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From 'grudge purchase' to valued asset: why compliance is no longer enough and we need to provide work that has value and meaning

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The recent Heritage and the Law Workshop provided a great forum for discussion of current threats to the protection of Aboriginal heritage and identified a range of challenges faced by both the heritage consulting industry and Aboriginal and Torres Strait Islander communities. The workshop focused its attention on the political and ideological undercurrents that are presently influencing changes to the law across Australia. While these drivers are important and need to remain the focus of activism and advocacy, I argue the role the archaeological consulting industry can play in changing what we do and how we do it is equally critical.

Introduction

This paper is an adaptation of my presentation at the *Heritage and the Law Workshop* held at the Australian Archaeological Association 2015 Conference in Fremantle, WA. It is intended as an opinion piece on the historical trajectory of heritage consulting and where we, as an industry, have the ability to influence the future direction of heritage consulting. I reflect on the early days of the heritage consulting industry, focusing on the political pressures that led to heritage protection in the first place and the important role the first generation of consultants played. I consider the evolution of the consulting industry and how legislation has developed side by side with the growth of the industry – how they have interacted with each other.

While it is self-evident that legislation and policy development have shaped the nature of the industry, it is also clear that the type of work done by consultants and the role we have played has had a big effect on policy development. This suggests that we have an important role in

shaping our own destiny through meaningful work and advocacy for heritage protection, just as many of the first generation of consultants did. We are not passive players and in the end, we have a critical role in shaping the heritage industry that we inherit.

The origins of Aboriginal heritage protection

As early as 1938, FD McCarthy drafted an Act for heritage protection in NSW (McCarthy 1938), but it was not until the 1960s that formal Aboriginal heritage protection was enacted, beginning in South Australia in 1965¹ with the passing of the *Aboriginal and Historical Heritage Protection Act*. Following South Australia's lead, Aboriginal heritage protection spread remarkably quickly across all state jurisdictions over the next

¹ There was an earlier *Northern Territory Native and Historic Objects Heritage Protection Ordinance 1955*, but was largely ineffectual as it required compulsory acquisition of land as opposed to blanket protection.

decade – Tasmania being the last, in 1975 when the Aboriginal Relics Act was passed². It is interesting that within the short space of ten years we went from very little protection in any state to protection in every state. This should concern us because that which can be established in such a short time frame can also be unwound in a similar time frame, as a precedent takes hold in one state and is copied as a ‘successful’ template elsewhere. This is what makes the current legislative and policy changes in Western Australia an issue that is relevant to all of us across the country, no matter where we live and work.

The establishment of laws to protect Aboriginal heritage did not happen in isolation. They were developed in a progressive political climate and formed part of a broader political movement for protection of heritage generally, or what was commonly referred to as the ‘National Estate’ at the time. During the 1972 Federal Election campaign, Labor Leader Gough Whitlam stated that:

...two overriding objectives [of a Labor Government would be] to preserve and enhance the quality of the National Estate (Bonyhady & Griffiths 1996).

Following through on that campaign promise, the Whitlam Government established the 1973 *Committee of Inquiry into the National Estate* chaired by Justice Hope, which played a key role in highlighting the need for heritage protection and led to the establishment of the Australian Heritage Commission in 1975.

² 1965 *Aboriginal and Historical Heritage Protection Act SA*;

1969 *National Parks and Wildlife Act NSW* (amended);

1967 *Aboriginal Relics Preservation Protection Act QLD*;

1972 *Victorian Archaeological and Aboriginal Relics Preservation Act VIC*;

1972 *Aboriginal Heritage Act WA*;

1975 *Aboriginal Relics Act TAS*.

Protection of Aboriginal heritage also formed part of the political struggle for Aboriginal rights (Atwood 2004). It is no coincidence that the formative period when Aboriginal heritage laws were enacted overlapped with some of the most important events in the recognition of Aboriginal rights arising out of a burgeoning awareness of injustices (see for example McGuiness 1991:47; Jonas & Langton 1994; *Eveleigh News*, 30 October, 1957, p.2):

- 1961: the Australian Institute of Aboriginal Studies is formed in Canberra.
- 1962: the Commonwealth Electoral Act is amended to give the vote to all Aboriginal people; Aboriginal people in Queensland, Western Australia and the Northern Territory are given the right to vote in Federal elections; and the Aboriginal Affairs Act is enacted in South Australia.
- 1965: Freedom Ride, NSW.
- 1966: Gurindji Wave Hill Station ‘Walk Off’.
- 1967: Referendum on Constitutional Recognition of Aboriginal People.
- 1972: Aboriginal Housing Corporation purchase ‘The Block’, Redfern.

The role of the public and special interest groups was recognised at the time as an important factor in the adoption of legislation. For example, Sharon Sullivan noted in a 1975 paper entitled ‘The State, People and Archaeologists’ that:

Legislation for the protection of sites in New South Wales is the result of long term agitation by archaeologists and conservation groups, coupled with a growing demand from the wider public for such protection.

The demands of reputable archaeologists were an important factor, but it was eventually an awareness of growing public interest and support which prompted the then Minister for Lands, Tom Lewis, to set up a committee to frame the present legislation (1967). By 1970, when the legislation was gazetted, such legislation had become an acceptable social goal, which it had not been in the 1940's, when the matter was first

strongly canvassed by concerned archaeologists.

The form of the legislation and its administration by the National Parks and Wildlife Service, reflects the fact that it was primarily designed to protect relics for the use and enjoyment of the people of New South Wales; therefore preserving sites for research by archaeologists is only one of a number of state aims. (Sullivan 1975: 23-31)

The political will to enact legislation also reflected a genuine public interest in the emerging scientific discoveries that revealed the long antiquity of Aboriginal occupation of the country. The incredible discoveries at Lake Mungo, pushing Aboriginal occupation back beyond 40,000 years, had a big impact on the way in which Aboriginal people and Aboriginal cultural heritage was viewed by many Australians. It also had a broader impact on the way Australians saw their own country. As historian Tom Griffiths noted:

[the] broad understanding of the human antiquity of Australia, always deeply known to Aboriginal people themselves, has been a relatively recent and dramatic event that had to await the twin revolutions of professional archaeology and radiocarbon dating, both of which emerged in local practice in the 1950s and 1960s.

No segment of the history of *Homo sapiens*, wrote archaeologist John Mulvaney, 'had been so escalated since Darwin took time off the Mosaic standard.' Since the 1960s, archaeological dates for human occupation in Australia have deepened from 13,000 years before the present (at Kenniff Cave in Queensland in 1962) to over 40,000 years at several sites by the 1980s. (Griffiths 2014: 8)

The introduction of Aboriginal heritage protection laws was also, in part, a reaction to amateur artefact collecting that resulted in many Aboriginal sites being picked clean of surface artefacts. In some cases these amateur collectors literally gathered artefacts by the truckload (Mulvaney 1990: 149-150). In a recent paper at the Victorian Archaeological Colloquium,

Michael Lever argued that the extent of artefact collecting in Victoria was at such a scale that it has likely distorted the archaeological record we see today (Lever 2016). While on the one hand the introduction of laws to protect against amateur artefact collecting was a bureaucratic management response, it also demonstrated a growing awareness that the artefacts had scientific and cultural importance worthy of protecting in the first place. Therefore, the need to protect Aboriginal sites from artefact collectors reflected a newfound value that Australian society placed on Aboriginal heritage.

The role of individuals, particularly the important parts played by John Mulvaney and Isabel McBryde, in agitating for change and undertaking public outreach to showcase archaeology as a new and interesting field of investigation was also critically important in establishing this newfound value given to Aboriginal heritage (Bonyhady & Griffiths 1996).

The 1970s: A small but dedicated industry

There are a number of features about the first generation of heritage consultants and government archaeologists that stand out, in contrast to the much larger, highly professionalised industry we have today. The small cottage industry emerging after the introduction of heritage laws was very active in forums, conferences and establishment of bodies such as AAA and ICOMOS, a situation that can be compared with the relatively low participation rates that we see today³. Some remarkable

³ The Australian Association of Consulting Archaeologists Inc (AACAI) had 138 members (in all membership categories) for the 2015–2016 financial year (data from Cindy Shadiack, AACAI Secretariat Officer). This represents a small fraction of the active consulting industry. For example, Aboriginal Victoria lists 262 consultants on its cultural heritage advisor list for June 2016, whereas AACAI's website only lists 41 members in Victoria – representing only 15% of the consulting industry.

developments came out of this early period. Foremost among them was the development of the Australia ICOMOS Burra Charter in 1979, a benchmark standard for the conservation and management of heritage that has had a major influence on the development of heritage conservation practice across the world⁴ (Colley 2003).

There was a much greater level of resourcing for state government driven research and management planning, such as the NPWS Sacred Sites Survey (Kijas 2005; Creamer 1975, 1988; 2003) and the Victorian Archaeological Survey (VAS). Some of the best talent and energy was found in senior government positions, such as Sharon Sullivan at NPWS and Peter Coutts at VAS. This had an important impact on early policy development and practice standards (Sullivan 1985). The VAS started with a research drive to expand the limited knowledge at that time about the State's Aboriginal archaeological heritage. It was responsible for prolific archaeological survey work and an impressive publication record under the tenure of founding Director Peter Coutts (1975, 1982).

Public participation in archaeological fieldwork as volunteers was commonplace. This acted to strengthen links between archaeological researchers and interested members of the public. These links helped to establish a pool of advocates and supporters for archaeology and heritage protection outside the industry.

While noting the positive aspects of the early heritage industry, it is also important to note there were negative features, particularly in the notable lack of Aboriginal participation and inclusion in archaeological investigation work. Aboriginal cultural / social values were seldom considered alongside archaeological values. During this period, it has been noted that:

⁴Most recently, the Burra Charter has been the main inspiration for the China ICOMOS China Principles

Several published, powerful indigenous outcries (e.g. Langford 1983; Kelly 1975) established the need for archaeologists to consult with the Aboriginal communities who have custodianship of the cultural resources they wish to utilize in their studies. (Greer et al. 2002: 266)

The 1980s: Gradual expansion and government investment

The second decade of the industry was marked by a gradual expansion and increasing professionalization of the heritage consulting industry. The Australian Association for Consulting Archaeologists (AACAI) was formed in 1980. Much of the early work put into developing this industry body was carried out by a small group of pioneering, Sydney-based consultants led by people such as Laila Haglund, Helen Brayshaw and Mary Dallas. Their vision was a profession based on a code of ethics, standards and policies designed to bring a level of quality and professionalism to the industry and a form of industry self-regulation that could hold consultants to account for their work.

With pressure mounting on developers to meet the obligations set by the heritage legislation of the preceding decade, agencies such as the NSW National Parks and Wildlife Service began to employ archaeologists and in some cases historians and anthropologists. This was an exciting time when the focus of work moved from establishing databases and gathering information to heritage management and protection. As workload pressure grew, it became infeasible for the heritage agencies to do the research in house that was needed to make informed decisions about the impact of developments on Aboriginal sites. This provided the impetus for the expansion of a fledgling consulting industry. During this early period a significant amount of consulting work was carried out for government agencies and statutory authorities. Some government bodies, such as The Electricity Commission of NSW and the

Tasmanian Forest Commission, decided that they wanted their own advisors and employed archaeologists.

The 1990s and 2000s: Integration with the planning system, expansion and government outsourcing

Three big external trends had a significant impact on archaeological consulting in the 1990s and in many ways set the template for the model of archaeological consulting that is still with us today.

First, heritage formed part of a big expansion in the scope and application of environmental protection – chiefly achieved through better integration of environmental assessment requirements into planning systems. Although most states had very strong blanket protection for Aboriginal heritage, many jurisdictions had no requirement on development consent authorities, such as local councils and state planning agencies, to consider heritage matters. Therefore, in practice, most heritage went unprotected unless identified during the course of development works by a keen-eyed observer. This all began changing in the 1990s and 2000s as heritage increasingly became linked into the planning system in most states. Where this did not happen in a formal sense, many local government authorities developed their own policies requiring heritage protection and assessment. These changes greatly increased the demand for heritage consultants and opened up new opportunities for employment in environmental and town planning consultancy firms. As an indicator of the quantum increase in consulting work during this period, Maclaren North found that historical archaeological permit approvals tripled in Victoria and more than quadrupled in NSW during the period 1997-2005 (North 2007: 214, 232).

Second, the heritage consulting industry was affected by outsourcing and downsizing as small government and austerity politics came to dominate policy making. Government heritage

agencies were downsized, and their research capabilities were curtailed – in Victoria the VAS was replaced with Aboriginal Affairs Victoria in 1992. Across most of the country this left a reduced staff of government archaeologists focused on core administrative and permit approval processes. Similarly, government statutory authorities cut back on non-essential staff by outsourcing their in-house archaeology. Therefore, significant cut backs in government investment in archaeology (including in the university sector), came at exactly the same time as the private sector heritage consulting industry rapidly expanded. Ulm et al. (2005: 11-23 & 2013: 34-43) and Mate and Ulm (2016: 168-183) have tracked these changes through a series of surveys of the profession. In 2015 55% of survey respondents were employed in the private sector, a large increase from the 47.9% who reported private sector employment in 2005, whereas there has been a substantial relative decline in government employment, down from 22.7% in 2005 to 12% in 2015 (Mate & Ulm 2016: 174). While university sector employment has been more or less stable between 2005 and 2015 (25.1% in 2005 and 24% in 2015), Ulm et al. (2005: 11-23) cited a similar industry analysis by Truscott and Smith (1993: 217-221) in the mid-1990s that found 36.9% of archaeologists in permanent positions were employed in the university sector, indicating that a sizable shift from academia occurred in the 1990s. The surveys undertaken by Sean Ulm and his colleagues demonstrate that the structural shift in employment from government to the private sector over the last two decades has been considerable.

Third, new forms of professional standardisation developed in construction and engineering industries and spread across into environmental and heritage consulting. The philosophy underpinning these systems was consistency, traceability and replicability. The systems were conceived in hard science fields where problems and solutions are considered quantifiable and a system can be reduced into a detailed flow chart,

and where precise metrics can be provided. In part, this can be viewed in an environment where increasing criticisms were levelled at what has been referred to as ‘the imperfect empiricism of the social sciences’ (Spencer 1987: 331-372). These systems gradually seeped into environmental and heritage consulting with the well-intentioned aim of creating higher consistent and measurable standards of work. However, as argued at greater length below, it is questionable how well these systems apply to a social science field like heritage, where answers are not always absolute and where there are a range of different research approaches and methods, both quantitative and qualitative, that can be applied to understanding and answering them.

The last decade: increasingly prescriptive heritage management regimes

The last decade has seen a marked increase in standardisation and templating being applied to archaeology. Government heritage agencies have been at the forefront of driving this change through legislation and policy development. The big change of the last 10 years has been the introduction of permit-less assessment systems that allow qualified archaeologists to undertake fieldwork with little or no pre-approval, on the proviso that a set of prescriptive standards and guidelines are followed. One example of this is the Aboriginal Heritage Regulations 2007 in Victoria. There are three main reasons I have personally heard cited for the introduction of these systems - a lack of government resources to deal with the volume of assessment and excavation work; the need to enforce basic minimum standards in the industry; and last the number of new, relatively inexperienced archaeologists who have entered the industry in the last decade and been employed to meet the rapidly increasing demand for heritage assessments. Hence, government agencies have sought to introduce simple, ‘one size fits all’ standards that can be easily followed and easily checked off and approved by government.

This ‘one size fits all’ approach to heritage management and assessment is exemplified in the *Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales (Office of Environment, Climate Change and Water 2010)* referred to as ‘The Code’ by practitioners. It mandates the dimensions of excavation units, specifies distance between each excavation trench, requires excavations to be placed on a grid layout and excludes the use of mechanical excavation methods. This replaced an earlier expansive set of guidelines, *the NPWS Standards and Guidelines Kit 1997* (NPWS 1997) that included the *Standards for Aboriginal Heritage Management Manual*, written primarily by Denis Byrne of the National Parks and Wildlife Service Cultural Heritage Services Division. The latter provided a wide scope of approaches and methods and required consultants to think and engage in how they approached each particular project and its associated range of values and archaeological research potential. This example from NSW is a good example of how the heritage management system has become more process oriented rather than outcomes oriented.

I and others (Wheeler et al. 2010) have argued that the ‘one size fits all’ approach embodied by standards like the NSW Code and the Victorian Aboriginal Heritage Regulations 2007 have acted to discourage innovation, restrict new thinking and make it difficult to implement research-based approaches to heritage work. For government, however, the beauty of prescriptive systems of assessment is they can be much more easily administered by a small number of public servants managing a large approval workload. The development of these systems has undoubtedly provided efficiencies for government, but I would argue it has been at the cost of quality and innovation in Aboriginal heritage assessment and management work delivered by the industry.

The evolution of consulting: cause and effect

In the evolution of the consulting industry each external change that has affected it has prompted a corresponding internal adjustment within the industry, and this has then affected the next round of external change. For example, when heritage was integrated into planning systems, requiring heritage assessments to support many types of development approval, it suddenly increased the need for qualified archaeologists to meet demand. This resulted (at different times in each state) in a cohort of relatively inexperienced archaeologists being employed as consultants to write reports to support these approvals. During the same period government began cutting back and outsourcing their in-house capabilities as balanced budget and austerity politics started to gain traction. Therefore, in order to manage the greater workload with fewer staff, the heritage consent authorities decided to adopt simplified ‘one size fits all’ systems in an attempt to manage the compliance approval workload and achieve some measure of consistency. This has led us to where we are now – an industry focus firmly placed on compliance.

In observing the past history of cause and effect in the heritage consulting industry, there is a clear risk that the current compliance focus within a prescriptive heritage management framework could have a detrimental impact on innovation, research output and public value in what is at heart a science that lives and dies on public interest and Aboriginal community support. Although there have been some gains from the standardization and setting of prescriptive minimum standards, in that they have raised the floor level so to speak, they have also created barriers and disincentives for consultants to implement new approaches and new thinking that allow the field to develop and provide more value back to the community for the money that is spent on heritage. These barriers and disincentives have shifted the industry towards process-oriented heritage assessment work

focused on data gathering, or what Graham Connah referred to as ‘stamp collecting’ (Connah 1983).

It has become a regular refrain from development proponents, Aboriginal stakeholders and academic researchers to question the value of archaeological survey and testing programs that have become the bread and butter of the consulting industry across the growth areas of the major capital cities. Proponents want to know what new things have been learnt as a result of money spent on heritage consulting work and they increasingly want to know how this new knowledge can be incorporated into interpretation. Aboriginal stakeholders want to know what has been discovered about their ancestral use of the land and how their important intangible values can be protected and remembered. The broader community wants to know what has been learnt that new residents moving into a growth area suburb would find interesting and enriching about their new home. Academic researchers want to know what information can be drawn out of the consulting grey literature to inform current research.

As a profession, if we do not engage with these issues and consider the value our work provides to people, we are at risk of finding ourselves in a position where:

- Government, development industry and Aboriginal community see limited value in the archaeological work – because it is seen as a hollow compliance exercise;
- The only observable value for retention of legal protection is seen as the opportunity it provides for Aboriginal community participation and employment in ‘cultural recovery’ of artefacts; and
- Regulators decide that cutting out the archaeological component and providing employment straight to the Aboriginal community achieves the same objective at reduced cost.

Is there cause for optimism?

There are some very promising new trends and initiatives aimed at providing more value for money spent on cultural heritage. These also expand the scope of what a heritage project gives back to stakeholders. Some are being driven within government such as the recent intangible heritage protection provisions established in Victoria, but many are coming organically from Aboriginal communities, consultants and clients. Notable trends that have emerged in the last two to three years include a large increase in cultural values assessment and mapping; an increase in collaborative projects with Aboriginal community organisations and businesses with a focus on outcomes and research; a significant increase in Aboriginal heritage interpretation and public heritage projects; and renewed advocacy for protection of Aboriginal heritage – particularly amongst consultants, academics and activists in Western Australia. These new trends are promising because they share a common thread of improving what the system of heritage protection provides back. If Aboriginal communities, clients and the general population appreciate the information we provide as an industry, then political support is likely to follow and protection will remain strong.

In my view these new trends need to be reinforced, and accompanied by a renewed advocacy for research in consulting archaeological assessment work. Tick box process-oriented assessment work that simply measures presence / absence and ‘hit’ or ‘miss’ impact are archaeology dumbed-down. As a group of people, we did not join this profession to do that kind of work — we need to, and can do, much better. Forums for discussion and presentation of consulting-based research such as the excellent Victorian Archaeology Colloquium convened by La Trobe University and the AACAI journal *JAACA* are important and should be supported and expanded. There is also a very important role for government heritage agencies to encourage better research and set the policy

levers that already exist within the scope of their legislation to support innovative and interesting work. Universities also need to get involved. There is a large, untapped source of funds for cash-strapped universities that the private sector and consulting industry can provide, but in general these opportunities go begging because archaeology departments rely on old funding and research models. Much of the heavy lifting also needs to come from within the heritage consulting industry – to produce high quality work, promote and publish their results and become advocates of their work.

Conclusion

As an industry, we cannot afford to sit above the fray and assume that current levels of heritage protection will remain locked in place for all time. Nor can we afford to believe the prevailing conservative politics will suddenly shift in our favour. We need to be mindful that the law is largely a reflection of popular will – or put another way, a reflection of what is valued by the general community. If the community value archaeological investigation and recording of Aboriginal sites, it is more likely that our elected politicians will maintain laws to protect its continued role in Aboriginal heritage protection. If it is not valued or perceived to provide little value, then it is open for review.

We need to advocate for innovative and meaningful outcomes from the cultural heritage management process that provides value to the Aboriginal community and the broader community alike. Only then will we start to shift both perception and the reality that our work is a grudge purchase paid solely to obtain a compliance approval. Support from the Aboriginal community for our role in conserving their heritage and support from government, developers, consent authorities and the general community for heritage protection are two sides of the same coin. If we can show what we do is important and has meaning and importance, the support for our role will follow.

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