The Senate

Environment, Communications, Information Technology and the Arts Legislation Committee

Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005

February 2006

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Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005

Referral and conduct of the inquiry

1.1 On 9 November 2005, on the recommendation of the Selection of Bills Committee, the Senate referred the Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005 ('the Bill') to the Committee for inquiry and report by 8 February 2006.

1.2 The Committee contacted state and territory governments, national heritage bodies, legal centres and other interested organisations and individuals to invite submissions and has received seven submissions, which are listed in Appendix 1.

1.3 The Committee thanks all those who assisted in its inquiry.

The Bill

1.4 The Bill was introduced into the Senate on 12 October 2005 and proposes amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* ('the Act') which, as the Minister for Family and Community Services and Minister Assisting the Prime Minister for Women's Issues, Senator the Hon Kay Patterson, noted in the Second Reading speech:

> …preserves and protects places, areas and objects of particular significance to Aboriginal and Torres Strait Island people.[1]

1.5 The purpose of this Bill is to amend the Act in order to:

(a) provide greater certainty to international cultural loan arrangements by ensuring that declarations made under the Act cannot act to prevent the return of objects imported temporarily to Australia with a certificate of exemption under the *Protection of Movable Cultural Heritage Act 1986* (Schedule 1);

(b) provide for the repeal of Part IIA and other provisions in the Act that only apply to places in Victoria to enable the Victorian Government to administer Aboriginal heritage protection in Victoria directly through its own legislation (Schedule 2); and

(c) bring the Act into line with the Legislative Instruments Act 2003 by making amendments to clarify which class of instruments contained in the Act are non-exempt legislative instruments for the purposes of the

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1 Senator the Hon Kay Patterson, Second Reading speech, *Senate Hansard*, No 15, 2005, 12 October 2005, p. 3.

Legislative Instruments Act 2003 and, accordingly, subject to its provisions (Schedule 3).[2]

1.6 The Bill also proposes to make consequential amendments to the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*.

1.7 When the Bill becomes an Act, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* will still apply to Victoria, but it will apply in the same manner as it applies to the other states and territories. Removal of the specific references to Victoria will place Victoria on the same footing in relation to protection of Aboriginal cultural property as the other states and territories under the Act. It will allow Victoria to pass its own Aboriginal cultural heritage legislation and the Commonwealth Act will continue to act as a 'nation-wide "backstop"'[3] as it does for the other states and territories for the 'protection of Aboriginal cultural heritage, to be called upon as a last resort when significant places or objects are not adequately protected by State or Territory laws'.[4]

Proposed amendments

Schedule 1 – Effect of declarations

1.8 The proposed amendments in Schedule 1 will 'help to secure the framework for future international cultural exchanges of benefit to Australia'.[5]

1.9 Schedule 1 amends the Act as follows:

- item 1 inserts a new subs.12(3A) which provides that declarations issued under subsection (1) of the Act seeking to preserve or protect objects will not apply to objects where there is a certificate in force under s.12 of the *Protection of Movable Cultural Heritage Act 1986.* A s.12 certificate enables a person to import Australian protected objects for temporary purposes and subsequently to export those objects;
- item 2 inserts a new subsection 18(2A) which provides that where emergency declarations are issued under subsection (1) seeking to protect or preserve areas or objects, those declarations will not prevent the export of objects where a certificate is in force under s.12 of the *Protection of Movable*

2 *Explanatory Memorandum*, p. 1.

3 The Hon Elizabeth Evatt, AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 1996, p. 236, cited in Department of Parliamentary Services, *Bills Digest* No. 65, 30 November 2005, p. 9.

4 The Hon Elizabeth Evatt, AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 1996, p. 236, cited in Department of Parliamentary Services, *Bills Digest* No. 65, 30 November 2005, p. 9.

5 Senator the Hon Kay Patterson, Second Reading speech, *Senate Hansard*, No 15, 2005, 12 October 2005, p. 3.

Cultural Heritage Act 1986. The certificate authorises a person to import Australian protected objects and subsequently to export them again; and

- item 3 introduces new subsection 21EA which provides that all declarations made under ss.21C, 21D or 21E will be subject to any certificates made under s.12 of the *Protection* o*f Movable Cultural Property Act 1986* authorising the export of objects.

1.10 The provisions will allow museums and other cultural institutions in Australia to obtain significant Aboriginal cultural heritage objects that are owned by institutions outside of Australia under contractual and other loan arrangements for temporary exhibition in Australia. Such arrangements are difficult to negotiate unless the overseas lending institutions have the protection of a s.12 certificate.

1.11 The amendments in Schedule 1 will ensure that a s.12 certificate cannot be overridden by a declaration under the Heritage Protection Act, as was the case in Victoria after the staging of an exhibition by Museum Victoria.

1.12 In 2004 an exhibition entitled *Etched on Bark 1854* included items on loan from the British Museum and the Royal Botanic Gardens, Kew. The items became the subject of temporary declarations under the *Heritage Protection Act.* The Dja Dja Wurrung Group claimed traditional ownership of the items and their return was prevented by the operation of the declarations. Museum Victoria had contractual obligations to return the items to the institutions concerned as soon as the exhibition had finished but was unable to do so. Legal proceedings were then instituted in the Federal Court by Museum Victoria and elders of the Dja Dja Wurrung People.[6]

1.13 At the conclusion of the Federal Court proceedings,[7] the injunction which restrained the Museum from removing or permitting to remove the objects in question from Victoria was dissolved and the Museum was able to return the objects to the lending institution.

1.14 The proposed amendments in relation to declarations for objects which are the subject of a certificate under s.12 of the *Protection of Moveable Cultural Property Act 1986* will allow international institutions to lend objects to Australian cultural institutions and ensure they are returned to the lending institutions overseas.

1.15 In his submission to the inquiry, the Director of The Australian Museum confirmed that:

> The Australian Museum fully supports these proposed changes to the legislation, as it would bring certainty to the process of acquiring

6 Department of Parliamentary Services, *Bills Digest* No. 65, 30 November 2005, pp 5-6.

7 Museum Boards of Victoria v. Carter [2005] FCA 645 20 May 2005; Carter v. Minister for Aboriginal Affairs [2005] FCA 667 923 May 2005.

> Aboriginal cultural material for loan, exhibitions, research and Aboriginal community access from overseas cultural organisation[s] to Australia.[8]

1.16 The Director continued:

> It would place this material within a straightforward and secure legal framework thus increasing the likelihood of successful requests for collections to be loaned to Australian cultural organisations.[9]

Schedule 2 – Repeal of Part IIA

1.17 Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* effectively prevents Victoria passing its own Indigenous heritage protection laws and makes it the only jurisdiction not to have its own Indigenous heritage protection laws. Under the current Act, the Commonwealth delegates its powers to the State Minister to administer the provisions under Part IIA of the Act relating to matters of preservation of Aboriginal places or objects in Victoria. This arrangement was the result of a request from the then Victorian Government in 1987 as it was seen to provide stronger protection for Aboriginal cultural heritage in that state.

1.18 However, by 1996 the Victorian Government highlighted the need to revisit Aboriginal cultural legislation. In a submission to the independent review of the Heritage Protection Act undertaken by the Hon Elizabeth Evatt (the Evatt Report),[10] the Victorian Government argued that the dual regime, under Part IIA of the Heritage Protection Act and the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972,* was both administratively cumbersome and fraught with problems of interpretation:

> The enactment of new Aboriginal cultural heritage legislation at State level would enable the eventual abolition of Part IIA of the Commonwealth Heritage Protection Act. This would be consistent with the Federal Coalition policy that State legislation should be the primary source of statutory protection for Aboriginal cultural heritage, with Commonwealth legislation being used only as a last resort. In principle, Victorian legislation would need to consider mirroring many of the existing provisions of Part IIA, but would also update and incorporate those sections of the existing Archaeological and Aboriginal Relics Preservation Act 1972 which are considered necessary for the effective protection of Victorian Aboriginal cultural heritage. [11]

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8 The Australian Museum, *Submission 2*, p. 1.

9 The Australian Museum, *Submission 2*, p. 1.

10 The Hon Elizabeth Evatt, AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984,* August 1996.

11 The Hon Elizabeth Evatt, AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984,* August 1996, p. 236.

1.19 The Minister, in her Second Reading speech on the Bill, noted that in 2005 the Victorian Government:

> …wrote to the Australian Government…to explore how this obstacle could be removed to allow proposed new Victorian cultural heritage legislation to be put in place.[12]

1.20 Schedule 2 repeals Part IIA of the Act which contains the Victorian Aboriginal cultural heritage provisions and also proposes consequential amendments to the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* as a result of the repeal of Part IIA of the Heritage Protection Act.

1.21 In relation to these proposed amendments the *Bills Digest*[13] records that in 1986 the Victorian Legislative Council rejected two Bills that would have granted land at Lake Condah and Framlingham Forest to their traditional owners. The Victorian Government then asked the Commonwealth to pass the necessary legislation – the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* is the result.

> Under Part III [of the Aboriginal Land (Lake Condah and Framlingham Forest) Act] which deals with the management of Condah land, the Kerrup-Jmara Elders Aboriginal Corporation is responsible for compiling a register of sacred and significant sites on Condah land. Subsection 16(2) requires that the register be kept in a manner that would prevent the disclosure of its contents other than in accordance with the purposes of Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* without the permission of the governing committee. The current Bill removes this exception. This amendment is consequential on the proposed repeal of Part IIA.
>
> In relation to Framlingham Forest, the Kirrae Whurrong Aboriginal Corporation is required to compile a register of sacred or significant sites and a similar exception also applies in subsection 24(2). That exception is removed.[14]

1.22 The repeal of Part IIA will enable the Victorian Government to administer Aboriginal heritage protection directly through its own new legislation.

1.23 Schedule 2 Item 6 of the Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005 not only repeals Part IIA of the Act but also allows for a 12 month period before the provisions removing the Victorian references come into force. This is to allow the Victorian Government time to implement its own legislation. If Victorian legislation is not enacted within this timeframe, the relevant Commonwealth provisions which repeal Part IIA are themselves repealed leaving Part IIA of the Act intact.

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12 Senator the Hon Kay Patterson, Second Reading speech, *Senate Hansard*, No 15, 2005, 12 October 2005, p. 3.

13 Department of Parliamentary Services, *Bills Digest* No. 65, 30 November 2005, pp 6-7.

14 Department of Parliamentary Services, *Bills Digest* No. 65, 30 November 2005, p. 7.

1.24 However, in his submission, the Hon Gavin Jennings MLC, Minister for Aboriginal Affairs (Victoria) advised that:

> An exposure draft of the proposed Victorian legislation has recently been subject to comment by Aboriginal communities and other interested parties…Following consideration of comments and submissions received on the exposure draft, I intend to introduce the Aboriginal Heritage Bill to the Victorian Parliament during the Autumn 2006 sittings. However, that legislation cannot come into effect while the existing Victoria-specific provisions of the Commonwealth *Aboriginal and Torres Strait Islander heritage Protection Act 1984* remain in force.[15]

1.25 Further, the Minister indicates that the existing arrangements are administratively cumbersome, are not readily understood by organisations, groups and individuals whose activities may have an impact on Aboriginal heritage and:

> … do not cater for the aspiration of those Victorian Aboriginal people (particularly native title claimants and traditional owners) who do not consider that their interests are represented by the organisations listed in the existing schedule.[16]

1.26 This was a concern that was raised in other submissions.[17] Dr Sharman Stone, Federal Member for Murray, has observed that:

> Unfortunately while the Victorian section of the Act (IIA) was presumably well intended, it was very poorly conceived and drafted. It created opportunity for vexatious claims and misuse, as well as considerable distress as some indigenous groups, for example the Bangerang, found themselves left off the schedule as spokespeople for the area they saw as their traditional lands. There has been no process for such groups to challenge the schedules or to be included.[18]

1.27 The Yorta Yorta Nation Aboriginal Corporation also raised the question of how Indigenous people were recognised for the purposes of heritage protection. They argued that the Commonwealth regime was preferable to the proposed Victorian arrangements which they claimed would create 'a complicated system of Aboriginal Registered Parties and an ambiguous process for determining applications for development'.[19]

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15 Minister for Aboriginal Affairs (Victoria), *Submission 1*, pp 1-2.

16 Minister for Aboriginal Affairs (Victoria), *Submission 1*, p. 1.

17 See The Hon Dr Sharman Stone, MP, *Submission 4;* Mr Neale Adams, *Submission 6* and Yorta Yorta Nation Aboriginal Corporation, *Submission 7*.

18 Dr Sharman Stone, *Submission 4*, p. 1.

19 Yorta Yorta Nation Aboriginal Corporation, *Submission 7*, p. 3.

Schedule 3 – Technical amendments relating to legislative instruments

1.28 The Explanatory Memorandum states that the proposed Schedule 3 will 'bring the Act into line with the *Legislative Instruments Act 2003* by making amendments to clarify which class of instruments contained in the Act are non-exempt legislative instruments for the purposes of the *Legislative Instruments Act 2003* and, accordingly, subject to its provisions'.[20] This means that legislative instruments are registered on the Federal Register of Legislative Instruments, tabled in Parliament and subject to scrutiny and disallowance procedures of Parliament.

1.29 The Central Land Council raised some concerns about the effects on certain declarations[21] made under the Heritage Protection Act should those declarations become legislative instruments and therefore subject to the provisions of the *Legislative Instruments Act 2003* which establishes a regime for the registration, tabling, Parliamentary scrutiny and sunsetting of legislative instruments.

1.30 The Council notes that under sections 9, 10 and 12 of the Heritage Protection Act, the Minister may make declarations for the protection of significant areas or objects, after consideration of various matters. Should such declarations become legislative instruments, under the sunsetting provisions of Part 6 of the *Legislative Instruments Act 2003*, they will automatically cease to have effect 10 years after registration, unless Parliament resolves to keep them in operation.

1.31 The Land Council points out that:

> While emergency declarations made under section 9 of the Heritage Protection Act may only have effect for a maximum period of 30 days, declarations made under sections 10 and 12 may have effect for **any period of time** determined by the Minister. Accordingly, in 1992, pursuant to section 10 of the Heritage Protection Act, the Minister for Aboriginal Affairs made a 10 year declaration to protect Junction Waterhole, near Alice Springs in the Northern Territory.
>
> Therefore, one of the consequences of making Ministerial declarations "legislative instruments" is that there is the potential for declarations to cease to have effect after only 10 years, even if the Minister has determined that the declaration should be in effect for a longer period. Whether or not declarations will continue to have effect after 10 years will be at the Parliament's discretion.[22]

1.32 Accordingly, the Land Council submits that ministerial declarations made under sections 10 and 12 of the Heritage Protection Act be exempt from the sunsetting provisions and that:

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20 *Explanatory Memorandum*, p. 1.

21 Central Land Council, *Submission 5*, p. 1.

22 Central Land Council, *Submission 5*, p. 2.

> …provision be made in Schedule 3 of the Bill for the *Legislative Instruments Regulations 2004* to be amended to include Ministerial declarations made under sections 10 and 12 of the Heritage Protection Act in the list of legislative instruments which are exempt from the sunsetting provisions.[23]

1.33 The Committee notes the concerns raised in the evidence with regard to the sunset provisions and draws this matter to the Minister's attention.

Other issues

1.34 The Committee received a number of submissions which raised a range of related issues. Mr Ernst Willheim, ANU Research School of Social Sciences, raised a number of concerns he has with what he considers are 'serious deficiencies' in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984,* including that:

- the Act provides insufficient recognition or protection of those Aboriginal traditional or spiritual knowledge or beliefs which restrict disclosure which severely inhibits the protection of areas and objects of particular significance to Aboriginal people;
- the requirement for the appointment of a reporter and the full reporting procedure whenever an application is made under s 10 of the Act should be amended to provide that such an appointment is discretionary;
- the threshold test required for the making of declarations under sections 9 and 10 of the Act, currently the same, should be much lower when seeking a s.9 'emergency' declaration than that required for a s.10 'permanent' declaration.[24]

1.35 The Committee notes the concerns raised by Mr Willheim and other submitters.

1.36 The Committee recommends:

> **That the Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005 be agreed to without amendment.**

Senator Alan Eggleston
Chairman

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23 Central Land Council, *Submission 5*, p. 2.

24 Mr Ernst Willheim, *Submission 3*.

Minority Report by Australian Greens and ALP Senators

Greens and ALP Senators are concerned the Howard Government has failed to deliver on its promises to better protect Indigenous heritage.

On 20 August 2003, during debate on the Environment and Heritage Legislation Amendment Bill, Senator Robert Hill told the Senate:

> *We gave undertakings a couple of days ago that the [ATSIHP] Bill would be brought to the Senate as quickly as possible. The minister has since reaffirmed to me that negotiations and consultations are continuing to take place…We recognise the shortcomings in the existing system. Reform of that is long overdue…We are anxious to have a new and better piece of legislation put in place as quickly as possible.*

Greens and ALP Senators are concerned that the "new and better piece of legislation" has never materialised, and Indigenous groups have not been properly consulted.

We are, therefore, concerned that the Chairman's report does not address the reason for referral to committee (as stated in Hansard, Selection of Bills Committee report, 9 November 2005), namely

"(i) Adequacy of amendments to protect Indigenous heritage
(ii) Do amendments address concerns of Indigenous Australians?
(iii) Do amendments reflect changes recommended by the Evatt Report?"

We are also concerned that the Chairman's report does not fully address the concerns raised by Indigenous communities during the limited consultation process.

The Chairman's report considers the extent to which the Bill meets its stated objectives (greater certainty of cultural loan arrangements, enabling Victorian State legislation, clarifying legislative instruments status) but in doing so does not consider how the particular amendments specifically relate to the three criterion of this inquiry (protecting heritage, Indigenous concerns, Evatt recommendations) nor does it consider how the Bill as a whole addresses these issues.

We note that there were few submissions to the inquiry and that the issues raised in the referral to committee were not substantively addressed in those submissions. It is unfortunate that the timing of this inquiry over Christmas meant that few submissions were forthcoming. Discussions with community representatives over the last six months have highlighted concerns over heritage issues, and we do not believe that the lack of engagement with the inquiry is reflective of a lack of community concern with the issues.

1. The Chairman's Report

(a) Greater certainty of international cultural loans

We support the analysis of the report that the Bill will deliver greater certainty in this regard. The emergence of these problems however illustrates a wider concern within the Indigenous community about the return of artefacts of great cultural significance that were taken without consent. Many Indigenous communities may not consider the ability to view stolen sacred artefacts behind glass in one of our museums a substitute for the effective loss of that heritage. While the Bill provides loan certainty to overseas museums and collections, it does not address these community concerns about the protection of their heritage nor the recommendations of the Evatt report on the repatriation of objects.

Recommendation 12.4 of the Evatt Report states that "…to fulfil its overall national responsibility for Aboriginal cultural heritage, and to underline the national importance of protecting that heritage, the Commonwealth Government should include the repatriation of Aboriginal cultural material on the agenda of its bilateral discussions with relevant countries". It is unclear to what extent this is in fact taking place, and the committee may need to seek information from DFAT in relation to this issue to address the reasons of referral of this Bill to committee. It is important to note that there is increasing international activity around the return of cultural artefacts, with the Government of Italy now suing what is arguably the wealthiest museum in the US. Within this changing international environment it seems like a good time to revisit this issue.

Recommendation 1:
That the enacting of legislation to provide certainty for international loans of Indigenous Australian artefacts be accompanied by a clear policy on the investigation and repatriation of objects of cultural significance that have been removed from Australia without the consent of their custodians.

(b) Concordance with the Legislative Instruments Act 2003

Legitimate concerns were raised by the Central Land Council regarding the impact of the sunset clause in this Act which would effectively see heritage protection declarations made by the Minister automatically ceasing after 10 years. While these concerns were raised in the report, it is our opinion that bringing them to the attention of the Minister may not be a sufficient response, and the committee should recommend that the Bill be amended as suggested by the CLC. This would ensure that existing declarations do not have to be remade.

Recommendation 2:
That provisions be made in Schedule 3 of the Bill for the Legislative Instruments Regulations 2004 to be amended to include Ministerial declarations made under sections 10 and 12 of the Heritage Protection Act in the list of legislative instruments which are exempt from the sunsetting provisions.

2. Addressing the Reasons for Reference

(i) Protecting Indigenous Heritage

Since coming to power in 1996 the Howard Government has failed to meet its obligations to protect and conserve Indigenous heritage and has drastically reduced its engagement in Indigenous heritage issues. This has been illustrated both in the Government's reluctance to use the ATSIHP Act and in its administration of the heritage provisions in the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The 1984 ATSIHP Act was initially enacted as a temporary stop-gap measure while the then Labor government developed more comprehensive national land-rights legislation. When it became apparent in 1986 that such legislation would not be forthcoming, its sunset clause was repealed. The point is that it was not at the time considered to provide an adequate national approach to the Commonwealth's heritage obligations, and was described in the Evatt report as an Act of 'last resort' intended to fill the gaps in State and Territory heritage protection.

It is fair to say that the ATSIHP Act has seen very little use. Of the two hundred applications lodged since its commencement in 1984 only twenty-two declarations have been made. Since the advent of a Coalition Government in1996 only one declaration has been made. At the same time there has been an apparent reluctance to prosecute breaches of the Act. Furthermore, with the advent of the EPBC Act it appears the intention of the Commonwealth has been to confine its statutory involvement in Indigenous heritage issues to the EPBC Act, while ignoring the ATSIHP Act.

There is now a view that with the advent of the heritage provisions in the EPBC Act "…[i]n so far as practical implementation, the ATSIHP Act is ostensibly a piece of dead legislation, at least in terms of the life of the Howard Government" (Wilkinson & Macintosh 2006, in press). That is, it appears the intention of the Commonwealth has been to confine its statutory involvement in Indigenous heritage issues to the EPBC Act, while ignoring the ATSIHP Act.

This is problematic for two reasons. Firstly, the ATSIHP Act has a far greater capacity to protect Indigenous heritage than the EPBC Act. The EPBC Act confines the statutory role of the Commonwealth to matters of international significance (i.e. World Heritage Areas), national significance (i.e. National Heritage places) and places located in Commonwealth areas (i.e. Commonwealth Heritage places). The ATSIHP Act contains no such limitations.

In the Intergovernmental Agreement on the Environment (1992) and the Council of Australian Government's (COAG) Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment (1997), the Commonwealth expressed a desire to limit its involvement in environmental issues largely to Commonwealth areas and matters of international and national significance. In this sense, the structure outlined in the EPBC Act is consistent with a long-standing policy on environmental issues. However, the COAG agreement explicitly excludes heritage issues from this arrangement, stating only that a 'co-operative national heritage places strategy' should be prepared that sets out the roles and responsibilities of the Commonwealth and

states on heritage issues. In relation to Indigenous heritage, the COAG agreement notes in Clause 6 that 'indigenous heritage issues are being addressed in a separate process and are not covered by this Agreement'. To date, the co-operative national heritage places strategy has not been prepared and the Indigenous heritage process appears to have been terminated by the Federal Government in the late 1990s. Consequently, it appears the Commonwealth's decision to confine its involvement in Indigenous heritage issues in the manner described was a unilateral decision made with little or no consultation with Indigenous communities or the states and territories.

When the heritage amendments to the EPBC Act were debated in 2003, Senator Robert Hill gave repeated assurances that the Government was carrying out a consultation process with Indigenous communities on an amendment bill to the ATSIHP Act that would ensure the Commonwealth continued to play an active role in the protection of Indigenous heritage sites that did not fall within the scope of the EPBC Act. He also assured the Senate that this amendment bill would be debated in Parliament as soon as the consultation process was completed.[1] From the information that is currently available, it appears there was no consultation process at the time these statements were made and that no consultation on a broad ATSIHP Amendment Bill has been carried out with Indigenous communities since.

The second reason why the limitation of the Commonwealth's involvement in Indigenous heritage protection to the EPBC Act regime is problematic concerns the way the National and Commonwealth Heritage Lists are being administered. In relation to the National Heritage List, it appears that a place of significance to a particular Indigenous community will not be eligible for inclusion on the National Heritage List unless it can be established that the place is important to the broader Australian community, for example, because it is of archaeological, anthropological, or scientific interest, or because it marks a significant event in colonial or post-Federation history. By establishing these stringent criteria, the Howard Government has ensured that a significant proportion of Indigenous heritage places will not be included on the National Heritage List, and those that are will not necessarily be the sites that are of greatest value to Indigenous Australians.

A further problem that applies to both the National and Commonwealth Heritage Lists concerns the manner in which the Minister for the Environment and Heritage has exercised statutory discretions to stall or block the listing of Indigenous heritage sites that do meet the listing criteria. As the Greens, the ALP and others predicted in the debate concerning the heritage amendments to the EPBC Act, the listing processes have become highly politicised and the Minister has demonstrated an unwillingness to list places that are politically contentious.

The decision making process under the EPBC Act in relation to Indigenous heritage protection is felt in this way to ultimately reflect another example of 'white people making decisions about black issues and values'. Further, the apparent priority that is being given to places that relate to colonial and post-Federation history suggests that the Government is not concerned about Indigenous heritage, or at the very least, that it sees it as a 'lower order' issue.

[1] See Senate Hansard, 14 August 2003, pp. 13638 – 13639 and 14082, per Senator Robert Hill.

(ii) Addressing concerns of Indigenous Australians

We are concerned that the timing of the ECITA inquiry into the ATSIHP Amendment Bill 2005 was such that we were unable to illicit substantive Indigenous community submissions or enable adequate community consultation to properly ascertain the level and substance of community concern regarding this Bill. This issue has been particularly acute during this inquiry due to the reduced capacity within Indigenous community organisations in recent times, consultation fatigue, and the requirement for submissions to be turned around quickly so late in the year. One of the fundamental principles of Indigenous community consultation is allowing sufficient time for discussion and decision-making processes to take place.

The parliamentary committee inquiry process is not one that is easily accessed by Indigenous communities, and where parliamentary committees have been seriously engaging with Indigenous issues they have often adapted the inquiry process to make it more user-friendly – for example, holding informal committee hearing on-the-ground in Indigenous communities. There is an increasing degree of cynicism among community members who have taken part in government consultation processes at various levels and have not felt that their contributions were valued or taken into account in the final policy outcomes.

(iii) Reflecting the Evatt Report recommendations

While it is arguable that some of the amendments may address particular recommendations arising from the Evatt Report (e.g. the need for a consistent national policy), it is fairly clear that these amendments as a whole do not address the report's recommendations in a substantive fashion and that there is no evidence of any other efforts on behalf of government to address the reports major recommendations.

We acknowledge that the Evatt Report recommendations were not substantively addressed by any of the submissions, however this Bill relates to Aboriginal and Torres Strait Island Heritage Protection and one of the reasons for referral was to assess the amendments against the Evatt Report recommendations. We are concerned that what was a very comprehensive report that made some very sensible and extremely valuable recommendations related directly to the title of this Bill is not being addressed.

The main points of the Evatt report recommendations include:

- Respecting customary restrictions of information including gender-restricted information.
- Protection from disclosure contrary to customary law restrictions including guidelines on the kind of information courts can seek and exemption from freedom of information laws.
- Guaranteed access rights to sites of recognised significance for those recognised as being allowed to do so under customary law.
- Effective interaction with state and territory laws.
- Minimum standards for State and Territory cultural heritage laws including automatic blanket protection for sites clearly falling within these standards.
- The establishment of independent Indigenous cultural heritage bodies.

- The integration of cultural heritage assessment into the planning and development process at the earliest possible stage.
- The establishment of an Aboriginal Cultural Heritage Agency and of Indigenous cultural heritage bodies controlled by Aboriginal members representative of Aboriginal communities with responsibility for site evaluation and administration.
- The inclusion of protection of all aspects of Indigenous heritage, including intellectual property
- That decisions on a site are an issue for Indigenous people to determine on the basis of an assessment of the intensity of belief and feeling of significance.
- Decisions should be made on the basis of information provided by relevant Indigenous communities or individuals and that any anthropological information be provided with their consent
- That a voluntary mediation procedure should be developed to encourage agreement making, within an adequate timeframe to allow proper consultation and negotiation with the site protected during the process.

Recommendation 3:
That the Federal Government fulfils its previous commitment to consultation with Aboriginal and Torres Strait Island communities on a broad range of amendments to the ATSHP Amendment Bill, including those recommended by the Evatt report.

Recommendation 4:
That the Federal Government fulfils its previous commitment to review the ATSIHP Act with a view to introducing a broader ATSIHP amendment Bill within the current term of Parliament.

3. Summary of Recommendations

The Chairman's report does not adequately address the stated reasons for referral to committee, and the proposed amendments are arguably insufficient when judged against these criteria. They do not appear to adequately protect Indigenous heritage, they do not seem to address the concerns of Indigenous Australians and they do not appear to reflect the recommendations of the Evatt report.

The Government should deliver on its 2003 commitment to fully consult with Indigenous communities and to introduce a "new and better piece of legislation".

Recommendations

1. That the enacting of legislation to provide certainty for international loans of Indigenous Australian artefacts be accompanied by a clear policy on the investigation and repatriation of objects of cultural significance that have been removed from Australia without the consent of their custodians.
2. That provisions be made in Schedule 3 of the Bill for the Legislative Instruments Regulations 2004 to be amended to include Ministerial declarations made under sections 10 and 12 of the Heritage Protection Act in

the list of legislative instruments which are exempt from the sunsetting provisions.

3. That the Federal Government fulfils its previous commitment to consultation with Aboriginal and Torres Strait Island communities on a broad ATSHP Amendment Bill
4. That the Federal Government fulfils its previous commitment to review the ATSIHP Act with a view to implementing the Evatt Report recommendations.

Senator Rachel Siewert **Senator Kate Lundy** **Senator Dana Wortley**

Australian Greens Addendum

Community concerns regarding state Indigenous heritage legislation

The Australian Greens have some additional concerns regarding the enabling of State administration of Aboriginal heritage protection in Victoria that we do not believe were adequately addressed by the Chairman's report.

We feel that it should be noted that serious concerns have been raised by Indigenous communities in Victoria about the substance of the proposed state legislation. Concerns include the lack of adequate Indigenous community consultation and involvement in the drafting of the Victorian legislation, and the manner in which it excludes some traditional owners and Aboriginal organisations from decision-making processes and may ultimately over-ride their ongoing role as the traditional custodians of their heritage.

The concerns raised by the Yorta Yorta in their submission raise some complex issues for this committee inquiry, as they substantively relate to the manner in which the Victorian Government has purportedly failed to adequately consult with and address the concerns of Indigenous peoples in constructing its draft legislation. They are concerned that the draft Victorian legislation imposes an Aboriginal Heritage Council which is appointed by the Minister and a system of Registered Aboriginal Parties that do not necessarily reflect existing community structures, decision making processes or recognised Traditional Elders. These measures could undermine existing community structures, agreements and decision-making processes and create community conflict between those community leaders who are included and excluded from the council.

They are also concerned that the proposed state heritage legislation effectively sidelines Indigenous involvement in decisions about cultural heritage to a purely advisory role, and increases the ability for Indigenous people to be played off against one another. There are also serious concerns for existing community appointed Aboriginal heritage inspectors and cultural officers who have invaluable knowledge, experience and community contacts.

Community concerns have also been raised about the manner in which the proposed structure for Aboriginal Heritage Agreements and Cultural Heritage Permits takes away any right of veto over development proposals and creates potential conflicts of interest for the state government on proposed developments.

The difficulty for the committee is in weighing up the prima facie case for uniform legislation across States and Territories with the manner in which the devolution of responsibility to Victoria may effectively mean that the Commonwealth is failing to meet its heritage obligations to the Indigenous peoples of Victoria. In this way both the amendments to the ATSIHP Act and the Victorian legislation fail to meet the recommendations of the Evatt report, particularly in relation to minimum heritage

protection standards, integrating heritage into planning processes and Indigenous decision-making.

While Australian Greens support in principle a consistent application of Commonwealth law across all State jurisdictions, we believe that the Commonwealth has an obligation to ensure that Indigenous heritage will be adequately protected before it devolves responsibility to Victoria. The Commonwealth has legal and moral obligations to protect Indigenous heritage that arise from international agreements, the Australian Constitution and the nature of the Australian political system. The ATSIHP Act was intended to act as a fall-back measure for situations in which states or territories were not ensuring this protection. To this end, we are concerned the ultimate effect of enacting this Bill without ensuring the proposed Victorian legislation meets Commonwealth and community expectations would be a diminution of the protection of Aboriginal heritage in Victoria.

Recommendation 5:
That the Commonwealth pursue further consultation with Aboriginal groups over their concerns with state and territory heritage legislation and undertake to discuss with the state and territory governments any community concerns with to ensure no diminution of heritage protection.

Senator Rachel Siewert

Appendix 1

Submissions

1. Minister for Aboriginal Affairs, Victoria
2. The Australian Museum
3. Mr Ernst Willheim
4. The Hon. Dr Sharman Stone MP
5. Central Land Council
6. Mr Neale Adams
7. Yorta Yorta Nation Aboriginal Corporation