

Heritage Law in Australia

A Brief Introduction



"Mount Watermark" Photo by Dr Tim Owen, GML Heritage



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Note on the ICOMOS GA2020 logo:

The logo for GA2020 features a Xanthorrhoea plant in the shape of the Sydney Opera House.
The Xanthorrhoea plant is also known as 'Gadi' – the plant name is connected to the Gadigal people, the Traditional Owners of the Country on which GA2020 will take place.
The image of the Sydney Opera House is used under licence from the Sydney Opera House Trust

1. Introduction

This short Guide provides an overview of the idea of heritage in Australia as well as identifying its underpinning laws, policies and key facilitators. We've prepared the Guide for readers who may not be familiar with how (or even why) we identify and protect "heritage" in this country. These are important questions to consider as Australia will be hosting, for the first time, the General Assembly of ICOMOS in Sydney in October 2020 (**GA 2020**).

ICOMOS is the International Council on Monuments and Sites, a network of over 10,000 experts in 151 countries (including archaeologists, planners, architects, historians and anthropologists) who contribute to identifying, conserving and maintaining heritage sites, places and landscapes.

ICOMOS' triennial General Assembly typically attracts over 1,000 Members. The theme for **GA2020** is '**Shared Cultures – Shared Heritage – Shared Responsibility**.' This theme reflects the changing nature of our population and culture, particularly in the context of rapid change and conflict. Underlying this theme is an appreciation for our shared stewardship of international and local heritage, emphasising the knowledge and ownership of Indigenous and Traditional Owners.

Beatty Legal and **Unsworth Legal** are proud to be the official legal co-patrons of GA2020.

Beatty Legal is Sydney's leading specialist environment, valuation and planning practice. Founded in 2012 by Andrew Beatty, an Associate Member of ICOMOS, the firm advises and represents public, and private clients. Our heritage practice encompasses advising and representing clients seeking to protect significant Australian cultural objects, places and landscapes.

Unsworth Legal, founded in 2009 by Tim Unsworth, provides advice on commercial, administrative, estate and intellectual property matters as well as the laws affecting and regulating sports, competition, charities and health.

2. A few words about Australian Laws and Courts

Australia is a Federation, established in 1901, consisting of the Commonwealth government and separate governments for each of the States and Territories. In the event of inconsistency between laws, the law of the Commonwealth prevails over the law of a State or Territory.

Each level of government has its own laws and agencies concerned with heritage identification, protection and conservation. These laws are tested in, and interpreted by, the Courts sitting in each jurisdiction, including most importantly, the High Court of Australia– our Constitutional and final appellate Court.

Commonwealth legislation is relevant where heritage values are of national significance and/or are governed by Australia's international treaty obligations. The Commonwealth has enacted specific legislation for the protection of areas and objects of particular significance to Aboriginal and Torres Strait Islander people.

In general, most substantive law-making relevant to the identification and conservation of heritage is made by the six State and two Territory governments either in the form of specific heritage or environmental protection legislation, or in laws and policies that regulate planning and development controls. State and Territory legislation and policy is underpinned at the local level by development controls administered by government agencies.

The **case studies** in this Guide illustrate how Australian heritage laws are still evolving.

3. What is “heritage” and why is it important?

“Heritage” describes objects, places and landscapes that a community values as significant. The concept of heritage encompasses relationships between the natural, cultural and human characteristics of our world. Our heritage tells us important stories of nationhood and cultural becoming.¹

3.1 Types of Heritage

There is no single category of heritage– the term can refer to physical historical artefacts, cultural heritage practices, important cultural and historical landscapes, buildings and objects which have inherent heritage values, and heritage items, landscapes and places that are significant for their contextual relationship with a community and its surrounds. Heritage can comprise of both tangible and intangible elements.

Figure 1 below outlines the common attributes of Australian Heritage.²

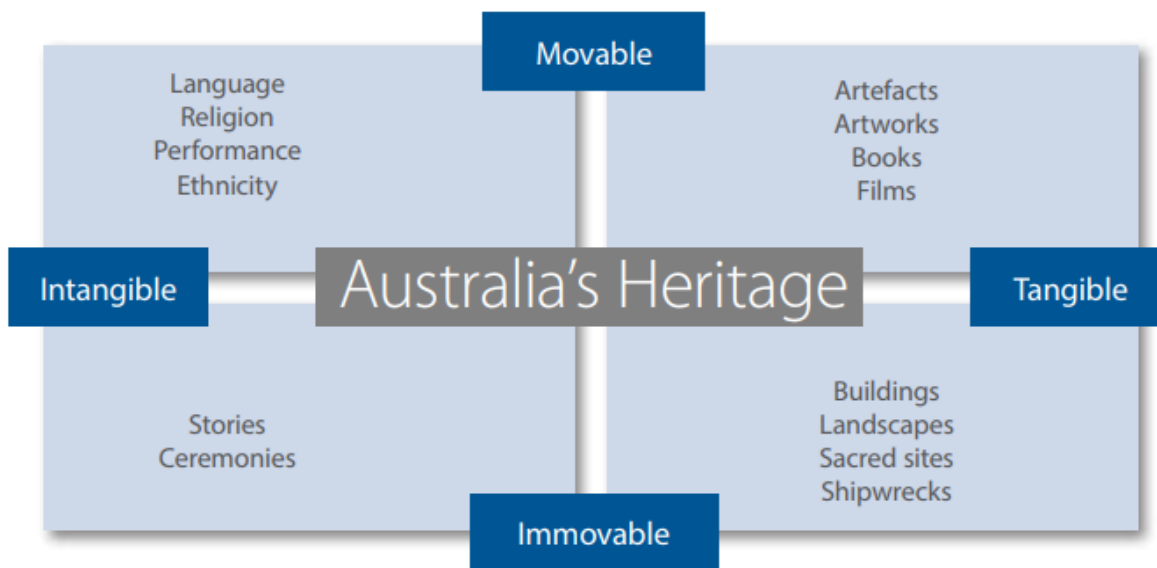


Figure 1: Australia's heritage matrix, *Australian Heritage Strategy*

Heritage can broadly be classified into four categories:

- natural heritage;
- human-made heritage;
- practices and rituals; and
- culture and icons.³

Many of these categories overlap, and often “*intangible heritage is a larger framework within which tangible heritage takes on shape and significance.*”⁴

Early conceptions of heritage in Australia were mostly concerned with the built heritage of Europeans—large, impressive sandstone buildings that were perceived as holding significance because of their relative age, or the person or institution that once occupied it. Contemporary Australia, however, embraces a changed substantive understanding of heritage, and recognises the full breadth of heritage, including natural heritage, Indigenous cultural heritage, ethno-diverse heritage, and the heritage of less-impressive-but-equally-significant built structures.⁵ This definition represents a growing recognition of Australia's cultural and historical diversity.⁶

3.2 Why is heritage important?

Objects and places can be important to a small group of people, such as geographic communities and identifiable cultural groups, or they can have a broader significance for regional/national/global cultural and historiographical understandings of the past, present and future. Heritage objects, places and landscapes weave together to represent our collective heritage, and can tell stories about our relationships with nature, culture, and community experiences of nationhood.

Sometimes the importance of an object or site is derived solely from its academic historical value; we might seek to protect the heritage item for the sake of research, or to help with understanding the past. In this way, a commonplace item from a bygone era may not hold any particular cultural significance to a defined group, but is nevertheless a useful artefact which assists historians to understand the daily life of a particular community in a particular era.

Heritage value comprises many facets. The **Burra Charter 2013**,⁷ defines “cultural significance” or cultural heritage value as:

“aesthetic, historic, scientific, social or spiritual value for past, present or future generations. Cultural significance is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects. Places may have a range of values for different individuals or groups.”

Heritage places and objects may have significance where they represent cultural practices or beliefs (historic, continuing or evolving) which are valuable to a community or group. The cultural significance of a geographic area may need to be assessed as a cultural heritage landscape where it contains multiple significant areas, pathways and objects that are interrelated and deeply intertwined in a people’s cultural traditions, belief and practice. A cultural landscape assessment is often needed to understand and value places of significance for Aboriginal and Torres Strait Islanders as this allows for the proper consideration of the place’s aesthetic, historic, scientific, social or spiritual value for past, present or future generations. The landscape depicted on the cover of this Guide is a good example of this kind of heritage site.⁸

Heritage is also important as a means of cultural exchange. Both natural and cultural heritage are intertwined with the development of literature, music, dance, art, food, and other creative works.⁹ The conservation of heritage is also the conservation of living cultural practices— when we protect and understand our heritage, we are better placed to pass on intergenerational knowledge and understanding. For this reason, the social value of heritage is particularly significant for Indigenous communities. The preservation of culture through heritage protection has been demonstrated to further develop identity and sense of place for Indigenous groups.¹⁰

In addition to the “cultural capital” of these sites and objects, the protection of heritage has immense benefits for the environment in protecting the ecological capital of natural heritage sites, and in some circumstances, generates income through tourism and social enterprises which are undertaken at heritage sites.¹¹

3.3 Does heritage have a monetary value?

The assessment of conservation priorities for heritage places and objects, especially in the context of competing and often incompatible alternative land uses, inevitably leads to consideration of the relative economic value of the heritage sought to be conserved.

Assessing the monetary value of heritage can be a complex task especially when considering the often-intangible aspects of culture and a community’s spiritual relationships with the natural forms of the landscape.¹²

This question was recently considered by the Australian High Court in the *Timber Creek* case (discussed at 9.5 [Timber Creek](#)) where the Court was asked to consider the amount of compensation payable following the construction of infrastructure items and buildings upon and across parts of an important cultural heritage landscape.

We expect, as Australia's recognition of the heritage value of our own Indigenous places continues to evolve, that there will be hard questions to be answered as to how the ongoing loss or compromise of such places should be treated – both legally and financially.

4. International Obligations

As much of the world's heritage is both shared and interrelated, there is significant international cooperation for the identification and management of heritage sites.

Australia has entered into a number of international treaties and conventions concerning heritage. These provide a basis for the enactment or amendment of laws with domestic legal effect. They can also be used by the Courts in interpreting statute law or by the Commonwealth in seeking to persuade the States and Territories to amend existing laws/policies.

Broadly speaking, our Commonwealth legislators do not have a specific power within the Australian Constitution to make laws for the protection of the environment or heritage. They do, however, have the Constitutional power to make domestic laws which give effect to Australia's obligations under a treaty or convention as the Commonwealth has the power to legislate on matters relating to external affairs.¹³

International conventions and bodies have been created for the purposes of identifying and protecting heritage, and Australia plays its part in the recognition of these international bodies and conventions where relevant. Australian heritage experts are also often involved in the inscription of World Heritage sites which is usually a lengthy, and sometimes contentious process.¹⁴

Here are a few examples of Australian adoption and implementation of international heritage laws:

4.1 The World Heritage Convention (1972)¹⁵

This Convention is the most widely ratified international legal instrument addressing the identification and preservation of our global heritage. Specifically, it seeks to advance the protection of built heritage from physical decay, and to retain cultural and natural heritage of the planet in light of a vastly changing social and economic community.

The Convention incorporates the environmental objectives from the 1972 *Stockholm Conference* which represented an increasing international awareness of our environment.¹⁶ Australia implements this Convention through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (discussed at 5. [National Legislation](#)) and its objects have been incorporated broadly into the purposive context of Commonwealth environmental legislation.

The practical impact of this Convention is to weave together the principles of ecologically sustainable development with the protection of cultural and natural heritage values.

Perhaps the most significant, tangible product of this Convention was the creation of the **World Heritage List**. There are now a large number of properties on this list, each of which has been assessed against international criteria and in relation to authenticity and integrity, and protection and management, in order to establish its Outstanding Universal Value (OUV). Many countries, including Australia, now implement this Convention by embedding protection of World Heritage properties in their national legislation frameworks.

Australia currently has 20 sites registered on the World Heritage List,¹⁷ including a combination of colonial, Indigenous and environmental heritage. This list includes monuments and sites that are crucial

to the ancient Australian natural and cultural story, such as the Gondwana Rainforests of Australia, Uluru-Kata Tjuta National Park, the Great Barrier Reef, Australian Convict Sites, and the Sydney Opera House.

4.1.1 Budj Bim Cultural Landscape World Heritage Listing

The Budj Bim cultural landscape was inscribed on UNESCO's World Heritage List on 6 July 2019 (at the World Heritage Committee's 43rd session in Baku, Azerbaijan). It is the first Australian site to be nominated and inscribed solely for its Indigenous cultural significance. The site is in South-Western Victoria, and comprises a series of aquacultural eel traps and associated stone huts built and used by the Gunditjmara people beginning approximately 6,600 years ago.

The inscription of Budj Bim on the World Heritage List is particularly significant for the Australian cultural heritage estate as it dispels the anachronistic perception of Indigenous Australians as purely 'nomadic.'



Photo by Tyson Lovett-Murray, Gunditj Mirring Traditional Owners Corporation

4.2 Shipwreck Agreements

Australia has several shipwreck preservation agreements with other countries. Mostly, these take the format of a Memorandum of Understanding (MOU), and outline at a general level what the obligations and restrictions of each State are in preserving history. Some examples include the preservation of seventeenth and eighteenth century Dutch explorer shipwrecks within Australia's waters, the preservation of *HMAS Perth (I)* in Indonesian waters, and cooperation MOU's with the United States of America for the preservation of underwater cultural heritage resource management activities in the Pacific region.

Australia has recently enacted the *Underwater Cultural Heritage Act 2018*. This provides for the identification, protection and conservation of Australia's underwater cultural heritage. An objective of the Act is to enable the cooperative implementation of national and international maritime heritage responsibilities— its enactment is a further step in Australia's possible ratification of the UNESCO 2001 *Convention for the Protection of Underwater Cultural Heritage*.

4.3 Ramsar Convention (1971)¹⁸

The Ramsar Convention is an international agreement which recognises and helps identify the significance of wetland ecological communities around the world. The Convention is not at face value a

heritage convention in the traditional sense, however it is an example of international law designed to preserve our global natural heritage.

This Convention is the cornerstone of Australia's wetlands management policy and legislation, with Australia now having about 7.3 million hectares of Ramsar listed wetlands. Australia's implementation of the Convention is given effect by the EPBC Act (as discussed at 5. National Legislation) as a 'matter of national significance.'

4.4 The Venice Charter (1964)¹⁹

The *Venice Charter* was written in 1964 and adopted by the newly formed ICOMOS in 1965. The Venice Charter outlines some of the important objectives of heritage conservation, such as at Article 2:

The conservation and restoration of monuments must have recourse to all the sciences and techniques which can contribute to the study and safeguarding of the architectural heritage.

Although not strictly an obligation in the same way as the above Conventions, the Venice Charter is a benchmark for the conservation of heritage, and provides governments and other organisations with widely used, non-obligatory frameworks for the restoration and conservation of world heritage.

4.5 Indigenous Heritage Conventions

There are a number of other international conventions which guide the conservation of Indigenous heritage, including:

- The United Nations Declaration on the Rights of Indigenous Peoples (particularly Article 31);²⁰ and
- The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (noting that the preamble recognises that Indigenous communities are particularly important stakeholders in preserving intangible cultural history).²¹

5. National Legislation

The primary federal legislation that governs the protection of heritage in Australia is the ***Environment Protection and Biodiversity Conservation Act 1999*** (Cth) (**EPBC Act**). Relevantly, it provides for the listing of certain categories of heritage places, requires approvals to be obtained for activities that affect, or are likely to affect the heritage values of listed heritage places, and establishes offences for unapproved adverse impacts on listed heritage.

5.1 Listing of World Heritage properties and National Heritage places

The categories of heritage sites listed under the EPBC Act are:

- places on the World Heritage list or Ministerially gazetted places that Australia has submitted for listing to the World Heritage Committee ("declared World Heritage");
- natural, historic or Indigenous places that are of outstanding national heritage value to the Australian nation ("National Heritage");
- heritage places on Commonwealth lands and waters or under Australian Government control ("Commonwealth Heritage"); and
- overseas places of significance to Australia.

When development or actions are likely to have specific impact, the EPBC Act provides a framework for recognising, quantifying, and approving (or refusing) impacts on heritage. Listed heritage places are afforded specific protections under the EPBC Act, and management plans and permits are required if they are to be disturbed or impacted. Unapproved impacts on the heritage values of listed heritage (including overseas heritage places) constitute an offence.

Under the EPBC Act, a proponent of a development is required to obtain approval for any activities which may have a significant impact on the heritage values of a declared World Heritage site, a National Heritage place, a declared Ramsar wetland, or listed threatened species. These matters are considered in the process of evaluating development or actions as they are ‘Matters of National Environmental Significance’ (NES) and are required to be considered under the Act. Where a significant impact on a matter of NES is likely, the person proposing to take an action must refer the matter to the Australian Government Minister for the Environment for assessment. Where the Minister agrees that there will likely be a significant impact, the proposed action is considered a ‘controlled action’, and the action is required to be approved under the EPBC Act.

In addition, the EPBC Act generally deals with environmental impact on Commonwealth land (or by a Commonwealth actor).²² These general prohibitions refer to significant impacts on the ‘environment’; this includes impacts on heritage as the definition of environment within the Act includes the heritage values of places.²³ Heritage is thus protected more generally in this way.

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

The ATSIHP Act recognises the specific harm that could arise from the desecration of sites which are culturally significant to Indigenous Australians. Declarations under this Act can be made for permanent (section 10) or emergency (section 9) protection of sites which the Minister is satisfied are culturally significant to the indigenous community, and are under threat of desecration.

In practice, however, very few declarations of either kind have been made, (particularly over the last decade),²⁴ and the responsibility for assessing Aboriginal cultural heritage often falls to the consent authorities for individual projects in reliance upon reports commissioned by proponents such as mining companies.

In our experience, this important Commonwealth Act which has been in force for 25 years, has not yet achieved its own simply stated objectives:

*the preservation and protection from injury or desecration of areas and objects in Australia and Australian waters, being areas and objects of particular significance to Aboriginals in accordance with Aboriginal tradition.*²⁵

Until the objectives of this Act are properly understood and effectively implemented, essential parts of Australia’s ancient cultural estate risk being diminished or lost forever.²⁶

6. State and Territory Legislation

Each Australian State and Territory has its own heritage legislation and, for the purposes of this Guide, the example we examine is the regime in New South Wales established by the *Heritage Act 1977* (NSW), the *National Parks and Wildlife Act 1974* (NSW) and the *Environmental Planning and Assessment Act 1979* (NSW).

6.1 Listing of Heritage (NSW)

The NSW Heritage Act establishes the NSW Heritage Council, provides for the listing of “items” on the State Heritage Register, and for heritage conservation agreements with owners of State Heritage items. The Minister may also issue Interim Heritage Orders for items of State or local heritage significance and stop work orders can be issued to prevent harm to heritage items.

The Act defines “heritage” broadly, including places, sites and objects with historic, aesthetic, archaeological, architectural, cultural, natural, Indigenous, social and or scientific value.²⁷ Some other Australian States also include prehistoric, protohistoric, technical, ‘special value for present and future generations’, as well as spiritual heritage.²⁸

The Act also creates and maintains a heritage register, which is similar to the federal listing process. Items on the NSW register are protected from development or activities that may damage or adversely impact these sites, unless a permit is obtained. Listings make their way to the register with the approval of the Minister (with the recommendation of the NSW Heritage Council).²⁹ The owner of a heritage item listed on the State Heritage Register has obligations in relation to minimum standards of maintenance.

Heritage conservation areas and heritage items of local (rather than State) significance can also be listed within each local Council's Local Environmental Plan (LEP).³⁰ This is a separate list to both the State and Federal heritage listings and provides local communities with an opportunity to identify and protect items of local significance.

In NSW, Local Councils are responsible for the identification and management of heritage conservation areas and heritage items of local significance. Areas and items are listed in local planning controls and objectives for their conservation are established in those controls. However, there are often inconsistencies between the conservation objectives for locally listed areas and items and the scale of development permitted by local or State planning controls. Councils also have the power to make interim heritage orders,³¹ which are orders made by the Minister (or the Council by way of delegation) at the recommendation of the Heritage Council, to protect a heritage site for short periods pending detailed assessments of importance and impacts. There are substantive differences between the Australian jurisdictions regarding the handling of items of local heritage significance.

6.2 *National Parks and Wildlife Act 1974 (NSW)*.

Aboriginal cultural heritage is largely managed under the *National Parks and Wildlife Act*. This Act provides for the listing of "Aboriginal Places" (which are generally afforded a similar level of protection to items on the State Heritage Register) and for the issuing of permits authorising impacts to Aboriginal objects and places. Without a permit, harming or desecrating an Aboriginal object or place can be an offence. However, where development consent has been granted for a larger scale project, permits may not be required as it is assumed that impacts have been assessed and approved under the development assessment process.

A draft *Aboriginal Cultural Heritage Bill* was released for public comment in 2018. This legislation proposes a new legal framework for the identification and management of Aboriginal cultural heritage which provides for greater involvement of Aboriginal people.

6.3 *Development and Planning – Assessment of Development (NSW)*

The *Environmental Planning and Assessment Act 1979* (NSW) regulates development in NSW. Where new development or modifications of existing development are proposed that may impact a local or State heritage listed site, additional assessment and approval requirements apply. Larger scale projects with the potential to impact heritage (including unlisted places and objects) may require a heritage assessment as part of the environmental impact assessment process. Carrying out work that affects listed heritage without an approval or permit is generally prohibited.

The Act also facilitates the preservation of natural and intangible heritage. An object of the Act is the facilitation of ecologically sustainable development and consent authorities are required to take into account the public interest and any impacts to the environment when assessing a development that requires consent. Any protection of the environment and, in particular, protection of the environment that seeks to promote sustainability and biological diversity, is a protection of NSW's living, natural heritage.

7. Heritage Policy

7.1 The Burra Charter

The Burra Charter: the Australia ICOMOS Charter for Places of Cultural Significance (**'The Burra Charter'**), was developed and adopted by Australia ICOMOS on 19 August 1979. It provides widely-accepted principles, practices and policies to be applied in relation to places of cultural significance. In doing so, it aims to assist developers, owners and custodians in providing advice and making better decisions about places of cultural significance.

The Burra Charter has been influential globally, and is recognised as one of the leading policy statements on the concept of 'cultural value'.³² It has informed the development of the *Hoi An Protocols*³³, similar guidelines in China (*Principles for the Conservation of Heritage Sites in China*),³⁴ and is extensively employed by heritage practitioners in South Africa.³⁵

The Burra Charter outlines the "Burra Charter Process", which prescribes the recommended method for analysing information and making decisions (see figure 2 below).³⁶ It is based on the premise that, in order to implement a management policy for a place of cultural and heritage significance, the significance of that place must be adequately understood first.³⁷



Figure 2: Burra Charter Process

7.2 Australian Heritage Strategy

The *Australian Heritage Strategy*, published in 2015, provides guidance on the identification and management of Australia's heritage places. The strategy envisages that "[o]ur natural, historic and Indigenous heritage places are valued by Australians, protected for future generations and cared for by the community."³⁸ The Strategy is to be realised through three outcomes:

7.2.1 Leadership

Nationally, heritage matters are guided by the Australian Heritage Council, Australia ICOMOS and the Australian Committee for International Union for Conservation of Nature (IUCN). Together, these bodies, along with the existing legislative framework, contribute to the management of places of heritage significance in Australia, and to the development of policies consistent with Australia's international heritage agreements.³⁹

7.2.2 Partnerships

The strategy notes that national leadership needs to be supported by strong public and private partnerships to improve heritage policy and to align heritage management.⁴⁰ Further, it examines the need to explore how innovative funding solutions, resource sharing initiatives and cooperation with the tourism industry can be developed to improve heritage policy.⁴¹ Australian and State governments have been working towards creating a 'One-Stop Shop' for environmental approvals to simplify the process and to better integrate heritage standards and best practices.⁴²

The Strategy notes that one of the most successful examples of the partnership approach has been the development of the Burra Charter of Australia ICOMOS.⁴³

7.2.3 Communities

Finally, the Strategy aims to build community engagement in the heritage management process, and to increase public awareness about the meaning of Australian cultural heritage and the need for its conservation. This may involve improving ease of access to information and encouraging information sharing to promote the effective management of heritage areas.

8. Key Heritage Actors

8.1 The United Nations

The *United Nations Educational, Scientific and Cultural Organisation (UNESCO)* is the primary UN body responsible for global heritage. The World Heritage Convention (as discussed at [4.1 The World Heritage Convention \(1972\)](#)) was adopted by the General Conference of UNESCO in Paris on 16 November 1972, and currently has 193 State Parties. The Convention defines the kind of natural or cultural sites which can be considered for inscription on the World Heritage List.

The Convention establishes the *Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage* ('**World Heritage Committee**')⁴⁴ which is composed of 21 State Parties and is responsible for the administration of the World Heritage List, and the List of World Heritage in Danger.

State Parties to the Convention are subject to a number of responsibilities, including: the adoption and integration of a policy "which aims to give the cultural and natural heritage a function in the life of the community" into domestic planning frameworks; to set up services "for the protection, conservation, and presentation of the cultural and natural heritage"; to undertake and develop scientific and technical studies with the aim to counteract potential threats to natural and cultural heritage; to take appropriate steps to facilitate the identification of national heritage and to encourage the establishment of programs for training in both protection and conservation, and scientific research.⁴⁵

The World Heritage Convention also created the *Fund for the Protection of the World Cultural and Natural Heritage* ('**World Heritage Fund**').⁴⁶ The World Heritage Fund consists primarily of contributions by State Parties of the Convention and can be used to meet the conservation needs of sites included on the List of World Heritage in Danger, and to meet requests from States Parties for the purposes of protecting their own listed sites.

The World Heritage Convention is primarily given effect in Australia through various provisions of the EPBC Act including for the declaration and management of World Heritage properties,⁴⁷ and the implementation of Australia World Heritage management principles.⁴⁸

8.2 International Council on Monuments and Sites and Australia (ICOMOS)

ICOMOS was created in 1965 in association with UNESCO. Its mission is to “promote the conservation, protection, use and enhancement of monuments, building complexes and sites.”⁴⁹ It also operates as one of three advisory bodies to the World Heritage Committee, developing international heritage frameworks and policies. The ICOMOS statutes prescribe the rights and duties of member organisations and national committees.

Australia ICOMOS was established in 1976 as a national committee of ICOMOS International, to “advance and promote heritage conservation through developing best practice, sharing knowledge and enabling professional development”.⁵⁰ Australia ICOMOS plays a pivotal role in shaping heritage industry practice in Australia and across the Asia Pacific—the most well-known manifestation of this is the Burra Charter.

8.3 Australian Government Department of the Environment and Energy

The Commonwealth Department of the Environment and Energy (**‘DEE’**) has federal responsibility for the oversight of policy and programs for heritage in Australia. The DEE designs and implements Australian Government policy and programs to protect and conserve heritage nationally.

8.4 Australian Heritage Council

The Australian Heritage Council (**‘AHC’**), a Federal body, was established by the *Australian Heritage Council Act 2003* (Cth).⁵¹ The AHC has a variety of functions under the Act including advising the Federal Minister on national heritage policies and on the nomination of places to be listed on the National Heritage List or Commonwealth Heritage List, as well as undertaking assessments of places of heritage significance under the EPBC Act.⁵² Also under this Act, Government Agencies are to consult with the AHC in the preparation of heritage strategies.⁵³

The AHC consists of a Chair, who is required to have substantial experience or expertise concerning heritage, and six other members with expertise in natural, historic and indigenous heritage.⁵⁴ The current Chair of the AHC is the Hon. Dr David Kemp AC.

8.5 Australian Committee for International Union for Conservation of Nature

The Australian Committee of the International Union for Conservation of Nature (**‘ACIUCN’**) was founded in 1979 as a forum for Australian members of the International Union for Conservation of Nature (**‘IUCN’**), to “contribute to the conservation and restoration of the natural environment in Australia and the appreciation of its diverse values.”⁵⁵

The ACIUCN provides Australian members with the opportunity to learn from IUCN experts, develop policy advice, publications and actions to promote “a world which values and conserves nature” in accordance with the mission and policies of IUCN.⁵⁶

8.6 Heritage Council of NSW

The Heritage Council of NSW (**‘the Council’**) is a Government agency constituted under the *Heritage Act*. Importantly, the Council advises the NSW Minister for Heritage on heritage matters, keeps the State Heritage Register of heritage items, and makes recommendations to the Minister for the listing of an item on the State Heritage Register. If the Council considers the item of “historical, scientific, cultural, social, archaeological, architectural or aesthetic” value it may be listed on the State Heritage Register.⁵⁷ The

Council may also make such a recommendation upon the request of the Minister, the owner of the item concerned, the council of the area in which the item is situated, or on the Council's own initiative.⁵⁸

In making recommendations to the Minister on whether an item should be listed, the Council is required to give notice of its intention to consider recommendation to affected peoples, and to consider any submissions received in response to these notices.⁵⁹

The Council also carries out investigations with respect to the conservation of items of environmental heritage, conducts community education concerning the State's environmental heritage, and makes submissions to persons or bodies in respect of environmental studies and planning instruments.⁶⁰

9. Australian Case Studies

In this part of the Guide we illustrate the evolution of heritage as a concept in Australian law.

9.1 The Tasmanian Dams Case

(Commonwealth of Australia and Another v State of Tasmania and Others (1986) 46 ALR 625)

On 1 July 1983, the High Court of Australia upheld an appeal by the Commonwealth Government seeking a declaration that legislation introduced to prevent the damming of the Gordon River in South-West Tasmania was valid. The Court held that the Commonwealth could exercise its constitutional powers to implement Australia's international agreements relating to cultural and natural heritage broadly, and to make laws specifically for the protection of Aboriginal cultural heritage. The validity of Australia's primary federal legislation for the protection of natural and cultural heritage, the EPBC Act, is to a large extent reliant upon the principles established in this case.

In 1978, the Tasmanian Hydro-Electric Commission proposed to construct a dam on the Gordon River to assist in the State's electricity generation capacity and to boost the Tasmanian economy. The construction of the dam was formally authorised by the Tasmanian State government with the introduction of the *Gordon River Hydro-Electric Power Development Act 1982 (Tas)* ('the **Dam Act**'). Prior to formal State approval of the dam project the area had been nominated for listing to the World Heritage Committee.

It was declared a World Heritage site in 1982 because of its outstanding and natural characteristics (including unique pleistocene archaeological sites demonstrating the sequence of human occupation at high southern latitudes during the last ice age). In an attempt to prevent the construction of the dam, the Commonwealth Parliament enacted the *World Heritage Properties Conservation Act 1983 (Cth)* ('the **World Heritage Act**'). The Commonwealth also made the *World Heritage (Western Tasmania Wilderness) Regulations* under the *National Parks and Wildlife Conservation Act 1975 (Cth)*. If legally valid, either the regulations or the Act would make it unlawful to construct the dam without the consent of a Commonwealth Minister. The Tasmanian Government challenged the validity of these Acts.

The Commonwealth argued in the High Court that its legislation was validly enacted by virtue of both sections 51(xxix) and 51(xxvi) of the *Commonwealth of Australia Constitution Act 1900 (Imp)* ('the **Constitution**'). These provide:

51 Legislative Powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...

(xxvi) the people of any race for whom it is deemed necessary to make special laws;

(xxix) external affairs

9.1.1 Races Power

Mason J, who formed part of the majority, held that a law intended to protect cultural heritage was evidently a law falling within the purview of s 51(xxvi):

*“... the cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers powers to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage”.*⁶¹

Tasmania argued that despite this, a law introduced to protect the natural and cultural heritage of the Tasmanian wilderness area could not be considered a special law with respect to the people of a race for the purposes of s 51(xxvi), because it was a law for the benefit of the whole of humankind.⁶²

However, this argument failed to acknowledge that just because an item or an area may hold significance for humankind as a whole, this did not preclude that site or area from having special significance to a particular group of people:

*“... an Aboriginal archaeological site which is part of the cultural heritage of people of the Aboriginal race has a special and deeper significance for the Aboriginal people than it has for mankind generally.”*⁶³

The High Court applied this principle to uphold the validity of various provisions of the Commonwealth legislation which prohibited the carrying out of the dam in view of the potential for damage to or destruction of Aboriginal sites, artefacts or relics.⁶⁴

9.1.2 External Affairs Power

The Commonwealth argued that its legislation was a valid exercise of the power conferred upon the Commonwealth government by s 51 (xxix) of the Constitution – the ‘external affairs power’. This was because the legislation and the regulations were made to give effect to Australia’s obligations under the *World Heritage Convention*.

The majority of the Court found, that a country’s internal affairs may also be the country’s external affairs.⁶⁵ Further, they held that it was self-evident that a matter which becomes the subject of international concern – not least a matter forming the subject of an international treaty to which multiple States had become Parties – was a matter of external affairs.⁶⁶ In so concluding, the majority held that protecting the world’s heritage was one of the most integral functions of international co-operation between nation states:

*“Protecting the world’s cultural and natural heritage and thus fostering the intellectual and moral solidarity of mankind... advances the foremost object of international relations”.*⁶⁷

Outcome

The majority of the High Court held that the Commonwealth legislation was supported by both of these heads of power and was therefore valid. This meant that the inconsistency between the State and the Federal legislation was to be resolved in favour of the Federal legislation, and the Act authorising the construction of the dam was thus ineffective in the absence of consent from a Commonwealth Minister.

9.2 AWWP v Rocla

(Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor; Australian Walkabout Wildlife Park Pty Limited (ACN 115 219 791) as Trustee for the Gerald and Catherine Barnard Family Trust v Minister for Planning and Infrastructure & Anor [2015] NSWLEC 1465)

The New South Wales Land and Environment Court upheld an appeal against the proposed expansion of a sand quarry at Calga. In doing so, the Court acknowledged the Burra Charter as the “key standard” in Indigenous Cultural Heritage assessment. The Court also provided guidance on how Aboriginal Cultural Heritage is to be assessed more widely, drawing particular attention to the need to consider the tangible and intangible context of the landscape and cultural environment.

In November 2015, the New South Wales Land and Environment Court upheld the merit appeals of two objectors to the approval by the Planning and Assessment Commission (**‘PAC’**) of a proposed sand quarry at Calga, NSW. The land the subject of the application was owned by Rocla Minerals. Australian Walkabout Wildlife Park (**‘AWWP’**) owned the land neighbouring the proposed development.⁶⁸

The critical factual question under consideration by the Court was “whether there [was] sufficient credible information upon which to assess the nature and extent of the Aboriginal cultural heritage, and the impacts of the project upon it, and to make a decision as to whether to consent to the development.”⁶⁹ This raised questions of the accepted approach to assessing the significance of Aboriginal cultural artefacts and places within the context of development assessments.

The Land and Environment Court found that the accepted methodology requires “an assessment of the archaeological, historical/social and ethnological values of discovered items and sites to inform the Statement of Significance *before* land management decisions are taken.”⁷⁰

Relevantly, the Court considered the process mandated by the Burra Charter, namely:

“Understanding the cultural significance comes first, then development of policy and finally management of the place in accordance with the policy. ... Policy for managing a place must be based on an understanding of its cultural significance.”⁷¹

The Court held that in these circumstances, the development a Statement of Significance and a conservation management plan after consent has been granted creates “unacceptable uncertainty” as “[t]here appears to be a real risk that new significant sites and/or information which might enhance the significance of known sites, and hence change or augment the overall cultural significance of the site, will be discovered too late to influence land-use decisions or to conserve other discovered significant sites in the cultural landscape.”⁷²

The Court acknowledged “that a requirement for full knowledge about a site is unrealistic and impractical” and identified that “cultural values are dynamic, not static, and may not be captured at any one time”. Nevertheless, in this instance the Court held that the required consultation with Aboriginal stakeholders about the Project “is incomplete until the outcome of the further investigations can inform that discussion.”⁷³

Some of the evidence given indicated that the interpretation of the meaning of the Aboriginal sites was not always consistent between Aboriginal groups.⁷⁴ The Court considered that although there was some level of difference between accounts, “the Aboriginal evidence [was] remarkably consistent” given “the inherent complexity of the concept of cultural landscapes, and the fact that this is an area in which Aboriginal culture is being revived after loss and fragmentation.”⁷⁵

Having regard to the relevant Office of Environment and Heritage guidelines and the evidence before it the Court reiterated the need to consider the significance of the identified “sites” within the context of their

cultural landscape: “the physical aspects of a site (in this case the engraved figures and stone arrangement) should not be considered in isolation but in association with its surrounding spiritual, cultural and physical environment.”⁷⁶

Outcome

The Court considered that the development of a conservation management plan *after* a planning consent has been granted would create an unacceptable level of uncertainty, and would be developed too late in the development process to “effectively influence major changes in the management regime which might be necessary in light of post consent investigations.”⁷⁷ The application for the Calga sand quarry was refused.

9.3 The Sirius Building

(Millers Point Community Assoc. Incorporated v Property NSW [2017] NSWLEC 92)

The NSW Land and Environment Court, in invalidating a decision made by the NSW Minister for Heritage not to direct the listing of the Sirius Apartment Building on the State Heritage register, outlined the process the Minister must follow in making such a decision. Importantly, the Court considered whether the Minister was under an obligation to form a preliminary determination of the State Heritage significance of an item irrespective of the decision to recommend, or not to recommend an item for listing. The case also provides useful guidance about how the Minister is to assess whether a proposed listing on the register would impose “undue financial hardship” on the owner of land on which the item is situated.

The Millers Point Community Assoc. (**‘the Applicant’**) challenged the decision by the Minister for Heritage (**‘the Minister’**) to not direct the listing of the Sirius Apartment Building (**‘Sirius’**) on the State Heritage Register pursuant to s 34(1)(a) of the *Heritage Act 1977* (**‘the Heritage Act’**). The Minister’s reasons for the decisions included that “whatever the heritage significance of the building...[it] is outweighed by the undue financial hardship its listing would cause to its owners”, that would result from a diminishment of what otherwise would be the site’s sale value.⁷⁸

The Applicant challenged this decision by firstly arguing that the Minister made an error of law in construing the phrase “undue financial hardship” in the context of s 32(1)(d) of the Act. Secondly, the applicant contended that the Minister failed to fulfil their obligation to determine whether Sirius is of State heritage significance within the meaning of the Act.

The Court identified that an assessment of whether a listing would result in an owner suffering undue financial hardship arising from the listing of an item on the State Heritage Register involved two steps.

The first was that “the consideration of financial hardship must involve the consideration of the (likely) financial status of the affected owner, mortgagee or lessee”, and that mere financial loss could not, as argued by the Respondent, by itself constitute financial hardship.⁷⁹

The second concerned the implications of the word “undue”. The Court considered that “undue” required “financial hardship” to be assessed within the context of the heritage values of the item, and that the Minister had to balance the hardship to be faced by the owner with the heritage significance of the item. The Court provided by way of example:

“...the World Heritage Listed Sydney Opera House would most likely be considered so important to Australia, indeed the World, that whatever the financial hardship caused by bearing the costs of maintaining and managing it, those costs could never be contemplated to cause “undue” financial hardship.”⁸⁰

The Court held that the Minister erred in construing the proper meaning of the words “undue financial hardship”, and that the Minister in the circumstances of this case failed to discharge the duty to make a determination as to the State heritage significance of Sirius. Accordingly, the Minister’s decision was invalid. Subsequent to the Court’s decision the Minister again considered the application for listing and again determined not to list the Sirius building on the State Heritage register.

9.4 Rocky Hill

(Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7)

The Rocky Hill case was a landmark refusal of development consent for a new coal mine near Gloucester, NSW. The NSW Land and Environment Court held that the Project would have “significant and unacceptable planning, visual and social impacts” for which reason the Project should alone be refused. Additionally, the Court concluded that greenhouse gas emissions (GHGs) resulting from the carrying out of the Project would contribute to climate change. This was found to be contrary to the principles of ecologically sustainable development and posed the potential for significant harm to Australia’s environmental heritage.

The Project, proposed by Gloucester Resources Limited (**GRL**) involved the proposed extraction of 2.5 million tonnes of coal per year from a new open cut coalmine, and included the construction of a coal handling and preparation plant as well as a conveyor system. The mine would be developed, operated and rehabilitated over 21 years. The NSW Planning Minister, through the Planning and Assessment Commission, refused to grant consent. GRL subsequently appealed to the Land and Environment Court.

The Court refused approval on the basis that the mine “will have significant adverse impacts on the visual amenity and rural and scenic character of the valley, significant adverse social impacts on the community and particular demographic groups in the area, and significant impacts on the existing, approved and likely preferred uses of land in the vicinity of the mine.”⁸¹ Importantly, the Court further held that the construction and operation of the mine “will contribute to climate change” through the transportation and combustion of coal from the mine, and that these costs exceeded the economic and social benefits of the project.⁸²

9.4.1 Impact on people’s culture

The Court considered that the significant net negative social impacts were a justification for refusing consent to the Project.⁸³ The adverse social impacts considered by the Court included adverse impacts on people’s culture by reason of impacts on Aboriginal culture and connection to Country and impact on heritage-scenic quality. The impact on Aboriginal cultural heritage included: impacts to identified “individual Aboriginal sites”, the risk that other unidentified Aboriginal sites might be affected and the broader impact on the landscape that is of high spiritual significance to the Aboriginal people. The Court considered that these heritage impacts would severely damage the Aboriginal people’s strong cultural and spiritual connections to Country causing negative social impacts to a disadvantaged and vulnerable group in society.⁸⁴

The Court identified that the heritage-scenic values of the area contribute to the residents’ sense of place and that the high visual impact of the open cut mine will significantly affect people’s sense of place.⁸⁵

9.4.2 Impacts of the mine on climate change

Gloucester Groundswell, a local community action group, was joined as second respondent to the proceedings. They advanced the argument that the Project should be refused because the greenhouse gas emissions from the Project would contribute global climate change.

The Court acknowledged that Australia was party to both the Climate Change Convention and the Paris Agreement, under which parties committed to the long-term goal of keeping global temperature rise to between 1.5°C - 2°C, based on a system of Nationally Determined Contributions (NDC's). Australia's NDC is to reduce emissions by 26-28% below 2005 levels by 2030.⁸⁶

Preston CJ held that the forecast GHG emissions from the Project would be contrary to Australia's NDC, stating:

*"It matters not that this aggregate of the Project's GHG emissions may represent a small fraction of the global total of GHG emissions. The global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources and remove global total GHG emissions... All emissions are important because cumulatively they constitute the global total of greenhouse gas emissions, which are destabilising the global climate system at an alarming rate."*⁸⁷

The Court also considered the need for a consent authority to have regard to the principles of ecologically sustainable development when assessing Project proposals, which were defined to include "the precautionary principle, inter-generational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms."⁸⁸ This was critical in that

*"the acceptability of a proposed development of a natural resource depends not on the location of a natural resource, but on its sustainability."*⁸⁹

9.5 Timber Creek

(Northern Territory v Mr A Griffiths (dec'd) and Lorraine Jones obh of Ngaliwurru and Nungali Peoples [2019] HCA 7)

The High Court determined financial compensation payable by the Northern Territory of Australia to the Ngaliwurru and Nungali Peoples ("the Claim Group") for the loss and impairment to the Claim Group's native title rights. In doing so, it has provided guidance on how one might put a financial value on cultural heritage.

Between 1980 and December 1996, the Government of the Northern Territory of Australia granted various tenures and carried out a number of public works over land in and around the town of Timber Creek. It was later held that these acts impaired or extinguished native title rights and interests held by the Claim Group, giving rise to a claim for compensation under the *Native Title Act 1993* (NSW) ('the NTA').⁹⁰ The Claim Group sought financial compensation for these actions under s 51 of the NTA. The High Court was concerned with how this compensation was to be calculated within the framework provided by the NTA.

The parties had agreed to apply a bifurcated approach to valuation, by first determining the economic value of the rights extinguished, and then estimating the non-economic losses resulting from the extinguishment of the native title rights and interests.⁹¹

The three questions to be determined by the High Court were:⁹²

- how the objective economic value of the affected native title rights and interests is to be ascertained;
- whether and upon what basis interest is payable on or as part of the compensation for economic loss; and
- how the Claim Group's sense of loss of traditional attachment to the land or connection to country is to be reflected in the award of compensation.

9.5.1 Economic Value

The High Court considered that the economic value of the native title rights and interests should be determined by an application of the *Spencer* test,⁹³ adapted to accommodate the unique character of native title rights.⁹⁴ The first step required to ascertain the economic value of the rights held, is to determine the nature and extent of those rights.⁹⁵ In this regard, the Court found:

*“... the Claim Group’s rights and interests were essentially usufructuary, ceremonial and non-exclusive. The Claim Group’s rights and interests were perpetual and objectively valuable in that they entitled the Claim Group to live upon the land and exploit it for non-commercial purposes.”*⁹⁶

However, these rights had since been limited by the historic grant of pastoral leases over land to which the rights and interests applied.⁹⁷ In this case, the Court held that the value of the rights and interests was to be determined by applying a percentage reduction to the economic value of full exclusive native title.⁹⁸ The appropriate discount in this case, having regard to the nature of the native title rights and interests which had been extinguished, was fifty percent.

9.5.2 Non-Economic Value

In calculating the non-economic value of the loss incurred by the Claim Group, the task was

*“to determine the essentially spiritual relationship which the Ngaliwurru and Nungali Peoples have with their country and to translate the spiritual hurt from the compensable acts into compensation.”*⁹⁹

The Court considered that this task required a number of separate but inter-related steps, as mandated by s 51(1) of the NTA: “identification of the compensable acts; identification of the native title holders’ connection with the land or waters by their laws and customs; and then consideration of the particular and inter-related effects of the compensable acts on that connection.”¹⁰⁰

There were a number of important principles which the Court examined in undertaking this exercise.

The assessment of compensation is not to be carried out by reference to a finite group of people. The NTA envisions, by way of its definition of native title rights at s 223, the entitlement to compensation is a ‘communal or group’ entitlement, which acknowledges the changing composition of the group as time passes.¹⁰¹ Further, although each act of extinguishment affects a particular piece of land, compensation is to be assessed by having regard to the effect of the acts within the context of the whole area over which the rights and interests are claimed.¹⁰²

*“... each act put a hole in what could be likened to a single large painting – a single and coherent pattern of belief in relation to a far wider area of land... The damage done was not to be measured by reference to the hole, or any one hole, but by reference to the entire work.”*¹⁰³

The High Court recognised that the exercise before it was intrinsically intertwined with a society’s perception of the value of its own heritage.

*“... what, in the end, is required is a monetary figure arrived at as the result of a social judgment, made by the trial judge and monitored by the appellate courts, of what, in the Australian community, at this time, is an appropriate award for what has been done; what is appropriate, fair or just.”*¹⁰⁴

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This document does not constitute legal advice and is merely intended to provide an outline of Australian heritage laws and policies.

Please contact us if you would like to discuss our legal services.

References

- 1 Ben Boer and Graeme Wiffen, *'Heritage Law in Australia'* (Oxford University Press, 2006) pp7-8.fds.
- 2 *Australian Heritage Strategy*, Commonwealth of Australia 2015, p8.
- 3 *Community Attitudes on Heritage*, Office of Environment and Heritage 2017.
- 4 Boer and Wiffen (n 1), p23.
- 5 Boer and Wiffen (n 1) 18.
- 6 See, for example *Tickner v Bropho* [1993] FCA 306 (Administrative law case which heard a conflict between a European heritage use of a site (the Swan Brewery Site) and its cultural heritage significance for Indigenous communities in the area).
- 7 See discussion in section titled "Burra Charter" on page 12 of this guide.
- 8 The photograph on the front cover depicts a view from the summit of Mt Watermark. Areas and objects around Mount Watermark are the subject of two applications for permanent protection made to the federal Minister for the Environment under section 10 of the *Aboriginal and Torres Strait Islander Protection Act 1984*. The areas and objects for which protection has been sought include grinding groove complexes, viewing corridors, multi complex burial places, traditionally significant mountain, gully, river and swamp areas and culturally important trees. These interconnected areas form a cultural landscape which would be destroyed or indirectly desecrated by proposed open cut coal mining operations.
- 9 *Heritage Interpretation Policy*, Office of Environment and Heritage 2005.
- 10 *Australian Heritage Strategy*, Commonwealth of Australia 2015, p 7.
- 11 *Australian Heritage Strategy*, Commonwealth of Australia 2015, pp 7–8.
- 12 Over the last 30-40 years, the economics of art and culture (also known as "cultural economics") has become a significant area of theoretical and applied economics. Professor David Throsby (Distinguished Professor in the Department of Economics Macquarie University) is internationally known for his work in the field of economics and culture.
- 13 This power is commonly referred to as the *external affairs power* and is listed as a head of power in the Commonwealth Constitution s 51 (xxix). The power is not at large and any legislation proposed must be appropriate and adapted to the treaty and cannot extend beyond its scope. For example, a treaty that concerned the protection of biodiversity can be implemented in domestic law by way of legislation, however any legislation enacted to protect biodiversity cannot extend to all matters of environmental law simply because biodiversity is an environmental law consideration.
- 14 Australia is currently one of the 21 States Parties of the World Heritage Committee. Periodic Reporting undertaken by State Parties under the 1972 World Heritage Convention identifies measures for the implementation of the Convention in the Asia Pacific Region as well as measures for conservation and management of each individual cultural and natural heritage property inscribed on the World Heritage List.
- 15 In full 'Convention Concerning the Protection of the World Cultural and Natural Heritage' adopted by the General Conference at the seventeenth session, Paris, 1972.
- 16 Boer and Wiffen (n 1) 69.
- 17 As at 30 June 2019 there are 19 sites. Listing of a 20th site (Budj Bim) is anticipated in July 2019. These sites are in forty one geographic locations as Australia's twelve "Convict heritage sites" throughout Australia are defined as a single "Site". Similarly, the eleven listed Gondwana Rainforest areas are a single site as are the two listed Australian Fossil Mammal sites.
- 18 In full 'Ramsar Convention of International Importance especially as Waterfowl Habitat' adopted by the General Conference, Iran, 1971.
- 19 In full 'International Charter for the Conservation and Restoration of Monuments and Sites (The Venice Charter 1964)' as resolved at the second International Congress of Architects and Technicians of Historical Monuments, Venice, 1964.
- 20 The Australian Government supports the United Nations Declaration on the Rights of Indigenous Persons **as a non-legally binding document** (see *International Human Rights System* (Website) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/International-Human-Rights-System.aspx>>).
- 21 *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006). The UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* has been ratified, approved or accepted by 178 countries. Australia is not yet a party to the Convention.
- 22 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 26, 28.
- 23 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 528.

24 In the period 2010- 2016, 94 applications for protection under section 9, 10 or 12 lodged but no declarations were made. See figure HER17 - applications for protection under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, 2010–11 to 2015–16 in Mackay R, *Australia State of the Environment 2016: Heritage* (Independent report to the Australian Government Minister for the Environment and Energy, Australian Government Department of the Environment and Energy, 2017) at 86.

25 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 4.

26 The ATSIHP Act has been the subject of a number of reviews over the past years. Most significantly in 2009. See discussion in State of the Environment 2011 Committee, *Australia state of the environment 2011* (Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, 2011) 750-1.

27 Boer and Wiffen (n 1) 186.

28 For example, other State level legislative instruments define 'heritage significance' to include significance 'to the present generation or past or future generations' (*Heritage Act 1992* (Qld), sch); 'spiritual' significance to 'individuals or groups within Western Australia' which 'may be embodied in a place itself and in any of its fabric, setting, use, associations, meanings, records, related places and related objects' (*Heritage Act 2018* (WA), s 5). South Australian legislation provides a detailed set of criteria used to identify places and objects of cultural heritage – for example a place must '[demonstrate] important aspects of the evolution or pattern of the State's history' or '[demonstrate] a high degree of creative, aesthetic or technical accomplishment or [be] an outstanding representative of particular construction techniques or design characteristics' (*Heritage Places Act 1993* (SA), s 16). Tasmanian legislation is crafted similarly to its South Australian counterpart to include criteria such as '[importance] to the course of pattern of Tasmania's history' and '[importance] in demonstrating a high degree of creative or technical achievement' (*Historic Cultural Heritage Act 1995* (Tas), s 16(2)).

29 The Heritage Council is discussed further in this document under the section 4 (f) *Heritage Council of NSW*.

30 See Standard LEP instrument 5.10.

31 *Heritage Act 1977* (NSW) Part 3.

32 'International Principles and Local Practice of Cultural Heritage Conservation' (Conference Proceedings, ICOMOS China, 5-6th May 2014) <https://www.getty.edu/conservation/our_projects/field_projects/china/tsinghua_conf.pdf>.

33 Richard A. Engelhardt, Pamela Rumball Rogers, *Hoi An Protocols for best conservation practice in Asia: Professional Guidelines for Assuring and Preserving the Authenticity of Heritage Sites in the Context of the Cultures of Asia* (UNESCO Bangkok, 2009).

34 ICOMOS China. 2015. *Zhongguo wen wu gu ji bao hu zhun ze = Principles for the Conservation of Heritage Sites in China*. Rev. ed. Beijing Shi: Wen wu chu ban she. http://hdl.handle.net/10020/gci_pubs/china_principles_2015.

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36 Australia ICOMOS, 'Understanding and assessing cultural significance', (Practice Note), p 2 <https://australia.icomos.org/wp-content/uploads/Practice-Note_Understanding-and-assessing-cultural-significance.pdf>.

37 *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013*.

38 *Australian Heritage Strategy*, Commonwealth of Australia 2015, p 3.

39 Ibid 17.

40 Ibid 32.

41 Ibid 34.

42 Ibid 30.

43 Ibid 32.

44 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) art 8.

45 Ibid art 5.

46 Ibid art 15.

47 Ibid s 14.

48 Ibid s 323.

49 ICOMOS, *ICOMOS' Mission* <<https://www.icomos.org/en/about-icomos/mission-and-vision/icomos-mission>>.

50 Australia ICOMOS, *Mission Statement* <<https://australia.icomos.org/about-us/australia-icomos/mission-statement/>>.

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- 51 *Australian Heritage Council Act 2003* (Cth).
- 52 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), pts 1A, 3A.
- 53 *Ibid* s 314ZA.
- 54 *Australian Heritage Council Act 2003* (Cth), ss 6-7.
- 55 *Constitution*, The Australian Committee for IUCN (at 6 June 2019) cl 3.
- 56 *Ibid*.
- 57 *Heritage Act 1977* (NSW), ss 4A, 32(1).
- 58 *Heritage Act 1977* (NSW), s 32(2).
- 59 *Heritage Act 1977* (NSW), s 33.
- 60 *Heritage Act 1977* (NSW), s 21.
- 61 *Commonwealth of Australia and Another v State of Tasmania and Others* (1986) 46 ALR 625, 719.
- 62 *Ibid*.
- 63 *Ibid*.
- 64 *Ibid*, 718.
- 65 *Ibid* 728, citing *R v Burgess; New South Wales v Commonwealth* (1975) 135 CLR 337.
- 66 *Ibid* 691.
- 67 *Ibid* 734.
- 68 Beatty Legal acted for Australian Wildlife Walkabout Park in these proceedings.
- 69 *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [471].
- 70 *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor; Australian Walkabout Wildlife Park Pty Limited (ACN 115 219 791) as Trustee for the Gerald and Catherine Barnard Family Trust v Minister for Planning and Infrastructure & Anor* [2015] NSWLEC 1465, [471] [emphasis added] (*'Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure'*).
- 71 *Ibid* [309].
- 72 *Ibid* [310].
- 73 *Ibid* [329] and [331].
- 74 *Ibid* [166].
- 75 *Ibid* [199].
- 76 *Ibid* [182].
- 77 *Ibid* [310].
- 78 *Millers Point Community Assoc. Incorporated v Property NSW* [2017] NSWLEC 92, [11].
- 79 *Ibid* [119].
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- 81 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [8].
- 82 *Ibid*.
- 83 *Ibid* 421
- 84 *Ibid* [351] and [407].
- 85 *Ibid* [321] and [350].
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- 87 *Ibid* [515].
- 88 *Ibid* [488].
- 89 *Ibid* [694].
- 90 *Northern Territory v Mr A Griffiths (decd) and Lorraine Jones obh of Ngaliwurru and Nungali Peoples* [2019] HCA 7, [6] (*'Northern Territory v Griffiths'*).
- 91 *Ibid* [84].

92 Ibid [2].

93 Ibid [66], citing *Spencer v Commonwealth* (1907) 5 CLR 418. In *Spencer*, the Court considered that the market value of land was to be determined by supposing “it [was] sold... not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser willing to trade, but neither of them so anxious to do so that he [or she] would overlook any ordinary business consideration”.

94 Ibid [66].

95 Ibid [68].

96 Ibid [69].

97 Ibid [69].

98 Ibid [70].

99 Ibid [155].

100 Ibid [218].

101 Ibid [229].

102 Ibid [219].

103 Ibid.

104 Ibid [237].