

The Clash between Environmental and Heritage Laws: An Australian Case Study

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Abstract : The exploitation of Australia's vast mineral wealth is regulated by a matrix of planning, environment and heritage legislation, and despite the desire for a 'balance' between economic, environmental and heritage values, Aboriginal objects and places are often detrimentally impacted by mining approvals. The Australian experience is not novel. There are other cases of clashes between the rights of traditional landowners and businesses seeking to exploit mineral or other resources on or beneath those lands, including in the United States, Canada, and Brazil. How one reconciles the rights of traditional owners with those of resource companies is an ongoing legal problem of general interest. In Australia, planning and environmental approvals for resource projects are ordinarily issued by State or Territory governments. Federal legislation such as the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) is intended to act as a safety net when State or Territory legislation is incapable of protecting Indigenous objects or places in the context of approvals for resource projects. This paper will analyse the context and effectiveness of legislation enacted to protect Indigenous heritage in the planning process. In particular, the paper will analyse how the statutory objects of such legislation need to be weighed against the statutory objects of competing legislation designed to facilitate and control resource exploitation. Using a current claim in the Federal Court of Australia for the protection of a culturally significant landscape as a case study, this paper will examine the challenges faced in ascribing value to cultural heritage within the wider context of environmental and planning laws. Our findings will reveal that there is an inherent difficulty in defining and weighing competing economic, environmental and heritage considerations. An alternative framework will be proposed to guide regulators towards making decisions that result in better protection of Indigenous heritage in the context of resource management.

Keywords : environmental law, heritage law, indigenous rights, mining

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