A history of Aboriginal heritage legislation in south-eastern Australia

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This paper details the role that archaeologists and archaeological knowledge played in the lobbying for, and framing of, Aboriginal heritage legislation in south-eastern Australia (New South Wales, Victoria and Tasmania). The central contention of the paper is that a fortuitous set of circumstances during the 1960's and 1970's privileged archaeologists and archaeological knowledge in the creation and framing of heritage legislation, which has established the framework under which Cultural Heritage Management (CHM), and indeed all archaeology in Australia, has since been conducted. Central to this process was the mobilisation of the discourse of the 'New Archaeology', which lent confidence to the perception of archaeology as a rigorous science. This self perception was reflected in the way in which the relevant bureaucracies were able to utilise the supposedly neutral and value free nature of archaeology as a 'science'. Archaeological knowledge, and archaeologists as the holders of expert knowledge, were afforded a central role in the legislation over the interpretation and disposition of material culture, which in a sense allowed them to play a role in the regulation and governance of indigenous cultural claims (though see Smith in press(a) with reference to the erosion of that authority).

In detailing the history of Aboriginal heritage legislation in south-eastern Australia the following questions are explored:

1. What were the circumstances that gave rise to the public issue of the need for heritage legislation;
2. What role did archaeologists and archaeological knowledge play in the lobbying for, framing and implementation of heritage legislation;
3. To what extent were the knowledge claims of the 'New Archaeology' implicit in the legislation;
4. Did the process of establishing the legislation contain the seeds for a challenging of the authority of archaeology?

Governing material culture

I have written elsewhere on the theory and politics of CHM (Smith 1993, 1994, Smith and Campbell 1998). However, I would like to briefly explain the theoretical insights that drive the links I make between archaeological knowledge, archaeologists as expert practitioners, the use of archaeology by government agencies, and the wider political implications of these relations.

To understand how archaeological knowledge can become entwined in public policy issues and wider political debates it is useful to turn briefly to a critical reading of Foucault's later work on governmentality. The governmentality thesis argues that expert knowledge in the social sciences has been mobilised by bureaucracies to govern the 'conduct of conduct'of populations (Foucault 1991). By making the surveillance of populations, and the monitoring of their internal states, a focus of 'technical' and supposedly neutral experts, the political dimensions of the exercise of power and knowledge are obscured. An extension of the governmentality thesis is the idea that the suite of behavioural and social sciences that have as their object the regularisation of the internal states of individuals existing within defined populations may be understood as 'technologies of government' (see Rose 1991, Dean 1994; Hindess and Dean 1998). As Rose states the mobilisation of expert knowledge and language as a technology of government renders:

> the world ... intelligible and practicable, and domains are constituted...which are amenable to interventions by administrators, politicians, authorities and experts... (1993: 289)

The object of archaeology is material culture and the discipline does not, at first glance, lend itself to being understood as a 'technology of government'. However, material culture has a symbolic dimension, both in the past and the present, for many different interest groups. Material culture as 'heritage' often provides a tangible physical representation or embodiment of a range of intangible cultural and historical identities, a sense of place and of community and so forth. Archaeological knowledge about material culture often does have an impact on the way various cultural and social groups perceive themselves and are perceived by other sectors of Australian society, this is particularly the case with Aboriginal culture. Thus, archaeological knowledge may be rendered as a technology of government which governments and policy makers may utilise to understand and govern a range of cultural and social groups (Smith and Campbell 1998).

The social problem

The 1960s and 1970s saw the intersection of a number of social issues together with the aspirations of Aboriginal people and archaeologists. In the first instance public debate began in the 1960s to turn to a concern over environmental issues. As Lowenthal (1979, 1990) and other commentators (e.g. Hunter 1981; Chase and Shaw 1989; Fowler 1982; Cleere 1984; Flood 1993) have noted, caught within this public debate was an increasing concern for the fate of cultural heritage. This public concern was largely a Western preoccupation, but in Australia, as with many other Western countries, a concern about the preservation of heritage became tied into debates about, and the questioning of, national and cultural identity. Coincidental with this were events originating in the public rise of Aboriginal activism, which was also bringing into question ideas about Australian identity and the nature of Australian history.

During the late 1960s and 1970s Aboriginal political activism became more public, and gained increasing media attention (Sykes 1989; Lippman 1992). Aboriginal identity was used by governments in attempts to arbitrate over the political legitimacy of Aboriginal interests. Conversely, as Miller (1986:192f) reports, Aboriginal people were concerned in the late 1960s and early 1970s to recapture a pride in their identity, and were actively reshaping Aboriginality as part of a politicised cultural revival. Cultural heritage was important in symbolising and providing material links with Aboriginal cultural identity (see Langford 1983; Fourmile 1989a; Ah Kit 1994). Issues of 'identity' became central to negotiations with governments over the legitimacy of Aboriginal claims.

Not only were European ideas about Aboriginal identity being explicitly challenged by Aboriginal people, ideas about

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Australian 'nationhood' were similarly under scrutiny. References to 'invasion' rather than 'peaceful settlement' jeopardised general Australian perceptions of history and national identity, while arguments about Aboriginal sovereignty and identity questioned the idea of a unified Nation. As Archer (1991) argues, these events encouraged a re-modelling of Aboriginal identity during the 1960s and 1970s which saw the rise of 'pan-Aboriginality' as a sub-state nationalism.

Further, Aboriginal people used claims to land *and* material culture as crucial strategies to forge new cultural and political identities. Increasingly assertive claims were made for ancestral lands via the Land Rights Movement, and the ethics of the collection practices of museums and archaeologists were called into question. Land was re-defined in public discourse as both material and cultural by these claims, as were the Aboriginal 'artefacts' held in museums and by university-based archaeologists. A politicised Aboriginality that called on the Aboriginal past as a way of defining the political legitimacy of Aboriginal interests had become an important political resource for Aboriginal people by the 1970s (Miller 1986; Sykes 1989; Archer 1991). Coincidental with all this was the rise in archaeological concerns over the fate of material culture, and in particular Aboriginal sites and places.

The early pastoral role of archaeology

McCarthy (1938), had already raised his concerns about the fate of Aboriginal artefacts and sites in the 1930s and had gone as far as drawing up proposals with Shellshear (Professor of Anatomy, University of Sydney) for Aboriginal heritage legislation. Although these proposals were submitted to the New South Wales government in 1939 and again in 1945 (McCarthy 1970c, 1970e; McKinlay 1973) his concerns would not be listened to until the 1960s when they began to coincide with wider public debate and expressions of concern over environmental issues in general. Indeed, it was when McCarthy's concerns found synergy with wider public debates that his proposals were incorporated into the *New South Wales National Parks and Wildlife (Amendment) Act 1969*, (McCarthy 1970e:153; Sullivan 1975a:10, 1975c:28), legislation that then formed the basis of the current provisions of the *National Parks and Wildlife Act 1974* (see below). An important point to note is the way in which McCarthy framed his concerns, as it presaged the more explicitly scientific discourse that drew on the theoretical vocabulary of the 'New Archaeology'.

McCarthy argued for the development of legislation to protect Aboriginal sites and artefacts, to not only advance scientific study and educate people as to the significance of 'our archaeological deposits' (1938:121), but also because he considered that cultural information was vanishing with the 'disappearance'of Aboriginal people and customs (1938:123-4). He was later to state that:

In most of eastern Australia the relics in situ exist as prehistoric antiquities because the Aboriginal culture no longer exists in most of this region (1970d:53).

He also argued that legislation was important if 'Australian archaeology was to have world significance', and that sites had to be protected from 'treasure hunters' so that they could be used by 'trained specialists' (1938:123). In these arguments McCarthy was setting the parameters of debate in which specialists or 'experts' were placed in position of pastoral care or as 'stewards' for a dead or relict past. His comments were to be rehearsed by other archaeologists in the 1960s and 1970s who increasingly applied pressure on both State and Federal governments to offer protection to Aboriginal material culture.

Archaeological lobbying for legislation was done for a variety of stated reasons which included the desire: to protect a vanishing past and its international scientific significance; to promote public education about the need for preservation; to protect the archaeological database, and specifically to promote a sense of Australian cultural identity (e.g. Mulvaney 1964, 1970, 1981a, 1981b; 1990; Megaw 1966; Moore 1975; Coutts 1977; McBryde 1986; Allen 1987; Davison 1991). However, importantly, the main issue seems to have been concern over amateur plundering of sites. Mulvaney recounts that in 1963 he addressed an ANZAAS conference on the need 'to control amateur plundering of sites' (1990:1). He later argued that legislation was essential to prevent destruction of sites due to increasing dangers posed by 'expanding road systems' that made access to sites by the public easier (1970:117). Megaw, in arguing for legislative controls stressed the need for public education about the values of 'Australia's heritage' and the 'recruitment ... of the interested amateur ... and general public' in preservation and recording threatened sites (1966:309). He went on to concede that the more technical issues of recording and preservation 'are intended chiefly for the professional rather than even the semi-skilled amateur'(1966:309).

This discourse is underwritten by a sense in which archaeologists perceived a pastoral role for themselves over Aboriginal material culture. Mulvaney argued in 1968 for the need to preserve Aboriginal sites, and was at pains to point out the 'morality' of leaving the investigation of sites to the professionally trained (sentiments that are also echoed by Megaw 1966, Jones 1968, and Allen 1970).

Not only was it argued that archaeologists had a moral right to access material culture due to the ethics of their scientific training, but clearly they had a 'responsibility', or in Allen's terms a 'duty' (1970:99), as spokespersons for the past and a vanishing people.

The reception of the 'New Archaeology'

The public debates that the new wave of university trained archaeologists began to engage in during the 1960s, and their lobbying of governments for protection of Aboriginal 'relics', were underwritten by the rhetoric of the 'New' or processual archaeology. Processual theory was explicitly imported into Australian archaeology to bolster claims about the new professionalism, relevance and rigour of 1960s and 1970s practice. The 1960s saw the influx of Cambridge trained archaeologists, the development of the then Australian Institute of Aboriginal Studies and university departments of archaeology (Moser 1995). At this time specific claims were made to distance the new 'professional' era from what was termed the 'amateur' period of the pre-1960s.

In the late 1960s and early 1970s a number of influential archaeologists called for Australian archaeology to adopt the methodology and philosophies of the emerging American literature. The adoption of processual theory was seen as ensuring disciplinary maturity and offered a way for the developing discipline to avoid parochialism. As Megaw states:

> We have still far to go in what has been regarded as the last state in the evolution of our archaeology: systematic search and theorizing with the aid of processual analysis (1966:308).

Megaw advocated a more scientific archaeology, and the adoption of the latest theoretical trends from the USA, to

ensure archaeological maturity in the eyes of the international community — even at the expense of relegating his and others' Cambridge training as 'old fashioned' (1966:308). Mulvaney (1971b:243) also called for 'more sophisticated techniques and sounder logic'; saying that Australian archaeologists would 'do well to consult American literature, particularly ... *American Antiquity*' (see also 1971a). In 1963 at an Australian Institute of Aboriginal Studies (AIAS) conference Jack Golson is also reported to have advocated that Australian archaeology adopt the theoretical and methodological techniques being developed in the USA (Mulvaney 1971a:373; see also Golson 1986). Jones, too, in 1968 warned against the simple collection of data and artefacts by professional archaeologists and argued that archaeology needed a cohesive theoretical framework, especially because:

> In terms of the 'mainstream of history', Australia is a peripheral eddy. If we are content merely to document this local sequence, we consign our work to a footnote of world prehistory (1968:535).

Processual theory was a vehicle for the newly emergent Australian archaeology to gain international recognition and acceptance. Subsequently, processual method and theory were *explicitly* adopted into the Australian discipline, as Moser (1995:181-2) documents, when they were incorporated into the teaching of prehistoric archaeology at Sydney University.

However, Australian archaeology did not entirely abandon the preceding culture history approach (Mulvaney 1973; McBryde 1986; Bowdler 1993). As Allen and Jones note, Australian archaeology pursued the development of its scientific and theoretical credentials on top of the old 'culture history approach', a processes which they refer to as Australia's 'hybridisation' (1983:166).

The question of the social and scientific relevance of archaeology addressed by processual theory was well taken in the Australian context. Australian archaeology was a new area of study with a need to make Aboriginal 'prehistory' relevant to larger archaeological concerns. The important point here is that, while archaeological practice may have been a 'hybradization' of culture history and processual science, nonetheless the rhetoric of procssual science was taken up as part of the public identity of the new discipline. As Jones (1993:106, 115) states the 1960s and 1970s saw both a 'scientific revolution' and the arrival of 'modern' archaeology.

The use of processual discourse and rhetoric by archaeologists found synergy with the common sense assumptions held by bureaucrats and governments about the nature of science as value free and neutral knowledge. Further, the significant discoveries at Lake Mungo between 1968 and 1974 captured public imagination, and bolstered the public claims of archaeologists about the relevance and importance of archaeological science. Archaeologists and, more importantly archaeological knowledge, provided bureaucrats with a way of making sense of the developing social problem of Aboriginal cultural politics that was intersecting with wider heritage issues. Archaeologists as 'experts' and their knowledge were, amongst other areas of expertise, mobilised to help policy makers make sense of, define, and thus regulate Aboriginal claims about the nature of their heritage. This was explicitly done in the development of Aboriginal heritage legislation in the south-eastern States. It was in these States that Aboriginal cultural identity had been popularly denied, with the common assumption that Aboriginal culture had 'died out' in the south-east of Australia. The new emerging claims of the Aboriginal land rights movement was thus particularly problematic for policy makers in this region, a situation which facilitated the mobilisation of archaeological expertise in the regulation of Aboriginal heritage.

The development of Aboriginal heritage legislation in south-eastern Australia

Embedding processual assumptions

The New South Wales Liberal government in 1966, due to pressure from academics, the Australian Museum and AIAS, established an Advisory Committee on Aboriginal Relics to, amongst other things, advise on the development of heritage legislation (McCarthy 1970e:153). The Committee comprised Emeritus Professor A.P. Elkin (Anthropology, University of Sydney) as chairperson, archaeologists from the Australian Museum and the University of Sydney (David Moore and Richard Wright, respectively), and representatives from the Lands Department, Geological Survey and the National Trust (Anon 1969:7; McCarthy 1970c; Sullivan 1972, 1975a; Carr 1970). The then Minister for Lands, Tom Lewis, was the minister responsible for establishing the New South Wales National Parks and Wildlife Service (NPWS) and with developing its legislation. Prior to the release of the Advisory Committee's recommendations the NPWS was established under the *National Parks and Wildlife Act 1967*, which also contained limited provisions to protect declared 'Historic Sites' (NSW, Legislative Assembly 1966, *Debates* vol. 65, p. 3053; Sullivan 1975b).

Lewis favoured the US national parks model, which also placed the management of 'relics' under a national parks service, and to this end employed Samuel P. Weems from the US Parks Service to help him develop the NPWS. Weems is reported as defining his brief as setting aside 'primitive areas' as National Parks (*SMH* 11.1.1967). The construction of National Parks as 'primitive areas' would have created no conceptual difficulties for the inclusion of Aboriginal material culture within the NPWS Act, as Aboriginal 'primitiveness'was a popularly held perception of the times (see Mulvaney 1958). McCarthy himself held this view of 'primitiveness', nominating national parks as appropriate for the preservation of 'primitive' areas and Aboriginal 'antiquities' (1970b:xii-i).

In September 1967 the Advisory Committee to the Minister for Lands resubmitted a revision of the text drafted in 1939 by McCarthy and Shellshear. This revision was finally incorporated into the *National Parks and Wildlife (Amendment) Act 1969*, gazetted in April 1970 (McCarthy 1970e:153; Sullivan 1975a:10, 1975c:28). This legislation then formed the basis of the current provisions of the *National Parks and Wildlife Act 1974* (Sullivan 1975c). The 1969 Amendment Act made provision for the protection of what the Act termed archaeological, anthropological and Aboriginal 'relics', and all relics became the property of the Crown under this Act (Anon 1969). The existing Advisory Committee became the Aboriginal Relics Advisory Committee to the Minister of Lands and the Director of the NPWS (McKinlay 1973; Sullivan 1975a). This Committee was to advise on any matter relating to the management and preservation of relics (Anon 1969).

There is a very real sense that archaeologists in the 1960s perceived themselves as dealing with a 'fossilised' past. Aboriginal culture was not only being relegated as part of New South Wales natural history by the development of heritage provisions within the New South Wales legislation, it was also

clearly being redefined as existing within a cultural vacuum. The perception of a 'vanished' people is embedded in the use of the term 'relics', specifically as it implies that Aboriginal heritage no longer exists within contemporary cultural and social contexts. Needless to say Aboriginal people find this problematic:

> The term, 'relic', has for us the strong connotation that items of Aboriginal cultural property so defined have no connection or significance to Aboriginal people today, that they belong to a dead past (Fourmile 1989b:50; see also NPWS 1989; Geering and Roberts 1992).

Aboriginal people had no input into the development of the New South Wales Act (Sullivan 1983, Smith 1996a). It is 1960s archaeological assumptions about the 'relict' nature of Aboriginal culture, and assumptions about the ability of archaeological science to offer pastoral care over a dead past that became embedded within the Act. Further, the term relic also emphasises the physicality of Aboriginal heritage and works to deny non-material aspects of cultural heritage. What ultimately is being protected by these acts is archaeological data and not Aboriginal 'heritage' as such.

In Victoria the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) was originally administered by the National Museum of Victoria, then in 1973 the Victorian Relics Office was established under the directorship of the archaeologist Peter Coutts (Coutts 1975, n.d.). In 1976 it became the Victoria Archaeological Survey (until Aboriginal heritage came under the auspices of Aboriginal Affairs Victoria in 1993). Lobbying for this legislation came from the National Museum of Victoria, AIAS, archaeologists, but notably in this State, also from amateur archaeologists as represented by the then Victorian Archaeological Society and the Victorian Naturalists Club (Coutts n.d.).

Under the Victorian act the definition of relic also includes Aboriginal 'skeletal remains' older than 1834, the date of European 'settlement' of Victoria (s.2). Archaeologists working in Victoria at this time argued that not only was Aboriginal culture extinct in that State, but that skeletal remains 'should be valued and scientifically collected with all possible data' (Gill 1970:27). Quite explicitly in this act is embedded the idea that human remains are simply to be understood as data, and part of the province of archaeology.

In Tasmania the embedding of processual science in the Aboriginal legislation appears to have been quite explicitly undertaken by legislators in a conscious attempt to de-politicise cultural claims by Tasmanian Aboriginal people. The Tasmanian Liberal government adopted the New South Wales model (Sims 1975) and placed the authority for the management of relics with what is now the Parks and Wildlife Service (PWS — then the Tasmanian National Parks and Wildlife Service). Originally, provisions to protect Aboriginal relics were to be incorporated into the 1974 amendments to the *National Parks and Wildlife Act 1970* (Tas), but in the end were relegated to the *Aboriginal Relics Act 1975*. As revealed in archival documents the Tasmanian government was subject to persistent rigorous lobbying about the need for legislation from archaeologists, natural historians, the Tasmanian Museum, the Department of Anatomy at the University of Tasmania, the AIAS and other bodies from the mid 1960s through the 1970s. These documents stress the need to preserve sites from the impact of tourism, to control research, to protect sites from amateur excavators and black market collectors, and for the government to include provisions in the legislation for opportunities and resources to educate the public about the importance of Aboriginal prehistory (see for instance Stockton n.d.; Memo 22.11.1968; McCarthy 1970a; Sims 20.9.1971, 26.10.1972, Jones and Mulvaney cited in Sims 1975; Lourandos in Minute Paper 19.11.1968; Edwards 1975).

Provisions advocated by Murrell (9.10.1973), Director of the Tasmanian Parks Service, were the need to protect 'aboriginal [sic] relics of archaeological importance', and to control the movement of 'relics of archaeological significance'. The assumption that the legislators were dealing with a 'dead'culture is embedded in discussions of the importance of the Act, and its implications for the protection of 'archaeological resources' and 'Tasmania's heritage'(PWS 500856).

The degree to which the legislators and archaeologists wished to believe they were dealing with a dead Aboriginal past and culture that they could claim stewardship over is revealed in two interlinked debates which were sparked over the drafting of the Tasmanian legislation. These were over the definition of 'Aboriginal relic' and the protection of skeletal remains. The definition of 'relic' in the Act basically includes all aspects of Aboriginal material culture made prior to 1876 and 'the remains of the body of such an original inhabitant or of a descendant of such an inhabitant who died before the year 1876' (s.2).

Eighteen seventy-six, the year Truganini died, was deemed, by policy makers and the Tasmanian white population generally, to be the year in which Aboriginal culture ceased to exist as Truganini was popularly represented as 'the last Tasmanian Aboriginal' (see Ryan 1981; Maykutenner 1995). This definition of 'relic' effectively denies the continuing culture of Aboriginal people in Tasmania (Brown 1995; TALC 1996). However, the Act, and documents on file, indicate that policy makers and legislators were aware of people they termed 'Aboriginal descendants'. At the time the legislation was being developed the Aboriginal Information Centre had been established (c. 1972/1973) and was lobbying government (see PWS 023962; McGrath 1995; Maykutenner 1995). However, the cultural and political legitimacy of these people is actively denied by the Act, and its underlying assumption that cultural identity is tied to racial definitions. The decision to exclude post 1876 material culture from the Act was actively taken by the Director of PWS:

> The reason for the definition of "aboriginal" in section 30a [current s2(3)a] is to ensure that the bill does not apply to present day persons of aboriginal [sic] descent. Without this definition it could be held that such persons are covered. (Murrell 26.7.1974)

The drafting of the Act to appease archaeological, AIAS and other lobby groups, meant that it was clearly concerned with preserving 'archaeologically' significant material. It subsequently enshrined in legislation politically meaningful and, for the government at the time, useful definitions of cultural identity.

The inclusion of skeletons in the Act had come from lobby pressure from the Department of Anatomy, University of Tasmania (Wendall-Smith 12.8.1974; Wallace n.d.). This was supported by PWS (Chief Management Officer 12.6.1974), but was queried by the Crown Counsel. Originally it was considered the inclusion of skeletal material was not necessary as they would be protected under the criminal code. However Wallace (University of Tasmania), in discussing the matter with the Solicitor-General, appears to have raised the issue of

what would happen under the criminal code if archaeologists were to excavate and study skeletal material, as he was concerned that these researchers could be prosecuted. Wallace reports that the Solicitor-General 'seemed appalled at the prospect of having the Crown prosecute a scientist for committing an indignity to a fossil' (Wallace n.d.). He goes on to report that 'in order that Truganini should not be the stumbling block, it was felt that the term "skeletal remains" might be qualified by some clause as "interred prior to 1875"' (Wallace n.d.).

The inclusion of skeletal material in the Tasmanian Act meant that Aboriginal remains pre-1876 were not protected with other human remains under the Criminal Code. Their inclusion in the definition of relic, and thus the Act, specifically appears to occur so that archaeologists and anatomists could have access to them. Their inclusion is not so much for their protection per se, but for their protection from developers and amateur researchers so that they could be reserved for, and studied by, 'scientists'. Their removal from protection under the Criminal Code also sets aside these remains as 'different' to the ancestral remains of white Tasmanians, and their identity as 'fossils', which are the subject of scientific stewardship and control, becomes institutionalised.

Regulation of archaeological professionalism - Permits and ignorance clauses

The most notable change between the 1969 and 1974 New South Wales Acts was that the collection of artefacts was controlled by permits under the later Act (s.86[b], 87). The regulation of destructive research, such as excavation, by permits or Ministerial consent is also a key feature in the Tasmanian (s.9, s.13[1,2], s.14) and Victorian (s.22) acts, while in Victoria notice of intent to survey areas is also a requirement under 1980 amendments to the 1972 act (s.22[a]). The control of destructive and non-destructive research by permit systems is a significant reflection of one of the main themes developed in archaeological lobbying for legislation in the 1960s and 1970s. Although archaeologists at this time were concerned for the protection of sites from increased development, of equal or greater concern was the destruction of sites by uncontrolled amateur collection and research. Mulvaney in particular was at pains to publicly argue for the need to protect against amateur disturbance of sites and that research should rest with the trained professional (see for instance 1968, 1970, 1990). Concerns over amateur activity also arises again and again in archived submissions to the three State governments from archaeologists concerned to see heritage legislation enacted (Smith 1996a).

The processual discourse which stressed the professionalism and neutrality of archaeological experts was important here in convincing policy makers of the importance of regulating archaeological research through permits. The lobbying of legislators about uncontrolled access to sites by amateurs found linkages with wider archaeological debates of the 1960s and 1970s which had, as argued above, been stressing the need to distance the new 'professional' and modern period of archaeology from the 'amateur' past.

Provisions also existed in these acts for archaeologists and other persons to report their research results or the location of sites within certain time frames (see NSW s.91; Tasmania s.10[5]; Victoria s.27). D.P. Landa (Labor Opposition) also commented, during debate on the New South Wales act, that the requirement that relics be reported 'within a reasonable time' (s.91) 'places an enormous responsibility on the experts ... It cannot be expected that experts, even with the best intention in the world, must go around notifying the director every time they find a relic' (NSW, Legislative Council 1974, *Debates*, vol.113, p.2277). The incorporation of these clauses reflects archaeological concerns of the 1960s, that scientific researchers were 'morally' and professionally obliged to report their findings within reasonable time frames. The inclusion of these provisions not only regulates archaeological scientific conduct, it also aims (somewhat naïvely perhaps) to ensure that information held by non-archaeologists would be revealed.

Through the permit process and similar provisions in the heritage legislation, archaeologists were, at their own behest, ensuring that their conduct as archaeologists could be regulated. This would help to ensure that amateurs would not have undue access to precious archaeological data, and that those who did have access through the legislation, gained that access by meeting certain professional standards. Standards which would be regulated by the heritage authorities responsible for the acts, and effectively, by the archaeologists employed in those agencies to administer the acts.

In Victoria the regulation of archaeological conduct is less obvious through the Act. As noted above amateur archaeologists were one of the principal lobby groups for legislation in that State. Their influence can be seen in that it is not illegal to collect surface artefacts under the 1972 Act. However, it is a requirement of the Act that all information about collections be reported to the agency (s.27). Nor do relics, unlike in New South Wales and Tasmania, automatically belong to the Crown — only those located within proclaimed archaeological areas are deemed under this act the property of the Crown (s.20). Mulvaney, in reviewing the Victorian Act shortly after its enactment, deplored the extent of amateur influence on the Act (cited in West n.d.). However, despite their influence the Act does work to regulate amateur activities. For example, the desire to regulate amateur enthusiasm appears to underlie the provisions for 'wardens', as amateurs could be put to use 'policing'sites and their visitors (s.9, ss.11-14). The requirements that collections be reported and provenanced ensures that these collections are not only 'useful' to archaeological research, but also accessible to archaeologists.

The influence of amateur lobbyists and organisations, however, quickly declined with the removal in 1973 of the administration of the Act from the Museum to the Victorian Relics Office (and thence the Victorian Archaeological Survey or VAS) under the directorship of Peter Coutts. Coutts appears to have explicitly used a list of tenets clearly drawn from processual assumptions about the nature of archaeological science in VAS policy from 1973 (see 9.12.1983) and appears to have been keen to promote professional activities via his administration of VAS and the Act (11.6.1974; 1978, 1980, 1982). The Victorian Act also nominates the development of education programs as a function of the agency administering the Act (s.4, s.10). Coutts, in fulfilling this aim of the Act, developed an extensive educational program designed to regulate amateurs and turn them into semi-professional archaeologists. He established the Summer School program in 1975 in which interested persons went through a complex series of accreditation and examinations to earn the 'right' to record and excavate sites in that State (Coutts 1978). In New South Wales the Sydney and Illawarra Prehistory Groups were also given instruction on site recording by NPWS archaeologists (Sullivan 1975a). Both these programs grew out of the intentions of both Acts, which was to regulate

material culture as an 'archaeological' resource, and to limit access to that resource to people who held and understood archaeological and scientific values and ethics.

Another significant result of the stress on the control of amateur behaviour in archaeological lobbying for heritage legislation was the inclusion of 'ignorance' clauses in the three Acts. A key carry over provision from the NSW 1969 Act to the 1974 was that:

> A person who, without first obtaining the written consent of the Director, knowingly destroys, defaces or damages a relic or Aboriginal place is guilty of an offence against this Act. (s.90[1]; section 33 in 1969 Act)

Ignorance is a defence under the National Parks and Wildlife Act, and under the Tasmanian (s.21[3]) and Victorian (s.21, see also Bird 1988) Acts. Amateurs who could be deemed to 'know'what a relic looked liked could be policed under these acts. Moreover, it is reasonable to suspect that any concerns by developers over the effects of heritage legislation on proposed developments would have been allayed by the recognition of ignorance as a defence under these Acts. An important issue to note here is that although Aboriginal heritage was a significant social issue in the 1960s and 1970s heritage legislation was not seen as being of critical importance to legislators (a point noted by Landa in NSW, Legislative Council 1974, *Debates*, vol.113, p.2276-2277), nor was the management of relics necessarily seen as a priority within some of the bureaucracies responsible for them (see Sullivan 1992; McGowan 1992; Hope 1993). Rather the development of legislation by governments and their policy makers was simply part of a process to de-politicise the claims of Aboriginal activists by reducing heritage issues to legal issues of management overseen by archaeological professionals — professionals whose own conduct could be assured by the administration of the various heritage acts.

As Kate Sullivan (1986) notes the New South Wales legislation would probably never have been passed if parliament had been aware of quite how many sites there actually were in the State. Archaeologists themselves believed that as Aboriginal people were nomadic hunters and gatherers they would have left relatively little behind in the way of material culture (Mulvaney 1963:34). The fiction of *Terra nullius*, may have also influenced the erroneous perception by legislators that Aboriginal people would leave little material culture behind them (see NSW, Legislative Assembly 1974, *Debates*, vol. 110, p.2154 on issue of site numbers in NSW). Legislators clearly had little indication of exactly what the consequences would be of protecting relics within each of the three States. However, the inclusion of the 'ignorance' clauses in the acts is revealing here. It is through the inclusion of the ignorance clauses that we get close to the primary aims of the acts — that is the protection of archaeological access to data and regulation of archaeological/amateur conduct and professionalism rather than the policing of public and developer behaviour and relic protection. The fact that the Acts have become as effective as they have done rests, in part, with the later development of planning acts which effectively required the inclusion of Aboriginal site assessments in environmental impact assessment (New South Wales/Tasmania) or effect statements (Victoria).

Aboriginal criticisms and lobbying

In the development of the three Acts there is no evidence to suggest that Aboriginal people were consulted in the drafting process. All three Acts have come under sustained criticism by Aboriginal commentators for this reason, as well as their tendency to privilege archaeological concerns and values over Aboriginal concerns, the use of the term relic, and the existence of the ignorance clauses, amongst other issues (see for instance, Fourmile 1989b; NPWS 1989; Geering and Roberts 1992; Organ 1994; Brown 1995; TALC 1996). Although Aboriginal people have lobbied all three State governments for legislative change, and while there have been policy changes with respect to such issues as consultation, reburial and so forth, it is only in Victoria that legislative change in response to Aboriginal lobbying has been made to date.

In 1984 a review of the Victorian Act was undertaken by the Cain Labor government. Coutts had been slow during the preceding decade to respond to Aboriginal demands for consultation (Smith 1996a:286f). Increasing Aboriginal frustration in general and Aboriginal community anger over the apparent failure of VAS and the 1979 Alcoa EES to protect sites in particular, brought about the review (Bird 1988; Kennan pers. comm. 1995). The important point about Aboriginal opposition to the initial Alcoa EES was their claim that the archaeologists' professionalism had been compromised by the failure to survey the entire proposed development area, and that there were inaccuracies and contradictions in the scientific assessment of the sites (Rose and Rimmer 1979). Further, the VAS was portrayed by the Aboriginal community as having 'failed' to protect potential culturally and historically significant sites, which Rose and Rimmer (1979) were at pains to point out were also significant and important to non-Aboriginal people. It was this challenge to the professionalism of archaeology that triggered a review of the Act (Kennan pers. comm. 1995).

It is important that this trigger was not just Aboriginal disgruntlement over a lack of consultation, but that archaeological professionalism and stewardship was also argued to be inadequate. The Alcoa case provided an opportunity for Victorian Aboriginal people to *explicitly* undermine archaeological claims to stewardship, and thus undermine the authority of archaeological knowledge as a technology of government. Archaeological expertise, in the Alcoa case, could not only be argued to have failed to provide 'stewardship', it moreover had not worked to de-politicise Aboriginal claims — particularly at the end of a decade which had seen a Victorian Aboriginal cultural and political resurgence (Broome 1995:152f).

A Bill which emphasised Aboriginal control of heritage, particularly by local communities was developed by the Review Committee (Bird 1988:75). A submission by the Australian Archaeological Association criticised the Bill for not mentioning archaeology explicitly enough, for removing formal management structures, and for endangering research by requiring that research results be vetted by Aboriginal organisations (Gaughwin 26.2.1986). This Bill was blocked by the Liberal Opposition in 1986 because, as Cain (pers. comm. 1995) reports, the Liberal Opposition were worried by the implications that the Labor Bill would have for issues of Aboriginal sovereignty. The Victorian Labor government then requested the intervention of the Federal Labor Government.

At the same time that the Victorian government was attempting its legislative change, the Commonwealth was in the process of reviewing the *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984* (Cwlth). A two year sunset clause had been included in the

Commonwealth Act requiring that it be reviewed or repealed in 1986 (Ward 1985). In redrafting this Act, and in response to the Victorian government's request, the Victorian amendment Bill was incorporated, largely unchanged (Cain pers. comm. 1995) into Part IIA of the *Aboriginal and Torres Strait Islander Heritage (Amendment) Act 1987*. This act now works in tandem with the early Victorian 1972 Act. However, one Aboriginal critic of the Commonwealth Act notes that archaeological expertise and evidence still played a significant regulatory role in the management of Aboriginal heritage in that State (cited in Smith 1996a:293).

Discussion

The development of Aboriginal heritage legislation in south-eastern Australia occurred at a time when important social issues about the nature and significance of Aboriginal heritage were being publicly debated. Archaeological concerns over the preservation of 'archaeological' sites coincided with the discipline's concern to cement its new found identity as a professional activity by using the rhetoric of processual science. This in turn coincided with increasingly assertive Aboriginal cultural claims which worked to create a circumstance in which archaeological lobbyists could be listened to by governments. Archaeological concerns about unregulated amateur activity at sites, underpinned by claims to professional stewardship of a 'dead' past, became useful to policy makers concerned to make sense of Aboriginal cultural heritage and the claims being made on the basis of this heritage by Aboriginal activism.

Archaeological discourse which stressed the scientific neutrality of professionals as against unskilled amateurs, provided policy makers with a way of understanding Aboriginal heritage issues that also depoliticised those issues by redefining them as ones of scientific intervention. To paraphrase Rose (1993), archaeological knowledge and discourse provided policy makers with a way of making Aboriginal heritage issues intelligible, practicable and amenable to interventions by administrators and politicians. Thus, the role of archaeologists and their knowledge was vital to the development of heritage legislation, which in effect allowed the regulation and governance of certain Aboriginal cultural demands and claims, while ostensibly meeting the concerns of archaeologists about the fate of their data.

Archaeological assumptions about the nature of archaeological data were clearly written into the heritage Acts of south-eastern Australia. More significant, however, are the assumptions about the nature of appropriate archaeological research which have also been embedded in the Acts. The scientific rhetoric of processual theory, which bolstered the claims of professional archaeologists over those of amateur researchers, was vital in assuring that archaeological lobbyers *were* indeed listened to by policy makers. In utilising this rhetoric archaeologists provided a discourse that found synergy with bureaucratic and common sense assumptions about the nature of science and expertise. The development of the legislation had very little to do with the preservation of Aboriginal heritage as such, and more to do with the preservation of archaeological access to data. Moreover, it became important to regulate archaeological access to that data to ensure that professional standards were maintained. This was important to the discipline at a time when it sought to show the international archaeological community its scientific maturity, and to ensure that that standards were maintained and regulated. However, it was also important to policy makers. Archaeological professionalism and its claims to scientific neutrality were useful discourses in defining and regulating Aboriginal cultural interests and it was important that archaeological neutrality and expertise remained intact by policing amateur activities. The legislation, in bolstering and regulating the expertise and professionalism of archaeological science, was insuring the usefulness of archaeological knowledge as a technology of government.

Other commentators on the history of CHM have noted the degree to which what they term the 'scientific paradigm' has underwritten the CHM process (see Ellis 1994; Greer and Henry 1996; Ross 1996). These commentators have argued that this paradigm has worked to exclude other values, and has hampered the introduction of new concepts and practices into CHM, particularly if these innovations may be seen to be at odds with archaeological science. What this history of the south-eastern legislation reveals is that the 'scientific paradigm' is quite specifically bolstered by processual theory, and that its embedding in legislation, and thus CHM practice, does indeed mean that any innovations at odds with the assumptions of processual science simply make no sense in the intellectual and conceptual parameters set for CHM by the legislation. Further, processual science also underscores the framework for the significance assessment process in CHM (Smith 1996b, in press(b)). The processual assumptions embedded in the assessment process and the legislation are mutually reinforcing. It is, however, the degree to which processual science defines the parameters of CHM archaeological practice that the seeds for any challenge to the authority of archaeology have been sown.

As the history of the Victorian legislation reveals, archaeology must maintain the tenets of processual science within the CHM process or its authority and professionalism are open to challenge and scrutiny. Any aberration from a processual position calls into question the professionalism of CHM archaeologists, and thus their control over rights of access to their data. Further, government heritage policy has, since the 1980s, gone through considerable change. Although not legislated for in New South Wales and Tasmania, Aboriginal consultation is now a mandatory part of the CHM process. As McGowan (1996) has noted in the case of Tasmania, heritage policy may work outside of the legislative frameworks and has outstripped the aims of that State's heritage Act, as it has also in New South Wales. What this means is, as policy and government attitudes to Aboriginal cultural claims change, archaeologists are constrained in their ability to participate in policy debates due to their confinement within the intellectual parameters set for them by the processual assumptions and discourse embedded within the legislation. Innovative and politically informed attempts to alter CHM archaeological practice can only, given the parameters set for archaeological involvement in CHM, work to undermine the authority of archaeological expertise. Any role for archaeologists and archaeological knowledge beyond that of 'scientific experts' is simply at odds with the role that was carved out for archaeologists during the drafting of the heritage Acts. This does not mean to say that archaeologists and archaeological knowledge and values are not significant players in policy and legal debates, but it does mean that archaeologists are beginning to be left behind. Moreover, as policy continues to develop archaeologists may find themselves increasingly peripheral or continually challenged by other interests in the policy process.

Conclusions

What this paper demonstrates, by reference to the archaeological literature of the time, and previously unaccessed archival documents, is that the historical role of stewardship and pastoral care of material culture claimed by archaeologists was formalised in south-eastern Australia in the late 1960's and 1970's in heritage legislation. Archaeologists actively pursued their interests by lobbying for heritage legislation to be established, but a fortuitous confluence of events acted to make archaeological knowledge a technology of government, which privileged the practitioners of this particular form of expert knowledge.

It is perhaps under played in the history of Australian archaeology, but the theoretical vocabulary of the 'New Archaeology' lent the rhetorical weight of 'science' and 'objectivity' to a discipline that was trying to establish not only its intellectual but its public relevance. This was guaranteed not so much by the rigour of the arguments and newly 'scientific' practice (indeed the actual practice of archaeology never matched the rhetorical borrowings from the American literature), but by the utility that forms of expert knowledge afforded increasingly sophisticated modes of liberal governance — in this case to de-politicise some aspects of a newly emerging cultural and political critique which challenged many aspects of Australian nationhood.

Acknowledgments

My thanks to Aboriginal Affairs Victoria, NSW National Parks and Wildlife Service and the Tasmanian Parks and Wildlife Service for access to their archives. Gary Campbell read and commented on drafts of this paper.

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