the protection and preservation of the Aboriginal heritage;

and for other purposes

5.7.1 History

The AHA was brought in to repeal the Aboriginal and Historic Relics Preservation Act 1965. It also made various amendments to other Acts. During 1997, new legislation was drafted in an attempt to repeal the current Act. Debate between Aboriginal communities and heritage professionals deplored the Bill as pro-development and contrary to the protection of Aboriginal heritage. The Bill failed to pass Cabinet and reach the first reading stage in either house, leaving the 1988 Act still in force. A second attempt is presently underway to put the same Aboriginal Heritage Bill through with some minor amendments. At time of writing it had not been accepted by Cabinet.

5.7.2 What does it protect?

The AHA has a form of blanket declaration by the way the Register of Aboriginal Sites and Objects (RASO) is administered. Site cards in the Register give details and location of a site, however the Minister may not have made a declaration on whether the site is in fact an Aboriginal site. If the site or object is on the Register it is ‘conclusively presumed’ to be an Aboriginal site or object under section 11. Subsection 9 (2) requires that the entries provide enough information that the Minister may readily identify the site as Aboriginal. If the Minister determines that an entry is not an Aboriginal site or object, it may be removed; this determination must be preceded by the consultation process.
This means that all sites and objects that are entered in the Register are protected. These sites or objects can be anything of importance to Aborigines according to Aboriginal tradition; this includes sacred sites. Alternatively, they can be of archaeological, anthropological or historical importance.

At June 1998, the RASO contained approximately 4000 registered sites and more than 2000 recorded sites. In 1997 DOSAA received 624 Development Applications, forwarded from the various Local Council Planning Divisions and the Development Assessment Commission (DAC). This was an increase of almost 200 applications from 1995. Not all of these would have affected a site (Cooke 1998, pers.comm., 17 June). Figures for the number of sites affected by Development Applications were unable to be obtained.

5.7.3 What doesn’t it protect?

The AHA doesn’t protect sites or objects that have not been found, identified and entered into the central archives. The Act does not protect sites or objects that the Minister has determined are not Aboriginal and the decision has not been reversed (ss11 (b)). Objects or sites held only in local archives are also unprotected. However at the present time no local archives exist, although some local communities do have copies of the site information for their region in their possession, for instance Point Pearce Mission and the Coorong National Park. (Cooke 1998, pers.comm., 17 June). Some communities, such as the Kaurna community, hold some salvaged artefacts from sites that have been developed.
5.8 *Heritage Act 1993*

An Act to conserve places of heritage value; and for other purposes

5.8.1 History

This Act is South Australia’s most recent piece of cultural heritage legislation. It was brought in to operate in conjunction with the DA and various sections throughout the HA refer to this piece of legislation. When introduced, the HA repealed the original *South Australian Heritage Act 1978*, and made amendments to a variety of other Acts, including the AHA. Its primary function has been to implement protective measures for South Australia’s built heritage.

5.8.2 What does it protect?

The HA can protect sites on the Register and sites subject to Conservation Orders. It can be used to protect built heritage as well as places of archaeological, palaeontological or geological significance to South Australia. Therefore, it not only protects buildings of aesthetic value, but also buildings and sites of historical significance. Places of importance to Indigenous Australians may also be protected by the Act, however these are rare. The only ones listed are of contact and post-contact origin, such as the Aboriginal Mission at Point Pearce. Terrestrial and offshore sites can come under the protection of the Act, so where the HSA (SA) does not protect anything underwater that was not a ship or was not part of or associated with a ship, such as an aeroplane, this Act can do so.

As can be seen from the Table 4 below, although the HA has the ability to protect sites that are of archaeological, palaeontological and natural significance, it does not take advantage of this power to a significant extent. Inquiries were made on the status of Aboriginal sites on the Register database, however information could not be obtained. All that could be established was that no pre-contact Indigenous sites were listed on this Register and that such sites could be found on the RASO administered by DOSAA.

Most of the 22 natural sites that are listed as part of the heritage of South Australia are actually registered for their cultural links. Places such as the Olive Plantation on Mann Terrace in North Adelaide, the Old Gum Tree site at Glenelg North and Frenchman’s Rock and surrounds at
Penneshaw on Kangaroo Island, whilst all being ‘natural’ features, are associated with activities of people in South Australian history.

Table 5: Register of State Heritage Items (22 October 1998)

<table>
<thead>
<tr>
<th>Type of site</th>
<th>Number of Registered Sites</th>
</tr>
</thead>
<tbody>
<tr>
<td>Palaeontological</td>
<td>4</td>
</tr>
<tr>
<td>Archaeological</td>
<td>6</td>
</tr>
<tr>
<td>Natural</td>
<td>22</td>
</tr>
<tr>
<td>Historic</td>
<td>2071</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>2103</strong></td>
</tr>
</tbody>
</table>

5.8.3 What doesn’t it protect?

The HA does not protect items that are not Registered or Interim Listed. It also does not protect items that are of local heritage significance. Places for which an owner has applied successfully to be excluded from heritage listing for a maximum of five years cannot come under the protection of the Act. It is not known how often this provision is taken advantage of, however it effectively means that a property owner is not subject to heritage-based restrictions regarding alterations and development. This is not to say that pressure from the community would not prevent substantial changes from being made; Gawler Chambers, on North Terrace, is a case in point and will be discussed in detail later.
5.9 Development Act 1993

An Act to provide for planning and development and to regulate development; to regulate the use and management of land and buildings, and the design and construction of buildings; to make provisions for the maintenance and conservation of land and buildings where appropriate; and for other purposes

5.9.1 Relevance to Cultural Heritage Protection

Numerous sections in the DA affect cultural heritage places and sites in South Australia. This Act aims to integrate the planning and development process in South Australia. The Act affects private developers as well as government entities, all of which are required to submit Development Plans/Development Applications to their relevant Local Council Planning Division or the DAC.

Development Plans may designate State and Local Heritage Areas. Hence places that are of State or local heritage significance should be incorporated into Development Plans under the DA. Developers remain subject to provisions of both the AHA and the HA. However, the AHA is not linked to the DA. According to the Department of Environment and Natural Resources (1996) (now the Department of Environment, Heritage and Aboriginal Affairs) ‘development’ is any work that could affect the heritage value of a place. Therefore, ‘demolition, removal, conversion, alteration, additions, painting and any other work that will materially affect [a heritage] place’ is part of the definition of development (Heritage Conservation Leaflet 1.6).

Local Governments may establish Local Heritage Registers to list their local heritage places. Currently there are seven Local Heritage Lists in South Australia, containing a combined total of 1547 buildings (Samuels 1998).
6. Relevance of Commonwealth legislation to Cultural Heritage in South Australia

6.1 Relevance of Commonwealth Legislation to Historic (European) Cultural Heritage in South Australia

Each of the Commonwealth Acts discussed above deal with some aspect of South Australia’s cultural heritage. As noted, two are currently not relevant to historic heritage, although the WHPCA has the ability to apply here if the need arose.

The Commonwealth has legislation to cover all the current areas of heritage protection although some Acts do this more successfully than others. Some types of heritage can be protected under more than one Act. For instance, relics protected under an HSA may also be protected as Class B objects under the PMCHA.

Table 2 shows that historic cultural heritage in SA is heavily represented under the AHCA. The number of registered historic places is more than ten times that of the Indigenous sites and objects and just over five times that of the natural sites Australia-wide. However, these sites are only protected from damage or destruction by Commonwealth agencies or authorities, not from private enterprise or private owners.

An explanation for the differences evident in Tables 1 and 2 is that they are a reflection of the number and type of sites that are nominated by the community. As Table 1 illustrates, the number of nominated Indigenous sites is less than 1% of the nominated historic sites.

A second cause for the difference in the figures is that the number of sites identified throughout Australia is substantially higher for built heritage due to the ease of identification. It has been suggested that the higher figures for historic sites could also be due to the awareness of the non-Indigenous population of Australia of the national value of their heritage places, and also the knowledge of the availability of legislative protection for them (David Bishop 1998, pers.comm., 24
August). This would be the case in some circumstances where Indigenous people understand that their heritage is important to them, but not necessarily important to the wider community.

Up until 1994 eight items had been refused export permits under the *PMCHA* throughout Australia; seven of these were for items of historical significance to Australia, one was for a painting. Jamieson points out that these figures may be misleading because the Minister will sometimes notify the public or appropriate person that an object will not be issued a permit before one has been applied for (1995:222). In some cases the legislation has been amended to incorporate items that have been advertised for sale and could result in their exportation from Australia (Jamieson 1995:223). No prosecutions under the Act have occurred in SA.

The historic shipwrecks legislation is presently only used to protect non-Indigenous wrecks and relics. Sites associated with maritime history and archaeology can be protected under the RNE (e.g. the SS *Admella*, the *Geltwood* and the *Zanoni*, are in the RNE). However, most of the enforceable ('real') protection for historic and Indigenous sites is left to the State governments. This means that each State has legislation that is not totally comparable with other States.

The RNE is able to protect sites that are not only of aesthetic importance, but also sites that are of importance to the history and development of Australia. This means that at present, places do not need to appear to be ‘outstanding’ in order to be included in the Register. Sites along the South Australian coast such as the numerous remains of 19th century whaling stations that have become a few piles of rubble, ceramic and glass can be protected under the Act, along with outstanding built heritage situated in the middle of the Adelaide central business district. However, the extent and effectiveness of registering these remote sites is questionable due to lack of monitoring.

**6.2 Relevance of Commonwealth Legislation to Indigenous Cultural heritage in South Australia**

All of the Commonwealth Acts can be used to protect Indigenous cultural heritage in South Australia, and only the *HSA* is not presently used in this way. The *PMCHA* is probably the strongest in its protection of Indigenous cultural heritage. Indigenous heritage of Class A status can be temporarily exported (with a certificate of exemption) from Australia as part of exhibitions by museums or art
galleries. Some Class B objects can also be removed. If an item is sold to a foreign investor who wishes to take it out of Australia, the National Cultural Heritage Fund will usually aid in the acquisition of the object to prevent its removal from the country. This Act also has the largest penalties for breaches against it. The ATSIHPA can protect anything of relevance to the Indigenous population of Australia, but is not used very often, and when it has it rarely been successful in achieving its stated aims. It is often preferred to deal with Indigenous heritage protection issues at State level to reduce the Commonwealth’s involvement.

The WHPCA has been used to protect Indigenous heritage places, but the World Heritage Properties web site points out that actions must be proclaimed unlawful by government regulations for each World Heritage Place (Environment Australia World Heritage Areas (online) 1998). The Governor-General must make these proclamations. The reason that uranium mining is currently able to go ahead at Jabiluka in Kakadu National Park is that such a proclamation has not been made, and the previous ‘3 mines policy’ has been increased.

Although four areas (Uluru-Kata Tjuta, Kakadu, Tasmanian wilderness and Willandra Lakes) are listed partly for their cultural value, only the Tasmanian Wilderness area listing has resulted in an Indigenous site being prevented from being damaged (Kutikina Cave). Importantly, the activities undertaken within the area must be so damaging to the World Heritage value that the area would no longer meet the criteria for listing. Apparently the mine at Jabiluka would not result in damage to that extent, hence it has not been prevented from continuing. SA has only one World Heritage listed place.

The AHCA protects Indigenous cultural heritage, but no more than it does the other types of heritage. RNE listing highlights the importance of places as part of the heritage of Australia. The criteria for listing of natural and historic heritage places can be provided to the public if requested. The request system does not work in the same way for Indigenous heritage due to various secrecy clauses and the unique protection requirements of the sites.
CHAPTER SEVEN

7. Comparison between cultural heritage laws

7.1 How is Indigenous heritage treated at Commonwealth level as opposed to South Australian legislation?

Federal legislation for the protection of Indigenous heritage, whilst being applicable to the entire country, does not provide adequate protection for Indigenous sites and objects (Draper 1996). Only one Commonwealth Act that primarily affects Indigenous heritage, the ATSIHPA, provides criminal sanctions to be implemented in the event of a breach of either of the Acts. These sanctions are only applicable to sites that are subject to declarations under the Act. As there is only one site currently protected by such a declaration, the sanctions only apply to that site. Recent cases have illustrated that the ATSIHPA, although supposedly in place to act as a ‘last resort’ option, has dramatically failed to have this affect (Evatt 1996:267).

Provisions are made for emergency declarations to be made by the Minister or by an inspector. However, Evatt, showed that few applications have been approved under the Act and currently only one long-term declaration is in force (1996:266-271; Goldflam 1995:13). The recent failures of the Act to protect both Goonininup and Kumarangk from development stresses the need for a more lenient view towards sacred and religious Indigenous cultural heritage sites.

It appears that sites with obvious physical attributes gain better protection under all cultural heritage legislation, whether these sites are historic or Indigenous. This can be explained in several ways. Part of the reason for the higher figures for historic places is the basis for the various Registers. As previously stated, many of the places on the RSHI and the RNE have been nominated through consultation with National Trust lists that historically were, and still are, predominantly based on the built heritage. Another explanation could be that Australian-European culture encourages the placement of value in tangible items: the more ‘impressive’ the item, the more valuable it becomes.
The WHPCA also has problems. Whilst it provides for places to be listed as World Heritage Properties with UNESCO, it does not provide any type of blanket protection for the eleven properties that are currently listed. However, some of these places gain ‘real’ protection from other legislation. This can be done by establishing the area as a National Park or Conservation Zone, which restricts a variety of activities throughout the designated region.

The WHPCA only protects places of outstanding universal value. Of the eleven World Heritage Listed places in Australia, four of these are listed for their cultural attributes, as is shown in Table 3. Australia is one of the unique countries whose natural items meet all of the criteria for listing and which has places listed for both their natural and cultural value (Environment Australia 1997).

Sullivan (1995) notes that Aboriginal cultural sites are the only Australian cultural sites represented on the WHL. The Adelaide Parklands have been submitted for nomination to the WHL, and consideration is being given to nominating the historic German-settled Barossa Valley region (Iannou 1998). The Commonwealth can actually use the WHPCA for places that are not on the WHL, so the range of protection that the Act can provide is extensive. This means that where other protective legislation is lacking, or loopholes in the other Acts allow certain activities to be undertaken, and the Commonwealth government believes that the place requires urgent protection, it can use the WHPCA to indefinitely protect the property (Boer 1995). Whether the government would use this power is questionable.

Other Commonwealth legislation, such as the AHCA, also affects Indigenous cultural heritage. However, historic cultural heritage is represented to a greater degree in both Commonwealth and State Registers. The exception here is the PMCHA where Class A Indigenous objects are automatically prohibited from importation or exportation in Australia (see s 7.3.2). The protective scope of this Act is broad, as almost anything of any kind of importance to Australia, whether scientific, archaeological, religious or historical, requires a certificate or permit in order to export it to another country. Permits can allow items to indefinitely leave Australia for various purposes. Numerous items have been refused permits or certificates since the enactment of the legislation.
So the legislative protection at Commonwealth level for Indigenous cultural heritage varies from very good protection in the case of movable objects to, at the least, minimal actual protection and implementation. The South Australian circumstances are much better, to an extent. As the majority of environmental legislation is left to the States, it is expected that the State legislation would provide more adequate protection than the Commonwealth Acts.

All three specific heritage protection Acts can in some way provide protection for Indigenous heritage. The most beneficial piece of legislation is the AHA. It requires people to obtain permits to enter upon property, and consultation between the Minister (or delegated person, currently the Chief Executive Officer of DOSAA) and the Indigenous Communities is required for any changes in site or object status. Note here that a site must actually have a status under the Act in order for consultation to be required.

Indigenous heritage can also gain protection under the HA, the DA and various local government planning regulations (although this protection is minimal). The DA deals with Aboriginal Heritage Agreements, as does the HA, however the AHA has the most relevance to Indigenous heritage protection.

Tehan and others recognize that the AHA was a change in the approach to Indigenous heritage protection. The Act not only allows for changes in Aboriginal tradition over time, but also ‘places control and management of Indigenous heritage with local Indigenous people in terms of deciding what constitutes heritage and who should make the decisions in relation to it’ (Tehan 1996:285). Evatt recommends this as one of the minimum standards for cultural heritage laws (Evatt 1997:440).

Many commentators refer to the inadequacies of the ATSIHPA (Brennan 1997; Draper 1996; Evatt 1996; Goldflam 1995 & 1997;Hancock 1995; Nettheim 1998). Draper (1996:3) is one of the few who also states that the AHA 1988 is ‘ineffective, has fundamental flaws [and] inconsistencies’, compounded by the various loopholes that exist if one looks for them. He does not elaborate upon these problems.
The Act provides for continuous consultation with the Aboriginal Heritage Committee, Aboriginal organizations, traditional owners and any other Aboriginal persons when any alterations to a site’s status are planned. However, by referring to many of the sections within the AHA, one can see that the Minister is only required to take ‘all reasonable steps’ to consult with these people. What is ‘reasonable’ is not defined. This consultation requirement was weakened substantially by a South Australian Supreme Court interpretation under section 35 (disclosure of information)\(^7\), where the court decided that there was no further requirement under the Act that the views of those people consulted had to be complied with (Tehan 1996:297)

A section 23 application to damage or destroy requires that the person or developer has the authority of the Minister. In order to give authority, the Minister must ‘take all reasonable steps’ to consult with the relevant people. Again this seems to provide a loophole for the Minister to approve damage or destruction and avoid the consultation processes. The Minister is required to accept the views of the Aboriginal people as to whether a site or object is of significance according to Aboriginal tradition (s13). Note here that if the Minister has not consulted with the relevant people, their views cannot be known, and therefore the Minister does not have anything to accept.

While the AHA has the foundations for excellent protection of Indigenous cultural heritage in South Australia, and is much more adequate than its Commonwealth counterpart, in practice it can be (and has been) ineffective. The provisions for consultation can be operated adequately, however the extent of the Minister’s discretion is too high if one considers the protection of sacred sites should be paramount. Politics therefore plays a very large role in the arena of heritage protection. As Draper points out, those with political influence, sufficient funding and good lawyers can succeed in the fight of development over preservation (1996:9). It will be shown by the case studies that when loopholes exist within current legislation, and when it fits the government’s agenda or there is substantial public support, they are quite capable of intervening in the development process in order to prevent the destruction of South Australia’s heritage.

\(^7\) Aboriginal Legal Rights Movement v The State of South Australia & Stevens (1995) 64 SASR 558
Indigenous heritage protection legislation also seems to be more applicable to rural regions that are subject to increasing development demands or land use alterations. It does not seem to operate in previously developed areas, such as the Adelaide CBD. It is open to speculation whether developers on sites located in the city ever discover and report findings of extant Indigenous sites or objects. Prior to protection legislation being implemented in the first instance, archaeological surveys were not required before development commenced. With Adelaide being located centrally within the tribal lands of the Kaurna people, along the only large course of fresh water in the area, undoubtedly there would be many sites of Kaurna occupation near the city centre. Many of the Aboriginal settlement sites in Adelaide have been located along the banks of what is now Torrens Lake (see Harris 1998). Modern findings of such sites, if any, do not seem to be picked up by the media, if indeed they are reported to the DOSAA at all.

7.1.1 Aboriginal Heritage Agreements under the Aboriginal Heritage Act

The AHA provides for Aboriginal Heritage Agreements to be entered into between owners of land where Aboriginal site or objects are situated and the Minister. The Minister must consult with the traditional owners (and others as provided for in s37A) on the agreement, and give them a chance to become a party to it. The Agreements become binding on subsequent owners and/or occupiers of the land. This gives a legal avenue for traditional owners to have access to, and protection and management for, their land while allowing for and restricting specified land-use activities undertaken by the landowner.

However, only one Aboriginal Heritage Agreement currently exists in South Australia, for Granite Island, at Encounter Bay (Evatt 1996:327). Helen Cooke, Senior Cultural Heritage Officer with DOSAA in Adelaide, reports that ‘the document uses difficult legal language and covers some financial agreements, but does not clarify the conservation of heritage sites’ (1998, pers.comm., 19 October). Two other sites went through the consultation processes of setting up Aboriginal Heritage Agreements with the Traditional owners (both from the Kaurna community) however nothing has been finalised through DOSAA regarding any Aboriginal Heritage Agreements (Cooke 1998, pers.comm., 19 October).
Therefore, despite the provision for Aboriginal Heritage Agreements to protection and manage Aboriginal Heritage sites on privately owned property, the section has failed to be of much use to Indigenous communities and owner/developers.

7.2 How is historic (including maritime) cultural heritage treated at Commonwealth level as opposed to South Australian legislation?

Commonwealth protective legislation for historic sites is abundant. There are Acts that cover all three types of heritage: natural, historic and Indigenous. As noted above for Indigenous cultural heritage, the Commonwealth legislation has limited penalties available for when breaches occur. The same applies for historic heritage, unless an object comes under the PMCHA, where the largest penalties of all the heritage protection Acts are found. Breaches of the HSA (Cth) are also subject to fines or imprisonment.

Legislation at Commonwealth level provides a basis from which State governments can develop their own effective cultural heritage protection legislation. Although not enacted for this reason, the Commonwealth Acts have been useful in this respect. South Australia has followed the Commonwealth legislation in part, through the definitions of what can be considered historic cultural heritage, which are basically identical to those in the Commonwealth Acts. SA’s historic heritage is protected under three Commonwealth Acts: the AHCA, the PMCHA and the HSA.

The AHCA provides for the protection from damage by Commonwealth agencies and authorities. Forms of historic heritage that are subject to this protection include built heritage, industrial heritage, relics and ruins and also any other sites that can be considered of historical importance to Australia. The criteria by which the Commission establishes the significance of sites are currently under review. The Commission aims to list places that are of national importance on the RNE, leaving places and sites of State, regional or local importance to State and Local governments to be listed upon their Registers.

Brian Samuels, principal Heritage Officer with Heritage South Australia, questioned these changes in levels of significance as assessed by the AHC. As a long-term heritage professional in South
Australia, he was concerned that places that could be considered of National importance within South Australia and the small States and Territories would not necessarily be considered of National importance by the AHC (Samuels 1998, pers.comm., 27 June). The basis of Mr. Samuels' concern was that the earlier settled higher population Eastern States, New South Wales and Victoria, would dominate the lists even more than they currently do. This would result in more items needing to gain protection from other legislation, and losing the beneficial connotations the public draws from an item being identified as part of the National Estate.

Although the definitions and criteria for listing are essentially the same for State and Commonwealth Acts, enforcement and the resulting penalties, as major factors for deterrents of criminal activity, exist mainly at State level. That leaves penalties for damage or destruction of Indigenous or historic cultural heritage to South Australia, allowing for variation between the State and Territory governments for implementation, administration, enforcement and maximum levels for penalties.

The PMCHA protects historic heritage by controlling its movement into and out of Australia. While Class A objects under the Regulations of the Act are automatically prevented from leaving the country (a form of blanket protection), historic movable cultural heritage come under Class B objects. These types of object enjoy quite stringent protective measures under the Act, with all applications for permits that have been rejected by the Minister under the Act being for historic heritage items. Amendments were made to the regulations to provide for ‘general permits’ to be available for public institutions, such as art galleries, ‘to export works for research or public exhibitions’ (Jamieson 1995:219).

The protection afforded by the HA is only for historic heritage, with built heritage predominant. Out of the 2103 registered sites, 2061 are for built heritage (see Table 3 above). Many of these sites are listed for their importance to a community or group, therefore many churches are registered, as are sites of importance to various cultural groups, such as the Cornish population on York Peninsula, or the Chinese in the goldfields. Places of historical significance to the settlement and development of the State, such as the Old Gum Tree at Glenelg North are also protected by the HA. Places of very
high significance may also be duplicated on other Registers, such as the RNE. The Old Gum Tree site is one of these sites.

Penalties for the PCMHA are high (up to $200,000 for a corporation), as are penalties for breaches of other importation/exportation laws and regulations. The HA has the second highest penalties, the highest for any of the South Australian Acts being discussed, with a maximum fine of $60,000 or 5 years imprisonment. Maximum fines of $5,000 (or five years imprisonment) for an individual are sanctioned in the HSA (SA). Perversely, this Act does not include fines for corporations. The reason for this is not known. Presumably, individuals working for a corporation found to be in breach of the Act would be prosecuted on an individual basis. Finally, the AHCA does not provide any penalties at all.

The only differences between how historic shipwrecks are treated at Commonwealth level as opposed to State level are in the blanket protection provision and the maximum fines for breaches. As the same State authority implements them both, variations in administration do not occur to any discernable degree. Bill Jeffery highlighted the need to bring the South Australian legislation in line with the Commonwealth as the main reform issue at State level (1998, pers.comm., 23 July).

Although the HA established the RSHI and penalties for intentional damage to a registered place, any alterations to a heritage place are controlled under the DA. Developments must receive authorisation from the appropriate planning authority. Therefore damage done by a person to a place in contravention of a Development Plan, is liable to prosecution under the DA. Only damage done in contravention of a restoration or no development/stop work order, or damage done to an archaeological or palaeontological site is punishable under the HA.
CHAPTER EIGHT

8. Comparison of Indigenous and historic cultural heritage legislation

When comparing how historic and Indigenous heritage is treated at the two upper levels of government, it is necessary to establish whether the legislation should be treated equally or with equality. To treat the sites equally would be an assumption that all sites are of equal value and also in need of equal protection. It is contended that this is not the case for heritage sites in South Australia or Australia, nor probably anywhere else in the world. There exists a wide diversity of sites, from fragile prehistoric rock art or shell midden sites, to respectively well preserved places of built heritage, such as Carrick Hill Estate (also exposed to high tourist visitation).

It is acknowledged that many places of historical significance are not as well managed and conserved as Carrick Hill and similar sites, for instance the many historic remains from early settlers homes and remnants of industrial activity that scatter the Australian landscape. It is also noted that such sites often do not require intensive site management and conservation plans beyond a preliminary standard. Management plans would change according to the numbers of visitors coming to the sites. Therefore, it can be argued that places with high visitation figures require more stringent maintenance, and that the funds gathered from entry fees facilitate better management practices (Jacobs & Gale 1994).

This view is substantiated when one looks at places on the RNE or RSHI. A high percentage of registered or identified sites are in townships, cities and suburbs, and as such they are generally very well maintained. More highly accessible places often benefit from better conservation management.

The following sections compare how Indigenous cultural heritage sites and objects are treated by Commonwealth and State legislation. It will look at how the sites and objects are protected, and if this protection is ‘comparable’. That is, are they treated differently for an acceptable reason? If not, is there any reason at all that they are treated differently, and should this be changed? Discussion of natural heritage will come up at times.
8.1 How is Indigenous cultural heritage treated by protective legislation at Commonwealth level compared with historic cultural heritage?

The five Commonwealth Acts that will be compared in this section were noted and discussed earlier (also see Appendix B). They all are able to have some affect on Indigenous sites and objects; only four of them currently do this. Four of the Acts may protect places of historic significance, including shipwrecks. Only three of them currently affect these types of places. One would anticipate from these figures that Indigenous cultural heritage enjoys more legislative protection due to the variety of statutes that can be used to do so. It will be shown that this is not in fact the case, and that historic heritage gains better protection under the legislation, and also by judicial interpretation of the Indigenous heritage laws. Politics can also play a large role in what does and does not enjoy the full protection afforded by the law.

An effective way to determine whether Indigenous and historic sites are treated comparatively is to look at the width of the definitions, the figures for sites that are represented on the various registers (where applicable) and the penalties that are in place for offences and as deterrents to future offenders. Finally, there will be some comparison of judicial interpretation to see whether the courts back up the protection available in statutory form. This may also illustrate the existence of flaws and loopholes that require some reform.

8.1.1 Discussion of Definitions

Under the AHCA, Indigenous heritage can be protected by meeting at least one of several criteria. Firstly, a site must form part of the cultural environment of Australia. It must also possess aesthetic, historic, scientific or social significance for present and future generations. There are eight criteria that expand upon these requirements; at least five of these criteria can be met by various sites and objects of cultural heritage value to Indigenous Australians. The other criteria would be harder for Indigenous heritage to meet, although it is not excluded from the definitions. Truscott reports that Indigenous heritage is rarely listed for aesthetic or technical importance, or for special association with an important person (1995:572). Instead, listing is usually for uniqueness or rarity, demonstrative value, scientific importance archaeologically or for importance to the prehistory of a region
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(Truscott:572). By comparison various types of historic heritage could quite easily meet all eight of the criteria.

The WHPCA uses the same definition for cultural heritage as defined by Article 1 of the *Convention for the Protection of the World Cultural and Natural Heritage*. Indigenous cultural heritage can meet the criteria under monuments (paintings, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features) or sites (works of man or combined works of man and nature, including archaeological sites). Such monuments must be significant for their contribution to history, art or science. Sites must be significant for their historical, aesthetic, ethnological or anthropological contribution. The deciding factor is that the listed places be of ‘outstanding universal value’.

World Heritage Listed places of cultural value in Australia include the Willandra Lakes Region (including Lake Mungo), where evidence for the earliest cremation in the world has been found and Uluru-Kata Tjuta National Park where there are outstanding examples of traditional human land-use and association with living traditions and beliefs of outstanding universal significance’ (DEST 1995:28).

Historic monuments and sites in Australia fit less easily into these definitions. In terms of historic monuments, the criteria of the *Convention* appear to be more relevant to historic monuments and sites in Europe and Asia. This is evidenced by sites that are listed in those places, such as the Acropolis in Athens and the Churches and Convents of Goa in India (DEST 1995:50-51). Australian listed sites are much more aligned with the natural criteria. It is also uncommon that sites are listed for both natural and cultural criteria.

The ATSIHPA is not relevant at all to historic cultural heritage. The criteria for significant places are broad, encompassing physical remains of human activity as well as significance for importance to Aboriginal or Torres Strait Islander traditions, customs or beliefs. It must be remembered, however, that this Act is for use as a last resort option and on the occasions that declarations have been requested, when faced with competing factors, the sites have not gained protection.
The *HS Act* (Cth), while being relevant to Indigenous heritage (and also able to protect PNG vessels) does not currently protect any vessels of Indigenous origin, so as such, whilst the option is available it will probably never be utilised. Criteria for selection of vessels as historic shipwrecks are not set out in the Act. The blanket declaration provision means that ships automatically become of ‘historic significance’ when they are 75 years old. The Minister may declare the remains of ships that are less than 75 years old historic, but there are no guidelines under the Act to aid in this selection. As such, it is not possible to discuss this Act in the capacity of definitions as to when Indigenous or ‘historic’ vessels may be considered to meet the requirements of the Act.

Lastly, the *PMCHA*, defines movable cultural heritage as objects that are of importance to Australia for ethnological, archeological, historical, literary, artistic, scientific or technological reasons. The objects, after meeting one of these criteria, must then fall into one of eight categories. Indigenous objects can fit into at least five of these categories, as well as specified objects of Indigenous origin being in Class A of the Control List. Evatt (1996) lists the Aboriginal and Torres Strait Islander objects that require permits in order to be exported. They include:

- objects relating to famous and important Aboriginal people or to other people significant in Aboriginal history;
- objects made on missions or reserves (but not made specifically for sale);
- objects relating to the development of Aboriginal protest and self-help movements; and
- original documents, photographs, drawings, sound recordings, film and video recordings and any similar records relating to objects in this category (p27)
Historic objects can fit into all eight categories, but only come under Class B of the Control List. The full list is given in the *Regulations of the PMCHA 1988*.

### 8.1.2 Figures for Indigenous/Historic site or objects that are protected under each Commonwealth Act

Table 6 set out below shows the national figures for sites and objects that are protected under each of the Acts. Only the AHCA, the HSA (*Cth*), and the WHPCA establish lists or registers of sites protected by the respective Acts. Data for the ATSIHPA, are available through the Evatt report, although the Act does not establish a Register. No such register or list is produced for the PMCHA, although details of permits or certificates for objects exported, imported and rejected are available from the Annual Reports on the workings of the Act.

<table>
<thead>
<tr>
<th>Name of Act</th>
<th>Indigenous</th>
<th>Historic</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Australian Heritage Commission Act 1975</strong></td>
<td>1183</td>
<td>14,632</td>
</tr>
<tr>
<td><strong>World Heritage Properties Conservation Act 1983</strong></td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td><strong>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</strong></td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Historic Shipwrecks Act (Cth) 1976</strong></td>
<td>0</td>
<td>&gt;5000</td>
</tr>
<tr>
<td><strong>Protection of Movable Cultural Heritage Act 1986</strong></td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Total no. of sites/objects registered/listed under Acts</strong></td>
<td>1187</td>
<td>&gt;19,632</td>
</tr>
</tbody>
</table>
As is illustrated by the table, the total number of registered or listed historic sites at Commonwealth level is more than ten times that of the historic sites. The figures for Indigenous sites on the RNE may be slightly misleading as a single ‘site’ may in fact by a combination of spatially distributed discrete sites, such as listings for Dreaming tracks (McBryde 1995:113). However, the figures would not be distorted to a great degree. It is interesting that, while Indigenous heritage may be protected under each of the Acts, historic heritage has a greater capacity for filling the majority of significance criteria and is more highly represented on the registers and lists. The RNE is probably the most comprehensive list as it does not prevent activities from taking place on non-Commonwealth owned National Estate properties, therefore is less likely to receive objections from the public than listings that will affect the way a private owner can use their property. It is also the only heritage register that combines natural, Indigenous and historic heritage.

8.1.3 Penalties that exist under the Commonwealth legislation

Three out of the five Commonwealth Acts set up maximum penalties for damage or destruction of sites under the Acts. The two that do not are the AHCA and the WHPCA. Unless a property is registered or listed under another Act that does provide for penalties to be implemented, listing in the RNE relies upon moral obligations from the public. The WHPCA allows for injunctions to be issued by the High Court or Federal Court, restraining a person from committing certain unlawful acts in World Heritage Listed or nominated areas unless they have the written permission of the Minister (s9, 10 &
The courts may also grant Interim Injunctions. The only penalties under the WHPCA are for breach of confidentiality and for inspectors failing to return identification cards. Table 7 lists the maximum and medium level penalties for breaches under the Commonwealth legislation.

**Table 7: Penalties under Commonwealth heritage protection Acts**

<table>
<thead>
<tr>
<th>Act</th>
<th>Maximum Penalties</th>
<th>Medium level Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Protection of Movable Cultural Heritage Act 1986</em></td>
<td>$100,000/5 years imprisonment (s9 (3) &amp; 14 (2))</td>
<td>$2,000 (s43)</td>
</tr>
<tr>
<td><em>Historic Shipwrecks Act (Cth) 1976</em></td>
<td>$10,000/5 years imprisonment (s13 (3)(a))</td>
<td>$1,000/1 year imprisonment (s14 (2))</td>
</tr>
<tr>
<td><em>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</em></td>
<td>$10,000/5 years imprisonment (s22 (1))</td>
<td>$500 (s22 (3))</td>
</tr>
<tr>
<td><em>World Heritage Properties Conservation Act 1983</em></td>
<td>$1,000/12 months imprisonment (s17 (c))</td>
<td>$100 (s17A (9))</td>
</tr>
</tbody>
</table>

The medium level fine of $500 under the ATSIHPA is for failing to report a discovery of remains (*not sites or objects*) that the person has reasonable ground to suspect are Aboriginal. In comparison, failing to report the discovery of the remains of a ship to the minister can receive a fine of up to $5,000. The only reasonable explanation for this difference is that ship remains may pose navigational hazards. Otherwise, it must be questioned why such a large difference in penalties exists between historic shipwrecks and the remains of an Indigenous person.

Are these penalties sufficient deterrents? It is possible to look at the penalties in terms of the monetary value of the item or site. A famous or rare work of art or carvings of Indigenous origin may receive a great deal of money at sale. Historic articles collected from a shipwreck may also have a high market value. Aboriginal remains? Probably not a *high value* commodity, and could not be sold on the open market, however does this mean that the deterrent should not be as high? This should not be the case. The importance of remains to Indigenous Australians would be sufficiently high to warrant high penalties for failing to report a discovery, not to mention the potential scientific value of the item to the archaeological community to aid in interpreting the prehistory of Australia.
Do the penalties actually deter people from breaching the Acts? For that information cases must be looked at. While figures for items that have been legally imported or exported under the PMCHA are available, as are details of items that have been refused permits, details of breaches of the Acts are not easily accessible. Very few prosecutions have occurred under the PMCHA since its enactment. One case is currently being pursued in Western Australia, and another case is under appeal (Nancy Zorbas 1998, DCAA, 30 October).

The HSA (Cth) has had several prosecutions, predominantly in Victoria. One case involved artefacts stolen from shipwrecks in NSW and South Australia, however the offenders were prosecuted in Victoria under the Commonwealth legislation (Jeffery 1998 pers.comm., 23 July). Victorian police seized numerous artefacts from divers’ homes in April 1992 after the owner of a wreck reported that various objects associated with the site were missing (The Age 14 April 1992:5).

A number of other fines have since been issued to divers for illegally removing artefacts from wreck sites in Victoria, two of which were handed down by virtue of the Navigation Act 1912 and the Crimes Act 1958 (Vic). No prosecutions have occurred in South Australia under the Act, although it was used to seize a brass signal cannon illegally taken from the SS Admella (1859) when negotiations with the custodian failed obtain it for loan. The cannon is now kept in a museum at Port MacDonnell in the State’s southeast.

The ATSISHPA has never been used to prosecute offenders. Likewise, no injunctions to prevent a breach have ever been made (Evatt 1996:106-107).

Two conclusions may be reached from looking at this information. One is that the monetary gain possible from the sale of items that are protected under the PMCHA and also the HS Act lures people to try to escape detection, and the penalties need to be higher to deter offenders. As such, it could be concluded that sites protected by the ATSISHPA are not targeted as a possible source for monetary gain, therefore breaches against that Act do not occur. Alternatively, it could be concluded that detection and enforcement levels are higher under the first two Acts, and lower for the ATSISHPA. In addition, the lack of protection actually afforded by the ATSISHPA due to the current status of only a
single declared site under the Act would substantially affect the number of prosecutions that could eventuate.

However, the number of prosecutions is in reality not particularly high, so education must have some affect on the figures. Therefore, it is determined that penalties may not be sufficient deterrents and the ATSIHPA has failed to provide adequate protection for sites of importance to Indigenous Australians.

8.1.4 Judicial Interpretation

The lack of judicial interpretation makes it difficult to compare the protection of Indigenous and historic heritage at Commonwealth level in this respect. The courts have at times been required to clarify some points under the Acts.

The Administrative Appeals Tribunal (AAT) and the Federal Court made an impact upon the AHCA and as such the RNE in a case in 1995 (see section 12). The judicial interpretation meant that the AHC may need to include other aspects when determining whether a site should be registered.

A case under the HSA (Cth) in Victoria failed due to a loophole in the legislation. The case against the defendants was dropped after their counsel established that the wreck they were being prosecuted for stealing from was declared an historic shipwreck three days prior to the proclamation of the legislation in that State (The Age 11 July 1990:15). No judicial interpretation of the Act itself actually occurred, and as such the Act remains unaffected by case law.

The refusals for permits under the PMCHA have been challenged in the AAT and as such some refusals have been overturned. Judicial interpretation has not affected the application of this Act.

The primary Act that seems to have been affected by judicial interpretation is the ATSIHPA. The relevant cases have been outlined above. The judiciary has expanded upon the roles of the Minister in determining applications (in Kumarangk) and also in removing the guarantee of confidentiality in regards to secret and sacred information (Broome Crocodile Farm Case). Although Justice O’Loughlin stated that the Minister should not be required to read every submission in a report under
section 10 (Tehan 1996:291), by overturning the Minister’s declaration on the basis that he didn’t read all the submissions implies that this is the view taken by the courts.

8.2 How is Indigenous cultural heritage treated by protective legislation at South Australian level when compared with historic cultural heritage?

State legislation for the protection of cultural heritage deals with criminal matters more than Commonwealth legislation, mainly stemming from planning and development laws and regulations. Three South Australian Acts will be compared in this section. Each of them deals with a different type of heritage, and they don’t overlap to any degree. Duplication of registered sites and objects is common between Commonwealth and State Acts, rather than between Acts from the same level of government. Only two of the Acts deal in any way with development. The other, the HS Act (SA), is aimed more at public ‘souvenir collecting’ and similar activities, as well as modern shipping activities. It does not regulate offshore development activities.

As in the previous section the width of the definitions in each of the Acts will be looked at, and compared to see how well each type of heritage fares. Each of the Acts establishes separate registers, and as such has different significance or heritage value criteria. These will also be compared, as will the figures for the sites that are represented on each register.

The penalties for damage and destruction of sites will be looked at. Only the HSA (SA) has ever prosecuted individuals for breaches of the provisions, and the results of these cases are outlined in Chapter Nine. They all relate to the same shipwreck site, the Zanoni. Therefore, a discussion of judicial interpretation of the Acts is not relevant. However, the lack of prosecutions will be considered.

8.2.1 Discussion of Definitions

In comparing the definitions in each of the State Acts, the aim is to establish whether the definitions of each type of heritage protected are of a comparable width, as was done for the Commonwealth Acts. Do any of them restrict what can be protected within each definition to an unacceptable extent? Are any of the definitions too broad? Should any of them be more exclusive?
Firstly, the HSA (SA) will be looked at as it is the only one that has not been repealed by a later Act, and is also the oldest piece of South Australian heritage protection legislation still in use. Some amendments were made in 1983. ‘Heritage’ itself is not defined within this Act. Neither is ‘value’ or ‘significance’. This is the same as in the Commonwealth legislation of the same title. In this way both of the HSAs are markedly different to other types of heritage legislation. However, in South Australia the Minister must declare all shipwrecks historic individually.

The definition for what can be considered Aboriginal heritage is broad and almost all encompassing. Evatt (1996:322) comments that the AHA has one of the broadest definitions of Aboriginal cultural heritage of any of the State and Territory laws. Tehan recognizes that the AHA was a change in the approach to Indigenous heritage protection. The Act not only allows for changes in Aboriginal tradition over time, but also ‘places control and management of Indigenous heritage with local Indigenous people in terms of deciding what constitutes heritage and who should make the decisions in relation to it’ (1996:258). The Australian Capital Territory Land (Planning and Environment) Act 1991 is the only other Act that accepts that Aboriginal traditions are not stagnant, continuing to change over time (Evatt 1996:322). Boyd (1996:297) also notes this change in emphasis in the more recent legislation towards more contemporary Indigenous values of sites.

The AHA applies to areas or objects of significance according to ‘Aboriginal tradition’ or of significance to Aboriginal archaeology, anthropology or history. Therefore the definition can apply to contact and post-contact sites. ‘Aboriginal tradition’ has a similar definition to that in the ATSIHPA, in that it includes ‘traditions, observance, customs and beliefs’ of the people that inhabited Australia before European colonisation (s3). However, the AHA definition continues on to say that it also includes traditions, observance, customs or beliefs that have evolved or developed from that tradition since European colonisation’ (s3)

Lastly, there is the HA, enacted in 1993. The criteria for listing are almost identical to the AHCA, except that they apply to places of significance to South Australian history. The criteria are also aimed more at cultural significance than natural significance, although the natural environment may be protected under some criteria. Heritage places can be protected for their:

- evolutionary importance;
• rare, uncommon or endangered qualities of cultural significance;
• ability to yield information to contribute to an understanding of the State's history;
• value as an outstanding representative of a particular class of places;
• demonstration of creative, aesthetic, or technical accomplishment or outstanding representation of construction or design techniques;
• strong cultural or spiritual association for the community or a group; or
• special association with the life or work of a person or organisation of historical importance. (s16)

Geological, palaeontological and archaeological sites may be protected under section 17 of the Act. Archaeological significance refers to historic places that can be studied using archeological techniques in order to answer historical research questions (DENR 1996, leaflet 1.9). Aboriginal places cannot be protected under this Act. Although not specifically excluded by virtue of any part, the Act is not designed to be used for their protection.

8.2.2 Figures for Indigenous/Historic site or objects that are protected under each Act

As each of the Acts establishes a Register that deals specifically with each type of heritage comparison between the number of sites represented to establish whether one type is 'favoured' by the legislation is not as effective as for the Commonwealth Acts. However, it will still give a representation how many of each type of site are protected by the Acts, which is a useful point by which to compare them.

South Australia has 54 protected shipwrecks on the Register of Historic Shipwrecks, but when wrecks in Commonwealth waters are also included, this figure jumps to 163 protected wreck sites. This is out of a total of 782 wrecks on the database, which includes wrecks that have not been protected by a declaration, and recent wrecks. Kenderdine (1997) distributes similar figures between the Commonwealth and South Australia, giving a ratio of approximately three in four of the historically recorded wrecks being located in State waters. This is despite the higher number of wrecks being protected by the Commonwealth legislation.
The RASO contains over 6000 recorded sites and objects, approximately 4000 of which are registered sites. If an application came up that would affect a recorded site, the Minister would be required to determine whether the site should actually be protected by the Act, and if so, register it as such.

The RSHI lists historical, archaeological and palaeontological sites. Of the total 2103 item registered, 2071 are listed as historic items (see Table 6 and Fig. 3). The remaining 32 listings make up the natural, archaeological and palaeontological listings.
**Table 8: Figures for sites protected under the various State Acts**

<table>
<thead>
<tr>
<th>State Acts</th>
<th>Number of registered sites</th>
</tr>
</thead>
<tbody>
<tr>
<td>Historic Shipwrecks Act (SA) 1981</td>
<td>54</td>
</tr>
<tr>
<td>Aboriginal Heritage Act 1988</td>
<td>&gt;4000 (+2000 recorded)</td>
</tr>
<tr>
<td>Heritage Act 1993</td>
<td>2103</td>
</tr>
<tr>
<td><strong>Total number of sites registered at State level</strong></td>
<td><strong>&gt;6157</strong></td>
</tr>
</tbody>
</table>

It appears from the figures above that Aboriginal heritage gains better protection than historic (including maritime) heritage at State level. There are several reasons that the figures could seem to give this impression. The first reason would be the extent of the resources, that is, the total number of sites extant. It must be noted that the majority of the population of South Australia reside in cities and towns, leaving much of the State undeveloped, or developed by rural and mining industries. Many Indigenous sites are located in remote outback areas, or along remote parts of the coastline. Not many still exist in developed areas, for instance in Adelaide, which was once the site of the summer and winter campsites for the Kaurna people (Harris 1998). For historic heritage, it is the opposite. Much of it is located within developed area like cities and towns, although substantial amounts have been lost by redevelopment.

Secondly, the *AHA* is the only one of the three Acts that operates on a form of blanket protection, where sites are protected until it is determined that they are not sites under the Act. Only recently have a series of regional surveys been undertaken to review the site cards held by DOSAA. Some of the site cards had separately listed small sites, when in fact they were each part of one large site. Therefore, the figures may be distorted somewhat. As such, the site cards are undergoing reform as part of the surveys. Also, some site cards are based on historical reports with no physical basis, and others are so outdated (recorded as early as the 1920s in some cases) that the site was destroyed long ago by development before protective legislation was enacted (Cooke 1998, pers.comm. 17 June). Knight reports that the surveys were actually done to reduce the number of protected sites. The outcome of the surveys has not been released (1998, pers.comm., 3 November).
So it appears from the figures that Indigenous heritage gains very good protection, historic heritage is well protected and maritime heritage does not gain very much protection. This is not reflected in the national figures, so how do the figures compare to those on the national scale? It is interesting to compare the number of registered sites in South Australia to the RNE, being the most comprehensive register. Maritime figures are compared against those for the Commonwealth Act, however there are some problems with this as the Commonwealth has the blanket protection, and the RNE also contains some historic shipwrecks. The figures are compared on Table 9 below.

Table 9: Comparison between Commonwealth and South Australian registered sites

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Indigenous</th>
<th>Maritime</th>
<th>Historic</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Australia</td>
<td>4000</td>
<td>54</td>
<td>2103</td>
</tr>
<tr>
<td>Commonwealth</td>
<td>870</td>
<td>5000</td>
<td>9294</td>
</tr>
</tbody>
</table>

This table brings up several interesting points. The number of Indigenous sites on the RASO is high in comparison to those on the RNE, mainly because the majority of known sites in SA with a connection to Aboriginal people are listed in the Register. This is not the situation for those on the RNE, where the significance criteria are narrower. It has already been explained why the maritime figures are so different. The historic heritage figures are also interesting. The number of historic sites on the RNE is only five times larger than for the RSHI. The number of registered historic sites on the RNE that are located in SA is approximately half of this number (1080). Another 990 sites are listed as indicative places (refer to Table 2). By adding the registered sites to those indicative places, the figures become very close (2070). The indicative places are often listed as such because their condition cannot be or has not been investigated, and consequently they are not registered.

Data are not available on the numbers of registered sites permitted to be destroyed for the HA or the HSA (SA), but they are available for the AHA. Cooke reports that in the last few years approximately four section 23 applications to destroy a site have been authorised, and the artefacts salvaged (1998, pers.comm., 17 June). Numerous applications under sections 12, 21 and 23 have been placed under the Act. At June 1998, there were almost 20 applications pending authorisation.
In 1996, four archaeological excavations were approved through the Act, in 1997 no archaeological excavations were applied for, and so far (October) in 1998, there have been three archaeological excavations, two of which were related to developments. Other archaeological excavations may have taken place during this time through the National Parks and Wildlife Act 1972 (SA), by applying for scientific research permits. However, it was not until 1998 that DOSAA came to an agreement with National Parks for applications to be verified by them (Cooke 1998, pers.comm, 19 October).

8.2.3 Penalties that exist under the South Australian legislation

All three of the SA Acts has penalties in place for damage or destruction of sites. The HSA (SA) has penalties that are lower than the HSA (Cth). Table 9 shows the maximum and medium level penalties for individuals under each South Australian Act; penalties for corporations are higher. The highest penalties are for damage to and destruction of sites. Failure to notify the Minister of the discovery or location of a site is subject to the maximum penalty under the HSA (SA) and the AHA.

<table>
<thead>
<tr>
<th>Act</th>
<th>Maximum penalties</th>
<th>Medium level penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Historic Shipwrecks Act 1981</td>
<td>$5,000/5 years imprisonment (s13)</td>
<td>$1,000 (s9,s10)</td>
</tr>
<tr>
<td>Aboriginal Heritage Act 1988</td>
<td>$10,000/6 months imprisonment (s20, s21, s23)</td>
<td>$2,000/3 months imprisonment (s22)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$2,000 (s24)</td>
</tr>
<tr>
<td>Heritage Act 1993</td>
<td>$60,000/15 years imprisonment (s30, s36-38)</td>
<td>$15,000/4 years imprisonment (s25-28: archaeo/palaeo sites)</td>
</tr>
</tbody>
</table>

Strangely, sections 9 and 10 of the HSA (SA) do not specify that the penalty is a maximum, therefore it may be assumed that the fine is the only one that can be imposed upon conviction. However, in practice it probably would not operate in this way. The HA imposes the largest fines out of all three Acts. The possible reason for the larger fines for the HA could be that many registered places are in
the city and therefore subject to applications for large-scale developments. This same reasoning could be easily applied for Aboriginal sites should those penalties be increased.

It is again necessary to question whether these fines are sufficient deterrents. Perhaps for the individual, they would be high enough to discourage breaches. However, for a corporation, $50,000 or $60,000 (in the case of the HSA (SA) and the AHA) would not be a large fee, especially in the instance of large-scale development. Time-delays for stop-work orders under both the AHA and the HA are better deterrents, as well as the adverse publicity that could be generated by the media in the event of substantial destruction to a site, whether it was indigenous or historic.

It is not relevant to look at cases under these Acts, aside from those that are discussed in some detail below. Prosecutions have never been attempted under the AHA or the HA. Whether this is through people abiding by the law, from lack of detection, or due to cases that are not watertight enough to warrant a court case, it is not known. Therefore judicial interpretation has not affected these laws either.

The level of protection is, however, intrinsically liked to the administration of the Acts. Funding, resources and employees with the time and ability to enforce the Acts contribute a great deal to how the Acts are administered and enforced. Details of these situations under each of the Acts are not accessible to the public.
CHAPTER NINE

9. Some Legal Cases in Historic Heritage Protection

Some recent legal cases have come up in the area of historic cultural heritage protection. In Adelaide, an important case, that only one author, lawyer Jamie Botten (1992) has deemed of enough importance to warrant comment, occurred in the field of historic heritage conservation, that of Gawler Chambers. Despite the lack of legislation in place to protect the site from destruction, the Government, in conjunction with numerous requests from the National Trust, managed to prevent demolition of the site (this will be discussed in greater detail later).

A second case of importance to built heritage protection was between the Advance Bank of Australia Limited and the Queensland Heritage Council (Advance Bank Australia Limited v Queensland Heritage Council P & E Appeal No. 169 of 1993). This case, whilst not in the jurisdiction of South Australia, has repercussions for heritage protection cases throughout Australia. The case saw the Advance Bank prevent their building, Ascot Chambers, at the corner of Edward and Queen Streets, Brisbane from inclusion on the Queensland Heritage List. Justice Row referred to ordinary dictionary terms in order to establish whether the building was in fact of historical value to Brisbane, to the extent that it ought to have the legislative protection of the Queensland Heritage Act. Through its interpretation of theses dictionary terms and holes in the case defended by the Heritage Council, the Court found that Ascot Chambers was not of sufficient value to warrant registration.

A third case is of importance not only to historic sites, but also to all places on the RNE. A case was put before the Administrative Appeals Tribunal by Mount Isa Mines Ltd (MIM) against the AHC for the interim listing of the Sir Edward Pellew Group of Islands at the Mouth of the McArthur River in the Northern Territory (Brennan 1996). MIM did not agree that the Islands met the criteria of s4 of the Act and the AAT found that the place did not meet the definition of National Estate under the Act. The Full Court of the Federal Court heard the appeal by the AHC against this decision in 1995 (Australian Heritage Commission v Mount Isa Mines (1995) 133 ALR 353; 60 FCR 456). The Majority decision held that if a place did not meet the ‘objective’ criteria for National Estate listing, then the Commission’s decision to Register a place could be reversed by the Courts. The Court was of the
opinion that the Sir Edward Pellew Group did not meet these criteria, and therefore were required to be removed from the interim list. The AHC subsequently appealed to the High Court, and the case is yet to be resolved.

Figure 4: The Sir Edward Pellew Group of Islands

This case has serious implications not only for places to be listed in the future but also to places already listed in the Register. Flood (1995:198) observes that monetary value, cost of preservation or political considerations are relevant to decisions regarding actions that may affect a place in the Register, ‘but are irrelevant to whether the place should be listed’. She goes on to state that the ‘sole criterion of listing places in the RNE is, and must be, their national estate significance’ (Flood 1995:198). This is reflected in section 24A of the Act states that upmost [sic] importance should be given to the significance of a place as part of the National Estate (this section was an amendment made in 1991).
However, the Federal Court decision requires that ‘other matters may be taken into account’ ([Australian Heritage Commission v Mount Isa Mines in Brennan 1996:319](#)). This means that the significance assessment process may be required to include impact upon various considerations that have no relevance to heritage value, such as planning and development.

**9.1 Case Studies**

Three cases will be reviewed below, each of which has relevance to one of the State Acts. Only one case has direct relevance to archaeology, however they all impact upon their respective pieces of legislation. The cases were chosen for their high profile.

**9.2 Gawler Chambers and South Australian history: Development conflict**

During the 1980’s proposals were considered by the Adelaide Development Company (ADC) to refurbish and redevelop the site of Gawler Chambers, a five-storey red-brick building built by the South Australia Company (SAC) in 1912-13 and situated on the corner of North Terrace and Gawler Place, Adelaide. ADC had owned the site since 1945 when they purchased it from the SAC, a major player in the history of the State. The SAC had owned the site of Gawler Chambers since settlement, and its headquarters had been based at the site before Gawler Chambers was built, and later in four rooms on the first floor of the building ([Adelaide Development Co. Pty. Ltd. v Corporation of the City of Adelaide and another, LSJS 457](#)).

Heritage listing for the site was considered on numerous occasions by both Adelaide City Council (the Council) and also by State Heritage (now Heritage South Australia). Gawler Chambers was investigated for possible inclusion in the City Register as part of the City of Adelaide Heritage Study undertaken in 1982 (LSJS 457 at 461; Botten 1992:291). The Minister for the Environment and Natural Resources (who was delegated with the power the list properties on the RSHI under the old [SA Heritage Act 1978](#)) reviewed Gawler Chambers for inclusion on the Register. The South

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8 The majority of information for this case study came from Justice Debelle’s reasoning from the Supreme Court case cited. The majority of information for this case study came from Justice Debelle’s reasoning from the Supreme Court case cited (the Register is in practice a list of items of City heritage listed in the Regulations of the City of Adelaide Development Control Act 1976)9 The majority of information for this case study came from Justice Debelle’s reasoning from the Supreme Court case cited.
Australian Heritage Committee advised the Minister not to register the property. In 1988 a review was again undertaken by the Council of the City Register, however at the time of the application which resulted in the Supreme Court action cited above, Gawler Chambers was still lacking heritage protection under either register.

Figure 5: Gawler Chambers 1914 (courtesy of Heritage SA files)

Between 1985 and 1990, ADC perused a variety of redevelopment proposals for the site, from refurbishment for use as offices to turning the rooms into serviced apartments. It was not until 1990 when an architectural firm approached ADC and proposed the demolition of Gawler Chambers and the construction of an eleven storey ‘all-suites hotel’ on the site that ADC found that they had an economically viable proposal for the site. ADC approved of the proposal, so in December 1990 the

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9 The Register is in practice a list of items of City heritage listed in the Regulations of the City of Adelaide
architectural firm submitted a development application to the Council to obtain planning approval to demolish Gawler Chambers. At the same time, the Council was again considering Gawler Chambers as a possible City of Adelaide heritage place.

The same day that the development application was lodged, the firm also lodged an objection to the possible listing. Numerous correspondences were exchanged between the Council, ADC and the architectural firm. The Council also forwarded the development application to the Minister for comment. In March 1991, the National Trust of South Australia requested that Gawler Chambers be Interim Listed on the RSHI. The National Trust also wrote to the Council asking them to wait until Gawler Chambers was Interim Listed before considering the development application. By May 1991, the Minister had decided to issue an urgent conservation order to prevent the development of the site and advised the Council that Gawler Chambers had also been placed on the Interim List.
The Court's decision was based upon the dates of the correspondence between the parties involved and whether the Council acted in accordance with the *City of Adelaide Development Control Act* 1976 (*City Act*) and the HA when it referred the application for development to the Minister. According to the *City Act*, the Council must not approve an application to develop a place that is an item of State Heritage without concurrence of the City Planning Commission (s42 (1)). However, it was argued by counsel for ADC that the application must be considered with reference to the law that was in force at the time the application was submitted, not when the Council chose to make its decision. At the time of the development application, Gawler Chambers was not on the Interim List and a conservation order was not in force. As such, according to the law that was in force at the time, if planning approval was received, Gawler Chambers could be demolished.

Therefore Justice Debelle concluded that the Council need not have regard to the fact that Gawler Chambers was Interim Listed in the RSHI nor that a conservation order had been posted. It was decided that the Council should hear and determine the development application, as granting of the approval would not constitute a breach of the law by the Council. By the end of the case, ADC’s position had changed and they no longer sought all the declarations initially requested of the Court.

One of the most interesting developments was yet to occur. Justice Debelle had commented during reasoning that if an application was to be affected by an alteration or change to the law that occurred between the time the application was lodged and the time that the Council made it’s decision, this would mean that the law operated retrospectively, and this in principle could not happen unless authorised by statute (LSJS 457 at 470).

The South Australian Government reacted to this decision and introduced the *Statute Amendment (State Heritage Conservation Orders) Bill* 1991. The Bill was passed in December 1991 and proclaimed in January 1992. This had the effect of acting retrospectively in that an application to develop an item of State Heritage, whether or not the item was listed at the time of the application, would be considered to be affecting an item of State heritage, thereby subjecting the developers to the
HA. Botten (1992:294) also notes that the legislation itself was able to act retrospectively and so was relevant to applications made before the statutory amendments were made, hence affecting the Gawler Chambers development.

Figure 7: Gawler Chambers 1998 (courtesy Heritage SA files)

Gawler Chambers is currently listed on the City of Adelaide Heritage Register and RSHI. ADC commissioned a conservation study of Gawler Chambers by architectural heritage consultants Swanbury Penglase in 1995. The study recommended that Gawler Chambers be conserved and restored as part of Adelaide and South Australia's heritage because it satisfies the significance criteria under State, Local and City of Adelaide heritage regulations and should remain on both the City Register and RSHI (Swanbury Penglase 1995:Recommendations). The study also submitted that the
‘philosophy for the conservation of Gawler Chambers should follow the recommendations of the Burra Charter’ (Swanbury Penglase 1995:40).
9.3 Kumarangk/Hindmarsh Island and Indigenous Heritage: Development conflict

The case of Kumarangk, or Hindmarsh Island, has received abundant commentary in scholarly journals and the media throughout the 1990s (Brennan 1997; Evatt 1997; Goldflam 1997; Hancock 1995; *Journal of Australian Studies no. 48*, 1996; Maddox 1998; Nettheim 1998; Ryan 1996; Tehan 1996). Tehan identifies the central problem of disputes over cultural heritage as the conflict of interests between developers’ property rights and Indigenous groups (1996:286). This was the issue at the core of the Hindmarsh Island case.

The developers, Binalong Pty. Ltd. proposed an expansion of their marina development on the western side of the Island. Approval was given on the condition that a bridge be constructed between Hindmarsh Island and Goolwa to facilitate access, which relies on a ten-car ferry (Ryan 1996:2). An Environmental Impact Statement (EIS) was commissioned by Binalong and released for public
comment on November 6 1989. The State government then requested that both anthropological and archaeological studies be carried out.

Between 1989 and 1990 Dr Rod Lucas and Ms Vanessa Edmonds undertook these surveys (Bell 1998; Ryan 1996; Tehan 1996). Edmonds identified 11 archaeological sites in the vicinity of the developments, five of which were newly discovered. The Lucas report was required to cover the marina area, and did not include the bridge development (Ryan 1996:3). He recommended that any potential developers should ‘consult directly with the [Ngarrindjeri]’ (Bell 1998:641). March 1993 saw the Minister for Transport, the District Council of Goolwa and Pt Elliot and Binalong enter into a binding deed to construct the bridge (Ryan 1996:4). The government then approved the bridge development, on the condition that DOSAA be contacted if any further archaeological deposits were discovered (Bell 1998:641). In 1993 a temporary access road was diverted to avoid damage to a registered site after discussions between the government, Indigenous representatives and the developers (Tehan 1996:291).

On October 8 1993 a public meeting was held where the Indigenous representatives announced that the developers had not consulted with the Ngarrindjeri according to the development agreement (Ryan 1996:4). In October 1993, the Ngarrindjeri sought protection of the area under the AHA (Bell 1998:5). In December 1993 the Aboriginal Legal Rights Movement (ALRM) and the Lower Murray Aboriginal Committee wrote to the Federal Minister, Mr. Robert Tickner, and expressed concern over the affect of the bridge development on the Aboriginal sites in the area. By this stage numerous protests (see figs. 14 & 15) had taken place at the development site by people opposed to the construction of the bridge, resulting in several arrests and considerable media attention (Tehan 1996:292).

Samuel J. Jacobs, QC, submitted a report of the “Enquiry into the building of the Hindmarsh Island Bridge” to the government in February 1994. Jacobs was investigating the financial and contractual arrangements regarding the bridge, and did not look into heritage issues (Ryan 1996:5). The report is yet to be made public (Bell 1998:642). Bridge construction began on October 27 1993, and halted on the 30th when bulldozers exposed a burial site. This resulted in the Department of Transport funding
Dr. Neale Draper, the State archaeologist, to do another archaeological report on the site (Ryan 1996:6).

The ALRM again wrote to Tickner in April 1994 after the SA Government announced that the bridge construction would continue. They requested an emergency declaration under section 9 of the *ATSIHPA*, claiming that the region was of mythological and cosmological significance to the Ngarrindjeri (Bell 1998:642). On May 3 the Minister for State Aboriginal Affairs, Dr. Michael Armitage, issued a section 23 authorisation under the State Act to damage or destroy any sites necessary to the minimal extent required to construct the bridge on (Bell 1998:642; Tehan 1996:292). Work resumed on the site on May 11, and the next day Tickner issued an emergency declaration. In June the emergency declaration was extended for 30 days.
The Draper preliminary report was received two weeks after Armitage’s section 23 authorisation. The main reason for the government allowing the development to proceed was that it had become contractually bound to do so with Binalong (Tehan 1996:290; Evatt 1996:300).

Draper’s report stated that Aboriginal sites existed on both sides of the proposed bridge site (Draper 1996) and that the Ngarindjeri were in total opposition to the construction of the bridge due to the threat of physical damage to foreshore sites. The report also referred to anthropological evidence of women’s sites in the channel between Goolwa and the Island (Evatt 1996:300).

On May 23 1994 Professor Cheryl Saunders was appointed under section 10(1)(c) of the ATSIPA to write a report on the ALRM’s December request to have the area declared an Aboriginal site under the Act. The Minister received the Saunders report, with an envelope containing details of ‘women’s business’ attached, on July 9 (Bell 1996:5). He made a section 10 declaration prohibiting a variety of activities...
activities on the site for 25 years, including the construction of a bridge, the next day (Evatt 1996:301; Tehan 1996:294). The Saunders report was successfully challenged by the developers in the Federal Court (Chapman & Ors v Minister for Aboriginal and Torres Strait Islander Affairs (1995) 133 ALR 74).

The court ruled that Professor Saunders’ public notices published on May 26 (Government Gazette) and May 28 (the Advertiser) were inadequate and lacked ‘specificity’ and that Tickner had not given due consideration to the representations attached to the Saunders’ report. Instead, he had relied upon the information given to him by a female staff member on what information was contained in the sealed envelope (Tehan 1996:295). Goldflam reports that as Tickner only received the ‘voluminous representations the day before he issued the section 10 declaration’, it was indicated that he did not give any consideration to them as is required by the Act (1995:13).

In May and June 1995, claims of fabrication of the ‘secret women’s business’ were made by several Ngarrindjeri people and broadcast by the media. The South Australian Government announced on June 8 that a Royal Commission (RC) would be held to establish whether the ‘secret women’s business’ was a fabrication (Maddox 1998:63). Maddox notes that the RC was held investigate the validity of one particular aspect of Tickner’s ban: the ‘secret tradition’. However, Maddox contends that the RC did not know and could not be told of the content of the secret tradition (1998:63). The view was widely held within and outside of Australia that the inquiry was in fact investigating the content and validity of the Ngarrindjeri women’s beliefs, rather than their existence, as the public were told (Maddox 1998:63).

Also on June 8 1995, Tickner announced that Federal Court Justice Jane Mathews would assemble a second section 10 report (Bell 1996:17). The report was tabled in Parliament in September 1996. It found that the applicants (the Ngarrindjeri women) had not provided sufficient information to support their application (Draper 1996:8). The women had chosen to remove the confidential information after the High Court decision in the Broome Crocodile Farm Case meant that the promised confidentiality
resulted in a denial of ‘natural justice’ to the developers (Draper 1996:8). Justice Mathews did not find that the women had fabricated their secret traditions.

The report of the RC was published on December 19 1995, and the same day 44 Ngarrindjeri lodged a second request with the Federal Minister for a section 10 declaration under the ATSIHPA (Bell 1998:2). The RC found that the women had fabricated the existence of secret traditions, as opposed to the Mathews Report (Draper 1996:8). This was despite evidence from amateur historian Betty Fisher, of oral information given to her in 1967 of the existence of ‘secret and important’ information to Aboriginal women relating to Kumarangk (Bell 1996:643). The Mathews Report was then invalidated by the High Court, who ruled that ‘Federal Court judges could not perform such functions’ (Brennan 1997:6). The case was then sent back to the Minister. Various groups are still protesting against the bridge construction which at present has halted (see figs. 9 & 10).
Several actions resulted from this case. One was the review undertaken by Evatt of the ATSIHPA and the other was special legislation to ‘cheat the Ngarrindjeri out of the chance to put their case without destroying their cultural traditions’ (Draper 1996:8). This is now the Hindmarsh Island Bridge Act 1997 (Cth) which specifically provides that the ATISHPA cannot be used to protect Indigenous sites ‘associated with the construction (or associated activities) of a bridge in the Hindmarsh Island Bridge area’ (Nettheim 1998:18). An application seeking a declaration that the Act was invalid was made, arguing that the changes to the Constitution made as a result of the 1967 referendum meant that the Commonwealth could only make laws for the benefit of the Aboriginal race (Nettheim 1998:18). The High Court avoided answering this by stating that the Bridge Act was actually an amendment to the ATSIHPA, and therefore a valid law (Nettheim 1998:18).

Nettheim argues that the Bill (as it then was) is inconsistent with the Racial Discrimination Act 1993 in that it discriminates against the Ngarrindjeri in comparison to all other Indigenous groups in Australia. The Attorney-General’s department argues that the Act is a special measure under the RDA, and even if it were not, it is not preventing the Ngarrindjeri from gaining protection for their heritage, just not in the Hindmarsh Island Bridge corridor (1997:7). Either way, the Bill was passed in 1997, and the development is no longer subject to the provisions of the ATSIHPA.

Bell (1998:2) observes that the circumstances surrounding the Kumarangk case are a reflection of the same dilemma that has continued to occur with site protection in Australia. She comments that while the ‘rules governing heritage applications may be specified by law, the processes by which and the conditions under which a declaration is sought have become increasingly politicised’ (Bell 1998:8). It was not within the limits of this case study to review all the actions by government officials during the course of the case. However, many other highly political actions took place, resulting in one resignation, and calls from some members of the public for two others (Bell 1998:642).

Womersley (1995:9) commented on government reactions to conservation issues at a series of heritage conservation workshops in 1986 run by the AHC. Others have also noted similar points
(Allom 1995; Dobb 1995; Sullivan 1993). Womersley’s statement, whilst referring to State legislation, accurately reflects the Commonwealth situation also and is relevant to the Gawler Chambers case as well as Kumarangk. He says that ‘[the States] go along with conservation if it suits them and if it does not suit them they just enact the necessary legislation to enable to project to proceed regardless of the importance of conservation issues’. As has been illustrated, in the Gawler Chambers case the South Australian Government stepped in to aid the conservation of heritage, whilst in the Kumarangk case, the Commonwealth government enacted legislation to allow the bridge development to proceed.
9.4 Zanoni protected zone: fishing prosecutions

The Zanoni was one of a number ships wrecked in Gulf St Vincent during the 1800's. Built in 1865 in Liverpool, England, she was a 338 ton three-masted iron and wood barque. In 1867 the Zanoni arrived at Port Adelaide carrying a load of sugar from Mauritius. She encountered a freak storm a short while later whilst returning to Port Adelaide from Port Wakefield with extra cargo before departing for Britain. No lives were lost, and the search for the sunken vessel was abandoned after just three days. It was not until a fisherman took a pair of divers to the location in 1983 that the Zanoni was positively identified: the divers reported the find to the Minister and received a reward under the HSA (SA) (Jeffery 1985:4).

The area around the Zanoni was declared to be a Protected Zone under the Act. It remains South Australia’s only Protected Zone. Other protected zones Australia-wide include the Pandora, Yongala, Aarhus and Foam (Qld), Zuytdorp (WA), Emden (Cocos Islands), Duckenfield (NSW), Cato and Porpoise (Coral Sea Territory) and a Japanese submarine I-124 (NT) (Staniforth 1998). The Zanoni
Protected Zone is a 100 hectare area and lies off the town of Ardrossan on the York Peninsula. The vessel lies in almost 20 metres of water and is largely undisturbed.

The Protected Zone signs have been improved over time. Originally a buoy identified the Zone, however, it was not until the person was within the zone that the notice prohibiting their presence without a permit was visible.

The first charges for offences against the regulations of the HSA (SA) were dropped as it was established that the wreck site was not accurately located, leaving the vessel itself outside of the area that had been declared (Jeffery 1987:18). This problem resulted in the first charges laid for offence against the Act being dropped. Signs were erected at three popular boat ramps at North Haven, Ardrossan and Port Vincent. These indicate the location of the designated Protected Zone and warn people taking boats into Gulf St Vincent that they are prohibited from entering the zone without a permit issued by Heritage SA.
In the 17 years since its operation, only 10 prosecutions have occurred under the HSA (SA). All of them have been for people fishing within the Zanoni Protected Zone without a permit (Jeffery 1998). As such, the prosecutions have actually been issued through the Regulations and not the Act itself (Staniforth 1998). Staniforth, quoting Gurney (1994), also comments that the major difficulties with enforcement of shipwreck legislation is the inability to prove that an offence has occurred beneath the sea without direct observation by an authorised inspector (1998).

A second disadvantage of the legislation is the unwillingness of the Courts to impose a substantial fine. By 1987 only 5 prosecutions had been successful, all with fines between $97 and $117, including costs. The defendants had all pleaded guilty to fishing within the Zone without a permit. By 1998, the figures for prosecution had doubled, however it was only the most recent prosecution that had more than a fine imposed when the catch of fish from the offender’s boat was seized (Jeffery 1998:16). The value of the catch was not published.
In order to provide an alternative fishing location, the Department of Fisheries sunk a 30 metre long barge south of the Protected Zone to create an artificial reef in 1984 (Jeffery 1985). Fishing boats can damage the *Zanoni* shipwreck site when their anchors catch on the hull, often tearing away the protective copper sheathing (see fig. 12).

It seems that prosecutions under the *HSA*’s will continue to occur until individuals learn to appreciate the value of this historical resource. This highlights the need for education of the public, particularly the fishing community and recreational divers. The Amnesty held in 1993 for holders of historic relics resulted in 542 artefacts declared to the Maritime Heritage Unit of Heritage SA. Australia wide, 3,711 relics were registered under the Act, with a total of more than 19,000 individual items. At the time of Kenderdine’s study, the WA branch still had 200 items waiting to be processed (1997:16). Green (1995:41) reported that several previously unlocated shipwrecks were reported to the Commonwealth and State governments during the amnesty. Despite these figures, holders of items are still coming forward with their relics, and a number of known private collections were not declared (Kenderdine 1997:16).

As recently as June 1998, an article was published in SA Angler magazine by a member of the fishing community who had gone as far as researching historical resources in order to establish the regions where historic ships had been wrecked so that he could find good fishing spots! He was particularly looking for ‘wooden hulled ships laden with cargo’ sunk during the late 19th century and the early 20th century (Watson 1998:5). These wrecks, such as the *Zanoni*, are especially vulnerable to damage from anchors and fishing lines. Community education is required to dispel the still apparent disregard for the archaeological, historical and scientific significance of the shipwreck resource.
9.5 How do these cases reflect the position of cultural heritage protection legislation?

Finally, it must be questioned just how much protection is afforded in reality by Commonwealth and South Australian heritage protection legislation, and why this protection is subject to change. Attention should be paid in particular to the case of Gawler Chambers in comparison to the case of Kumarangk. These cases both occurred at approximately the same time, the early 1990s. It should be noted that, although the government did not change during the Gawler Chambers main case (as opposed to the period of the series of investigations to list the building), a change of government at South Australian level did occur during the Kumarangk case, but without altering the decision to build the bridge.

Goldflam (1995:14) points out that party politics has a hand in decisions made at Commonwealth level regarding the States. He argues that, according to all cases involving Indigenous heritage sites, Commonwealth Labor governments oppose decisions of non-Labor State and Territory governments (Goldflam 1995:14). Although a valid point, especially in regard to a WA case (which Goldflam argues Mr. Tickner did nothing about until the WA Coalition was elected), Goldflam’s argument does not hold up particularly well for the Hindmarsh Island Bridge Affair, due to the change of government from Labor to Liberal during the case, just as the Federal Minister received the first application from the ALRM (Tehan 1996:291). This may be seen as part politics being played by the LRM. It is contended that in fact it was simply the way the circumstances occurred.

Unfortunately, the reality is that heritage protection appears to balance on the whims of the government of the day. The South Australian Government chose to step in at an opportune moment in order to aid the preservation of Gawler Chambers. One wonders whether the close proximity of the site to Parliament House and the site being of historic significance had anything to do with the decision. Also, the government itself was not financially involved in the dispute, as was the case for Hindmarsh Island. So, economics also play a part in more than simply resources for administration in heritage protection decisions.
CHAPTER TEN

10. Conclusion

The main aim of this thesis was to compare how legislation operating in South Australia dealt with Indigenous and historic cultural heritage, and whether inadequacies in the legislation can or do have an affect upon the future of the discipline of archaeology. Importantly, the future of archaeological research relies upon the present protection of cultural heritage resources so that sites can be studied in the future. This is particularly relevant in light of the increasing advances in archaeological technology, for instance dating methods and site survey equipment. However, such advances and equipment were not covered in the thesis due to word limit and time constraints: the line must be drawn somewhere. It was assumed that such advances would continue to occur, perhaps even to the point where site destructive techniques that are used today will be mostly unnecessary in the future.

The legislation was viewed from the perspective of an aspiring archaeologist rather than that of a lawyer. Five Commonwealth and three South Australian statutes were chosen for their current relevance to the protection of sites and objects of heritage value. The study sought to determine what types of heritage were able to gain protection and whether the Acts actually fulfil their aims in protecting these resources from the damage and destruction that can result from human interaction.

Chapter Two began by looking at the legal history of cultural heritage protection in Australia. Chapter Three reviewed Australia’s international obligations concerning heritage, from the UNESCO and ICOMOS charters to treaties such as the ANCODS Agreement.

The role of legislation in the protection of heritage was reviewed in Chapter Four, with attention to the guidelines established by statute. This is where the relevance to archaeology came in, by referring to site significance and management. Chapter Five looked at eight pieces of cultural heritage protection legislation implemented by both Commonwealth and South Australian governments over the last 25 years. As this study focused on the implementation of heritage protection in South Australia, it was necessary to outline the relevance of the Commonwealth legislation to this State in Chapter Six.
The major comparisons were in Chapters Seven and Eight, where Commonwealth and South Australian legislation were compared on basic areas such as the number of sites held in registers and the width of the definitions of what could be protected by the law. It was found that the figures for sites represented on the registers were quite different at Commonwealth level as opposed to State. While the RNE has broad criteria and no criminal sanctions, it favours historic heritage over Indigenous and natural. It is the only register that combines all three types of heritage, and yet it lacks the ‘teeth’ to prevent sites of national estate value from damage and destruction. It does not reflect the ‘value’ of the National Estate. It was also discovered that the number of Indigenous sites protected were greater than historic sites, but it is argued that the reason for this is that the total resource is substantially higher, and that the registers still do not accurately reflect the total number of sites.

Finally, in Chapter Nine, three South Australian sites were looked at in detail for their representation of how the State’s heritage protection legislation operates in practice. They were each chosen for the controversial nature of each site. Perhaps the Zanoni prosecutions may be perceived as less controversial than the Kumarangk and Gawler Chambers cases, however it did illustrate that the judicial implementation of the legislation requires some reform. Possibly the most interesting aspect of the shipwrecks legislation is that after 17 years the public is still disregarding the value of this resource, evidenced by Mitch Watson’s article in *SA Angler* (1998).

The three cases that were investigated all occurred during the same era: the late 1980’s and early 1990s. The outcomes of Kumarangk and Gawler Chambers were markedly different. It can only be concluded that the reasons for this are not only highly political, but are pivotal to this study: Indigenous heritage does not receive adequate protection from the law, in spite of the legislative sanctions that are implemented to do this.

Unfortunately, the politics surrounding these case studies are based very much on the bureaucratic decisions that take place behind closed doors. The public including academics are not able to access this information, and as such providing evidence to substantiate these assumptions is difficult, if not impossible. Whilst it was realised when the research began that cultural heritage protection is very
much at the whim of bureaucratic decision-making, what was not realized was how difficult it would be to show this. Hence the case studies must remain the major evidence of these processes.

10.1 Legislative reform: what needs changing, and will it happen?

What the case studies do show are several important things. One is the need for legislative reform. Each piece of legislation has flaws, some of them more major than others. Like all legislation, it is often not until a case makes it as far as the courts that the cracks appear. It has been comprehended from this research that in order for all cultural heritage sites to gain a minimum standard of protection, they must in some way be incorporated into the same Act. The statute that is most able to perform such a function in South Australia is the DA. This does not mean that the other legislation should be made obsolete. On the contrary, they must stay in place perhaps to be developed to a standard where they aid in identification and management of cultural resources, rather than dealing with the day-to-day list of development application forms and other minor functions. Such a function is not even specified in the AHA. Ignorance of legislation or sites is not an available line of defence for breaches of other types of legislation, but this is the case for many of the cultural heritage protection Acts such as HSA’s, and the AHA (see Dobb 1995; McBryde 1995). This is an area that must be reformed.

Commonwealth Acts

There are several areas that require reform in each Act. Firstly, Commonwealth entities should be obliged to take up the AHC’s recommendations on Commonwealth national estate properties under the AHCA. The AAT would be able to be accessed in the case of disagreements with any recommendations. Secondly, a balance needs to be found in the RNE between natural, Indigenous and historic heritage; at present there is a bias towards historic heritage. This could be remedied by implementing an education program for Indigenous Australians about the national value of their sites, and encouraging them to nominate their sites for the RNE.

The AHC is currently working towards reducing the number of sites in the RNE, to focus on places of national value. As was identified by Brain Samuels in section 7.2, this may be a disadvantage to the smaller States and ultimately will not aid in the preservation of heritage places.
The *HSA* (Cth) requires some reform simply because it has not been amended greatly since it’s introduction. The reward system under s18 should be removed. By this stage the public should be required to abide by the law, as they are any other heritage legislation. Secondly, as noted by Jeffery (1998:22) it is necessary to shift the focus of the Act to site management rather than discovery. Community involvement and education should be encouraged, however this would need to be done through the delegated authorities.

World Heritage Listed properties in Australia would benefit from ‘real’ protection by the *WHPCA*. In order to preserve these places for the future, certain destructive activities, such as large-scale mining, should be prohibited by blanket declaration. Places of cultural and natural significance, like Kakadu National Park, are unique and at risk of irreparable damage due to industrial activity and associated activities. Allowing these activities to take place in World Heritage Listed areas is to the detriment of all races throughout the world. These issues should be dealt with by the legislation to fulfil Australia’s obligations as signatory to the World Heritage Convention.

The *ATSIHPA* does not achieve its stated aim of the preservation and protection of places, areas and objects of significance to Aboriginal people. Throughout its operation, particularly during the 1990s, it has failed to do this, evidenced by several cases. The case of relevance to South Australia, *Kumarangk*, has been one of the most controversial under the Act. The *ATSIHPA* should be able to be used to prevent damage and destruction to Indigenous sites in Australia.

Technicalities and judicial intervention have resulted in the *ATSIHPA* being ineffective. Unfortunately, these are dilemmas than are difficult to address in legislation. Politics has played a major part in cases under this Act, however it is nearly impossible to prevent political agenda from having an affect.

A banner held by protestors displayed one of the best suggestions that could come out of the *Kumarangk* case. It stated that the Government should not enter into financial arrangements with developers in order to prevent internal bureaucratic conflicts. This, obviously, must be dealt with at higher levels of government.
The main areas that require reform in the *PMCHA* are monetary and age thresholds of certain heritage objects. These are dealt with by the Control List in the 1988 *Regulations*. Several changes are currently being drafted after a review by the National Cultural Heritage Committee summarized in the Department of Communications and the Arts 1997-98 Annual Report (1998:6). Age thresholds will be dropped to 30 years for most objects and monetary thresholds will be altered due to changes in market values (DC&A 1989:6).

**South Australian Acts**

As the *HSA* (SA) is almost identical to the 1976 Commonwealth Act, areas requiring reform are the same and have been outlined above. However, some reforms are needed in this Act to bring it in line with the Commonwealth Act. Blanket protection should be implemented, which has already been done in NSW and Victoria. The regulation of offshore development under the Act to prevent damage to sites by mining and fishing industries is also an essential area for reform. This Act is the only South Australian Act that has been reviewed in this thesis that does not currently perform this function.

While the *AHA* appears to give adequate protection to Indigenous sites and objects, the effectiveness of this Act seems to rely on its administration. While consultation clauses are provided, Ministerial discretion can still override any recommendations. This is not appropriate for places of spiritual significance to Aboriginal people, where damage can result in harm to Indigenous people. The Minister should be required to adhere to recommendations given by Aboriginal representatives.

Local Heritage Committees should be established by the Act, and these Committees should be responsible for nominations to the Aboriginal Heritage Committee established by s13. The Minister should not play a large a part in this process, as is currently the case. The *DA* should incorporate parts of the *AHA* so that representations by Indigenous Australians must be considered earlier in the development application/approval process. This may serve to eliminate some of the current problems that are the result of the ‘afterthought’ of heritage, for instance the report commissioned to Dr Rod Lucas in the *Kumarangk* case. This Act also requires penalties to be increased as a reflection of the significance of Aboriginal sites.
Finally, the only Act which appears to operate quite well is the HA. It protects many places of historical significance from any development that may damage heritage value. Penalties are high, reflecting the community’s value in these items. The Act is incorporated into the DA to an extent. It would be desirable to increase the interaction between all three South Australian heritage Acts to encourage a more even standard of protection.

10.2 Is integration of heritage laws at federal level desirable or necessary if at all possible?

Integration of the numerous heritage laws has been discussed at various times since their inception (Boer 1995; Dobb 1995; Flood 1989; Sullivan 1995; Ward 1983). Usually this integration is looked at on a Commonwealth level, due to the way federal system of government operates in Australia. Although these academics, along with many others, have discussed the need for an integrated system for heritage protection, some have questioned the desirability of integrating these laws due to the inherent differences in the nature of the types of heritage (Boer 1995; Jeffery 1998; Sullivan 1995).

The reasons for integration are that there are many variations between heritage laws through Australia. Integration would require legislation at Commonwealth level. Without co-operation from each of the State’s and Territories, this is un-constitutional; the portfolios of environment and planning reside with the State’s. The AHC has found a possible framework to rectify this problem (1998). They recognise that Australia’s cultural heritage policy is fragmented, and that many duplications and omissions occur (AHC 1998:4). They suggest minimum level significance criteria throughout Australia; Evatt (1996) makes this same suggestion in relation to Indigenous sites. Whether minimum standards could have a legislative basis is for lawyers to decide. Such an arrangement would be highly desirable.

When figures for South Australian Indigenous sites (4,000 registered under the AHA) are compared with NSW (32,000 registered under the New South Wales National Parks and Wildlife Act 1974), it is seen that some integration of heritage laws at Commonwealth level is necessary. However, it is concluded that before this integration can occur, there must be integration between Acts at South
Australian level. Therefore, reform must first take place at State level to bring the Acts to a minimum standard of protection for historic, Indigenous and maritime heritage sites.

10.3 Research Problems

There were two main areas that created research problems with this thesis. The first area was access to database information. For instance the RASO is unable to be accessed without permission from the Indigenous groups. While this is a perfectly valid requirement, it was therefore difficult to look at the types of sites that are protected under the AHA. This would have been a major point of comparison between the Acts. The RNE presented the same problems, although general locations and descriptions (e.g. engraving site/painting site/mythological site) were listed on the RNE Database.

Many databases, including the Register of Historic Shipwrecks, the RASO and the RSHI proved difficult to obtain information from. This was mainly due to technical problems with the programs that are yet to be resolved, and the prolonged processes involved with updating them.

The second problem area was that of bureaucratic administration. It is very difficult to gain information on the administrative operations of the legislation without being part of the government departments. Also, Acts that look as though they provide very good protection, may not due to several factors, such as political will and the administrative resources to implement the legislation. These things can cause a statute to be ineffective, despite excellent provisions for heritage preservation.
CHAPTER ELEVEN

11. Future Research and Recommendations

There is potential for further research into the area of cultural heritage protection legislation in South Australia. However, this should be undertaken by someone with greater knowledge of the law and its operations than by an archaeologist. As the law is always changing, it is necessary for archaeologists and other cultural heritage professionals to remain up to date with the laws that govern what they do.

It is recommended that legislation be an integral part of the teaching of archaeology at Universities where students are expected to obtain their degrees and go out and work in the field. An appreciation of the sites is necessary beyond a purely research-based approach. Archaeology can contribute in many ways to the significance and ultimately the protection of a site. It should be used to its fullest potential to aid in the preservation of cultural heritage sites for the future.
APPENDIX A: Internet Sites

There are several web sites that contain up to date information on each of the Acts that have been covered. Where applicable, they may contain access to database information. Some of these sites are in the process of being upgraded, so access may be limited.


Department of Communications and the Arts (information on movable cultural heritage) homepage available at http://www.dca.gov.au


ICOMOS information available at http://www.icomos.org

Register of the National Estate available at http://www.ahc.gov.au

World Heritage List available at http://www.cco.caltech.edu/~salmon/world.heritage.html

UNESCO homepage available at http://www.unesco.org
APPENDIX B: Statute Data: legislation affecting places and objects of historic significance

Australian Heritage Commission Act 1975 (Cth)

Important Sections

This Act was the first piece of specific cultural heritage legislation to be written by the Commonwealth. It established the Heritage Commission as a corporation that, whilst originally funded by the federal government, is able to accept gifts, devises and bequests (para 1 (1)(b)) and to operate as any other corporation may operate. It has a constitution that requires it to have at least four Commissioners with relevant qualifications or experience in a field related to the functions of the Commission (ss12 (4)). These fields are not specified, but one must assume they encompass anything from architects and historians through to environmental conservationists and archaeologists.

Although many places of heritage value are listed on both a State National Trust Register and the RNE, some may not be listed on both, even though the RNE actually relies upon the National Trust Register for most of its items (Pearson & Sullivan 1995:50). National estate properties may also be listed on State Heritage registers (as is the case in South Australia) or local government heritage lists, although these lists contain non-RNE listed places as well. The RNE is currently under review (Samuels 1998, pers.comm., 27 June).

The Act requires the Commission to notify property owners of an intention to list their property on the Register and to allow time for any objections to be made (S23 and 23A). The same is required if the Commission intends to remove a place from the Register (s24). This is a unique requirement that should be more widely used as this is not required under either the AHA 1988 (SA) or the HA 1993 (SA). These Acts simply specify the need for public notification.

The Commission is required to assess the significance of the place before registration, and cultural significance can be part of the assessment. Significance itself is not defined, but can include aesthetic, historic, scientific and social significance in terms of the natural or cultural environment (ss4 (1)). References are made to ‘importance’, to any uncommon, rare or endangered aspects of Australia’s natural or cultural history (para. 4 (1A)(b)), to the potential to yield information that will contribute to an understanding of Australia’s natural or cultural history (para. 4 (1A)(c)) and to a strong or special association with a particular community or cultural group (para. 4 (1A)(g)). Archaeological sites or objects can fit into all of these categories, as well as others (see AHCA ss4 (1)).

Part V of the Act deals with the protection of the National Estate. Although certain requirements must be met through the Environment Protection (Impact of Proposals) Act 1974, a loophole is built into the Act. It states that all government departments and authorities must not take any action that will adversely affect a place on the Register, unless there is no feasible or prudent alternative (s30). It provides for action to be taken after the Commission has been notified of the proposal and given time to comment (ss30 (3) and (3A)).

The National Estate Grants Program is administered under Part VA of the Act. This is an addition that was made in 1991, transferring the administration of the program from the Department of Arts, Sport, the Environment, Tourism and Territories (DASETT) to the AHC where administrators who are familiar with heritage places can implement it to its greatest capacity on a national level (Womersley 1995:84). Any State, internal Territory or approved body may apply for a grant under the Act (s31A). As at October 1998, the administration of the Fund is again under review.

Penalties

Commonwealth departments and authorities are obliged to prevent adverse effects to places on the Register unless there is not a feasible or prudent alternative (s30). Despite this apparent control, there are not any criminal sanctions under the AHCA, which would be pointless in any case because the Act does not apply to the general public. So although a place may be registered, the Commission relies on the morality of those not sanctioned by the Act, such as State departments or authorities, owners and developers to ‘do the right thing’ by the National Estate. The Act has been praised previously by numerous heritage professionals, especially in papers from a conference that was held.

10 defined in s3, interpretation
in 1986 (Sullivan 1995). However, many of the authors failed to acknowledge that, while the Act itself is comprehensive and well written, it does not have any ‘teeth’; this topic seems to have been consciously and carefully avoided. The AHCA only provides a basis from which other heritage legislation can cover the areas that the Act does and also put in place criminal sanctions for breaches of them.

The AHCA does not specify what action may be taken if the Commission concludes that a proposal will have an adverse affect on the significance of a part of the National Estate (that is not protected by any other legislation) but the Commonwealth department or authority maintains that it has no feasible alternative. This seems to imply that there is not a course of action available to take. The department or authority is only required to do the most minimal damage to the property that is possible in the circumstances. Ray Tonkin, the Director of the Historic Buildings Council of Victoria, recommends that section 30 be amended to compel Commonwealth entities to follow the advice of the AHC (Lennon 1996:24), effectively removing the loophole. This recommendation has not been taken up at this stage.

Although the Act was written with the intention of only applying to Commonwealth agencies and authorities, it has the opportunity to be an exceptional piece of heritage protection legislation if it were to be amended to apply to States, owners and developers as well. The difficulty with this option is that it would require either a change in the Constitution to give power over the environment to the Commonwealth, or agreement between the States to hand this power to the Commonwealth, similar to what occurred for the HSA (Cth). Neither option would be easy to achieve. With the AHC now having a high profile in the heritage conservation profession it may be possible to make it an all-encompassing Act with penalties in place for any breaches that are made. Alternatively, the Act could be used as a starting point for such a piece of legislation.

**Historic Shipwrecks Act 1976 (Cth)**

**Important Sections**

This was the Commonwealth’s first attempt at a criminally sanctioned piece of heritage protection legislation and they covered almost every area possible. Much thought seems to have been put into the writing of the Act even though it was written and passed through Parliament in a short time span (seven months) (Jeffery 1998:6-7). Some areas had already been covered by the Western Australian legislation, so the Commonwealth had a good starting point.

The definition of an ‘historic shipwreck’ is interesting. It does not require that the remains of a ship must have come into existence due to a wrecking event, just that the remains of the ship are of historic significance (ss5 (1)). Therefore, it seems that remains of abandoned ships and hulls that have had secondary or tertiary purposes such as breakwaters can be protected. This also applies for relics. The Act also covers remains that are not submerged and relics that have been removed from the sites (s4A & s5). Papua New Guinea and Dutch shipwrecks and relics are also protected. Section 4A cover blanket declaration for remains that are at least 75 years old. It doesn’t protect any ship that is 75 years old, it must be 75 years since the wrecking or abandonment. Section 12 provides for a Register of Historic Shipwrecks to be maintained. The Minister can provisionally declare a shipwreck to be historic, and this can be in force for up to five years (s6), without the wreck ever being fully listed.

A person may not enter a declared Protected Zone without a permit (s7), but there are defences available for breaches of this section. Certain other prescribed actions and activities, such as trawling or diving (or even carrying equipment that can be used for such purposes) are prohibited under sections 13 and 14. People who find previously unknown sites are required to notify the Minister in charge ‘as soon as practicable’ (ss17 (1)), however defences are also provided for a breach of this section (ss17 (2)).

If the Minister becomes aware that an article is held in the possession of a person, that person is required to inform the Minister of the exact location of the article, including the transfer of possession or custody (s10). These terms are interesting because it makes it clear that declared historic articles cannot actually be ‘owned’ by anyone except the Crown. The Minister can also give directions to the custodian to undertake some form of specified action. These actions can include conservation, exhibition or delivery of the article to a particular person or place (11).
An anomaly of this Act (and also the Historic Shipwreck Act (SA) 1981) in comparison to other heritage protection legislation is that it allows for rewards to be paid (in a variety of forms) to the person who is the first to notify the Minister of the location of a previously unknown shipwreck or relic that results in a declaration being made. This clause caters for two things. Firstly, for the fact that the Commonwealth government had effectively removed the possibility of salvage rights after one year had passed and they had not been claimed. The Common Law concept of salvage allocated rewards to salvors for what was saved (Prott & O’Keefe 1984:117). Secondly, rewards may also have been made available to allow for the losses from the previously (perceived) ‘legal’ trade in ‘treasure’ (artefacts) that were stolen from shipwrecks when the Commonwealth claimed all ownership in such articles itself. In total, since 1990, $55,000 has been paid in rewards under the Act, with the largest reward being $30,000 (Jeffery 1988:11). These rewards went to 46 individuals (Jeffery 1998:11).

Other Acts contain compensation provisions to cover this area, but the HSA (Cth) allows for compensation for the Commonwealth’s acquisition of property as well as the rewards (s21).

Sections 22 allows the Minister to appoint inspectors and s23 to 25 identify the powers of the inspectors, such as seizure, forfeiture and powers of arrest. The effectiveness of inspectors under all of the Acts will be discussed later.

The Register of Historic Shipwrecks is established under section 12. In practice, this is actually a register that contains lists of wrecks, relics and protected zones. A National Shipwrecks Database has been compiled by the various bodies delegated the task of implementing the Act in each State and Territory. The database contains 6176 shipwrecks, with approximately 5000 of these being protected sites, and 11 protected zones Australia-wide (Jeffery 1998:11).

Penalties
The available penalties for breaches of the Act are varied. They range from $2,000 for a person who fails to notify the Minister that they are in possession of an article that has been declared historic (s9), to a $10,000 or 5 year imprisonment penalty for a person who damages, destroys, interferes with, disposes of or removes an historic shipwreck or relic from Australian waters without a permit (s13). Penalties are proportionally larger for corporations. Some offences can be heard by a court of Summary jurisdiction, substantially reducing the amount of the penalties (s26)\footnote{All penalties referred to in this paper are the maximum available for breaches, not necessarily the amount that an offender would be fined. Most penalties that are imposed by the courts are substantially lower than the maximum.}.

Unauthorised entry into, or activities in, protected Zones have penalties available for breaches (ss14 (1)). Permits to undertake certain activities can be issued by the Minister (e.g. exploration or recovery of wrecks or relics, s15), and the Minister can impose conditions on the permit that, if contravened, can be subject to fines or imprisonment.

Section 16 lists the defences that are available for breaches of sections 13 and 14 or of sub-section 15 (5). These all relate to either the damage or destruction of a shipwreck or relic, unauthorised entry into a Protected Zone or contravention of a condition on a permit. The defences are:
- saving human life;
- securing the safety of a ship endangered by stress of weather or navigational hazards; or
- dealing with an emergency involving a serious threat to the environment; (s16, HS Act 1976)

Despite what appear to be large fines for various breaches of the Act, s16 deals with the defences that are available. The three listed defences noted above are reasonable, however the Act undermines itself by allowing for ‘any other reasonable excuse’ with out defining what a ‘reasonable excuse’ might consist of. The term ‘reasonable’ is not defined anywhere and ultimately it is left to the discretion of either the Minister (or delegate) or (if the case were to proceed) to the Courts to determine what would be ‘a reasonable excuse’. It is assumed that the ‘reasonable’ excuses would be comparable to the other defences.

Other penalties are also in place for acts such as deliberately providing false or misleading information to an inspector and hindering or obstructing the lawful actions of an inspector (s23). These types of penalties for such actions are provided in the majority of criminally sanctioned legislation.
**Protection of Moveable Cultural Heritage Act 1983 (Cth)**

**Important Sections**

The Protection of Moveable Cultural Heritage Act does not entirely prevent the import and export of objects in Australia. The Act establishes the National Cultural Heritage Control List, which identifies two classes of objects under section 8. Objects that are part of the Moveable Cultural Heritage can be of importance to Australia for several reasons, such as ethnological, archaeological, historical, artistic, scientific or technological (PMCHA ss7 (1)). Some objects would fall under more than one of these areas, and they then need to be part of one of the prescribed categories in subsection 7 (1). These include objects removed from the soil or subsoil; relating to members of the Aboriginal or Torres Strait Islander peoples; various types of art works; and military objects. Paragraph 7 (1)(j) allows for any other categories of objects.

Permits for export of Class B objects can be granted under section 10 by the Minister after referral to the National Cultural Heritage Committee who consults with experts in the appropriate field. Permits can be (and have been in the past) denied. Certificates of exemption may be granted for either Class A or B objects, allowing temporary importation and subsequent exportation under section 12. Section 14 makes it unlawful to import protected objects from foreign countries.

Part III deals with the administration of the Act by the Committee and Part IV establishes the National Cultural Heritage Fund. This Fund exists to aid in the purchase of protected objects, objects that have been refused exportation permits, and also the acquisition of any other objects. This Act also has an entire part that deals with the enforcement of the Act. This is a unique attribute. It lists what the inspectors can do in terms of search, seizure and arrest and goes as far as Court Proceedings and the granting of search warrants by telephone. This allows the Act to be easily enforceable, unlike many other types of heritage protection legislation. This does not necessarily mean, however, that it is enforced to a great degree.

**Penalties**

Penalties under this Act are generally to do with permits and inspectors. Attempts to export an Australian Protected Object either without a permit, or in contravention of a permit is subjected to a fine of up to $100,000 or five years imprisonment. A body corporate may receive a fine of up to $200,000 (s9). The same fines apply for the importation of foreign protected objects. Other fines are for the obstruction of inspectors ($2,000 or 12 months imprisonment) and for providing false or misleading information with regards to applying for a permit ($5,000/ two years imprisonment for a person and $20,000 for a body corporate). False statement or documents given upon request to an inspector can receive a fine of $2,000 for an individual or $5,000 for a body corporate. A court of summary jurisdiction may deal with all of the penalties reducing the maximum penalties by up to 95%. Objects protected by the Act can also be forfeited to the authorities.

**Historic Shipwrecks Act 1981 (SA)**

**Important Sections**

The first major difference occurs in section 5 where the Minister must declare each wreck or relic by notice in the Gazette, unlike section 4A of the Commonwealth Act where blanket declaration is legislated. Provisional declaration for a wreck in State waters lasts only 12 months (s6), but in the Commonwealth Act it can be in force for up to five years. The State may declare a protected zone of up to 100 hectares, where a protected zone under the 1976 Act can be as large as 200 hectares. This difference is due to the minimal areas of territorial waters that actually come under the jurisdiction of the State.

The Ministerial powers are identical regarding the notices of location (s9) and ascertainment of the locations (s10) and also with the Minister’s power give directions to the custodian. The only differences with the giving of directions under s11 are in subsections 5 to 8 where reviews of notices by the district court are sanctioned.

Both Acts establish a Register of Historic Shipwrecks under s12, with the South Australian one listing wrecks in its own State waters. Exploration and recovery permits have the same guidelines in both Acts; the specified defences to prosecution are also the same. Rewards are allowed for in both Acts if a new discovery leading to a declaration is made. Rewards can be monetary or a replica or other ‘souvenir’ or both can be given to the person who is the first to notify the Minister.
Penalties
Another major difference between the two Acts are the maximum penalties available for offences. Where a person fails to give notice of the location of a wreck or relic under section 9 a penalty of $1,000 may apply (Commonwealth: $2,000 [person] or $10,000 [body corporate]). The same penalty applies if a person doesn’t comply with a Minister’s notice or provides misleading information (s10). A person who fails to comply with the Minister’s directions for a wreck or relic (s11) can be fined $2,000 or face a 2-year prison term (c.f. Commonwealth: person-$5,000 or two years imprisonment; body corporate-$25,000).

A person who contravenes a section 12 prohibition (damage, destruction, interference, disposal or removal of a wreck or relic without a permit) can receive a fine of up to $5,000 or five years imprisonment, or both. The Commonwealth penalties for such offences are $10,000 or five years imprisonment for a person, and $50,000 for a body corporate.

Penalties for undertaking prohibited activities in a protected zone are $1,000 or one year imprisonment for both Acts. Breaching a condition imposed by the Minister as part of a permit for exploration or recovery can receive a fine of up to $2,000 or two years imprisonment under the State and Commonwealth Acts.

Finally, failing to notify the Minister of a discovery of a wreck or relic or providing false or misleading information can receive a $1,000 fine under the State Act, but a $5,000 (person) or $25,000 (body corporate) fine under the Commonwealth Act.

The reason that the fines are sometimes substantially larger for breaches of the Commonwealth Act would probably because of the need to show that the Dutch shipwrecks and relics are being well protected, and also because the offenders are breaching Commonwealth laws.

No amendments have been made to the maximum penalties since the introduction of the Act in 1981 in order to bring the Act into line with the Commonwealth Act. This is an area that requires review.

Heritage Act 1993 (SA)
Important Sections
The first three parts of the Act deal with Administration of the Act, including the State Heritage Authority and the State Heritage Fund, and the RSHI.

The State Heritage Authority has eight members, seven of whom must have experience in fields such as architecture, heritage conservation, archaeology or history and are appointed by the Governor (s2 contains full list). The eighth member must have knowledge or experience with heritage conservation and be nominated by the Local Government Association and approved by the Minister. Simpson (1994:163) noted that the Authority at that time were made up of ‘an environmental lawyer, a land agent, an Anglican archbishop, a member of a local government authority, an engineer, an architect and the Director of the National Trust’.

The Authority is responsible for administering the Register and investigating and promoting the establishment of places of heritage value and State Heritage Areas. It is also involved in heritage agreements, assisting councils, planning authorities, owners and the public regarding heritage conservation and providing advice to the Minister (s5).

Part Four deals with the Registration of heritage places, and this is where the definition of Heritage Value is found. Heritage Value has a very similar definition to the AHCA. Section 16 identifies a place as fulfilling the criteria of heritage value if:

- it demonstrates important aspects of the evolution or pattern of the State’s history; or
- it has rare, uncommon or endangered qualities that are of cultural significance; or
- it may yield information that will contribute to an understanding of the State’s history, including it’s natural history; or
- it is an outstanding representative of a particular class of places of cultural significance; or
- it demonstrates a high degree of creative, aesthetic or technical accomplishment or is an outstanding representative of particular construction techniques or design characteristics; or
• it has strong cultural or spiritual associations for the community or a group within it; or
• it has special association with the life or work of a person or organisation or an event of historical importance.

Anyone may make an application to have a place put in the Register without actually having a legal connection to the place. The State Heritage Authority may also consider a place for the Register of its own accord; an application by a member of the public is not a requirement.

Part of the Registration Process states that a place may be provisionally entered on the Register if the Authority believes it is of heritage value, or to protect the place while its value is assessed. Subsection 17 (3) allows for the authority to designate a provisionally entered place as of geological, palaeontological or archaeological significance. If a place is so designated, the owner must be notified and the reasons stated. The owner is then able to submit their opinion of whether the place should be confirmed for provisional entry in the Register. The Act does not seem to require that the owner provides any professional advice backing up their opinion.

Part 6 allows for Heritage Agreements to be entered into between the Minister and the owner of a Registered place or Area; these must be noted on the Register next to the entry.

The State Heritage Authority may also make orders for the restoration of a place if an offence has been committed against the Act. A no development order may be imposed if the owner is convicted of contravening a stop work order or causing intentional damage to a place.

Penalties
Part 5 contains provision for special protection of places of geological, palaeontological or archaeological significance, and excavation or disturbance of these places is prohibited (s25 & s26). The disturbance of a site not designated as archaeological in order to remove cultural artefacts is prohibited under section 27. Damage to or disposal of such an artefact is also prohibited. Contravention of any of these can result in a fine of up to $15,000 or four years imprisonment.

If a stop work or no development order is broken, a fine of up to $60,000 or 15 years imprisonment may be imposed (s37 &38). The same penalties apply if a place is intentionally damaged or destroyed to reduce its heritage value (s36).

World Heritage Properties Conservation Act 1983 (Cth)
Important Sections
This was the Commonwealths second attempt at criminally sanctioned heritage protection. However, this Act had to be quite non-specific as it needed to protect both natural and cultural heritage. The definitions that the Act uses are the same as those used in the Convention. Articles 1 and 2 of the Convention, which define the types of heritage that can be covered are set out below:

Article 1: ‘Cultural Heritage’:
• Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of history, art or science;
• Groups of buildings: groups of separate or connected buildings which, because of their architecture, homogeneity or their place in the landscape, are of universal value form the point of view of history, art or science;

• Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Article 2: ‘Natural Heritage’:
• Natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value form the aesthetic or scientific points of view; (PMCHA, Schedule)

Geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

Natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty. (Convention for the protection of the world cultural and natural Heritage, Schedule, WHPCA 1983:17)

It can be seen that the definitions of what can make an item worthy of registering on the WHL that almost anything natural or cultural could be considered if it was an ‘outstanding’ example. However, in 1988 section 3A was added which took the level of protection one step higher by making its protection of ‘identified property’ inclusive of items not having necessarily been nominated or accepted onto the WHL. Section 3A has the potential to be so broad, in fact, that the Commonwealth may have no intention of actually nominating the place; it can simply be ‘under inquiry to consider whether it should be nominated’ (Boer 1995:31). The potential of this section has not yet been tested by any cases.

Sections 6, 7 and 8 list the types of properties that can be Proclaimed to be protected by the specified unlawful acts that are listed in sections 9, 10 and 11. The Governor-General, unlike in other heritage protection Acts, is directly given the power for ‘emergency’ Proclamations of sites under the Act. Unlawful acts in relation to corporations include:
• excavation works;
• operations for or exploratory drilling to recover minerals;
• erection of building or structures;
• damage or destruction of buildings or structures;
• damage to any tree;
• construction/establishment of roads or tracks; or
• use of explosives. (s10)

Unlawful acts in relation to Aboriginal sites, as well as those acts outlined above, also include:
Damage or destruction to artefacts or relics; and removal of artefacts or relics. (para. 11 (1)(d) and para. 11 (1)(e)).

The responsible Minister can give consent for various acts to be undertaken on the Listed sites, some of which include acts that would otherwise contravene sections 6, 7 or 8. These acts must not be detrimental to the protection, conservation or presentation of the property, the meaning of which are set out in the Convention (s13).

Penalties
The only penalties that are actually assigned in the Act are for actions committed against Inspectors in the process of enforcing the legislation and for breaches of confidentiality. The penalties for these range from $1,000 and six months imprisonment (or both) to $1,000 and 12 months imprisonment (or both). Penalties for the unlawful acts outlined in the WHPC Act are not listed. This means that, if a monetary penalty were going to be imposed, the courts would decide the amount. If not, the courts would probably just impose injunctions to prevent the action being taken.
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

Important Sections

The definitions used in the Act for ‘Aboriginal Tradition’, and ‘significant Aboriginal area/object’ are almost totally non-exclusive of anything that has any connection with Aboriginal or Torres Strait Islander people. According to the Act, ‘Aboriginal Tradition’ means ‘the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships’ (s3). Significant areas and objects are those with particular significance in accordance with Aboriginal Tradition.

Section 4 states that the purposes of the Act are the ‘preservation and protection from injury or desecration areas and objects in Australia that are of particular significance to Aboriginal people’. Whether it actually achieves this purpose will be discussed later.

Emergency declaration may be made by the Minister upon application by (or on the behalf of) Aboriginal people seeking the preservation of an area that is under serious and immediate threat of injury or desecration. The time limit for an emergency declaration is 30 days, but this can be extended by up to 60 days (s9).

Section 10 outlines the other declarations that may be made, and lists what must be done in order for a declaration to be made. After receiving an application, the Minister must nominate a person to write a report on the area and after considering the report and any other representations and relevant matters, a declaration may be made. The report must detail several things, such as the significance, the nature of the injury or desecration, the extent of the area that should be protected, who a declaration will affect and the protection afforded by other laws (including State laws) (ss10 (4)). The report must also include a recommendation for a time limit for the declaration to be in force. The protection of objects does not require a report to be commissioned (s12).

When making, or deciding whether to make, a declaration for an area or object in a State or Territory, the Minister is required to consult with the State or Territory Minister on protection provided by laws in the relevant State (ss13 (2)). However, ss13 (4) states that if this is not complied with, the declaration is still valid. Section 15 allows declarations to be reviewed by Parliament. Division Two allows the Minister to appoint Authorized Officers to make emergency declarations.

Section 20 and 21 cover the discovery and disposal of Aboriginal remains. This includes the requirement of an owner or occupier (including developer) who suspects that they have found Aboriginal remains to report them to the Minister. The remains may then be returned to the community entitled and willing to accept them, dealt with under the direction of such people, or, if no possible custodian exists, they can be transferred for safekeeping. A person who is not an owner or occupier or an employee of such is not required by s21 to report a finding of Aboriginal remains.

The Act does not require a Register to be maintained.

Amendments were made in 1987 to add Part IIA to the Act to legislate for Aboriginal Heritage in Victoria. This section will not be discussed as it is not relevant to South Australia, however, it should be noted that it contains some extra provisions that are not included in the main Act, such as the enactment of Temporary declarations and Aboriginal Heritage Agreements. Aboriginal Heritage Agreements in South Australia are dealt with under the AHA 1988 (SA).

Penalties

There are numerous criminal sanctions in place for breaches of various parts of the Act. Section 22 deals with these in relation to areas and objects that the main Act protects. Part IIA deals with breaches in Victoria. The Act is taken to have been breached if an area or object is injured or desecrated. Injury and desecration are described in section 2. For an area, this can include the treatment of an area inconsistently with Aboriginal tradition, where some thing is done in the area that adversely affects Aboriginal tradition and the entry upon or over the area that, again, is inconsistent with Aboriginal tradition. The same applies for an object: if it has been treated in a way that is inconsistent with Aboriginal tradition, then the Act has been breached.
The penalties range from $5,000 or two years imprisonment (or both) for injury or desecration of an object by an individual to $10,000 or five years imprisonment (or both) for an offence against an area by a person. For a body corporate or their representatives, these fines are $25,000 and $5,000 respectively. Future development rights are not affected in the event of a breach, however the Minister or Inspector may issue a directions prohibiting or restricting access and/or specified activities in relation to a site (s24).

The same offences can be heard by a court of Summary Jurisdiction, reducing the penalties to $2,000 or 12 months imprisonment for a person and $10,000 for a body corporate.

Aboriginal Heritage Act 1988 (SA)
Important Sections
The definitions of Aboriginal objects, sites and tradition are as broad as those in the ATSIHPA, describing Aboriginal sites and objects as those with importance according to Aboriginal tradition or of significance to Aboriginal archaeology, anthropology or history (s3). ‘Aboriginal tradition’ is defined as ‘the traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs or beliefs that have evolved or developed from that tradition since European colonisation’ (s3). This therefore allows for contact and post-contact sites, objects and tradition to be protected under the Act, even though these can also be protected under the HA.

Section 5 outlines the Minister’s functions under the Act. These consist of any practical measures that are necessary for the protection of sites, objects and remains; searching for sites or objects; and researching into Aboriginal heritage. This research clause will be discussed later under the Administration section. The Minister may delegate certain powers (s21, 23, 29 and 35) to the traditional owners under section 6. The Aboriginal Heritage Committee is established under section 7, however the minimum number of representatives is not declared. The committee is required to consist of Aboriginal persons from all parts of South Australia (as far as possible) with equal representations of men and women. This is

Central archives, known as the RASO must be maintained by the Minister, containing a description of and information on the location of sites and objects. The Minister may also aid Aboriginal organizations to hold local archives of their heritage. The information contained on the Register or the local archives is confidential unless the traditional owners approve of any disclosure or such people cannot be identified or located. An application under section 12 can result in confidential information being made available to the applicant. A section 12 application is for a determination of whether a site or object is protected by the Act. These are made to find out if it is legal to take some form of action on or to the site that would otherwise be illegal. Time limits are specified for the consideration of applications. If the Minister sees fit, information may need to be provided by an expert (such as an archaeologist or anthropologist) to help with the determination of an application. Applications for determination may end up working against a developer if the site or object is found to be an Aboriginal site or object requiring entry into the Register.

Developers or those wishing to disturb an Aboriginal site not for the purpose of excavating the site itself or for uncovering Aboriginal sites, objects or remains must apply for a section 23 permit from the Minister. This permit may be issued to destroy part of or all of a site, with a requirement that adequate recording is done and the artefacts recovered are salvaged.

Prior to making any determinations under the Act, the Minister must consult with the Committee, any relevant Aboriginal organizations and traditional owners who may be affected by the any decision. According to subsection (13 (2)), the Minister ‘must accept the views of the traditional owners of the land or object in the question of whether the land or object is of significance according to Aboriginal tradition’.

Inspectors are appointed under Part 2 division 2. Their powers range from entering upon land (para. 17 (1)(a)) to inspecting a site for the enforcement of Aboriginal Heritage Agreements (para. 17 (1)(ba)). Traditional owners may request that an inspector may not exercise their powers in relation to a site or object (ss15 (3)).
The South Australian Aboriginal Heritage Fund is set up by Part 2 Division 3 and is administered by the Minister. The Fund can be used to acquire land, objects or records, to make grants or loans to assist research into Aboriginal heritage, to make payments as part of an AHA or for anything related to the preservation and protection of Aboriginal heritage.

**Penalties**

Part 3 of the Act deals with the protection and preservation of Aboriginal heritage. The major penalties are applied in these sections. The penalties for damage, disturbance, destruction and removal of or interference with sites, objects or remains can be subject to fines of $10,000 or six months imprisonment for an individual or $50,000 for a corporation. This obviously includes any attempt to excavate land (archaeologically or otherwise) without a permit.

Failing to notify the Minister of the sale of land that is subject to Ministerial directions under the Act can sustain a $2,000 fine. Contravention of directions given by a Minister under sections 24 or 25 can receive penalties of $50,000 for a corporation and $10,000 or six months imprisonment for an individual. The sale, disposal or removal of a registered object from South Australia can be subject to the same penalties as those above; this does not include the sale of land that an object is affixed to.

Interestingly, the maximum penalty for imprisonment compared with the maximum fines does not seem as compatible as those under other legislation. Under the Commonwealth *HSA* 1976 and the *ATSIHPA*, a $10,000 fine is equivalent to a five-year maximum prison term. In place of a $2,000 fine under the South Australian *HSA* 1981, and offender can receive a 12-month prison term. Also, it does not specify that a person may receive both penalties combined, as it does under most of the other Acts.
References

Adelaide Development Company Pty. Ltd. v Corporation of the City of Adelaide & another, LSJS 457.

Advance Bank of Australia Ltd v Queensland Heritage Council, Planning and Environment Appeal no. 169 osf 1993


Australia ICOMOS 1996, Understanding the Burra Charter, Australia ICOMOS.


Bell, D. 1998, Ngarrindjeri Wurruwarrin: a place that is, was and will be, Spinifex Press, North Melbourne.


Brennan, F. 1997, ‘Building a bridge on a constitutional sea change’ ILB, 4: 3


Colwell, M. & Colwell, D. 1985 *Heritage Preserved with the National Trust of South Australia*, Peacock Publications, South Australia.

**Coorong Cruises, Map of Fleurieu Peninsula** (Accessed 11 Dec 2001)

*Commonwealth v Tasmania* 158 CLR 1


Douglas v Tickner (Federal Court) (unreported judgement, 7 February 1995)


Prescott, J.R.V. 1985, Australia’s Maritime Boundaries, Department of International Relations, ANU, Canberra.


Robinson, M. 1986, Aboriginal Heritage and Environment Management, Reading 21, WA Department of Conservation no.251, Perth.


**Legislation**

Aboriginal Heritage Act 1988 (SA)

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

Australian Heritage Commission Act 1975 (Cth)

Development Act 1993 (SA)

Historic Shipwrecks Act 1976 (Cth)

Historic Shipwrecks Act 1981 (SA)

Protection of Movable Cultural Heritage Act 1986 (Cth)

State Heritage Act 1993 (SA)

World Heritage properties Conservation Act 1983 (Cth)

**Personal Communications**

Bishop, David. Register of the National Estate Section, AHC, 24 August 1998

Cooke, Helen. Senior Cultural Heritage Officer, DOSAA, 17 June & 19 October 1998

Esdaile, Stephen. Register of the National Estate Section, AHC, 19 & 27 August 1998


Knight, James. Cultural Heritage Consultant, ex-DOSAA, 3 November 1998

Samuels, Brian. Principal Heritage Officer, Heritage SA, 27 June 1998