

## BOOK REVIEW\*

### *Heritage Law in Australia*

by BEN BOER AND GRAEME WIFFEN

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'Heritage' encompasses a complex set of ideas, relationships, people and things from the natural, physical, material, animal, human and intellectual worlds. It arises out of the lived experiences of the human and natural worlds but it is not a homogenous concept. The complex set of ideas that is said to be 'heritage' often involves conflicting views, values, aspirations, things and cultures: one person's 'heritage' is another's roadblock, impediment, rubbish or threat. The story of the conflict between the Federal and Victorian Governments in 2005 in relation to the 'protection' extended to the alpine region of Victoria perhaps clearly explicates this point.

On 24 May 2005, the Victorian Government announced that cattle grazing would be banned in the Alpine National Park and that the Government intended to seek World Heritage listing for the Park on the basis of its natural heritage values.<sup>1</sup> Victorian Premier Steve Bracks said the Government had made the decision to protect one of Victoria's most significant natural assets and important water catchments. The Government will now work with the New South Wales and Australian Capital Territory Governments to seek World Heritage listing for the National Park.<sup>2</sup> On 16 June 2005, the Federal Minister for the Environment, Senator Ian Campbell, announced that he had listed the Alpine National Park 'on the Australian Government's National Heritage List under the emergency listing provisions of the *Environment Protection and Biodiversity Conservation Act 1999*'.<sup>3</sup> The justification for the emergency listing was expressed in the following terms by Senator Campbell:

In making my decision to emergency list the Park I have taken into account all the evidence provided to me on this complex issue ... I have assessed the natural and historic values of the Park and I believe that both the natural and historic values may be of outstanding heritage value to the nation. I also believe the Victorian Government's decision to ban grazing in the Park poses a clear threat to the historic heritage values.<sup>4</sup>

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1 Office of the Premier, Victorian Minister for the Environment, 'High Country Grazing Continues Outside National Park' (Press Release, 24 May 2005) <[http://www.dpc.vic.gov.au/domino/Web\\_Notes/newmedia.nsf/955cbeae7df9460dca256c8c00152d2b/4fbb24d02982648eca25700c0019adfd!OpenDocument](http://www.dpc.vic.gov.au/domino/Web_Notes/newmedia.nsf/955cbeae7df9460dca256c8c00152d2b/4fbb24d02982648eca25700c0019adfd!OpenDocument)> at 17 October 2006.

2 Ibid.

3 Senator Ian Campbell, Federal Minister for the Environment and Heritage, 'Emergency Listing for Victoria's Alpine National Park' (Press Release, 10 June 2005) <<http://www.deh.gov.au/minister/env/2005/mr10jun05.html>> at 29 September 2006.

4 Ibid.

The heritage was said to lie in ‘the heritage personified by the mountain cattlemen who, for 170 summers, have been grazing cattle in the relatively small area of the Victorian high country’.<sup>5</sup> Assuming the declaration was not made permanent, what should we make of the use of ‘heritage’ in this incident? What does it tell us about ‘heritage’ and the schemes for its definition, regulation and protection?

‘Heritage’ presents a conundrum. Its essential qualities are contradictory and paradoxical. It is often used in conjunction with ‘culture’ but this does not necessarily enhance or contribute to its meaning or understanding. Its multiple dictionary definitions suggest that ‘heritage’ has a variety of meanings but it relates ‘to things of historic or cultural value that are worthy of preservation’.<sup>6</sup> A more limited meaning suggests that it relates to ‘property that is or may be inherited; an inheritance’<sup>7</sup> and includes ‘valued things such as historic buildings that have been passed down from previous generations’.<sup>8</sup>

How do these short definitions assist in understanding ‘heritage’? Within them, the myriad meanings of ‘heritage’ begin to emerge. These definitions suggest that heritage encompasses the notion of history or what has been and that there is an element of preservation. There is an emphasis on ‘worth’ or ‘value’ within the idea of preservation. There is an indication that the idea encompasses culture, but the meaning of ‘culture’ is itself unclear. How broadly is the ‘heritage’ canvas to be drawn in the search for meaning and identification of those matters that are said to be worthy of preservation? Indeed, it is uncertain whether this idea of heritage encompasses the natural world of flora, fauna, fish, oceans and rivers and yet, in its modern iteration, and the complex set of national and international laws that seek to regulate and protect heritage, all these elements are present to some extent.

Heritage has a moral and ethical dimension, or at least, such is claimed in its name. For example, in a search for moral force in support of the United States’ (‘US’) response to 9/11, US President George Bush drew on this moral and ethical dimension when he said ‘by heritage and by choice, the United States of America will make that stand’.<sup>9</sup> On another level, the moral and ethical dimensions of heritage have been claimed in support of such far-reaching protective measures as those of the deep sea bed and ocean floor and its resources, described as the ‘common heritage of mankind’.<sup>10</sup> Basler suggests that this phrase was first used in international law, when the United Nations General Assembly considered measures to protect deep-sea resources.<sup>11</sup>

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5 Senator Ian Campbell, Minister for the Environment and Heritage, ‘Federal Labor Declares Itself against High Country Cattlemen’ (Press Release, 16 June 2005) <<http://www.deh.gov.au/minister/env/2005/mr16jun05.html>> at 20 September 2006.

6 *Compact Oxford English Dictionary* (2005).

7 *Ibid.*

8 *Ibid.*

9 George W Bush, ‘President’s Remarks at the United Nations General Assembly’ (Speech delivered at the United Nations General Assembly, New York, 12 September 2002) <<http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>> at 22 October 2006.

10 Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (1998) 12.

11 *Ibid.*

How then can such a diverse and heterogeneous concept be captured and regulated by law? In particular, how does law respond to this broad area so redolent with values that underpin the choices to be made in resolving 'heritage'-based conflicts? Ultimately, choices are made about which values are to be protected or preferred, whether by courts or through the political process by parliaments. Such questions of values and choice are not limited to heritage law and are commonly identified in many areas of law. For example, in the seemingly unending search for the meaning of 'property', the choices that law makes about extending proprietary protections to certain relationships are underpinned by societal choices about what should or should not be accorded such value.<sup>12</sup> However, heritage law is perhaps the most public face of conflicts over values and the mechanisms crafted at state, national and international levels, to make and manage those choices. Underlying these mechanisms is a never-ending political dimension that both explains the choices made and informs the decision makers.

*Heritage Law in Australia*<sup>13</sup> engages to some extent with these critical conflicts and choices as it attempts to present an integrated and informative compendium of the legal instruments relevant to managing and regulating these processes in Australia. In particular, Chapter 1 of the book provides a tantalising introduction to the breadth and depth of heritage generally and its 'philosophical, historical, political and economic' dimensions.<sup>14</sup> It is tantalising in that it raises contentious issues about heritage, its conflicts and contradictions and the broad canvas it encompasses. However, neither here nor at other points in the book does it explore these dimensions in detail. At one level, this is extremely frustrating as one searches for greater depth of critical analysis. At another level, the book does not set out to critically and theoretically analyse and explore heritage law. Rather, in the first chapter, the book successfully sets out the parameters of heritage law that it intends to include in subsequent chapters and provides direction and sources for those who wish to pursue a critical analysis.

The chapter first asserts the key link between heritage and environmental law and what is described as 'an expansive view of heritage'.<sup>15</sup> This then takes us to a broad notion of preservation and clearly encompasses both built heritage and the natural environment. Thus, it is clear from the outset that 'heritage', in this book, arises out of lived human experience as well as the natural environment. The chapter then briefly itemises other elements of heritage: monuments, objects, museums, and culture broadly defined, going beyond the 'British colonial heritage',<sup>16</sup> incorporating 'intangible heritage'<sup>17</sup> and including Aboriginal and

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12 See, eg, Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Review* 252; Kevin Gray and Susan Gray, 'The Idea of Property in Land' in Susan Bright and John Dewar, *Land Law Themes and Perspectives* (1998) 15; Maureen Tehan "'To Be or Not to Be (Property)": Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage' (1996) 15 *University of Tasmania Law Review* 267.

13 Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (2006).

14 *Ibid* 7.

15 *Ibid* 8.

16 *Ibid* 11.

17 *Ibid* 22.

Torres Strait Islander culture.<sup>18</sup> There is also an introduction to some of the basic elements of heritage and environmental law including sustainable development,<sup>19</sup> environmental ethics<sup>20</sup> and the ‘common heritage of mankind’<sup>21</sup> with references to some recent significant work in these fields.<sup>22</sup> These matters highlight the breadth of ‘heritage’, and the material in the book, and do so in an integrated and comprehensible way. Being broad in scope, however, means that the book is necessarily brief and summarises more than analyses the issues. Indeed, the authors themselves recognise the limitations of the task when they indicate that in relation to natural heritage ‘for the focussed purposes of this book’,<sup>23</sup> only those international instruments that are directly incorporated into Australian law are included.

The balance of the book is doctrinal in its approach and, with the exception of the first chapter, it is really a compendium of the range of laws and instruments, both international and domestic, that govern heritage in Australia in its many guises. This approach is not surprising given that the book derives largely from teachings that the authors have been engaged in at undergraduate and graduate levels, commentaries and reports and from practitioner-based writing such as *Halsbury’s Laws of Australia*.<sup>24</sup> This is not a criticism of the book. Rather, it clarifies both the purpose and the intended audience for the publication – both worthy objects of such a book. There is no doubt this book will be a useful addition to materials for law courses as well as a useful first resource for practitioners and it should be evaluated with those audiences in mind.

After the first chapter (Part I), the book is structured around a largely jurisdictional theme. The book is divided into six parts, each consisting of between one and three chapters. Each part has a short introduction summarising the issues raised in the part. This is both useful and distracting. Part I consists of the first chapter and no real purpose is served by the brief introduction. The same might be said of Parts V (Indigenous Heritage Law) and VI (Conclusion). However, in other parts of the book, particularly Parts III (Commonwealth Heritage law) and IV (State and Territory Heritage Law), the introductions provide a useful guide to the material covered in the various chapters.

Part II (Chapters 2 and 3) deals with international heritage law, the instruments relevant to heritage protection in Australia and the application of the *World Heritage Convention*<sup>25</sup> in Australia. The number of instruments covered in Chapter 2 is broad and includes the usual range of conventions in relation to the natural environment such as *Convention on Wetlands of International*

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18 Ibid 25.

19 Ibid 15.

20 Ibid 14.

21 Ibid 27.

22 Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law* (2004); Marie-Claire Cordonier-Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (2004).

23 Boer and Wiffen, above n 13, 24.

24 Ibid xvii.

25 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

*Importance Especially as Waterfowl Habitat*,<sup>26</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*<sup>27</sup> and the *Convention on Biological Diversity*.<sup>28</sup> Instruments dealing with other forms of heritage such as the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*,<sup>29</sup> and the *Convention for the Safeguarding of the Intangible Cultural Heritage*<sup>30</sup> are also covered. There is a very short section on implementation. Given the size and scale of the book, all of these matters are dealt with in the form of lists or brief summary form, but the coverage of them in such a cursory way still provides a very useful foundation for the later chapters dealing with the Commonwealth's heritage schemes. Chapter 3, dealing with the *World Heritage Convention* in Australia, is short but it operates as an example of the domestic application of international heritage instruments and begins to touch on the complex constitutional issues of the heritage protection scheme in Australia.

Part III covers Commonwealth heritage law. Once again, the scale of the subject matter is such that it can only be dealt with in a superficial way. However, the first two chapters are comfortably divided into cultural<sup>31</sup> and natural<sup>32</sup> heritage. With excellent use of headings, the chapters make clear and comprehensible the maze of legislation and regulatory instruments and procedures in each area. For example, in Chapter 4 there is an overview of the structure of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)<sup>33</sup> and the reader is guided through the relevant matters in the legislation with a series of brief descriptions under headings and sub-headings.<sup>34</sup> A similar approach is taken in Chapters 5 and 6, both of which deal with natural heritage. For completeness there is reference to Commonwealth grants schemes to support heritage including tax arrangements.<sup>35</sup> These chapters are particularly accessible in both their organisation and language and provide a useful guide to a vast amount of law.

Part IV consists of two chapters dealing with heritage in the States and Territories. The first, Chapter 7, deals with specific pieces of legislation and the second, Chapter 8, is a useful chapter covering a range of land use planning mechanisms relevant to the natural environment. Chapter 7, not surprisingly, covers an enormous amount of legislation and as a result is very cursory in its treatment. The chapter uses the same approach as the chapters in Part III but reads rather like a much larger scale map, lacking the level of detail and comment

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26 Opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975). See Boer and Wiffen, above n 13, 51.

27 Opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975). See Boer and Wiffen, above n 13, 53.

28 Opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993). See Boer and Wiffen, above n 13, 58.

29 Opened for signature 5 June 1992, 34 ILM 1322 (entered into force 29 December 1993). See Boer and Wiffen, above n 13, 42.

30 Opened for signature 17 October 2003, MISC/2003/CLT/CH4 (entered into force 20 April 2006).

31 Boer and Wiffen, above n 13, ch 4.

32 *Ibid* ch 5.

33 *Ibid* 107.

34 *Ibid* 123 ff.

35 *Ibid* 137.

in those earlier chapters. The organisation of the chapter, using headings such as listing, interim or provisional listing, permanent listing,<sup>36</sup> and then dealing with each jurisdiction's approach to listing, does not present as clear a picture as it does when dealing with the single Commonwealth jurisdiction. The occasional use of charts to capture the varying State and Territory approaches to issues is a useful and clear way to deal with the vast array of material.<sup>37</sup> Chapter 8 is both useful and dissatisfying. On the one hand, it is particularly valuable as it attempts to capture a wide range of State and Territory provisions in other legislation that impact on heritage protection, including local government regulations<sup>38</sup> and schemes for the private regulation of heritage.<sup>39</sup> On the other hand, it is in this chapter that the State and Territory natural heritage protection schemes are considered. This is dealt with in a cursory manner. Given the detail in relation to the Commonwealth regulation and protection of natural heritage, it appears to be a serious omission. There are other texts which deal with these schemes in detail<sup>40</sup> and some reference to them would have been useful.

The final substantive part of the book, Chapter 9, deals with Indigenous heritage. The broad approach taken to heritage throughout the book is particularly useful in this chapter as Indigenous heritage is considered as a living, changing heritage. There is engagement with controversies such as the *Hindmarsh Island Bridge Case*,<sup>41</sup> which is used as an illustrative case study on the use of the protective measures in Indigenous heritage legislation.<sup>42</sup> The broad approach means that there is examination of legislation which is not usually referred to in relation to heritage protection, such as the *Australian Institute for Aboriginal and Torres Strait Islander Studies Act 1989 (Cth)* and the role of the Institute as the keeper of significant Indigenous cultural materials.<sup>43</sup> The detail of State and Territory schemes contained in this chapter provides a useful summary of each jurisdiction although, as with other chapters, operates as a series of signposts rather than a detailed and exhaustive examination of the various schemes. The issue of currency is always a potential problem with texts and this one is no exception. New Indigenous heritage legislation has been passed in Victoria. The chapter deals with the old scheme and makes no reference to any proposals for change. The book indicates that a website is established to operate as an extension of the book's referencing system<sup>44</sup> and it is possible to manage currency issues by using the website for updates or for advising of major changes. The website does not appear to be operative.

The book has a relatively small list of cases and references are sparing. This is both an advantage and a disadvantage. Given the audience and scope of the book, it is useful at an introductory stage not to be overburdened with multiple and

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36 Ibid 196.

37 Ibid 186, 195.

38 Ibid 241.

39 Ibid 248.

40 See, eg, Gerry Bates, *Environmental Law in Australia* (6<sup>th</sup> ed, 2006).

41 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Hindmarsh Island Bridge Case*').

42 Boer and Wiffin, above n 13, 271.

43 Ibid 274.

44 Ibid 3.

complex case references, provided the major cases are mentioned. Here, the selection of case references is excellent and does not overburden. On the other hand, an incomplete picture may emerge because of the lack of detailed references. In relation to this book, it would be an imprudent reader who relies too heavily on the content of the book alone and fails to conduct further and deeper research on the matters referred to in the book.

This is an accessible and clearly written book. It fills an important gap in the area of heritage law. Like environmental law,<sup>45</sup> heritage law has long been seen as an adjunct of other legal categories rather than a discrete field of law. Unlike the field of environmental law, there is a dearth of specific heritage texts as a result. Heritage and related issues have been covered in more general texts, particularly environmental law texts.<sup>46</sup> However, this book provides a focused and comprehensive coverage of Australian heritage law like no other publication. Provided that it is seen as an introductory text rather than an exhaustive examination of heritage law, it should be very valuable as a resource for law and non-law students and practitioners engaged in the field of heritage regulation and protection.

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45 Jenny Steele, 'Book Review: The Philosophical Foundations of Environmental Law: Property, Rights and Nature by Sean Coyle and Karen Morrow' (2006) 69 *Modern Law Review* 663.

46 See, eg. Bates, above n 40.