REVIEW OF THE

ABORIGINAL AND TORRES STRAIT ISLANDER

HERITAGE PROTECTION ACT 1984

REPORT BY

HON ELIZABETH EVATT AC

22 August 1996

Senator The Hon John Herron
Minister for Aboriginal and Torres Strait Islander Affairs
Parliament House
CANBERRA ACT 2600

Dear Minister,

REVIEW OF THE
ABORIGINAL AND TORRES STRAIT ISLANDER
HERITAGE PROTECTION ACT 1984

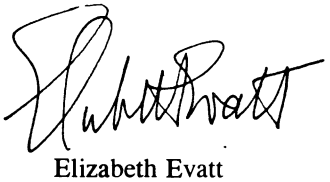
On 20 October 1995, the Minister for Aboriginal and Torres Strait Islander Affairs, the Hon Robert Tickner, announced that I had been invited to undertake a *comprehensive review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* with a request to report within six months; you will recall the period of the Review was extended by three weeks.

The Review commenced work on 1 December 1995 and has received nearly 70 submissions and conducted extensive consultations around Australia. The submissions and consultations involved the Aboriginal and Torres Strait Islander communities, State and Territory Governments, business and industry, and a wide range of interested individuals and organisations.

In June I provided you with a draft report without annexes. I now enclose final text of the report of the Review, together with the annexes.

I would like to draw your attention to the fact that the small group who worked full time on the Review and in the preparation of this Report did not include any members of the Aboriginal and Torres Strait Islander communities.

Yours sincerely,



Elizabeth Evatt

TERMS OF REFERENCE

The *Aboriginal and Torres Strait Islander Heritage Protection Act* was passed in 1984 under the power given to the Commonwealth Parliament by the 1967 referendum to enact legislation in relation to indigenous affairs. The review will examine and report on the operation of the Act in the 11 years since its passage. In particular the review will consider:

(i) the effectiveness of the provisions of the Act in providing protection for areas and objects of significance to Aboriginal and Torres Strait Islander people.

(ii) application of procedural fairness to inquiries in light of the judgments of the Federal Court arising from the appeals currently before it;

(iii) the effectiveness of interaction between Commonwealth and State and Territory indigenous heritage protection legislation;

(iv) the processes to be followed by the Minister after receiving an application for protection under the Act;

(v) the minimum requirements for information which must be included in the applications;

(vi) how secret/sacred information should be dealt with under the Act;

(vii) the efficacy of the reporting process under section 10(4) of the Act and alternative processes and/or structures which could be established to provide advice to the Minister;

(viii) the efficacy of the procedures for the making of declarations under the Act, including the Minister's role in making declarations;

(ix) the efficacy of the time limits currently included in the Act and the desirability of placing additional time limits on processes under the Act;

(x) whether the Act makes appropriate provision for the protection of areas and objects while mediation or reporting processes are underway;

(xi) whether there is adequate scope under the Act for applications to be successfully resolved through mediation;

(xii) whether the Act gives the Minister appropriate discretion to decide not to deal with or to defer consideration of applications;

(xiii) the development of administrative guidelines under the Act;

(xiv) the establishment of an authority, tribunal or commission and the resources required to administer the Act;

(xv) any other matters relevant to the operation of the Act.

The review will be required to report six months after it commences.

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ANNEXES

PARTICIPANTS:

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GLOSSARY – ACRONYMS

AAA	Australian Archaeological Association
AAPA	Aboriginal Areas Protection Authority (Northern Territory)
AHC	Australian Heritage Commission
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRC	Australian Law Reform Commission
ALRM	Aboriginal Legal Rights Movement Inc (South Australia)
ALSWA	Aboriginal Legal Service of Western Australia Inc
AMEC	Association of Mining and Exploration Companies Inc
ANCA	Australian Nature Conservation Agency
ATSIC	Aboriginal and Torres Strait Islander Commission
CAR	Council for Aboriginal Reconciliation
CIRCLE	Centre for Indigenous Rights and Critical Legal Enquiry, Bond University
CLC	Central Land Council
CRA	Conzinc Riotinto Australia
DAA	Department of Aboriginal Affairs (Cth)
DCA	Department of Communication and the Arts (Cth)
FAIRA	Foundation for Aboriginal and Islander Research Action
ICCPR	International Covenant on Civil and Political Rights
ICOMOS	International Council on Monuments and Sites
KLC	Kimberley Land Council
MCA	Minerals Council of Australia
MCATSIA	Ministerial Council on Aboriginal and Torres Strait Islander Affairs
MNTU	Mirimbiak Native Title Unit of the Victorian Aboriginal Legal Service Co-op Ltd
NASAC	National Aboriginal Sites Authorities Committee
NFF	National Farmers' Federation (Australia)
NLC	Northern Land Council
NPYWCAC	Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council
NQLCAC	North Queensland Land Council Aboriginal Corporation
NTSC	Native Title Supporters' Coalition
NSWALC	New South Wales Aboriginal Land Council
NSWG	New South Wales Government
PitC	Pitjantjatjara Council Inc
PGA	Pastoralists' and Graziers' Association of WA Inc
PWYRC	Patpa Warra Yunti Regional Council (ATSIC)
QldG	Queensland Government
RAC	Resource Assessment Commission
RCADIC	Royal Commission into Aboriginal Deaths in Custody
SACME	South Australian Chamber of Mines and Energy Inc
SAG	South Australian Government
TAC	Tasmanian Aboriginal Centre Inc
TALC	Tasmanian Aboriginal Land Council
TasG	Tasmanian Government
TSRA	Torres Strait Regional Authority
VFF	Victorian Farmers' Federation
VicG	Victorian Government
VWC	Victoria Women's Council
WAG	Western Australian Government

GLOSSARY – REPORTS

Chaney *Broome Crocodile Farm* s 10 report
Chaney, The Hon F M *The Particular Significance to Aboriginals of land Near Broome to be Leased for the Purpose of a Crocodile Park* Report to the Minister for Aboriginal Affairs under s 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (1994)

Coastal Zone Inquiry Final Report
Resource Assessment Commission *Coastal Zone Inquiry Final Report* 1993

Cultural Policy Framework
ATSIC *Cultural Policy Framework* Aboriginal and Torres Strait Islander Commission November 1995

Customary Laws
Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* Report (ALRC 31) AGPS 1986

DAA Review
Department of Aboriginal Affairs *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984: A review* AGPS 1986

Exploring for Common Ground
Council for Aboriginal Reconciliation *Exploring for Common Ground: Aboriginal Reconciliation and the Australian Mining Industry* 1993

Impact Evaluation
ATSIC Office of Evaluation and Audit *Impact Evaluation: Heritage Protection Policy* Aboriginal and Torres Strait Islander Commission 1993

Interaction
Ministerial Council on Aboriginal and Torres Strait Islander Affairs *Working Party Report on Item 4.1: Aboriginal Heritage Interaction between States, Territories and Commonwealth* 1995

Jones *Helena Valley* s 10 report
Jones, G *Significant Aboriginal Areas in the Vicinity of the Cedar Woods Housing Estate, Helena Valley, WA* Report to the Minister for Aboriginal and Torres Strait Islander Affairs (February 1994)

Menham *Old Swan Brewery (Goonininup)* s 10 report
Menham, J G *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Old Swan Brewery Area Perth, Western Australia* (November 1993)

Menham *Skyrail* s 10 report
Menham, J G *Skyrail,* Report to the Minister for Aboriginal and Torres Strait Islander Affairs (1995)

Native Title Report 1995

Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report July 1994-June 1995* AGPS 1995

Recognition, Rights and Reform

ATSIC *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* Commonwealth of Australia 1995

Saunders *Hindmarsh Island (Kumarangk)* s 10 report

Saunders, Professor C A, AO *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Significant Aboriginal Area in the Vicinity of Goolwa and Hindmarsh (Kumarangk) Island* Pursuant to Section 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (July 1994)

Senior Report

Minter Ellison Northmore Hale (Dr Clive Senior) *Review of the Aboriginal Heritage Act 1972: Prepared for the Minister for Aboriginal Affairs Western Australia* 1995

Stewart *Kakadu* s 10 report

Stewart, The Hon Justice D G Report to the Minister for Aboriginal Affairs on the Kakadu Conservation Zone (May 1991)

Valuing Cultures

Council for Aboriginal Reconciliation *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* Key Issues Paper No 3 AGPS 1994

Wootten *Iron Princess* s 10 report

Wootten, The Hon J H, AC, QC *Significant Aboriginal Sites in Area of Iron Princess Mine, Iron Knob, South Australia* Report to the Minister for Aboriginal Affairs under s. 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (1993)

Wootten *Junction Waterhole (Niltye/Tnyere-Akerte)* s 10 report

Wootten, The Hon J H, AC, QC *Significant Aboriginal Sites in Area of Proposed Junction Waterhole Dam, Alice Springs* Report to the Minister for Aboriginal Affairs under s. 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (1992)

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 12,
Draft Declaration on the Rights of Indigenous Peoples
E/CN.4/SUB.2/1994/2/Add.1 (1994)

SUMMARY OF THE REPORT

21 JUNE 1996

GOALS OF THE ACT

The purpose of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is to preserve and protect from injury or desecration areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

The Act was introduced in 1984 to enable the Commonwealth to protect significant Aboriginal areas and sites when State or Territory law does not provide effective protection. Aboriginals and Torres Strait Islanders can ask the Minister to make a declaration to protect an area or object which is under threat of injury or desecration. Declarations can be short term or long term; they are backed up by criminal sanctions. Since 1984 four long-term declarations have been made to protect areas. One remains in place. Three groups of objects have been protected by declarations.

The Act was introduced as a temporary measure, pending the introduction of national land rights legislation. The sunset clause was removed in 1986, when it appeared that land rights legislation would not be introduced. The Act has not been reviewed since 1986.

WHAT ARE THE PROBLEMS?

Uncertainty and delays

The procedures for making declarations under the Act are not spelled out in detail. The Act is intended to operate as a last resort, after the application of State and Territory laws. However the interaction between Commonwealth and State/Territory processes is not clearly established. This has led to delay and uncertainty in dealing with applications. For example, it is unclear how much consultation there should be with State and Territory governments about the level of protection available in the jurisdiction concerned, or how far those consultations should extend before an application under the Commonwealth Act proceeds to a determination. Emergency or interim protection has been granted by the Commonwealth Minister in very few situations, despite the long periods involved in consultations and in determining applications.

Fair procedures not spelled out

The Act establishes a reporting process as a guide to the exercise of the Minister's discretion, but it does not specify how the reporter should ensure that interested parties are treated fairly. This has left the Minister's discretion

open to legal challenges. Two declarations have been overturned by the Federal Court and other decisions of the Minister have also been set aside. The most recent cases of this kind involve Hindmarsh Island (Kumarangk) and the Broome Crocodile Farm. The procedures laid down for the Minister and the section 10 reporter by those cases have made the process burdensome and taken it away from the relatively simple procedures which were envisaged when the Act was introduced. They also expose Aboriginal people seeking the protection of the Act to intensive scrutiny of their religious beliefs.

Impeding development

The main threat to significant Aboriginal areas comes from construction and development of all kinds. State and Territory governments and developers are concerned about the delays and costs caused by the fact that intervention under the Commonwealth Act often comes after their planning processes have been completed and a project has been approved. Developers see this as yet another obstacle to be negotiated to get their project under way.

Lack of Aboriginal involvement and respect for custom

Aboriginal people consider that the Act has not protected their heritage. Few declarations have been made and only one is now in force. They say that the administration of the Act has given too much deference to ineffective State and Territory processes which do not recognise their role in the identification, management and protection of heritage. In some situations negotiations by the Commonwealth with the State/Territory government have resulted in arrangements being made without adequate consultation with Aboriginal people. In addition, the Act does not recognise that there are Aboriginal restrictions on information which play an important role in the protection and maintenance of their cultural heritage. The Act does not protect confidential information or respect Aboriginal spirituality and beliefs which require that confidentiality to be maintained. Its failure to deal with all aspects of heritage, including intellectual property was another subject of concern, though the Review has been unable to deal with this issue in detail (see Chapter 3). Nor does the Act adequately recognise or provide for the involvement of Aboriginal people in negotiation and decision-making about their cultural heritage. Aboriginal people want the Act to be maintained and strengthened.

POLICY GOALS OF THE REVIEW: MAINTAIN BASIC PURPOSES OF THE ACT

The Review received nearly 70 submissions and carried out wide consultations. Submissions covered a broad spectrum of views, from those who thought the Commonwealth should leave Aboriginal heritage protection entirely to the States and Territories, to those who thought the Commonwealth should take over the field completely. Others wanted the role of Aboriginal customary law to be fully recognised. Most submissions either supported or recognised the need to retain the basic principles of the Act as an effective safety net. They want it to fulfill its purposes of protecting Aboriginal

heritage in a practical and effective manner. That is the position taken by the Review.

The policy goals of the Review have been these:

- To respect and support the living culture, traditions and beliefs of Aboriginal people and to recognise their role and interest in the protection and control of their cultural heritage.

- To retain the basic principles of the Act, as an Act of last resort.

- To ensure that the Act can fulfill its role as a measure of last resort by encouraging States and Territories to adopt minimum standards for the protection of Aboriginal cultural heritage as part of their primary protection regimes.

- To encourage greater co-operation between the Commonwealth and the States and Territories, and to avoid duplication and overlap with State and Territory jurisdictions by recognition and accreditation of their processes.

- To provide access to an effective process for the protection of areas and objects significant to Aboriginal people.

- To provide a process which operates in a consistent manner, according to clear procedures, in order to avoid unnecessary duplication, delays and costs.

- To ensure that Aboriginal people participate in decisions about the protection of their significant sites and that their wishes are taken fully into account.

- To ensure that heritage protection laws benefit all Aboriginal people, whether or not they live in traditional life style, whether they are urban, rural or remote. The objective should be to protect living culture/ tradition as Aboriginal people see it now.[1]

- To resolve some of the difficulties of developers by better procedures which ensure early consideration of heritage issues in the planning process, effective consultation with Aboriginal people and genuine

[1] *National Aboriginal and Torres Strait Islander Survey: Australia's Indigenous Youth*, 1996, ABS. This study shows that 83% of young Aboriginal people believe in the importance of tribal elders. These young people have strong links to their culture, language and ancestral homelands; seventy per cent recognise their homeland, *Sydney Morning Herald*, 23.2.96.

mediation or other processes whose purpose is to avoid injury to or desecration of sites.

Making the Act workable

The recommendations in this report will help to restore the original intention of the Commonwealth Act to provide a straightforward and simple procedure at Commonwealth level where State or Territory legislation does not provide effective protection for an area or site, or where that protection is withdrawn by the State or Territory Minister. The recommendations would help to overcome many of the current frustrations and could contribute in a positive way to the goals of Aboriginal reconciliation.

ELEMENTS OF THE PROPOSALS

Maintain scope of the Act

The Act applies to any area or object anywhere in Australia which is of significance to Aboriginal people, whether or not they live in traditional life style, whether they are urban, rural or remote. These principles should be retained. The protection of cultural heritage should continue to recognise the changing nature of culture, and aim to protect living culture/tradition as Aboriginal people see it now. (Chapter 6)

Respect Aboriginal traditions and customs

The Act should recognise and respect Aboriginal customary law restrictions on holding, disclosing and using information about significant areas and objects. It should minimise the amount of information that Aboriginal people need to give about significant areas or objects to secure their protection. Standards are recommended for dealing with restricted information at each stage of the process. The wishes of Aboriginal people concerning the protection of a significant area or object should not be overridden unless there have been adequate consultations and inquiries and there is a compelling public interest in proceeding. (Chaters 4, 6 and 7)

Effective Commonwealth procedures

The procedures under the Commonwealth Act should ensure interim protection for areas which are threatened, basic principles of natural justice for persons affected and effective time lines. An outline of these procedures is set out below. The recommended procedures follow the existing statutory model, by keeping an informal inquiry process leading to the exercise of the Minister's discretion. This keeps the process relatively simple and inexpensive. However, there must be clear statutory guidelines for that process, setting out a clear procedural path with set time lines. Persons interested would have a proper opportunity to make representations on the issues affecting them. (Chapter 10)

Providing for agreement

The Act should provide for a specific voluntary mediation procedure which is offered to parties before a reporting procedure leading to declaration is considered. There should be appropriate time limits. Significant areas should be protected from continuing injury or desecration while mediation takes place. The Act should provide for registration of agreements reached during mediation or negotiations. Registration would give the agreement the force of a contract. (Chapter 9)

Questions of significance separated from question of protection

A principal recommendation is to separate the question whether an area is a significant area from the question whether it should be protected from a proposed use of land which poses a threat. The reporter will form an opinion about significance in the reporting process, based on information given by Aboriginal people about its significance to them. The reporter should be concerned with the existence of confidential information supporting the claim of significance rather than with its details. Confidential information given by Aboriginal people would be protected from disclosure contrary to Aboriginal tradition. Third party intervention in the question of significance would be minimised. This would bring the Commonwealth in line with States in assessing significance. It would help to reduce the avenues for challenging the Minister's decision, and increase recognition of Aboriginal customs, traditions and beliefs. (Chapter 8)

Decision about protection to remain a ministerial discretion.

Protection should not attach as of right to every site falling within the definition of the Act. The decision whether to protect an area would remain, as now, a matter for the Minister's discretion. In exercising that discretion, which has a 'political' quality, the Minister should weigh the competing interests of Aboriginal heritage protection with the interests of those affected and the public interest in the issues. The Minister would rely on the opinion of the reporter about the question of significance. The wishes of Aboriginal people would be taken into account. (Chapter 10)

Independent Aboriginal Heritage Agency and Advisory Committee

A new permanent independent agency should be established to administer the Act in all matters leading to the exercise of discretion by the Minister. The agency would relieve the Minister of procedural responsibilities, including those related to interim protection and the nomination of mediators and reporters. It would act in accordance with established principles and procedures, away from the political process. It should be a small expert agency, with a panel of mediators and reporters available to be called upon when needed. Its members should include a high proportion of Aboriginal people. The agency should be supported by an Aboriginal heritage advisory committee, composed of Aboriginal people, to advise on such matters as identifying Aboriginal people to consult about areas of significance. The cost and resource implications of the recommendation are considered. (Chapter 11)

Improving protection and avoiding overlap: Accreditation

The Commonwealth should work for greater co-operation with States and Territories, and actively encourage them to revise and update their Aboriginal heritage protection laws in accordance with agreed standards, so that they can fulfill their primary role in protecting Aboriginal cultural heritage more effectively. Duplication of functions and improved protection could be achieved if the Commonwealth were to recognise and accredit State processes meeting set standards. For example, if consideration of heritage issues were properly incorporated into the State planning process, with an independent means of determining the existence of significant areas or objects in consultation with Aboriginal people, the Commonwealth process could avoid revisiting the question of significance. If an application were made for protection under the Commonwealth Act, the question for the Minister would be limited to the balancing of competing interests in the exercise of an essentially political discretion. That is the proper role for a last resort mechanism. (Chapter 5)

Support national minimum standards

The Commonwealth should support the development of national minimum standards for Aboriginal heritage protection, building on work that has already begun at inter-governmental level. These standards should be reflected so far as possible in Commonwealth law (given its role is that of last resort) and form the basis for accreditation agreements. An important element of minimum standards would be effective procedures to ensure that relevant Aboriginal people are entitled to be consulted in regard to development proposals which may pose a threat to significant sites, to participate effectively in the decision-making process through mediation or other means and to have their wishes taken fully into account. Mediation should be encouraged. (Chapter 5)

National policy for indigenous heritage protection

The Commonwealth should develop a national policy for all aspects of indigenous heritage protection. Such policy should form the basis of standards for cultural heritage protection, and for programmes at all levels of government which affect Aboriginal heritage. An Aboriginal-controlled body such as an Aboriginal Cultural Heritage Advisory Council should have responsibility to oversee the implementation of this proposal, and should also have a role in monitoring Aboriginal heritage protection nationally and in co-ordinating laws and programmes that have an impact on Aboriginal heritage. (Chapter 3)

Maximise Aboriginal role in control and management of cultural heritage

The primary goals of cultural heritage protection laws and policies should extend beyond the provision of effective legal protection of areas, sites and objects. They should ensure that programmes for the management of cultural heritage provide for Aboriginal and Torres Strait Islander people to have, to the greatest extent possible, effective control over the protection, preservation and promotion of places, areas and objects which are culturally significant to

them. Programmes to advance these aims would include restoration and preservation programmes for significant sites, training and employing indigenous people as inspectors and as rangers and custodians of national parks, and education of Aboriginal people and of the wider community about Aboriginal cultural heritage. (Chapter 3)

OUTLINE OF RECOMMENDED PROCESS

(For further details see Chapters 10 and 11)
The Review considers that, failing an agreed resolution of an application for long-term protection under the Act, a modified version of the existing process should be followed. The essential nature of the process would be retained: it would be a relatively informal process, involving both an assessment of significance and a decision as to whether and, if so, on what terms to protect or preserve the relevant area by reference to competing interests.

The agency recommended in Chapter 11 to administer the Act up to the point where an exercise of ministerial discretion is called for would make interim protection declarations. It would also determine applications where agreements resolving applications are made and found to be consistent with the purposes of the Act. The following process is broadly consistent with State and Territory best practice and the direction of inter-governmental reform, and would permit the 'last resort' role of the Commonwealth to mesh with that of States and Territories to produce maximum uniformity.

The proposed process should include the following broad features:

Applications

- Applications should remain easy to make, either orally or in writing.

- The agency should maintain a written record of applications and information provided in support of them.

Procedural fairness

- The legislation should specify the information required to be provided in support of an application (specified information requirements).

- Procedural fairness requirements would be satisfied if the agency notifies interested persons about specified information and they have a fair opportunity to comment on that information before a decision is made.

- The agency may provide for other procedures solely at its discretion.

- The agency or Minister would not have to provide details or copies of information provided in support of an application unless express provision is made for this.

In the context of long-term declarations:

- Interested persons will have an opportunity to comment on the information provided to them by making written representations to the agency through a reporting process.

- The legislation should specify the information which must be included in the notice inviting representations from interested members of the public who should make written representations through the same reporting process.

- Where there are changes to the information provided in support of an application during a reporting process, the agency must inform interested persons and issue a new public notice.

Effective protection

- 'Effective protection' under State/Territory laws should be defined to mean actual protection.

Interim protection available

- Interim protection should be available pending determination of an application for long-term protection: there should be a lower standard of satisfaction in relation to the area and the threat than is required for long-term declarations.

Reporting process

- The agency must start a reporting process to determine valid applications for long-term protection unless the matter is either resolved beforehand to the satisfaction of the applicants or:
  - the agency dismisses the application as frivolous or vexatious; or
  - the agency refuses an application on the basis that the specified information requirements or notice requirements have not been met and the applicants have failed to provide further information reasonably requested.

- The agency should have discretion to delay the reporting process if there is another process under way that holds out a prospect of removing the threat or resolving the application to the satisfaction of the applicants. However, a reporting process should be started promptly once there is a 'serious and immediate' threat.

- The agency must form an opinion as to whether the area or object in question is a 'significant Aboriginal area' within the meaning of the Act. It must report to the Minister on that issue and also on the representations received from interested persons who may be affected by a declaration and other members of the public.

- The opinion of the agency on the issue of whether the area or object in question is a 'significant Aboriginal' area or object will bind the Minister.

- The reporter must provide a fair summary of the representations in the report, but should not recommend whether or not the Minister should make the declaration sought.

- The Minister should be entitled to base his or her decision on the report without having to consider the representations made in response to a public notice, although these should continue to be provided with the report.

Time limits

- All applications for protection must be determined as soon as is practicable: time limits for decisions on emergency and temporary protection and for the reporting process (once commenced) should be specified in the legislation.

Reasons for decisions

- The Minister should, after making a decision, provide to all interested persons a statement of reasons: the statement should satisfy the requirements of section 13 of the *Administrative Decisions (Judicial Review) Act 1977* and should be tabled in Parliament. Reasons for decisions relating to emergency and interim protection should remain available on request under the AD(JR) Act.

LIST OF RECOMMENDATIONS

CHAPTER 3:

CO-ORDINATING COMMONWEALTH LAWS, POLICIES AND PROGRAMMES

A NATIONAL POLICY

3.1 A national policy should be adopted as the basis for laws and programmes relating to Aboriginal cultural heritage at all levels of government. That policy should cover all aspects of Aboriginal cultural heritage, and should include such matters as positive support for Aboriginal culture and heritage, education of non-Aboriginal people, Aboriginal control of cultural heritage, recognition of Aboriginal customary law and tradition, and effective legal protection of cultural heritage.

A NATIONAL CO-ORDINATING BODY

3.2 There should be a body with specific responsibility for monitoring Aboriginal cultural heritage protection nationally, to coordinate laws and programs that have an impact on Aboriginal heritage and to develop and promote the national heritage protection policy at all levels of government. It should consist entirely or largely of Aboriginal people, or act on the advice of an Aboriginal-controlled body.

BODY TO REDUCE DUPLICATION

3.3 The body responsible for co-ordinating Aboriginal heritage protection nationally (see recommendation 3.2) should investigate whether Aboriginal heritage can be assessed on a similar basis under all Commonwealth legislation (whether general or specific) under which it is currently assessed with a view to working out how duplication in significance assessment can be eliminated.

CHAPTER 4

RESPECTING CUSTOMARY RESTRICTIONS ON INFORMATION

STANDARDS FOR PROTECTION OF INFORMATION

State, Territory and Commonwealth heritage protection laws should meet standards for protecting restricted information:

4.1 Heritage protection laws should respect Aboriginal customary law restrictions on the disclosure and use of information about Aboriginal heritage.

4.2 Procedures under heritage protection laws should minimise the amount of information Aboriginal people need to give about significant areas or sites to ensure protection and avoid injury or desecration.

4.3 The laws and related procedures must ensure that customary law restrictions on information received for the purpose of administering heritage protection laws or received in related legal proceedings are respected and observed.

4.4 Heritage protection legislation should specifically provide that a claim for public interest immunity may be made for restricted information.

CHAPTER 5

EFFECTIVE INTERACTION WITH STATE AND TERRITORY LAWS

REFORMING STATE AND TERRITORY LAWS

5.1 A goal of Commonwealth heritage protection law and policy should be the reform of State and Territory laws. This goal should be pursued by legal and political means.

MINIMUM STANDARDS FOR STATE AND TERRITORY LAWS

5.2 The Commonwealth Government should support and encourage the process of developing, in consultation with State and Territory governments, the Aboriginal community, and other interested parties, agreed minimum standards as the basis for uniform or model laws on Aboriginal cultural heritage protection, for adoption by the States and Territories and by the Commonwealth, where relevant. Resources should be allocated to support this process.

ACCREDITATION AND REFERRAL

5.3 The Commonwealth should accredit for the purposes of the Act determinations and procedures under State/Territory laws which comply with minimum standards. It should provide, where appropriate, for the referral of matters to State/Territory agencies or bodies which meet minimum standards.

RECOGNITION OF DECISIONS ON SIGNIFICANCE

5.4 The Commonwealth should accredit or recognise for the purposes of the Act decisions concerning the significance of a site by State/Territory Aboriginal cultural heritage bodies that meet the required standards and which apply definitions comparable with the Commonwealth definition.

CHAPTER 6

MINIMUM STANDARDS FOR CULTURAL HERITAGE LAWS

HERITAGE BASED ON SIGNIFICANCE

6.1 Minimum standards for State and Territory Aboriginal cultural heritage laws should include a definition of Aboriginal cultural heritage which is at least as broad as that of the Commonwealth law. That definition should extend to areas and objects of significance to Aboriginal people in accordance with tradition, including traditions which have evolved from past traditions. It should also extend expressly to historic and archaeological sites.

BLANKET PROTECTION

6.2 A minimum standard for State and Territory heritage protection legislation is that it provide automatic/blanket protection to areas and sites falling within the definitions outlined above, through appropriate and effective criminal sanctions.

ABORIGINAL CULTURAL HERITAGE BODIES

6.3 Minimum standards for State and Territory legislation should include the establishment of Aboriginal cultural heritage bodies with responsibility for site evaluation and for the administration of the legislation. They should:

- be independent;
- be controlled by Aboriginal members representative of Aboriginal communities;
- have gender balance;
- have adequate staffing, expertise and resources; and
- have access to independent advisers, eg anthropologists, archaeologists.

ASSESSING SITES A SEPARATE ISSUE

6.4 Minimum standards for State and Territory laws should provide for assessments relating to the significance of sites and areas to be separated from decisions concerning land use. The former should be the responsibility of Aboriginal heritage bodies; the latter the responsibility of the executive.

STATE AND TERRITORY PLANNING PROCESSES

6.5 Minimum standards for State and Territory planning and development processes should include these elements:

integration of Aboriginal cultural heritage issues with the planning and development process from the earliest stage;

an effective consultation/negotiation process for reaching agreement between developers and the Aboriginal community facilitated by a responsible Aboriginal heritage body;

the objective of negotiation should be to reach agreement on work clearance or site protection;

legislative recognition of agreements between land users/developers and relevant Aboriginal groups;

minimum disclosure of confidential or gender specific information through the use of a work area clearance approach;

separate consultation of Aboriginal women;

an independent Aboriginal heritage body should determine whether a site is significant and should make recommendations concerning its protection;

decisions overriding protection should have regard to the wishes of Aboriginal people, should be supported by compelling reasons of public interest and be subject to accountability;

procedures should be carried out expeditiously and within reasonable time frames.

ADOPTING DCA GUIDELINES

6.6 The Commonwealth Government should actively encourage the adoption of the *Guidelines for the Protection, Management and Use of Aboriginal and Torres Strait Islander Cultural Heritage Places*, developed by Department of Communication and the Arts (Cth) by all relevant Commonwealth, State and Territory agencies and by local authorities involved in land management and decisions concerning cultural heritage.

CONFIDENTIALITY

6.7 Minimum standards for the States and Territories should include confidentiality provisions to protect information provided in the course of administering State and Territory heritage protection laws from disclosure contrary to Aboriginal tradition, (without specific authorisation).

Such laws should prohibit any requirement to provide information where to do so would be contrary to Aboriginal tradition.

Such laws should provide for the protection of information which must not, according to Aboriginal tradition, be disclosed to persons of one particular sex.

ACCESS TO SIGNIFICANT SITES

6.8 Minimum standards should include provisions to ensure the right of access of Aboriginal people to significant sites on Crown land for the purposes of their protection and preservation and for traditional purposes.

EFFECTIVE CRIMINAL SANCTIONS

6.9 Minimum standards for State and Territory laws should include:
criminal sanctions with adequate penalties, and limited defences;
provision to ensure that criminal sanctions are effectively enforced;
provision to enable Aboriginal people to act as inspectors, to monitor compliance and to launch prosecutions.

CHAPTER 7

THE COMMONWEALTH ACT AND MINIMUM STANDARDS

PROTECTION FROM DISCLOSURE

7.1 (a) The Commonwealth Act should be amended to include a provision which protects information provided for the purposes of the Act from unauthorised disclosure contrary to customary law restrictions. The Act should require the Minister to respect gender restrictions on information to which he or she seeks access.

7.1 (b) Section 20 (1) of the Act should be amended to ensure that it does not operate to interfere with the cultural and spiritual beliefs of Aboriginal people.

INFORMATION PROTOCOLS

7.2 There should be protocols for s 10 reporters and mediators covering how they should receive and handle information subject to customary law restrictions.

EXEMPTION FROM FOI

7.3 The *Freedom of Information Act 1982* (Cth) should be amended to provide that information about Aboriginal heritage provided for the purposes of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and that is subject to customary law restrictions should be exempt from disclosure.

COURT PROCEDURES

7.4 The protection offered by s 27 of the Act should be extended to any court proceedings in relation to the Act or in which access is sought to information collected or provided for the purposes of the Act. The Act should also require the Federal Court in conducting proceedings in relation to the Act to take account of

the cultural and customary concerns of Aboriginal people and Torres Strait Islanders.

PUBLIC INTEREST IMMUNITY

7.5 The circumstances in which a court can require an Aboriginal person or an agency holding restricted information about Aboriginal heritage to produce that information should be limited by the provision of a claim to a public interest immunity. The Commonwealth provisions should extend to proceedings under State and Territory law in relation to matters arising under the Commonwealth Act.

ACCESS FOR PROTECTION OF HERITAGE

7.6 Section 11 should be amended to clarify that a declaration may include provisions concerning access to a site for the purposes of inspection, protection and preservation of an area and for traditional purposes.

REPEAL S 24 (3)

7.7 That subsection 24 (3) be repealed.

REVIEW PENALTIES

7.8 Penalties under the Commonwealth Act should be reviewed to bring them into line with current values.

PROSECUTIONS

7.9 The agency recommended by the Review to administer the Commonwealth Act should have power to initiate prosecutions for breach of declarations under the Act.

CHAPTER 8

DECIDING SIGNIFICANCE: AN ABORIGINAL ISSUE

BASIS OF ASSESSMENT

8.1 The question whether an area or site should be considered an area or site of particular significance according to Aboriginal tradition should be regarded as a subjective issue to be determined on the basis of an assessment of the degree of intensity of belief and feeling of Aboriginal people about that area or site and its significance.

RELYING ON STATE/TERRITORY ASSESSMENT

8.2 Where an assessment has been made of substantially the same issue [concerning the particular significance of an area] in the State/Territory process, it should be possible to rely on that assessment in the Commonwealth process.

REFERRAL TO ACCREDITED STATE/TERRITORY PROCESS

8.3 If a State or Territory Aboriginal Cultural Heritage Committee is constituted according to minimum standards and has the function of assessing the significance of an area according to Aboriginal tradition, there should be an accreditation process to allow that issue to be referred by the Commonwealth to the State/Territory body for consideration.

AN ABORIGINAL CULTURAL HERITAGE COMMITTEE

8.4 If the States and Territories do not consider establishing appropriate bodies to deal with heritage issues, the Commonwealth should establish an appropriately constituted Aboriginal Cultural Heritage Committee, to ensure that Aboriginal people are given a major responsibility in establishing the significance of a site.

SEPARATING ISSUE OF SIGNIFICANCE

8.5 The issue of significance should be considered separately from the question of site protection.

ASSESSMENT BASED ON ABORIGINAL INFORMATION

8.6 Where an assessment of significance of an area or site has to be made, it should be based on information provided by and consultations with the relevant Aboriginal community, communities or individuals and on any anthropological reports or information provided with their consent.

ASSESSMENT TO BE BINDING ON MINISTER

8.7 The opinion or conclusions of the agency recommended in Chapter 11 as to the significance of a site should be binding on the Minister.

DIFFERENCES OF OPINION

8.8 (a) The agency recommended in Chapter 11 should develop, with the advice of the recommended advisory council, procedures to be used, if necessary, to deal with situations where there are differences of opinion between Aboriginal people as to who has responsibility for an area.

8.8 (b) The agency recommended in Chapter 11 should report on whether there is a group to whom the area is an area of particular significance, and the degree and intensity of the belief about that place. If there are differing opinions among Aboriginal people on that question, these opinions should be included in the agency's report.

EFFECT OF THREAT

8.9 The assessment of the way in which the threatened action is inconsistent with Aboriginal tradition or adversely affects the significance of the area in accordance with tradition should be dealt with in the same manner as the question of significance.

CHAPTER 9

ENCOURAGING AGREEMENT: THE ROLE OF MEDIATION

A MEDIATION PROCEDURE

9.1 The Act should provide for a specific mediation procedure, which should be offered to parties before a reporting procedure leading to a declaration is considered.

MEDIATION TO BE VOLUNTARY

9.2 Mediation under the Act should be voluntary. Applicants should have the option of asking for a mediator to be appointed when they make their initial application.

AN AGREED MEDIATOR

9.3 A mediator should be nominated only with the agreement of the parties. A mediator should not be the reporter unless the parties accept this.

MINIMISING DISCLOSURE

9.4 The Act should allow flexibility in mediation and negotiation procedures and those procedures should be capable of adaptation to minimise disclosure of restricted information, and in particular, gender restricted information.

TIME FRAMES FOR MEDIATION

9.5 Time frames should ensure that the parties have adequate time to prepare a negotiating position but not so as to allow the procedure to result in undue delay in resolving the issue.

PROTECTION DURING MEDIATION

9.6 Significant areas should be protected from continuing injury or desecration while mediation takes place. The protection should last until mediation is successful or the time limit is reached, though a party may choose to end the process at any time.

REGISTERING AGREEMENTS

9.7 The Act should provide for the registration of agreements reached under its negotiation or mediation processes. To be registered, the agreement must be consistent with the purposes of the Act. The effect of registration will be to give the agreement the force of a contract. Breach of the agreement would give rise to civil liabilities.

ACCREDITING MEDIATION PROCEDURES

9.8 State and Territory mediation procedures that meet minimum standards should be accredited and recognised by the Commonwealth heritage protection procedure. The Commonwealth mediation process should be available if there is no accredited State or Territory process.

CHAPTER 10

MAKING THE ACT MORE EFFECTIVE: BETTER DECISION MAKING

OVERALL PROCESS

10.1 A modified version of the existing, relatively informal process whereby the Minister ultimately determines whether and on what terms Aboriginal heritage should be protected should be retained in preference to a more formal quasi-judicial process.

EFFECTIVE PROTECTION AND THREATS

10.2 References in the Act to effective protection under State or Territory law should be consistent in language and policy.

10.3 The Act should specify that effective protection of an area or object under the law of a State or Territory means actual and legal protection of indefinite duration.

10.4 The Act should define 'threat of injury or desecration' to include active consideration by the relevant government of removal of what might otherwise constitute effective protection under the law of a State or Territory.

10.5 The agency should seek up to date information when it is considering refusing to make a declaration under s 9 on the basis that there is no 'serious and immediate threat'.

10.6 The Act should require the Minister to consult interested persons before exercising any power to vary or revoke a declaration.

MAINTENANCE OF PROTECTION AND TIME LIMITS

10.7 The capacity for authorised officers to make emergency declarations under s 18 should be retained.

10.8 Emergency declarations under s 18 should be able to be made immediately, if necessary, where the authorised officer is satisfied as to significance and threat and without reference to whether the agency is considering or may be able to make another form of declaration.

10.9 Where an authorised officer is asked to make, or does make, an emergency declaration, he or she should be obliged to inform the agency of that fact as soon as possible.

10.10 Emergency declarations under s 18 should be able to be made for a period of up to four days (96 hours).

10.11 The standard of satisfaction as to significance and threat applying to decision-makers for the purposes of s 18 and s 9 declarations should be lower than that currently applying in relation to s 10 (and other) declarations. It should be based on the decision-maker having 'reasonable grounds to believe' that an area or object is significant and that there is a 'serious and immediate' threat to it.

10.12 The Act should provide that the purpose of short-term (30-day) declarations under s 9 where an application has also been made for a s 10 declaration in relation to the same area (interim protection) is to maintain the status quo in relation to the area pending determination of the s 10 application.

10.13 Section 9 declarations in the form of interim protection should be capable of extension for periods of up to 60 days at a time pending determination of the s 10 application.

10.14 The agency should be required to determine an application for protection of an area under s 9 as soon as is practicable and in any event, within 28 days.

10.15 The agency should be required to report to the Minister as soon as is practicable after instigating a reporting process under s 10. A notional outer time limit of six months may be appropriate, but this should not be set in legislation. The Minister should be required to determine an application under s 10 as soon as is practicable after receiving a report under that section.

10.16 The agency should be obliged to instigate a reporting process in response to an application under s 10 unless there is a specific justification for postponing such action.

10.17 The agency should be able to defer instigating a reporting process in response to an application for protection under s 10 where there is no immediate threat to the area in question and where there is a prospect that other processes, whether under State or Territory laws or under other Commonwealth laws, will resolve an application within a reasonable time. Once a threat becomes serious and immediate, the agency should instigate a reporting process promptly.

OBLIGATIONS TO DETERMINE APPLICATIONS

10.18 The agency should be obliged to prepare a report to assist the Minister to determine each valid application for protection under s 10 unless the application is determined beforehand in one of the ways specifically provided for in the Act.

10.19 The agency should have power to decline an application that is frivolous or vexatious.

10.20 The agency should formally decline an application that is resolved to the satisfaction of the applicants and withdrawn.

10.21 The agency should have power to dismiss an application where it considers that the information provided to it by applicants would not satisfy the legal requirements specified in the Act and the applicants fail to respond to reasonable requests by the agency to provide additional information.

10.22 Delay in raising heritage interests, provided that there are mechanisms in place that respect those interests, should be a factor in the exercise of discretion whether to make a declaration by the agency or Minister (as the case may be).

MAKING AND RECORDING APPLICATIONS

10.23 Applications should be able to be made easily. A valid application is one that is 'made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration'.

10.24 The agency should be required to maintain a register of applications in written form: where applications are made orally, the agency should record what it is told and seek acknowledgment from the applicants of its record of the application.

10.25 Where a new basis of significance or other new information is provided to the agency in relation to an area for which there is already an application registered, the agency should clarify whether the new information is part of the previous application or is provided in support of a new application, and deal with it accordingly.

PROCEDURAL FAIRNESS

10.26 The agency should be required to take reasonable steps to identify persons with an interest (in procedural fairness terms) in whether a declaration should be made before deciding whether to make a declaration under s 9 or providing a report to the Minister under s 10.

10.27 The Act should require the agency to provide interested persons with an opportunity to make representations in response to specified notification requirements before deciding whether to make a declaration under s 9 or providing a report to the Minister under s 10.

10.28 The Act should reflect the principle that, unless expressly provided by the Act, the opportunity for interested persons to make representations in response to specified notification requirements is the only means by which they may comment on whether a declaration should be made. Any further processes should be entirely within the discretion of the agency.

10.29 The Act should reflect the principle that, unless expressly provided by the Act, there is no obligation (and none shall be implied) on the agency or the Minister to provide interested persons, or members of the public who make representations in response to a notice under s 10, with information provided in support of an application under the Act.

10.30 The Act should continue to require publication of a notice so as to allow members of the public to provide written representations as to whether a declaration under s 10 should be made.

10.31 In the context of applications for protection under s 10, the opportunity for interested persons to make representations should be provided at the same time and in the same form as the reporting process (in writing).

10.32 The Act should define the specified notification requirements as follows:
- the identity of the applicants
- an identification of the area sought to be protected
- a description, in general terms, of the significance of the area to the applicants
- a description of the threatening activity and a description, in general terms, of the injury or desecration that would result if the activity were to occur
- a description of the form of protection and preservation sought.

10.33 The Act should specify that the public notice contain the following information:
- the identity of the applicants (which might be in general terms only, in which case the notice should indicate a means of obtaining more detailed information in this regard)
- a reasonable identification of the area for which protection is sought
- a description, in general terms, of the significance of the area to the applicants
- a description of the threatening activity and a description, in general terms, of the injury or desecration that would result if that activity were to occur
- a description of the form of protection and preservation sought (noting the sorts of orders that might be made)
- the matters required to be dealt with in the report, being a list of the statutory requirements (this should suffice, since the above information should give enough case-specific detail to enable interested people to make meaningful submissions) and
- an invitation to provide written representations within 30 days after the date of publication of the notice and an address where representations can be sent.

10.34 In order to avoid any uncertainty, the Act should provide that States and Territories are interested persons for the purpose of the obligation to notify interested persons.

10.35 The Act should provide that failure to comply with the obligation to provide interested persons with an opportunity to provide representations in

response to specified notification requirements does not, of itself, result in a declaration being invalid.

10.36 The Act should provide for particular Aboriginal community groups in each State/Territory to be prescribed for the purpose of the obligation to notify interested persons.

10.37 The agency should be obliged to provide interested persons with an opportunity to make representations in response to new specified notification requirements where a new basis of significance or other new information is provided to the agency beyond the scope of the specified notification requirements already provided. In these circumstances, the Act should also provide a capacity for a new public notice to be issued.

FURTHER ASPECTS OF THE REPORTING PROCESS

10.38 On receiving an application for protection under s 10, the agency should consult with the relevant State or Territory agency to ascertain whether there is effective protection of the area in question and to seek any further comments the State or Territory might wish to make in relation to the application. This should be done by requesting a report within a specified period.

10.39 On receiving an application, the agency should investigate the prospects of resolving the application without the need for a reporting process, through agreement between the applicants and interested persons whose agreement the agency considers would be required in order to resolve the application (such as those whose activities pose the threat to the area in question).

10.40 The agency should inform the applicants and other interested persons of its decision to instigate a reporting process and the point at which that decision was taken.

10.41 The agency should consider the possibility of adopting other procedures to assist the decision-making process where it considers that to be appropriate. Other procedures that might be followed include: providing access to representations (subject to any confidentiality claimed) generally or as between interested persons or otherwise and providing access to a draft report to interested persons for comment.

10.42 The Act should make it clear that written records of information provided orally to the agency do not constitute representations in writing to be attached to the report.

10.43 The Act should make it clear that the role of the reporter in relation to written representations is to summarise them as they are relevant to the criteria upon which the report is to be based: the reporter should have no role in recommending or suggesting whether a declaration should be made.

10.44 The Minister should be entitled to rely on the summary of written representations prepared by the agency without being required to consider them. The written representations should continue to be forwarded with the report.

IMPROVING ACCOUNTABILITY

10.45 All existing avenues of judicial review should remain available in relation to decisions made under the Act.

10.46 The Act should include a provision drawing attention to the fact that reasons for decisions under the Act may be sought under s 13 of the *Administrative Decisions (Judicial Review) Act 1977*.

10.47 Where the Minister is called upon to determine an application by exercising his or her discretion whether to make a declaration, reasons sufficient to comply with s 13 of the *ADJR Act* should be provided to the applicants and other interested persons and tabled in Parliament.

10.48 Responsibility for the receipt and processing of applications for protection under the Act should be removed from the Minister's office so that it is clear that the Ombudsman may investigate and report on issues of administration arising in relation to those functions.

CHAPTER 11

AN ABORIGINAL HERITAGE PROTECTION AGENCY

11.1 The decision whether or not to make a declaration to protect a site or object from injury or desecration should remain as a discretion of the Minister.

11.2 A new permanent independent agency 'The Aboriginal Cultural Heritage Agency' should be established to administer the Act in all matters leading to the exercise of discretion by the Minister.

11.3 ATSIC's current functions under the Act should be vested in the new agency.

11.4 The new agency should be comprised of a full-time Principal Member; a number of part-time Members; and a small administrative staff.

11.5 The qualities necessary for appointment as a Member should include knowledge and understanding of Aboriginal cultural heritage issues and/or of Aboriginal customs and traditions and/or of the archaeological or anthropological significance of areas and objects in accordance with Aboriginal tradition.

11.6 The membership of the agency should include a majority of Aboriginal and Torres Strait Islander people, and should have gender balance. Anthropologists, archaeologists and others with appropriate experience and expertise should be considered for appointment.

11.7 Members of existing tribunals should be considered as eligible for appointment as members of the agency.

11.8 The Principal Member should have legal experience.

11.9 Members of the agency, other than the Principal Member, would be remunerated on a fixed scale.

11.10 Members of the agency should be protected against liability for acts done in good faith in the same way as members of tribunals.

11.11 The mediation and reporting processes under the Act should be carried out by the Members of the agency.

11.12 The functions of the agency should include:
- registration and preliminary inquiries;
- acceptance or rejection of an application;
- making emergency and temporary declarations;
- inquiring into State/Territory protection and procedures; and
- conducting mediation and reporting processes.

11.13 Members who have conducted a mediation should not take part in the reporting process, unless the interested parties agree to this.

11.14 A wide range of Aboriginal people including custodians, inspectors, wardens, agency members and others should be appointed as authorised officers for the purposes of s 18.

11.15 The agency should issue guidelines concerning procedures for the assistance of applicants and interested persons.

ADVISORY COUNCIL

11.16 An Aboriginal Cultural Heritage Advisory Council should be established to advise the proposed agency and the Minister on issues arising under the Act, and in particular on the procedures to be followed and the persons to be consulted in making assessments for the purposes of the Act. This council should be constituted by Aboriginal people, in such a way as to strengthen links with local Aboriginal communities which have responsibility for heritage issues.

PROCEDURE FOR OBJECTS

11.17 The agency recommended to take responsibility for the administration of the Act should deal with applications relating to objects and determine the issue of significance before referring the matter for the Minister's decision whether to make a declaration.

CHAPTER 12

PROTECTING ABORIGINAL OBJECTS

SALE AND EXHIBITION OF OBJECTS

12.1 The Commonwealth should actively encourage the States and Territories to enact uniform national laws to prevent **[regulate?]** the sale and exhibition of significant Aboriginal objects. The wishes of Aboriginal people should be taken into account as the principal factor in deciding whether to consent to sale. Failing the introduction of uniform laws, the Commonwealth should enact legislation to apply where there is no relevant State or Territory law.

RECOGNITION OF AGREEMENTS

12.2 The Act should provide for the recognition of agreements about the protection of significant Aboriginal objects which are or were under threat, and covering their preservation, maintenance, exhibition, sale or use, and the rights, needs and wishes of the owner and of the Aboriginal and general communities.

RECORDS OF CULTURE

12.3 The definition of objects which can be protected under the Act should be extended to include objects which are of significance to Aboriginal people because they record, describe or portray an aspect of Aboriginal tradition.

REPATRIATION OF OBJECTS

12.4 To fulfill 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.

CHAPTER 1

THE INQUIRY

BACKGROUND

1.1 On 20 October 1995 the Minister for Aboriginal and Torres Strait Islander Affairs announced that the Hon Elizabeth Evatt AC had been invited to undertake a comprehensive independent review of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the Act).[1] The Act enables the Minister to make declarations to protect areas and objects which are of particular significance to Aboriginal people in accordance with Aboriginal tradition.

1.2 The Review was asked to take into account several earlier reports relating to the protection of indigenous heritage which deal with such matters as the promotion of co-operation between State, Territory and Commonwealth legislation and the need for national standards:

> Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA) *Working Party Report on Item 4.1: Aboriginal Heritage Interaction between States, Territories and Commonwealth* 1995;
>
> Council for Aboriginal Reconciliation *Exploring for Common Ground: Aboriginal Reconciliation and the Australian Mining Industry* 1993; and
>
> ATSIC *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* Commonwealth of Australia 1995.

1.3 An advertisement announcing the Review and calling for submissions from interested individuals and organisations was placed in all major capital city newspapers, in State and Territory regional newspapers, and Aboriginal and Torres Strait Islander publications in the week commencing 12 November 1995. Notices were also placed in some law journals and professional publications. The Australian Institute of Aboriginal and Torres Strait Islander Studies circulated details of the Review.

1.4 The work of the Review began in December 1995 in premises in Sydney. The Review was requested to report back to the Commonwealth Government in six months; an extension of three weeks was later asked for and granted. Financial and administrative support was provided by ATSIC and the Department of Administrative Services.

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[1] See Annex I.

SUBMISSIONS AND CONSULTATIONS

Submissions

1.5 The closing date set for receipt of submissions was 31 January 1996. This date was extended several times. In fact submissions were still being received in May and June. The total number of written submissions was 69. Most submissions were made by Aboriginal groups and individuals. Others came from anthropologists, lawyers, archaeologists, concerned members of the community, and from representatives of the farming, pastoral, mining and exploration industries.[2] A list is in Annex III. The following figures give a breakdown:

Aboriginal organisations and individuals (includes land councils and Aboriginal legal services)	38%	(26)
Government – Commonwealth and State/Territory	17%	(12)
Business and Industry representatives	13%	(9)
Professionals – (includes anthropologists, lawyers, archaeologists)	19%	(13)
Community groups and individuals	13%	(9)

Consultations

1.6 A programme of nation-wide consultation was undertaken, and advance notice was sent to interested groups and individuals. The Review travelled to each capital city and some regional areas to consult with individuals and organisations. Over 300 people took part in these informal discussions[3]. Meetings were held in Sydney with reporters and mediators who had acted under ss 10 and 13 of the Act, and with representatives of business and industry groups.

State and Territory Governments

1.7 In most States and Territories discussions were held with the Minister and the department or agency responsible for Aboriginal heritage matters. (It was not possible to see the Tasmanian Minister due to a pending election.)

[2] See Annex III.

[3] See Annex IV.

Comments on the Terms of Reference and Consultation Process

1.8 Although consultations took place in every State and Territory, concern was expressed about the lack of time for submissions and consultations.[4] Attention was drawn to recommendation No. 188 of the Royal Commission into Aboriginal Deaths in Custody (RCADIC) concerning negotiations to ensure self-determination in the design and implementation of policies affecting Aboriginal people. Concern was expressed that no provision had been made to involve Aboriginal people directly in the decision-making process of the Review or in its implementation.[5] Some complained about the narrowness of the terms of reference and the failure to review the Act completely in the light of the *Mabo* decision.[6] Another concern was that people wanting to make submissions were denied access to the *Interaction* report of the MCATSIA Working Party.

Coverage of the Act

1.9 The discussion in the Report is directed mainly to issues relating to the protection of areas and sites of particular significance to Aboriginal people. Most applications under the Act have related to areas and sites. The Act also applies to protection of Aboriginal objects. The issues concerning objects are considered in Chapter 12 and the procedures for dealing with applications to protect objects are considered in Chapter 11.

Other Aspects of Heritage

1.10 During consultations concerns were raised by Aboriginal communities about the exclusion of certain aspects of cultural heritage, such as intellectual property, from the scope of the Act. Some of these issues are considered in Chapter 3. Concern was also expressed in consultations about the lack of protection of Aboriginal interests in sea resources, about their lack of participation in the management of sea resources and about the damage caused to traditional fishing by commercial activities. The Act extends to the protection of areas of water and areas of land beneath waters within the Australian territorial sea and the continental shelf, but no applications have been made in this regard. Many of the concerns raised were considered in the Coastal Zone Report.[7] The Review supports its recommendations.

1.11 The application of Part IIA of the Act in Victoria is briefly discussed in Chapter 13.

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[4] MNTU, sub 17, p 2; CLC, sub 47.

[5] CLC, sub 47; Vic consultations, Wayne Atkinson.

[6] Goolburri, sub 13.

[7] Resource Assessment Commission *Coastal Zone Inquiry Final Report* 1993, Ch 10, "The Role of Indigenous People", p 165. See also Jull, Peter *A Sea Change: Overseas Indigenous-Government Relations in the Coastal Zone* 1993.

APPLICATION OF THE ACT TO TORRES STRAIT ISLANDER HERITAGE

1.12 The Act applies equally to Torres Strait Islanders. However, it has never been invoked in relation to the Torres Strait Islander heritage. For this reason most references in the text are to Aboriginal people. In fact, the Act defines 'Aboriginal' to include a descendant of the indigenous inhabitants of the Torres Strait Islands. ATSIC has proposed that each indigenous group and their cultural heritage should be defined separately.[8] This recommendation would require separate definitions for Aboriginal people and Torres Strait Islanders in s 3 (1). The Review supports this proposal.

1.13 The Review approached representatives of Torres Strait Islander communities, and received a submission from David Galvin, Acting General Manager of the Torres Strait Regional Authority. He informed the Review that the members of the Authority felt strongly that the Act should be maintained, though it had never been used in the Torres Strait Islands. They were comfortable that areas and objects were protected by the Act if required.[9] No other submissions were received in respect of Torres Strait Islander heritage.

[8] ATSIC, sub 54, p 5.

[9] TSRA, sub 26.

CHAPTER 2

OVERVIEW OF THE ACT: PROBLEMS ADDRESSED IN THE REPORT

> The available qualitative data and literature references suggest that Aboriginal and Torres Strait Islander peoples aspire to ownership and control of their heritage, but that they feel their needs in this aspect are not being met.[1]
>
> The introduction and administration of heritage legislation, including special indigenous heritage legislation, has resulted in a more difficult operating environment for the minerals industry.[2]
>
> The Act is ineffective in protecting heritage sites which conflict with the interests of Government or big business.[3]

This chapter discusses the background to the Act and reviews its operation since 1984. It assesses the extent of its use and its effectiveness. It looks at the difficulties experienced in using the Act from differing perspectives, and sets policy goals.

BACKGROUND TO THE ACT

2.1 The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is "An Act to preserve and protect places, areas and objects of particular significance to Aboriginals, and for related purposes."[4] Its purposes are:

> ... the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition. (s 4)

It provides this protection indirectly, by enabling the Minister to make short term and long term declarations to protect areas and objects of significance to Aboriginal people. The declarations are backed up by criminal sanctions.

A last resort

2.2 The Act was intended for use as a last resort to protect Aboriginal heritage where State and Territory laws are ineffective or there is

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[1] *Impact Evaluation*, p 59.

[2] MCA, sub 27.

[3] Michel and McCain, sub 15.

[4] This phrase is part of the long title of the Act.

unwillingness to enforce them. In introducing the Senate second reading, Senator Ryan said:

> The need for legislation to enable direct, immediate action by the Commonwealth has been highlighted by such events as Noonkanbah ... Time and again the Commonwealth has been powerless to take legal action where State or Territory laws were inadequate, not enforced or non-existent, despite its clear constitutional responsibility.[5]

In practice, difficulties have arisen from the interaction between the Commonwealth Act and the laws of the States and Territories. These problems are considered in Chapter 5.

A temporary measure

2.3 The Act was stated to be "an interim measure which will be replaced by more comprehensive legislation dealing with Aboriginal land rights and heritage protection."[6] The proposed life expectancy of the Act was two years. However, apart from the repeal of the sunset clause, s 33, and the insertion of Part IIA, which applies only in Victoria, the Act has not been changed.

Significance of the Act

2.4 The Act is important because it is a national Act which applies to any Aboriginal areas or objects anywhere in Australia. It represents an important step in the development of heritage protection legislation based on the principle that Aboriginal areas and sites should be protected because of their significance to Aboriginal people rather than because of their scientific or archaeological significance.[7] It is a significant departure from some State laws which remain modelled on the protection of relics and on the archaeological significance of sites, and which do not attach weight to what is or is not important to Aboriginal people.[8] Protecting areas which may have no scientific importance or physical definition endorses the value of these areas and objects to Aboriginal people as an expression of their living culture.[9]

Cultural heritage and land

2.5 The Act applies to any Aboriginal area in Australia, irrespective of whether it is on Crown land, national park, or private land, and whether the land is freehold or leasehold. A claim to the protection of heritage has some similarities with a claim to native title or land rights, in that significant areas (or sacred sites as they are sometimes referred to) play a role in demonstrating

[5] Second Reading Speech, 6 June 1984, see Annex II.

[6] Hansard, Reps 9 May 1984, 2130. The original title of the Act was the *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984*.

[7] 1986, p 2420, Hansard: the Act is intended to cover areas and objects of cultural or spiritual significance which Aboriginal and Torres Strait Islander people closely identify with today.

[8] These issues are discussed in Henry and Greer, sub 37. Early Aboriginal heritage laws were introduced as a result of lobbying by archaeologists: AAA, sub 61; Rose, sub 46.

[9] MNTU, sub 17, p 4. This feature should be kept: AAA, sub 61.

Aboriginal people's links with land. The *Mabo* case and the *Native Title Act* have brought increasing awareness of the centrality of land in Aboriginal culture and the relationship between the spirituality and beliefs of Aboriginal people and the places to which those beliefs attach. However, the Act is not intended as land rights legislation, nor as an alternative to land claims. While the view has been expressed that heritage legislation, although not conveying freehold or native title, is a type of land right stemming from indigenous relationships to land,[10] the protection of areas and sites under the Act has no directeffect on native title or land rights claims.[11]

HOW THE ACT WORKS: OUTLINE OF PROCEDURES

The Act covers significant Aboriginal places and objects

2.6 The Act can be used to protect areas and objects which are of particular significance to Aboriginal people in accordance with Aboriginal tradition:

> 'Aboriginal tradition' means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships; (s 3 (1))

The Act applies to any such area or object in Australia, whoever owns it and whether it is on public or private land.

Threats of injury or desecration, sections 10 and 12

2.7 The Minister has power to protect significant areas and objects when they are under threat of injury or desecration. 'Under threat' means that they are at risk of being used or treated in a manner inconsistent with Aboriginal tradition. The most common threats are construction work such as the building of roads, bridges or dams, mining, exhibition or sale of objects, or the entry of persons into places contrary to customary laws or traditions.

Applying for protection

2.8 An Aboriginal person or group of Aboriginal people can write to or approach the Commonwealth Minister in person to ask for the protection of an area or object which is under threat of injury or desecration. The application should describe the area or object and explain, as far as possible, why it is significant, and how it is threatened.

State and Territory laws

2.9 The Commonwealth Act is intended to cover situations where the State or Territory laws do not give effective protection to an area or object which is

[10] Allington, sub 16.

[11] AAPA, sub 49, p 17.

under threat. Protection will not be given under the Act where State or Territory laws are considered effective.

Procedures after application

2.10 When an application is received, the Minister should consult the relevant State or Territory Minister, s 13 (2). If the matter proceeds the Minister may then appoint a person to mediate, s 13 (3), with the objective of encouraging agreement between the Aboriginal applicants and those who threaten the area. If mediation fails, or if there is no possibility of mediation, the Minister must request a report to be prepared about the area, s 10 (4). He has to consider the report and the representations made by interested persons before deciding whether to protect the area by making a declaration.

Report procedures

2.11 The Act sets out the matters which have to be dealt with in the report. A notice has to be published to invite submissions from the public. The person appointed by the Minister to make the report receives written submissions and will usually speak with the Aboriginal applicants, other interested parties and the persons who are threatening the area or site. The reporter may have the assistance of an anthropologist or an archaeologist and may alsohave access to material prepared by State and Territory authorities in relation to the site or area.

Power is discretionary

2.12 The Minister can protect the area or site by making a declaration. This is a discretionary power. Even if the area is significant according to Aboriginal tradition, the Minister has to consider the report and take account of all interests, including the wider public interest, before deciding whether or not to make a declaration to protect the area or site. There is no right to a declaration of protection.

Urgent threats, sections 9 and 18

2.13 If there is an immediate threat of injury or desecration to an area, the Minister can be asked to make an urgent declaration to protect the area for 30 days. This can be extended, but not for more than another 30 days, making 60 days in all. The Minister can make an urgent declaration without asking for a report. Authorised officers can also make a declaration of protection for up to 48 hours where there is a serious and immediate threat to an area or object. This power has sometimes been used to prevent the auction of sacred objects.

Effect of declaration

2.14 A declaration can give complete protection to an area or object, or it may limit access to the area or the use of an object in order to ensure respect for Aboriginal traditions. The declaration has legal effect. Failure to comply with it is a criminal offence.

HOW THE ACT HAS BEEN USED

Data concerning the operation of the Act

2.15 The Review has prepared an analysis of the applications dealt with under the Act. A summary is in Annex VII, together with some specific case studies illustrating aspects of the operation of the Act. The Review has also drawn on the study of the working of the Act in a Report of the ATSIC Office of Evaluation and Audit.[12]

Number of applications: areas – to January 1996

2.16 Ninety-nine areas in Australia have been the subject of applications under the Act. The breakdown by States is:

State	Areas
Queensland	33
New South Wales	28
Western Australia	21
South Australia	8
Northern Territory	6
Tasmania	2
Victoria	1
Total	**99**

2.17 In some of these matters there were multiple applications under ss 9, 10 or 18, and some had repeat applications over a period of months or years. The breakdown in relation to individual applications is:

Type of Application	Numberof Applications	Numberof Declarations	Average Numberof days to complete *
s 9 (area/immediate threat)	75	11 (5 cases)	173
s 10 (area)	49	4	310
s 18 (immediate threat)	7	1	-

* These figures indicate the average number of days to complete a matter.[13]

[12] *Impact Evaluation*, p 42 ff.

[13] *Impact Evaluation*, p 44.

Declarations under sections 9 and 10: areas

2.18 In regard to areas the outcomes were that one s 18 declaration (48 hour-protection) was made in regard to Bright Point, Magnetic Island. In regard to five areas s 9 (short term) declarations were made. In four of these a s 10 declaration for long term protection was made at a later date. The cases are:

Old Swan Brewery (Goonininup) Perth, June 1989	– later revoked
Junction Waterhole (Niltye/Tnyere-Akerte) Alice Springs, May 1992	– for 20 years; remains in force
Broome Crocodile Farm WA, April 1994	– overturned by Federal Court
Hindmarsh Island (Kumarangk) SA, July 1994	– overturned by Federal Court

A s 9 declaration was made in respect of the 1992 *Boobera Lagoon*, Moree, NSW, application; the matter is pending. All these cases are included in Annex VII, Case Studies.

Basis of applications: areas

2.19 The most common threats complained of in applications for declarations arose from construction and development.[14] Mining accounted for about 10% of applications. Urban cases represented 28% of the total, and rural cases 72%.

The 'typical case' has been described in this way:

- it was from Western Australia, Queensland or New South Wales;
- it was in a rural area;
- it arose in response to the applicant perceiving a threat due to development or construction; and
- the Minister declined to grant the application on the basis that the State or Territory Government had handled the matter properly.[15]

Applications: objects

2.20 There have been twelve applications under s 12 for long term protection of Aboriginal objects and two under s 18 for 48-hour protection. A total of

[14] *Impact Evaluation*, p 43.

[15] *Impact Evaluation*, p 46.

eleven objects (or groups of objects were involved in these applications. Declarations were made in respect of three groups of objects:

Sotheby's Auction No 1, 1985	s 18 and s 12
Pickles Auction, No 2, 1986	s 12
Strehlow Collection, 1992-1995	s 12

In these cases the objects were purchased for return to their communities.[16]

HOW EFFECTIVE HAS THE ACT BEEN?

Few areas have been protected by declarations

2.21 The terms of reference ask for the Report to cover:

> (i) the effectiveness of the provisions of the Act in providing protection for areas and objects of significance to Aboriginal and Torres Strait Islander people.

One indicator of effectiveness is the number of places that have been protected by the Act, directly or indirectly. Only four declarations have been made under s 10 in relation to areas. No s 10 declarations have been made in respect of areas in NSW or Queensland, despite the large number of applications from those States.[17] Few short term declarations have been made under s 9, which applies to serious and immediate threats.[18] Furthermore, two of the four declarations under section 10 were overturned by the Federal Court[19] and one was later revoked. Only one place in Australia is protected by a s 10 declaration, Junction Waterhole (*Niltye/Tnyere-Akerte*), Alice Springs. Two other decisions declining applications have been challenged, one successfully.[20] Some submissions argue that these outcomes show that the Act has not been effective.[21]

Indirect effects

2.22 The number of declarations is not the only indicator of whether the Act contributes to the protection of heritage. It may have other, harder to measure, effects.

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[16] See Chapter 12 for further discussion of objects.

[17] Goolburri, sub 13, p 19. Although 25% of all applications are from Queensland, no declarations have been made about any area in this State. A s 9 declaration was made in respect of Boobera Lagoon, NSW. The matter is pending.

[18] Goolburri, sub 13, p 19.

[19] In the *Hindmarsh Island (Kumarangk)* case and the *Broome Crocodile Farm* case.

[20] The *Wamba Wamba* case (unsuccessful) and the *Bropho* case (successful).

[21] NSWALC, sub 43, p 2.

Restraint on States

2.23 In a number of cases intervention by the Commonwealth has led to positive negotiations involving the Aboriginal applicants, the State authorities and developers. Protection or partial protection of a site or area has been the outcome in some situations, even if no declaration was made.[22] In these and other cases the existence of the Act could be a restraint on State action, and could play a part in encouraging State and Territory governments to make their protection regimes more effective. States may also adopt a more concerned attitude in particular cases as a result of being drawn into negotiations and mediation initiated by the Commonwealth.[23] Without the Act as the ultimate threat or last resort, some consider that the protection of Aboriginal interests would be seriously weakened.[24]

Influence on outcomes

2.24 Intervention by the Commonwealth has sometimes resulted in the negotiation of satisfactory arrangements, or to the withdrawal or modification of development proposals, even where no declaration is made. This may explain at least in part the lengthy periods which elapsed while some applications were pending. In some cases an application for a declaration has created an opportunity for the Minister to appoint a mediator who has been able to help the parties to negotiate a satisfactory outcome.[25] Some Aboriginal people have been able to take a role in management and care of heritage through mediated agreements. The Act may encourage responsible developers and land users to consult with Aboriginal people and look for ways to accommodate their wishes.[26] The Act has been used to prevent the sale and auction of objects when that would be contrary to Aboriginal tradition and in some cases this has led to the private purchase of objects and their return to communities.[27]

PROBLEMS AND CRITICISMS

2.25 These modest achievements of the Act have to be weighed against an ever-growing number of problems and difficulties, the effect of which has been to prevent the objectives of the Act from being realised. The problems concern the procedural framework of the Act, the relationship with State and Territory laws and procedures, and the general failure of the Act in the eyes of Aboriginal people to be an effective means of protecting cultural heritage.

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[22] For example, Bloomfield River (Winjal Winjal) Qld.

[23] *Impact Evaluation*, p 47; ATSIC, sub 54, p 4.

[24] NLC, sub 66, para p 4.

[25] See Chapter 9.

[26] CLC, sub 47, p 13.

[27] See Chapter 12.

Problems with the procedural framework of the Act

Lack of clear procedures

2.26 Many criticisms have been made of the lack of adequate procedures in the legislation.[28] The deficiencies have contributed to delays, litigation and cost for the applicants and other affected parties.[29] The intention behind the Act was to have a relatively simple procedure, comprising a political element – the discussions with State Ministers – followed by a short, basic reporting process. In an early decision the Federal Court held that an emergency declaration was purely a discretionary remedy. Provided that the Minister considered relevant issues, he was under no legal obligation to act.[30] In a later case, however, the court held that the Minister could not decline a s 10 application without requesting and considering a s 10 (4) report. The reporting process then became the focus of attention and in two long-running cases the conduct of inquiries leading to the s 10 reports and the Minister's decisions following those reports were challenged and overturned.[31] The court imposed strict requirements on the reporting process. These requirements have been burdensome and costly for everyone involved, and the outcomes have made the Act unworkable in accordance with its original intentions.

Delays in dealing with matters

2.27 There have been considerable delays in responding to and deciding on applications for protection. The table above (para 2.17) shows that even s 9 applications have taken many months to be dealt with, though they are made on the basis of a serious and immediate threat. Aboriginal people are concerned that some sites for which protection was sought were damaged as a result of delay. For example, in the *Helena Valley* case in WA:

> An application had been made in April 1993 under sections 18 (declined), 9 and 10. No declaration was made under s 9. A reporter was appointed in October 1993. Most of the area of significance was destroyed prior to the report to the Minister, in February 1994, and the Minister's decision in May 1994.[32]

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[28] See, for example, WAG, sub 34, p 3.

[29] Similar problems have arisen under some State legislation. The following problems were identified in the *Senior Report* in relation to the Western Australian Act (page ix); conflict; prolonged and bitterly contested litigation; procedural uncertainty; need for procedures to avoid sites; better dispute mechanisms needed.

[30] *Wamba Wamba Local Aboriginal Land Council v Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (1989) 23 FCR 239; 86 ALR 161, Lockhart, J.

[31] The *Hindmarsh Island (Kumarangk)* case and the *Broome Crocodile Farm* case.

[32] The Commonwealth Ombudsman's submission deals in some detail with this case: sub 41.

Concerns of developers and miners

2.28 The lengthy periods taken to deal with some applications concerns not only Aboriginal people, but also developers who may be subjected to a further Commonwealth process after going through the requirements of State or Territory land management laws. Even if the application under the Commonwealth Act is finally declined, the developer may have had investments tied up and have been subjected to long periods of uncertainty.[33] While it has been accepted by industry representatives that no mining project has ever been stopped through the operation of the Act, delays are said to have led to tension and frustration.[34] The Act is seen as a threat to business interests.[35]

Interaction with States and Territories

Ineffective State/Territory laws impose burden on Commonwealth

2.30 If the Act is to operate effectively as a last resort, there should be an effective system of protection in the States and Territories. When the Bill was introduced, the Minister said that:

> Where a State or Territory has no law capable of providing effective protection, or no action is being taken to give effect to that law, the Commonwealth will act in appropriate cases. It is open to the States to ensure that effective heritage protection is offered by their legislation.[36]

Twelve years later this hope has not been realised. The result is that the Commonwealth Act is often called on as a substitute for State protection:

> The effectiveness of the Act in providing protection for areas of significance to Aboriginal and Torres Strait Islander people is limited by incompatible and inadequate legislation operating in a number of States. This has created a situation where the Commonwealth Act is invoked to provide primary site protection rather than, as the scheme of the Act suggests, a last resort of back-up to legislation in the States and Territories.[37]

Reference to States and Territories contributes to delays

2.31 The Act, and its operation, place emphasis on the consultations between the Commonwealth and State Ministers:

> Let me assure the House that all reasonable attempts will be made to consult with State and Territory colleagues. On occasions the relevant Minister may be

[33] AMEC, sub 48; MCA, sub 27; Council for Aboriginal Reconciliation *Exploring for Common Ground: Aboriginal Reconciliation and the Australian Mining Industry* 1993, p 31 recommends national standards for heritage legislation.

[34] *Exploring for Common Ground*, p 33.

[35] AMEC, sub 48, p 6.

[36] Second Reading Speech, Annex II.

[37] AAPA, sub 49, p 1.

> unavailable to discuss the matter, and the urgency of the threat to the area or object may be such that the Minister for Aboriginal Affairs must take a decision without the benefit of such consultation. There may be occasions when a State or Territory Minister will refuse to consult. The Bill is framed to ensure that such refusal will not frustrate its proper operation.[38]

What appears to have been contemplated in this statement was a relatively short period to consult with the State Minister and to find out what protection was available for an area under threat. But in practice, there have been sometimes long drawn out discussions with the State Ministers, without any apparent action at either Commonwealth or State level and without any interim protection of cultural heritage claimed to be at risk.[39] There is concern that the prolongation of inter-governmental discussions, from which the applicant and other interested persons are excluded, may defer unduly any decision by the Minister about the application until it becomes too late to act. Another related concern is that State opposition to intervention by the Commonwealth has contributed to the low level of protection accorded under the Act.[40]

2.32 State and Territory Governments concerns about the Act and its operation are explored in Chapter 5 and Annex VIII.

Aboriginal concerns about the scope of the Act

No obligation to make a declaration

2.33 Aboriginal people are critical of the Act because the power to protect areas and objects is discretionary. The Minister is not obliged to act, even if an area is of
significance to Aboriginal people.[41] He/she can revoke a declaration without any express requirement to consult the parties. The Act does not specify criteria which, when established, confer a right to a declaration. The political nature of the discretion is discussed in Chapter 10.

Act provides little protection for confidentiality

2.34 Aboriginal people are concerned that the Act does not protect from disclosure confidential information which may be communicated during the reporting process, including information which is restricted to persons of one

[38] Second Reading Speech, Annex II

[39] There were some cases where negotiations involved the applicant, and had a positive outcome.

[40] Goldflam, Russell "Between a Rock and a Hard Place: The Failure of Commonwealth Sacred Sites Protection Legislation" in *Aboriginal Law Bulletin* Vol 3 No 74 June 1995: says that the Act has failed to save a single Aboriginal heritage site in the face of determined opposition by a State or Territory government.

[41] *Wamba Wamba Local Aboriginal Land Council v Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (1989) 23 FCR 239 at 247-248; 86 ALR 161 at 170; NLC, sub 66, para 3.1.

sex under Aboriginal tradition. The confidentiality provisions of s 27 do not apply to the reporter and the Minister:

> Much Aboriginal cultural and spiritual knowledge is of a secret and sacred nature. According to Aboriginal law it must be treated as highly confidential, even between Aboriginal people of the same group. The right to such knowledge may need to be earned and some members of an Aboriginal group may never be eligible to receive it. Procedures such as investigation, public reporting and registration, in themselves are contrary and damaging to Aboriginal traditions of privacy and the sanctity of spiritual intellectual property, quite apart from any threatened physical damage.[42]

The reporter has no guidelines as to how to receive and deal with such information. This is a serious subject of concern at the time this Report is being prepared (June 1996), because of the circumstances of the *Hindmarsh Island (Kumarangk)* case and of recent Federal Court decisions, the effect of which may be to discourage use of the Act by Aboriginal people. This issue is discussed further in Chapter 4.

Definitions favour traditional Aboriginal people

2.35 Some consider that the reference in the Act to 'Aboriginal tradition' disadvantages Aboriginal people who do not follow the traditional life style of those in remote communities.[43] The reality is that traditional values persist today in many communities whose lifestyles are removed from those who have been referred to as 'traditional Aborigines'.[44] This is discussed further in Chapter 6.

Act is too complex, hard to use

2.36 The Act, which operates alongside State and Territory laws, and other laws dealing with heritage and land rights, adds to rather than overcomes confusion about the array of statutory regimes potentially available for heritage protection.[45] The Act is process-oriented in that protection of sites depends on an application being made under the Act; however this rarely results in specific protection. Procedural changes are discussed in Chapter 10.

Act ignores broader issues of heritage

2.37 The Act was introduced as an interim *ad hoc* measure pending land rights legislation, yet nothing has yet been done since to give it a broader focus or to fulfill the commitments given when it was introduced.[46] It does not address newly emerging issues concerning native title and self-determination.

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[42] NLC, sub 66, p 5.

[43] Atkinson, sub 5, p 51.

[44] *Impact Evaluation*, p 6.

[45] CLC, sub 47, p 16.

[46] *Recognition, Rights and Reform*, para 6.5.

Unlike some State legislation, it gives no role to Aboriginal people in decisions relating to protection or in the administration of the Act.[47] Nor does it ensure that Aboriginal people will be consulted and have a right to negotiate questions of cultural heritage which arise in the development process. Furthermore, there is no provision to ensure that Aboriginal people will have an ongoing responsibility for the control or management of cultural heritage sites or for access to those sites.[48] Nor does it cover all aspects of cultural heritage important to Aboriginal people. For example, it makes no provision concerning intellectual property.[49]

Proactive measures wanted

2.38 Submissions point out that the preservation of Aboriginal cultural heritage requires much more than the prevention or prohibition of injury or desecration. It requires proactive measures to be undertaken. What is asked for is the commitment of resources to Aboriginal communities to take measures to preserve cultural heritage in all its forms.[50] These issues should be taken into account in the design and implementation of national laws and policies concerning indigenous cultural heritage. They are referred to in Chapter 3.

Aspirations for reform

Aboriginal desire for effective Commonwealth law

2.39 In its present state the Act has lost the confidence of many Aboriginal people, who see it as unable to meet the aspirations of Aboriginal and Torres Strait Islander people concerning the protection of their cultural heritage in the post-*Mabo* era. The desire expressed by many Aboriginal people is that the Commonwealth maintain and strengthen its role in regard to the protection of cultural heritage and make the Act more effective.

Business, developers, miners

2.40 The aspirations of the mining industry have a different focus. For example, AMEC said that:

> The mineral exploration and mining industry recognises the cultural significance of genuine areas and objects to present day Aboriginals and Torres Strait Islanders and respects the importance of protecting this heritage where practicable. AMEC cannot convey strongly enough however, its conviction that effective

[47] CLC, sub 47, p 16.

[48] *Recognition, Rights and Reform*, para 6.19. The Act is not intended to grant permanent forms of protection, or to transfer title to Crown or to Aboriginal and Torres Strait Islander applicants, except in the case of skeletal remains.

[49] Except in Part IIA, which applies only in Victoria.

[50] CLC, sub 47, p 38.

> preservation of Aboriginal and Torres Strait Islander heritage can only be achieved through the implementation of a clear, practical and equitable statutory regime and accompanying process.[51]

Others sought the removal of duplication and the establishment of national guidelines for consultation and negotiation and integrating government decision-making processes.[52]

State and Territory governments

2.41 The concerns of State and Territory governments are to avoid duplication of functions and the frustration which arises when approved projects are subjected to further delays. They want clear procedures with reasonable time frames which avoid long delays and do not create unnecessary obstacles to economic development.[53]

GOALS FOR REFORM OF THE ACT

2.42 The main task for the Review is to ensure that the Act is better able to realise its objective of protecting Aboriginal heritage. The objectives for the Act, arrived at after consideration of the submissions received and the consultations undertaken, are these:

> To respect and support the living culture, traditions and beliefs of Aboriginal people and to recognise their role and interest in the protection and control of their heritage.
>
> To retain the basic principles of the Act, as an Act of last resort.
>
> To ensure that the Act can fulfill its role as a measure of last resort by encouraging States and Territories to adopt minimum standards for the protection of Aboriginal cultural heritage as part of their primary protection regimes.
>
> To avoid duplication and overlap with State and Territory jurisdictions by recognition and accreditation of their processes.
>
> To provide access to an effective process for the protection of areas and objects significant to Aboriginal people.
>
> To provide a process which operates in a consistent manner, according to clear procedures, in order to avoid unnecessary duplication, delays and costs.

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[51] AMEC, sub 48, p 6.

[52] *Exploring for Common Ground*, p 31, recommends national standards for heritage legislation.

[53] See Chapter 5.

To ensure that Aboriginal people participate in decisions about the protection of their significant sites and that their wishes are taken fully into account.

To ensure that heritage protection laws benefit all Aboriginal people, whether or not they live in traditional life style, whether they are urban, rural or remote. The objective should be to protect living culture/ tradition as Aboriginal people see it now.

2.43 Some of the tensions between the competing goals of development (which requires confident planning) and heritage protection could be resolved by better procedures to ensure early consideration of heritage issues in the planning process and effective procedures to ensure consultation and participation by Aboriginal people in genuine mediation or other processes whose purpose is to avoid injury to or desecration of sites.

Broader goals for heritage protection

2.44 The reform of the Act needs to be considered in the broader context of Aboriginal cultural heritage, its protection and promotion and the diverse laws and policies now in force. These matters are discussed in Chapter 3.

CHAPTER 3

CO-ORDINATING COMMONWEALTH LAWS, POLICIES AND PROGRAMMES

> In terms of the world's cultural heritage, [Australia's] Aboriginal sites have been judged to be much more significant than this country's remains of European settlement.[1]
>
> We believe that the process of reconciliation should firstly address the basic needs of indigenous people, that is the preservation and restoration of our heritage and culture.[2]

This chapter describes the range of Commonwealth laws, policies and programmes concerning Aboriginal cultural heritage and explains how the Act relates to these. It points to the proliferation of laws and programmes concerning heritage and the lack of co-ordination of all these elements. It makes recommendations about how a more coherent and co-ordinated approach can be achieved to ensure that the Commonwealth meets its national and international responsibilities to protect Aboriginal cultural heritage.

COMMONWEALTH LEGISLATIVE PROTECTION FOR ABORIGINAL HERITAGE

Introduction

3.1 The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is one of a large number of Commonwealth Acts under which Aboriginal and Torres Strait Islander heritage may be protected. There are also various Acts in all the States and Territories.[3]

Constitutional power

3.2 Protecting Aboriginal heritage is a significant national responsibility in respect of which the Commonwealth has potentially wide legislative powers. The Australian Constitution gives the Commonwealth the power to make special laws with respect to people of any race.[4] It can legislate to acquire property on just terms from any State or person for any purpose for which it has the power to make laws.[5] It also has the power to make laws with respect

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[1] Sullivan, S "The Custodianship of Aboriginal Sites in Southeastern Australia" in McBryde, I (ed) *Who Owns the Past?* 1983, page 139.

[2] Parsons, sub 24.

[3] See Chapter 5 and Annex VIII.

[4] The Constitution s 51(xxvi).

[5] The Constitution s 51(xxxi).

to copyright, patents of inventions and designs, and trade marks.[6] The Constitution also protects freedom of religion by providing that the Commonwealth shall not make any law for prohibiting the free exercise of any religion.[7]

Australian Heritage Commission Act

3.3 The *Australian Heritage Commission Act 1975* (Cth) established the Australian Heritage Commission. Its function is to help "identify, conserve, improve and present Australia's National Estate"[8], that is , "those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community".[9] The National Estate does not specifically include objects. In 1994 there were 794 indigenous places registered as part of the National Estate out of a total of 18,190.[10] Individuals can approach the Commission to ask for registration of a place.

Listing on Register gives limited protection

3.4 The AHC keeps the Register of the National Estate. It lists places on the Register after a technical assessment of significance. Listing in the Register gives limited protection in that imposes obligations on all Commonwealth Ministers, Departments and authorities. Ministers must do everything possible to ensure their departments and authorities for which they are responsible do not:

> ... take any action that adversely affects, as part of the national estate, a place that is in the Register unless he is satisfied that there is no feasible and prudent alternative to the taking of that action and that all measures that can reasonably be taken to minimise the adverse effect will be taken, s 30(1).

3.5 Before taking any action that might "affect to a significant extent, as part of the national estate", a place in the Register, Ministers, Departments and authorities must notify the AHC to enable it to comment, s 30(3).

Aboriginal heritage and the National Estate

3.6 The *Australian Heritage Commission Act 1975* (Cth) says that a place is part of the National Estate if its significance is because of "its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons".[11] The AHC has listed places in the Register that have symbolic and religious significance and has listed large cultural landscapes

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[6] The Constitution s 51(xviii).

[7] The Constitution s 116.

[8] AHC, sub 52.

[9] *Australian Heritage Commission Act 1975* (Cth).

[10] Council for Aboriginal Reconciliation *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* Key Issues Paper No 3 AGPS 1994, page 26.

[11] *Australian Heritage Commission Act 1975* (Cth) s 4(1A)(g).

such as the Arafura Wetlands, for their social and cultural values. It has also listed dreaming tracks. Assessment is scientific but, as a matter of policy, the AHC does not list places for their indigenous values without consulting relevant Aboriginal and Torres Strait Islander communities.[12] AHC funds communities to identify places to go on the Register and to conserve places that are already on it. It also gives grants (through the States/Territories) for maintenance of knowledge, investigation and education under the National Estate Grants Program.

Action where heritage is threatened

3.7 The AHC will act on behalf of Aboriginal people if a place, whether registered or not, is threatened. It informs the relevant Ministers and consults with the Aboriginal community and the people from whom the threat is coming.[13] However, there are no formal links between the AHC Act and the Act under review, or at the programme level. Listing in the Register of the National Estate is not given any particular recognition for the purpposes of assessments under the Act.

World Heritage Properties Conservation Act 1983 (Cth)

Protection of internationally outstanding cultural and natural heritage

3.8 The *World Heritage Properties Conservation Act 1983* (Cth) implements the UNESCO Convention for the Protection of the World Cultural and Natural Heritage (WHC) which Australia ratified in 1974. The Convention aims to protect cultural and natural heritage of "outstanding universal value". Kakadu National Park, Uluru-Kata Tjuta National Park and the Willandra Lakes are on the World Heritage List. The International Council on Monuments and Sites (ICOMOS) gives independent advice to the World Heritage Committee on areas nominated for listing. Changes to the operational guidelines for the implementation of the Convention mean that 'cultural landscapes' can now be included in nominations. The concept of 'cultural landscapes' is particularly appropriate for the recognition of Aboriginal heritage because it embraces interaction between people and the 'natural' environment, and includes places having powerful religious, artistic or cultural associations even in the absence of material cultural evidence.[14] Uluru-Kata Tjuta National Park is the first area in Australia to be listed under this category. Prompted by the conflict over the Old Swan Brewery (Goonininup) site, and moved by a paper by Clarrie Isaacs on the Great Rainbow Serpent Dreaming Track associated with the site, the Australian

[12] AHC, sub 52.

[13] Westphalen, sub 38.

[14] Council for Aboriginal Reconciliation *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* Key Issues Paper No 3 AGPS 1994, page 33.

division of ICOMOS is currently exploring ways of handling conflicting cultural values in a professional, just and effective way.[15]

Protection for Aboriginal heritage on listed areas or sites

3.9 The Act protects "identified properties" in Australia and its external territories. These are properties that are on the World Heritage list, nominated for listing, or the subject of a Commonwealth inquiry into whether they should be listed. The Act has specific provisions protecting "Aboriginal sites" which are, or are located on, an identified property:

> ...the protection or conservation of which is, whether by reason of the presence on the site of artefacts or relics or otherwise, of particular significance to the people of the Aboriginal race. (s 8(2))

3.10 If the Governor-General is satisfied that a site or artefact or relics on a site are at risk of damage he or she can make a declaration that prohibits, except with the written consent of the Minister, a range of activities on the site which might result in such damage, ss 8(3), 11. The Act protects Aboriginal places under the same broad definition as the Act under review. There is no procedure laid down for applications to protect areas under the Act and no reporting process is called for.

Confirmation of Commonwealth power to protect Aboriginal heritage

3.11 The Commonwealth first used this legislation to protect Aboriginal sites in the Tasmanian Wilderness World Heritage area which were threatened with flooding as a result of the Tasmanian Government's plans to dam the Franklin River. In the *Tasmanian Dams* case,[16] the High Court found that the *World Heritage Properties Conservation Act 1983* (Cth), which implements the WHC, was a valid exercise of the constitutional power to make special laws in respect of people of the Aboriginal race:[17]

> ... something which is of significance to mankind may have a special and deeper significance to a particular people because it forms part of their cultural heritage. Thus an aboriginal archaeological site which is part of the cultural heritage of people of the aboriginal race has a special and deeper significance for aboriginal people than it has for mankind generally.[18]

Concern about Aboriginal involvement in management leading to applications under the Act

3.12 There is no direct connection between the *World Heritage Properties Conservation Act* and the Act under review. Aboriginal involvement in the management of World Heritage Listed Properties has been an issue of

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[15] Domicelj, J and Marshall, D "Diversity, Place and the Ethics of Conservation" in *Scientific Journal: ICOMOS Articles of members* 1994, page 28.

[16] *The Commonwealth v Tasmania* (1983) 57 ALJR 450.

[17] The Constitution s 51(xxvi).

[18] *The Commonwealth v Tasmania* (1983) 57 ALJR 450 at 501 per Mason J.

contention. Where areas are listed for cultural values Aboriginal people may be involved in the management, for example, in Willandra Lakes and in the Uluru-Kata Tjuta National Park areas. In areas listed only for natural values, this may not necessarily occur, for example, in the Queensland Wet Tropics area. The Skyrail application under the Act was partly a result of Aboriginal people in the area seeking to be involved in the management of the area.

Native Title Act 1993 (Cth)

Recognition of native title

3.13 The decision of the High Court in the *Mabo* case[19] established that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of this country, in accordance with their laws and customs, to their traditional lands. The *Native Title Act* (NTA) gives legislative recognition and support to that entitlement by:

- providing for the recognition and protection of native title;
- establishing ways in which future dealings affecting native title may proceed, and to set standards for those dealings;
- establishing the National Native Title Tribunal to determine claims to native title (among other things); and
- providing for, or permitting, the validation of past acts invalidated because of the existence of native title.

The right to negotiate

3.14 In broad terms, the Act provides that in future, acts that affect native title (for example, grants of mining or exploration and prospecting leases or compulsory acquisition of land) can only be validly done if they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special "right to negotiate".[20] This right to negotiate gives registered native title claimants or holders the chance to negotiate (among other things) about protecting, managing and access to, heritage areas or sites in native title-affected land or water where a government proposes to allow mining, mining exploration or other activities there, s 26, s 29, s 35.[21]

Determination if no agreement

3.15 If the parties cannot reach agreement about a proposed activity (future act) then the Native Title Tribunal (or recognised State/Territory body) must decide whether the mining or other activity can go ahead and if so, on what basis. The relevant body must take into account:

- the effect of the proposed act on
  - any native title rights and interests,

[19] *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1.

[20] See the Preamble to the *Native Title Act 1993* (Cth).

[21] *Native Title Act 1993* (Cth) ss 26, 29 and 35.

  - the way of life, culture and traditions of any of the native title parties,
  - the development of the social, cultural and economic structures of those parties,
  - freedom of access by those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the lands or waters in accordance with their traditions,
  - any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions,[22]
  - the natural environment of the land or waters concerned;
- any environmental assessment made by a court or tribunal or commissioned by the government or statutory authority;
- the interests, proposals, wishes of the native title parties in relation to the management, use or control of the lands or waters concerned;
- the economic or other significance of the proposed act to Australia and to the State or Territory concerned;
- any public interest in the proposed act going ahead; and
- any other relevant matter, s 39.[23]

A determination about whether or not an activity can go ahead can be overruled by the relevant State/Territory or Commonwealth Minister (depending on which body makes the decision) s 42. A decision authorising an act, and which has regard to the effect of a proposed act on a site of particular significance, does not affect the operation of Commonwealth, or State/Territory site protection laws.[24] A site can still be protected under the applicable heritage protection laws.

Avoiding the negotiation procedure

3.16 A government can avoid the negotiation procedure (using the 'expedited procedure') if the mining or other activity is likely to have only limited effects, that is, if it:

- does not directly interfere with the community life of the native title holders;

[22] Note that the definitions of area and site of particular significance coincide with those used in the Act being reviewed. The findings of the Native Title Tribunal on this issue has no consequences under the Act being reviewed.

[23] Some activities may be excluded from the right to negotiate process by a written determination of the Commonwealth Minister. This may occur only where the Minister (a) considers the act will have minimal effect; (b) has informed Aboriginal and Torres Strait Islander representative bodies and the public; (c) has invited submissions; and (d) is satisfied that native title holders will be consulted about access authorised by the excluded act: *Native Title Act 1993* (Cth) ss 26(3) and (4).

[24] *Native Title Act 1993* (Cth) s 39(2).

- does not interfere with areas or sites of particular significance, in accordance with the traditions of the native title holders; and
- does not involve, or create rights which allow major disturbance to land or waters.[25]

3.17 Interested parties are notified and can object if the government is seeking to avoid having to negotiate in this way.[26] If these parties object, the tribunal or recognised State/Territory body must decide whether or not the act proposed is likely to have only the limited effects that enable the government to avoid the negotiation procedure.[27] The Commonwealth discussion paper *Towards a more workable Native Title Act: Outline of proposed amendments* suggests that the procedure to avoid negotiating (the expedited procedure) may become redundant if exploration is excluded from the right to negotiate.[28]

Native title and heritage protection

3.18 The relationship between native title and heritage protection is complex. Certainly, the recognition that there is a place of particular significance in an area may make it easier to succeed in a native title claim because "areas and objects of cultural significance are likely to be evidence of the continued existence of native title".[29] Views differ as to whether the existence of a site of significance in a particular area is a form of native title interest or not.[30] There may be a connection, but the Act is not about proprietary interests in land. Native title procedures are likely to be the first mechanism native title holders, claimants or potential claimants use to protect their heritage from changes to land use. Native Title Tribunal decisions have in some cases found that it was not likely that a site would be interfered with because State legislation would give effective protection.[31]

3.19 This view has not been adopted in all cases,[32] and it must be doubtful whether State/Territory legislation could be relied on in many circumstances.[33] In any event *Towards a more workable Native Title Act: Outline of proposed amendments* proposes that the right to negotiate about exploration or prospecting activities would be removed from the Act on the ground that

[25] *Native Title Act 1993* (Cth) s 237.

[26] *Native Title Act 1993* (Cth) s 32.

[27] *Native Title Act 1993* (Cth) s 32(4).

[28] Commonwealth of Australia *Towards a More Workable Native Title Act: An Outline of Proposed Amendments* 1996, page 15.

[29] MNTU, sub 17.

[30] See, for example CLC sub 47: "... it can be argued that the interest of custodians in a sacred site is a form of native title interest that stems from the customary legal interests enjoyed by those custodians".

[31] See, for example, *Re Irruntyju-Papulankutja Community* (6 October 1995); *Re Waljen People* (24 November 1995); and *Re Clarrie Smith and the State of Western Australia and CRA Exploration PL and Asian Mining NL and Sorna Ltd* (11 December 1995).

[32] See for an example of a different approach *Re Ngarinyin Community* (21 December 1995).

[33] This subject is canvassed broadly in Chapter 5.

heritage legislation would continue to provide protection for sites of significance from the impact of these activities. The right to negotiate would remain in regard to the production stage of mining activity.[34] This would be an unfortunate development so far as the protection of cultural heritage is concerned as neither State/Territory nor Commonwealth heritage protection legislation guarantees an adequate process of negotiation, a process which is essential if heritage is to be given proper consideration in decisions concerning land use.[35] If the proposal is implemented native title claimants and holders may make greater use of the Act to gain protection for their areas or sites.

Protection of Movable Cultural Heritage Act 1986 (Cth)

3.20 The *Protection of Movable Cultural Heritage Act 1986* (Cth) covers all movable cultural property of significance to Australia. It controls overseas trade in the most significant objects of Australia's movable cultural heritage and provides for the return of objects illegally imported into Australia and other nations. Passing it enabled Australia to fulfill the requirements for ratification of UNESCO's 1970 Convention on the Means of Prohibiting and Preventing the Illegal Import, Export and Transfer of Ownership of Cultural Property. A control list divides Australian protected objects into 13 categories, including Aboriginal and Torres Strait Islander heritage, archaeology and ethnography. Some Aboriginal and Torres Strait Islander objects cannot be exported at all. These include bark and log coffins, human remains, rock art, carved trees and sacred and secret ritual objects. Exporters must apply for a permit to export:

- objects relating to famous and important Aboriginal people, or to other persons significant in Aboriginal history;
- objects made on missions and reserves;
- objects relating to the development of Aboriginal protest and self-help movements; and
- original documents, photographs, drawings, sound recordings, film and video recordings and any similar records relating to objects included in this category.

3.21 The National Cultural Heritage Committee[36] is considering changes to update these classifications and categories to bring them into line with current

[34] Commonwealth of Australia *Towards a More Workable Native Title Act: An Outline of Proposed Amendments* 1996, page 14.

[35] See Chapters 5 and 6.

[36] This committee has ten members, one nominated by the Minister for Aboriginal and Torres Strait Islander Affairs: *Protection of Movable Cultural Heritage Act 1986* (Cth) ss 15 and 17.

views of the significance of this heritage.[37] Protection of movable cultural heritage is, and must remain, a national responsibility.[38]

Environment Protection (Impact of Proposals) Act 1974 (Cth)

Environmental Impact Statements

3.22 The *Environment Protection (Impact of Proposals) Act 1974* (Cth) gives the Commonwealth Minister the power to take steps to protect the environment in relation to projects and decisions under the control of the Commonwealth Government. 'Environment' includes all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings. In theory this could include significant Aboriginal sites. The object of the Act is to ensure, as far as possible, that the Commonwealth Government and its authorities examine and take into account matters affecting the environment when they:

- formulate proposals;
- carry out works and projects;
- negotiate, operate and enforce agreements and arrangements (including those with State governments);
- make decisions and recommendations; and
- spend money, s 5(1).

3.23 Under administrative procedures provided for under the Act the Minister can direct that environmental impact statements or public environment reports be prepared and be made public. He can hold inquiries and make recommendations or suggestions about the matters in those reports or statements, and require conditions to be attached to relevant approvals or agreements, s 6. An inquiry held under the Act has extensive powers, for example to call witnesses and to require documents to be produced, s 11.

Allows investigation before planning

3.24 This model provides for impacts to be investigated before development. The impact on Aboriginal cultural sites could be considered in these environmental impact statements or reports, as happens in NSW. However under this Act such consideration would be limited to projects over which the Commonwealth Government has control.

[37] The Victorian Government suggests that this Act should be extended to apply to a far broader range of objects: VicG sub 68, page 11.

[38] Aboriginal concerns about the return of items from overseas and related problems are considered in Chapter 12.

National Parks and Wildlife Conservation Act 1975 (Cth)

A model for Aboriginal involvement in planning and management

3.25 The *National Parks and Wildlife Conservation Act, 1975* (Cth), which is administered by the Australian Nature Conservation Agency (ANCA), provides a model for involving Aboriginal people in planning activities on, and management of, public land. The Act deals with the establishment and management of parks, reserves and wilderness zones on Commonwealth land. Generally speaking, mineral extraction is prohibited in these declared areas except with the approval of the Governor-General and in accordance with a management plan, s 10. Activities such as building works and timber felling are prohibited unless done in accordance with a management plan.

3.26 In preparing the management plan the ANCA Director must notify the public. Anyone, including named Aboriginal councils, can make representations, s 11(3). The Director must take into account the interests of Aboriginal owners and other Aboriginal people interested in the land within the park or reserve, s 11(ba). The Act provides for Boards of Management. Where the reserve or park is situated on Aboriginal land, the relevant council must agree to a board being set up, and there must be a majority of Aboriginal people on the board nominated by the traditional owners, s 14C, s 14D. The Director of Parks and Wildlife must consult with the relevant land council where a park or reserve, or conservation zone is located on their land, s 16. These arrangements apply to Uluru-Kata Tjuta National Park which is Aboriginal land leased back as a national park. There are similar provisions in Northern Territory legislation, for example, the *Cobourg Peninsula Aboriginal Land Sanctuary Act 1989* (NT) and the *Nitmiluk (Katherine Gorge) National Park Act 1989* (NT). Native title claimant groups have sometimes adopted the joint management approach as their preferred land management model, if their claim is successful.[39]

Funding indigenous management and conservation

3.27 The Act authorises the Director to help and co-operate with Aboriginal people in managing Aboriginal land outside parks, reserves and conservation zones. He or she must consult with the relevant Aboriginal people and the relevant State or Territory authority, s 18. In line with Recommendation 315 of the Royal Commission into Aboriginal Deaths in Custody, the ANCA funds a Contract Employment Program for Aboriginal People in Natural and Cultural Resource Management (CEPANCRM). Projects funded must aim to protect or enhance the natural/cultural environment and employ Aboriginal people in natural and cultural resource management, for example, to manage, identify or interpret sites or to collect oral histories. The projects must be on Aboriginal-held land, Crown land, national marine parks or associated land reserves.

[39] Atkinson, sub 5, Appendix page 5. He suggests that the Yorta Yorta people of Victoria are proposing a similar land management arrangement in relation to the Murray Goulburn region.

Other laws

3.28 There are a number of other laws touched on in this report which do, or could, play a role in the protection of Aboriginal cultural heritage, for example, copyright and designs laws.

OTHER COMMONWEALTH PROGRAMMES

Aboriginal and Torres Strait Islander Commission (ATSIC)

Functions include protection of Aboriginal heritage

3.29 One object of ATSIC is to further the economic, social and cultural development of Aboriginal and Islander people.[40] The Commission's functions include the protection of cultural material and information considered sacred or otherwise significant by Aboriginal and Islander people, s 7(1)(g). Regional Councils have a function to formulate a regional plan for improving the economic, social and cultural status of Aboriginal and Torres Strait Islander residents of the region, s 94(1).

3.30 ATSIC has a Heritage Protection Program which is a component of the Land Heritage and Environment sub-Program, which in turn is a part of the Commission's overall social programme. The Land, Heritage and Culture Branch administers the Act. The objectives of the programme are:

- to return significant cultural property to Aboriginal and Torres Strait Islanders;
- to ensure Aboriginal and Torres Strait Islander involvement in the administration and management of protection and conservation programmes for cultural property; and
- to ensure effective protection of Aboriginal and Torres Strait Islander sites of significance.

3.31 To meet these objectives ATSIC provides early action and advice to the Minister on applications under the Act for protection of areas and objects of significance. It provides funds to establish and operate keeping places, community museums and cultural resource centres. It also facilitates the return of items of cultural property to Australia. Funding for this programme is only a very small part of the overall ATSIC budget.[41]

New cultural and policy framework

3.32 In the past, ATSIC has been criticised by Aboriginal people for its failure to equally address the need for cultural development as well as social and

[40] *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 3(c).

[41] ATSIC Office of Evaluation and Audit *Impact Evaluation: Heritage Protection Policy* Aboriginal and Torres Strait Islander Commission 1993, pages 16-17 and 36.

economic needs.[42] ATSIC is now developing a new cultural and policy framework to ensure that the Commonwealth Government has a co-ordinated and strategic approach to managing Australia's indigenous cultures. It is consulting on a discussion paper it released in November 1995 with the aim of having a new draft policy to the Board of the Commission in October this year. Proposals suggested in the paper include a new indigenous cultural policy structure within ATSIC, such as a new advisory body, a new overall cultural development programme, and a number of sub-programmes in areas of policy priority. Other proposals include a co-ordinated national strategy for indigenous language maintenance and teaching, and for recording indigenous cultural sites and property of cultural significance. A national network of keeping places and a national keeping place is proposed.[43]

Department of Communication and the Arts (DCA)

DCA responsibilities

3.33 The DCA is directly responsible for programmes which relate to ownership and protection of Aboriginal and Torres Strait Islander culturally significant places, areas and objects, including human remains. These include legislative protection through the *Protection of Movable Cultural Heritage Act 1986* and new programmes set up in response to*Distinctly Australian* initiatives of 1993-94.

Cultural Heritage Management

3.34 The Heritage Branch of DCA manages, in co-ordination with AHC, AIATSIS and ANCA, the Indigenous Cultural Heritage Program set up as part of the *Distinctly Australian* policy statement. The programme is concerned with cultural heritage management and has focused on three aspects of this.

- ***Planning framework.*** It has developed, is consulting on and proposes to publish, a comprehensive set of principles and guidelines for protecting, managing and using cultural heritage places.
- ***Training.*** It developed and ran a training course in heritage place management for 25 participants from Aboriginal and Torres Strait Islander communities and organisations and Commonwealth and State/Territory heritage and land management agencies throughout Australia. Materials will form the basis for future training courses.
- ***Application.*** It ran a project to demonstrate the practical application of the management planning process at sites.

[42] Atkinson, sub 5, Appendix page 4.

[43] ATSIC *Cultural Policy Framework* Aboriginal and Torres Strait Islander Commission November 1995.

Programme for protection and return of significant cultural property

3.35 In October 1993 Commonwealth Ministers with responsibilities for Aboriginal and Torres Strait Islander affairs endorsed National Principles for the Return of Aboriginal and Torres Strait Islander Cultural Property. In line with these principles, DCA funds two national programmes for the return of Aboriginal and Torres Strait Islander ancestral remains, and Aboriginal secret/sacred objects. The projects will try to determine the origins of unprovenanced remains and catalogue objects held in State/Territory museums and the National Museum of Australia to provide for their possible return to appropriate communities and owners. The Museums Australia Standing Committee (Museums and Indigenous People) is the steering committee for these projects; it is also developing a strategic plan for other policy aspects including community return of ancestral remains and protection of cultural property.[44] The programme includes grants to help with transporting cultural property from museums to the relevant community and to enable community members to discuss the physical return of material to their community.

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)

3.36 AIATSIS was established in the early 1960s to record the culture and history of Aboriginal people. In the 1970s it administered the National Sites Register Program. Under this programme site recorders throughout the country were funded to record sites which were then registered on the National Sites Register. The Register, now called the Sites Inventory or Sites Archive, is not actively maintained and is no longer comprehensive. It is added to only when AIATSIS funds people to do recording work. The Act under review, s 14(2) provides that declarations in relation to an area must be lodged with AIATSIS and entered on the Register. AIATSIS is empowered to promote the study and protection of cultural heritage matters and to encourage community understanding in relation to Aboriginal and Torres Strait Islander people and their societies.[45] Activities include its rock art protection programme which fills gaps in State/Territory programmes. It also maintains a cultural resource collection consisting of materials relating to Aboriginal and Torres Strait Islander studies. Native title claims have resulted in increasing demands for access to that collection.[46]

[44] DCA, sub 66; Tandanya sub 42; Council for Aboriginal Reconciliation *Valuing Cultures: Recognising Indigenous Cultures as a Valued Part of Australian Heritage* Key Issues Paper No 3 AGPS 1994, page 27; CAMA policy, December 1993.

[45] *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth) s 51.

[46] See the *Australian Institute of Aboriginal and Torres Strait Islander Studies Annual Report 1994-95* 1995, page 2.

Parliamentary inquiry into cultural heritage

3.37 The House of Representatives Standing Committee on Aboriginal and Torres Strait Island Affairs was inquiring into cultural heritage in 1995. Its work had not been completed before the March 1996 election.

INTERNATIONAL OBLIGATIONS AND PRINCIPLES FOR PROTECTING ABORIGINAL HERITAGE

3.38 As a state party to a number of international instruments, Australia has obligations in relation to Aboriginal culture and heritage. The United Nations Decade of the World's Indigenous People (1995-2004) may see the adoption of a draft declaration on the Rights of Indigenous Peoples, which directly addresses these issues.

Elimination of racial discrimination

Equality

3.39 As a party to the *International Convention on the Elimination of all Forms of Racial Discrimination*[47] Australia must take steps to eliminate all forms of racial discrimination, art 2. In the Convention 'racial discrimination' means any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life, art 1. The Convention requires the Commonwealth to prohibit and eliminate racial discrimination, and to guarantee the right of everyone to equality before the law without distinction as to race, colour or ethnic origin, and in particular the right to a range of civil rights including the right to freedom of thought, conscience and religion, art 5(d)(vii).

3.40 The *Racial Discrimination Act 1975* (Cth) implements the Convention and it binds States and Territories as well as the Commonwealth. Four of the leading cases brought before the High Court under the RDA involved Aboriginal or Torres Strait Islander land issues.[48]

Special measures

3.41 The Convention enables the Commonwealth to take special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, in order to guarantee

[47] UN General Assembly, 19 December 1966; ratified by Australia on 30 September 1975.

[48] *Koowarta v Bjelke-Peterson* (1982)153 CLR 168; *Gerhardy v Brown* (1985) 159 CLR 70; *Mabo v Queensland (Mabo No 1)* (1988) 166 CLR 186; and *Western Australia v Commonwealth* (1995) 128 ALR 1.

full and equal enjoyment of human rights and fundamental freedoms, arts 1(4), 2 (2). Laws which have been upheld on the basis that they are a 'special measure' include *Pitjantjatjara Land Protection Act 1981* (SA)[49] and s 35 of the *Aboriginal Heritage Act 1988* (SA) prohibiting the release of Aboriginal information contrary to tradition.[50]

Self-determination in cultural development

3.42 The *International Covenant on Economic, Social and Cultural Rights*[51] (ECOSOC) provides that:

> All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

ECOSOC requires that all State parties to the Covenant "promote the realisation of the right of self-determination ..."[52]

Indigenous right to enjoy own culture and religion

3.43 The *International Covenant on Civil and Political Rights*[53] (ICCPR) provides that persons belonging to religious or linguistic minorities:

> ... shall not be denied the right, in community with other members of their group, to enjoy their culture, to profess and practice their own religion, or to use his or her own language. (art 27)

The ICCPR also provides for freedom of religion, which includes the freedom to adopt and manifest a religion or belief of choice, and respect for the liberty of parents to ensure the religious education of their children in conformity with their own convictions, art 18.

Right and duty to develop culture

3.44 Principles outlined in the *Declaration Of The Principles of International Cultural Co-operation*, UNESCO, 1966, include that

- Each culture has a dignity and a value which must be respected and preserved;
- Every people has the right and the duty to develop its culture;
- In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.[54]

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[49] See *Gerhardy v Brown* (1985) 159 CLR 70.

[50] See *The Aboriginal Legal Rights Movement Inc v The State of South Australia and Stevens (No 2)* (unreported, Supreme Court of South Australia, 28 August 1995); and *Aboriginal Law Bulletin* Vol 3 No 76 October 1995, page 23.

[51] UN General Assembly 16 December 1966, ratified by Australia in 1975.

[52] Articles 1(1) and (3). See also ICCPR article 1.

[53] UN General Assembly 16 December 1966, ratified by Australia on 13 August 1980.

Duty to identify, protect, conserve, preserve and transmit

3.45 The *Convention For The Protection Of The World Cultural and Natural Heritage*[55] imposes a duty on Australia to ensure that its cultural and natural heritage of outstanding universal value is identified, protected, conserved, presented and transmitted to future generations. To fulfill this duty Australia must endeavour to integrate the protection of heritage into comprehensive planning programmes, set up services for protecting and conserving heritage, conduct research into the dangers that threaten heritage, do what is necessary to identify, protect and restore heritage and to foster centres for training and research on heritage.

ILO Convention 107 on protection and integration of indigenous populations

3.46 ILO Convention 107 was formulated in 1957 and its themes of protection and integration are outdated. Australia has not ratified this Convention. However, in its time, it was notable for including explicit statements about land rights, requiring that regard be had to indigenous peoples' cultural and religious values and forms of social control and that they should be actively involved in measures taken for their protection and integration.[56] It has been reformulated in a more modern form in ILO Convention 169 which states that in applying national laws and regulations to indigenous peoples' due regard shall be had to their customs or customary laws, art 8.[57]

Draft Declaration on the Rights of Indigenous Peoples

3.47 As part of the United Nations decade of the World's Indigenous People (1995-2004), the Working Group on Indigenous Peoples' Rights has developed a draft Declaration on the Rights of Indigenous Peoples.[58] The draft is now in the process of discussion at the UN Commission on Human Rights. It articulates the fu[illegible] pursue cultural developme[illegible] traditions and customs, art 12, and in particular:

> ...the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.[59]

[54] Article 1.

[55] Ratified by Australia in 1974.

[56] Articles 4, 5 and 11.

[57] Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989. In force 5 September 1991. Australia is not a party.

[58] UN E/CN.4/Sub.2/1994/2/Add.1 (1994).

[59] Article 13.

The declaration requires State parties to take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.[60]

WHAT IS WRONG

There is not a comprehensive system of protection

3.48 The plethora of Commonwealth legislation and administrative programmes under which Aboriginal cultural heritage may be protected does not provide a comprehensive or integrated Aboriginal cultural heritage protection regime.[61] Legislation has been enacted in response to international initiatives or other issues of the moment[62] rather than as a result of a systematic assessment of what is needed to ensure that Aboriginal people are able to maintain, protect, develop and fully enjoy their culture and heritage. For example, the Act under review was enacted initially as an interim measure,pending land rights legislation, but it remained in force after it became clear that national land rights legislation was no longer on the government's political agenda. Even so, the Act has not been reviewed until now.

There are inconsistencies and gaps in protection

Heritage protection depends on location

3.49 Heritage protection is an important national issue but the main responsibility is left to States and Territories, whose laws vary considerably.[63] This means that whether or not an area or object of particular significance to Aboriginal people is protected may depend on the circumstance of its location in a particular State or Territory. The Ngaanyatjarra Pitjantjatjara Yankunyatjatjara Women's Council Aboriginal Corporation, whose member communities live in two States and a Territory, point out that heritage issues affecting their members cannot be dealt with in one legal framework.[64] The Commonwealth Act is an act of last resort, and the main priority of ATSIC has been the administration of that Act rather than developing comprehensive policies or seeking the introduction of effective uniform laws. Although there have been some attempts to achieve uniformity,[65] these have not yet been successful.

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[60] Article 13; the World Council of Indigenous People (a UN non-government organisation) has also developed a charter of rights.

[61] See, for example, Tandanya, sub 42 page 2 in relation to the lack of synchronised and uniform policies.

[62] MNTU, sub 17: "It is ad hoc".

[63] This is discussed in more detail in Chapter 5.

[64] NPYWCAC, sub 29.

[65] This issue is discussed in Chapters 5 and 6.

Gaps

3.50 The fragmentary and ad hoc development of the law has meant that there are a number of areas of Aboriginal culture and heritage that are not adequately protected, or not protected at all:

> Indigenous cultural heritage, based on a holistic and integrated world view, in which the various aspects of existence were intricately interwoven and interdependent, became fragmented and redefined to suit the administrative convenience of the coloniser. Thus lands, sites of significance, cultural objects, biodiversity, languages, cultural knowledge, arts, etc, all became the responsibility of different government departments at both federal and state levels, each charged with administering various bodies of legislation.[66]

Some State and Territory laws do not adequately protect movable Aboriginal heritage, for example, objects, so that objects moved from one State to another can avoid the law.[67] The Act provides limited power to protect movable objects. There is not effective protection for intellectual property, designs, traditional food resources, traditional and contemporary cultural expressions, rituals or legends.[68] The Act does not cover these.[69] Action should be taken to ensure better protection of intellectual property, and a broad approach should be taken to the protection of Aboriginal cultural heritage at all levels. The Review makes a policy recommendation about this matter below.

Relationships between the regimes are not clear

3.51 The remedies where heritage is endangered "although profuse, are fragmentary, and the relationship between the various protective regimes is not always clear".[70] The *World Heritage Properties Conservation Act 1983* (Cth) may give the highest level of protection, but this is limited to World Heritage properties and protection is at the complete discretion of the relevant Minister. The Australian Heritage Commission processes can be used to register places whether or not they are under threat, but they provide a lower level of protection. The Aboriginal community may choose to take action under two or three pieces of legislation at the same time. For example, in the Old Swan Brewery (Goonininup) case, (1988-1994) National Estate Register listing was sought from the Australian Heritage Commission while applications were being made under the Act. The site was listed in May 1991 for both cultural

[66] Fourmile, Henrietta *Making Things Work: Aboriginal and Torres Strait Islander Involvement in Bioregional Planning* Consultant's Report 1995, page 15.

[67] This subject is discussed further in Chapter 12.

[68] Sutherland, sub 8; MNTU, sub 17 page 12; TAC, sub 63; FAIRA, sub 51; KLC, sub 57; ATSIC, sub 54 page 7; White, sub 22; ATSIC *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* Commonwealth of Australia 1995, paras 6.34-6.97. Commonwealth Attorney-General's Department produced an issues paper in 1994 raising some of these issues: *Stopping theRip-Offs: Intellectual Prope rty Protection for Aboriginal and Torres Strait Islander Peoples,* October 1994.

[69] Other than to the extent that Part IIA, which applies only to Victoria, does so. See Chapter 5 and Annex VIII.

[70] CLC, sub 47.

and general historical reasons. There were native title claims being pursued in parallel to proceedings under the Act in several cases, such as Skyrail, Barron Falls National Park, North Queensland (1994); Broome Crocodile Farm, Broome WA (1993, 1994); and Button's Crossing, Kununurra (1993).

Duplication or overlap of functions in some areas

Duplication in significance assessment

3.52 There are no formal links between the Australian Heritage Commission and ATSIC, which administers the Act under review. There have been informal exchanges in which ATSIC has asked for AHC advice on the significance of places.[71] The lack of formal connections leads to some duplication in carrying out significance assessments at the Commonwealth level.[72] In the Old Swan Brewery (Goonininup) case for example, the brewery precinct was assessed for the purpose of the first s 10 application, assessed again by the AHC for National Estate listing, and assessed again for the second s 10 application. There have been a number of other applications under the Act in which the Heritage Commission had either funded surveys for significance assessment, or had assessed them as significant, or had listed them. These include:

Maxwell River Cave, South West Tasmania

- application concerned an ancient rock art cave found during an AHC funded survey.

Moana Beach, SA

- stone arrangements on the site associated with a dreaming site that is registered on the National Estate.

Amity Point Stradbroke Island, Qld

- AHC survey had established significance of the sites in question.

Burleigh Mountain National Park, Qld[73]

- site in question had been nominated for listing with the AHC at the time damage occurred.

The AHC assessments may have been given some consideration at an informal level in the process under the Act, but they had no recognised legal status. Each process should take advantage of and complement the work and knowledge of the others.

[71] AHC, sub 52.

[72] AHC, sub 52.

[73] See Annex VII.

Different criteria for significance

3.53 Because there are different criteria for significance in some of the different pieces of legislation, it may not be possible for one agency to fully take into account the assessment of the other. In the case of the Old Swan Brewery (Goonininup), the National Estate listing included both Aboriginal and non-Aboriginal associations in the Statement of Significance; in relation to the Aboriginal significance it stated:

> The precinct is of social significance to Aboriginal people, and as a resting place for the Wagyl, of religious significance to some of them.[75]

Overlap in programme functions

3.54 Both ATSIC and DCA have program responsibility for Aboriginal heritage protection. AIATSIS also has a role, for example, in the protection of rock art. Each should be able to take full advantage of the work and knowledge of the other.

Legislation is out of step with practice

3.55 Aboriginal people are sometimes recognised as having a role in the protection of their heritage in practice, even where legislation makes no such provision. Some Commonwealth legislation, although it can protect Aboriginal heritage, does not specifically refer to it. (This is also the case in some States.[76]) It protects Aboriginal heritage because it is of value to the regional, national and world community as a whole, and is part of Australian or world heritage. Tests of significance in this kind of legislation tend to emphasise objective factors. The account taken of the views and aspirations of Aboriginal people may depend more on the way the legislation is applied in practice than on its drafting. For example, although the *Australian Heritage Commission Act 1975* (Cth) does not specifically refer to Aboriginal heritage, in practice, Aboriginal people have an opportunity for consultation and involvement under AHC processes.

There is no coherent implementation of Australia's international obligations

Legislation and administration does not reflect UN principles of self-determination and control

3.56 Although the Act under review is concerned with protecting areas and objects "of particular significance to Aboriginals", it does not provide Aboriginal people with a specific role in deciding what should be protected. The only right they have is to apply for protection. Aboriginal people do not decide whether or not a site is significant or, if so, whether or not it should be

[75] AHC Register of the National Estate. Register Entry: Swan Brewery Precinct: 0172465/11/020/0130/01.

[76] See Annex VII.

protected. Some State/Territory legislation is equally defective. For example, in some States, Aboriginal people have little legal recognition and no right to be consulted when developments are planned which may affect their heritage.[77] Submissions express concern that Aboriginal people are not extensively employed in heritage protection administration and ask for more support for employment programmes.[78] The Commonwealth, although it has international responsibilities, has not ensured that legislation at State and Territory level complies with these obligations.

No comprehensive legislative and programme strategy to ensure that Aboriginal people are able to enjoy their culture

3.57 Enjoyment of culture has many dimensions. Legislative protection, when a threat to cultural heritage arises, is only one of these. Programmes to support and develop Aboriginal culture, including heritage, and to enable its transmission may be of far greater importance to the long term protection of heritage than laws or procedures to deal with immediate threats. Keeping places and language programmes are critical. Also essential to enjoyment of culture and practise of religion is access to sacred or important sites.[79] Educational programmes for non-Aboriginal people are part of the answer.[80]

> It would seem to us that protection of cultural heritage is better achieved from within the culture, if migaloo had a better understanding of traditional cultures and were actually involved as Murree people are, then the preservation and protection of culture could be much better achieved. A key to this of course is education of migaloo to understand, respect, appreciate and participate in the traditional culture of his country. If migaloo see this cultural heritage on these terms and are able to feel that they are actually part of it then it seems quite reasonable that they'd be more inclined to help Murree people preserve and protect it. We feel that education is part of the answer... We see that awareness of Murree cultures these days is generally part of the curriculum of many schools across the country, but still we believe that the more exposure that school children have to traditional cultures the more it will benefit them, us and this nation. Integration of traditional peoples and culture is critical to the development of this nation and must begin and be reinforced in the education systems.[81]

At the moment there is no comprehensive strategy to achieve these aspects. DCA has some functions in this area and so does ATSIC. There needs to be more co-ordination between relevant agencies and more emphasis in heritage programmes for nurture and support for Aboriginal heritage. This is a point made in ATSIC's discussion paper *Cultural Policy Framework*.

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[77] See Chapter 5 and Annex VIII.

[78] Atkinson, sub 5; Saunders, sub 21. The AHC has offered training and advice to support a cooperative approach between the Commonwealth and the States/Territories.

[79] The issue of access to sites is discussed in Chapter 6.

[80] FAIRA, sub 51, page 21; Saunders, sub 21. See also ATSIC *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* Commonwealth of Australia 1995 para 6.21.

[81] Darumbal, sub 39.

World cultural and natural heritage obligations not fully implemented

3.58 As yet, heritage, and in particular Aboriginal heritage, is not fully integrated into comprehensive planning processes.[82] This issue is discussed in Chapter 6.

Aboriginal customary law not fully recognised

3.59 UN obligations,[83] recommendations of the Australian Law Reform Commission[84] and the recommendations of the Royal Commission into Aboriginal Deaths in Custody[85] require that as far as possible heritage protection laws should recognise Aboriginal customary law. Neither State nor Commonwealth laws adequately reflect this. For example, to achieve protection, Aboriginal people may be required to divulge restricted information contrary to customary law.[86] No recognition is given to traditional decision-making processes.

Developing or living culture not fully recognised

3.60 UN instruments recognise the duty of Aboriginal people to develop their culture, and their right to develop and evolve their culture. This requires recognition that Aboriginal culture is living and developing and may change over time. The Act recognises living culture, but not all State laws and practice do.[87] Some of these laws are based on the outdated idea that Aboriginal culture has died out, and as a result only physical manifestations of culture such as rock art, bones and so on need to be protected. Neither Commonwealth or State laws handle well the fact that an evolving culture may give rise to disputes within Aboriginal communities.

Heritage protection laws are not well understood

3.61 The Review is concerned that many Aboriginal people do not know about the Act or about State or Territory legislation and how they fit together. People who are unaware of laws cannot use them. In referring to the Act, the Ombudsman said:

> I have detected comment in the media to the effect that some Aboriginal people are perceived as having a good grasp of the legislation (indeed, to the extent, allegedly, of being able to use it repeatedly and to ulterior ends), but I am

[82] The incorporation of Aboriginal heritage interests into planning processes is discussed in Chapter 6.

[83] For example ICCPR article 27.

[84] Law Reform Commission *The Recognition of Aboriginal Customary Laws* Report No 31 AGPS 1986.

[85] Royal Commission into Aboriginal Deaths in Custody *National Report* AGPS 1991, Recommendation 219.

[86] This subject is discussed in some detail in Chapter 4.

[87] The ambit of the various Aboriginal cultural heritage protection laws is discussed in Chapter 6.

> concerned that most indigenous Australians or their representatives may have no knowledge and no effective access to these legislative protections.[88]

The consultations undertaken by the Review confirm the view that knowledge of the Act among Aboriginal people and, in particular, understanding of how to use it, is quite limited outside legal services, land councils and the like. Submissions and consultations also show that communities and cultural officers want education and training in understanding the Act and also State and Territory legislation.[89] It is noted, however, that during the period of this Review ATSIC has published *Protecting Heritage: A plain English introduction to legislation protecting Aboriginal and Torres Strait Islander Heritage in Australia.*[90] This is a useful step, and needs to be followed with further measures.

THERE SHOULD BE A NATIONAL POLICY

Introduction

3.62 The Commonwealth has international, moral and legislative obligations to ensure that Aboriginal heritage in its broadest sense is nurtured and protected in a comprehensive and consistent way. Although in legislative terms the Commonwealth responsibility for Aboriginal heritage is a last resort mechanism, its obligations are much broader. The starting point for ensuring that it meets those obligations, is to have a national policy on heritage protection with a pro-active focus. The policy should cover all aspects of culture and heritage that are important to Aboriginal people and should be developed by an Aboriginal-controlled process. It should take into account the considerable amount of work that has already been done by a number of bodies including the Council for Aboriginal Reconciliation, ATSIC, in its report *Recognition Rights and Reform*[91] and in developing a cultural policy framework,[92] the Royal Commission into Aboriginal Deaths in Custody and the Aboriginal and Torres Strait Islander Social Justice Commissioner.[93]

3.63 This national policy should form the basis for legislation and programme development at Commonwealth level, and for initiatives to

[88] Commonwealth Ombudsman sub 41 page 3.

[89] Michel and McCain sub 15; Victorian consultations.

[90] ATSIC *Protecting Heritage: A plain English introduction to legislation protecting Aboriginal and Torres Strait Islander Heritage in Australia* Aboriginal and Torres Strait Islander Commission 1996.

[91] ATSIC *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* Commonwealth of Australia 1995 Chapter 6.

[92] ATSIC *Cultural Policy Framework* Aboriginal and Torres Strait Islander Commission November 1995.

[93] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report July 1994-June 1995* December 1995 AGPS

ensure that Aboriginal heritage is adequately nurtured and protected at State and Territory level.[94] On the basis of the work of the Review there appear to be a number of key areas or principles that need to be covered by a national policy. The rationale for these principles and the specific implications for heritage protection law are discussed in detail in other sections of the report. They are set out here because the Review considers that they are critical to achieving comprehensive, appropriate and effective protection for Aboriginal cultural heritage. They form the basis of the Review's recommendations.

What elements the policy should include

Policy should be comprehensive

3.64 The policy should cover aspects of Aboriginal culture and heritage that Aboriginal people want covered, not only areas, sites or objects. For example, it should also include:

- intellectual property including designs, knowledge of flora and fauna and folk tales;
- movable objects; and
- language.[95]

Provide for nurture and support of Aboriginal heritage

3.65 An important element of any heritage protection should be to promote the development of Aboriginal culture and heritage. Measures to enable Aboriginal people to nurture and support their own heritage play a much more significant role in heritage protection than measures to deal with situations of crisis. Measures should include training, education for non-Aboriginal people, restoration, preservation, rediscovery, facilitating access, research, language documentation and recording and keeping places.

Aboriginal involvement in heritage protection: control and self-determination

3.66 Recognised principles of self-determination require a high level of Aboriginal involvement in Aboriginal heritage protection. This should include planning, identification (if identification is required) and management of areas, assessing significance and threat, prosecution of those injuring heritage, and decisions about whether or not to protect heritage. As far as possible Aboriginal people should administer Aboriginal heritage protection programmes. Aboriginal access to areas and sites is another key element. Measures for increasing Aboriginal involvement in heritage protection are discussed in a number of parts of this report.[96]

[94] The Review discusses initiatives for State and Territory laws in Chapter 5.

[95] ATSIC *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* Commonwealth of Australia 1995 page 120.

[96] In particular in Chapters 5, 6 and 7.

Recognition of customary law and tradition

3.67 Processes for cultural heritage protection should recognise Aboriginal customary law and cultural practice on matters of how knowledge is held and transmitted, on who should have access to knowledge and information, and who can divulge knowledge or information. They should also recognise Aboriginal customary law and views on what is significant according to tradition and what constitutes a threat. The issue of protecting restricted information is discussed in Chapter 4. Decision-making about the question of significance under the Act is discussed in Chapter 8.

Recognise living and evolving culture

3.68 Heritage protection laws and programmes should be based on the assumption that Aboriginal culture is living and evolving. It should not be confined to protecting 'relics' or areas where there is physical manifestation of human habitation. It should not lock Aboriginal people into a concept of tradition that predates the invasion of Europeans. These issues are discussed in Chapter 6.

Effective legal protection

3.69 Because the protection of Aboriginal cultural heritage is an important national responsibility the Commonwealth must ensure, even if it is not directly involved, that Australia has effective heritage protection laws. National policy should cover how that effective legal protection is to be achieved. It should include information and education programmes for Aboriginal people to ensure that they know about heritage protection laws and how to use them effectively to protect their heritage. Achieving effective legal protection at State and Territory level is discussed in Chapter 6. The Commonwealth approach is discussed in Chapters 7 and 10.

3.70 There should be a National Policy for all aspects of indigenous heritage protection. The policy should form the basis of heritage protection standards, laws and programmes at all levels of government and wherever they affect Aboriginal heritage. The policy should cover all aspects of Aboriginal heritage. Its elements should include:

- nurture and support of Aboriginal culture and heritage including education for non-Aboriginal people;
- Aboriginal control of land/or participation in the management and protection of their cultural heritage;
- recognition of Aboriginal customary law relating to cultural heritage;
- recognition of Aboriginal culture as a living and dynamic force;
- effective legal protection of all aspects of Aboriginal cultural heritage, including areas, objects and cultural knowledge; and
- education for Aboriginal people about using the law to protect heritage.

RECOMMENDATION: A NATIONAL POLICY

3.1 A national policy should be adopted as the basis for laws and programmes relating to Aboriginal cultural heritage at all levels of government. That policy should cover all aspects of Aboriginal cultural heritage, and should include such matters as positive support for Aboriginal culture and heritage, education of non-Aboriginal people, Aboriginal control of cultural heritage, recognition of Aboriginal customary law and tradition, and effective legal protection of cultural heritage.

THERE SHOULD BE A CO-ORDINATING MECHANISM

Body to monitor and co-ordinate

3.71 There is no one body at Commonwealth level with the specific responsibility for overseeing Aboriginal heritage on a national basis. The responsibility for various aspects of Aboriginal heritage protection is distributed across a number of agencies. This has led to a fragmentary approach and gaps in programmes and protection. It has also led to innovative approaches and to the infusion of Aboriginal heritage issues into a whole range of government activities. This distribution could be kept. There should be one body responsible for monitoring Aboriginal heritage protection overall and co-ordinating laws and programmes that have an impact on Aboriginal heritage. It should consist largely or entirely of Aboriginal people, or act on the advice of an Aboriginal- controlled body. This role could be given to an existing or a new agency. The role of the body would be to:

- monitor the effectiveness of Commonwealth, State and Territory Aboriginal heritage laws;
- make initiatives to develop, and foster the implementation of, the national policy at all levels of government;
- co-ordinate heritage protection initiatives and programmes;
- take action to achieve comprehensive heritage protection laws in line with the national policy; and
- liaise with relevant State, Territory and Commonwealth Government departments.

RECOMMENDATION: A NATIONAL CO-ORDINATING BODY

3.2 There should be a body with specific responsibility for monitoring Aboriginal cultural heritage protection nationally, to co-ordinate laws and programmes that have an impact on Aboriginal heritage and to develop and promote the national heritage protection policy at all levels of government. It should consist entirely or largely of Aboriginal people, or act on the advice of an Aboriginal-controlled body.

MINIMISING DUPLICATION OF SIGNIFICANCE ASSESSMENT

3.72 To avoid delay, and waste of resources, duplication of significance assessment at Commonwealth level should be minimised. This would be made easier if Aboriginal areas, sites or objects were assessed on a similar basis in all Commonwealth laws including the *Native Title Act 1993* (Cth),*World Heritage Properties Conservation Act 1983* (Cth),*Australian Heritage Commission Act 1975* (Cth) and the Act under review. The body responsible for monitoring and co-ordinating policy should consider whether this can be done.

3.73 As a first step the Act under review could be amended to provide that where an area or object has been assessed as significant on a substantially similar basis, and on substantially similar issues, the Commonwealth heritage assessment process should be able to take that assessment into account. Even if the current differences remain, an assessment by one of these bodies should be able to be relied on for the purpose of considering applications for declarations under ss 9 and 18. This issue is considered in Chapter 8.

RECOMMENDATION: BODY TO REDUCE DUPLICATION

3.3 The body responsible for co-ordinating Aboriginal heritage protection nationally (see recommendation 3.2) should investigate whether Aboriginal heritage can be assessed on a similar basis under all Commonwealth legislation (whether general or specific) under which it is currently assessed with a view to working out how duplication in significance assessment can be eliminated.

CHAPTER 4

RESPECTING CUSTOMARY RESTRICTIONS ON INFORMATION

> This is a permanent Dreaming place and only the traditional owners used to hear these stories that their grand parents told them. Now they are going to hear this story all over the place. This dam has made the story really come out into the open; the story used to be really secret. Now other tribes are going to hear about it. It used to be a secret for the Arrernte mob. Well now everybody is going to learn, and the white people as well are going to learn about it ... We will have to give away our secrets again.[1]

The terms of reference ask the Review to consider how secret/sacred information should be dealt with under the Act.[2] This chapter discusses the restrictions which Aboriginal custom and tradition impose on the holding and dissemination of information and the importance of these restrictions in the cultural life of communities. Standards for dealing with confidential or restricted information are proposed.

Obligation and need to respect Aboriginal customary law restrictions on information is well established

4.1 Restrictions on access to certain kinds of information are a central feature of traditional Aboriginal life. This aspect of Aboriginal traditional life has long been an issue for Aboriginal people in their interactions with non-Aboriginal people. Accommodating these restrictions in non-Aboriginal laws and procedures is not new either. It has been acknowledged and provided for in some laws and in practice, for example, in Northern Territory land rights legislation and procedures. Despite this, there continues to be a lack of understanding in the non-Aboriginal community about the importance to Aboriginal people of this element of their culture, particularly where protection of heritage is concerned. Customary law restrictions are discussed in this chapter in terms that are most likely to apply to Aboriginal people living in remote areas where they have been less disturbed in their relationship with land. However, in recognition of the fact that Aboriginal culture is a living and evolving culture it would be wrong to assume that, because some Aboriginal people have been moved away from their original country and their life styles may have dramatically changed, this element of Aboriginal culture no longer has any force.

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[1] Female custodian: reported in Wootten *Junction Waterhole (Niltye/Tnyere-Akerte)* s 10 report, p 74.

[2] Term of reference (vi).

FAILURE TO UNDERSTAND THE IMPORTANCE TO ABORIGINAL PEOPLE OF RESTRICTING ACCESS TO INFORMATION

4.2 It is clear to the Review that there is widespread ignorance among non-Aboriginal people about the importance to Aboriginal people of protecting information and knowledge that is subject to customary law restrictions. Non-Aboriginal people often do not understand a:

> ... social world where the point of social life, its rationale ... [is] *not* to reveal, assemble and collate knowledge and information [as is the case in western societies] ... but to prevent its spread, to restrict its transmission and to fashion a system of social statuses out of this variable distribution and restriction of knowledge.[3]

4.3 Wootten notes that because of this 'cultural gulf' between European and Aboriginal attitudes to the acquisition and spreading of knowledge, Europeans find it difficult to appreciate why Aboriginal people appear loath to discuss a site until a development proposal appears to be well under way:

> Aborigines, working under long inherited laws of protection through secrecy, prefer not to mention the existence of a sacred site, let alone its significance, until it is almost on the point of being destroyed. Europeans find this approach to be very frustrating, and, because they do not understand it, will claim that Aboriginal people find sites only after development proposals have been announced.[4]

4.4 Another consequence of this failure to understand has been that laws and procedures designed to protect heritage have failed to provide adequate measures to protect information about that heritage. By failing to protect restricted information, or by requiring Aboriginal people to divulge information against their traditions, heritage laws have contributed to the desecration of what they were specifically designed to protect. The Australian Law Reform Commission noted in 1994 that:[5]

> The lack of understanding of the significance of women's and men's business has hindered the communication of cultural information between indigenous and non-indigenous people ... The division between women's and men's business has often resulted in the legal system only getting half the story when it comes to issues involving women.[6]

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[3] Weiner, J F "Anthropologists, historians and the secret of social knowledge" in *Anthropology Today* Vol 11 No 5, October 1995, p 5.

[4] Wootten *Junction Waterhole (Niltye/Tnyere-Akerte)* s 10 report, p 31, quoting a report of the Aboriginal Sacred Sites Authority, 1984.

[5] Australian Law Reform Commission, *Equality before the law: justice for women* (ALRC 69) Pt I, para 5.29.

[6] See also Bell, D "Sacred Sites: The Politics of Protection" in *Aborigines, Land and Land Rights* Peterson, N and Langton, M (eds) Australian Institute of Aboriginal Studies 1983, p 281.

WHY PROTECTING RESTRICTED INFORMATION IS IMPORTANT

It is important to Aboriginal people

4.5 The law should recognise and respect customary law requirements and restrictions on information about areas, sites and objects to the greatest extent possible because doing so is important to Aboriginal people. Submissions and consultations show that it is a major issue for Aboriginal people that their customary law in this area is respected.[7]

> Aboriginal people are frequently caught by the most distressing dilemma of being required to demonstrate the significance of part of our Law when those very explanations are, by our Law, restricted. It amounts to being forced to break our Law to prove to Europeans that our Law still exists. It is blackmail of the worst sort because it threatens our culture, not just one or two individuals.[8]

> Customary law requirements about the classes of persons allowed access to information should be respected to the greatest extent possible at all stages of the process from application to declaration. In what ever model is adopted for protection of Aboriginal cultural heritage, the utmost respect should be given to this principle.[9]

Revealing information in public is dangerous

4.6 Aboriginal people are concerned that the inappropriate use or release of knowledge is dangerous.

> One of the most difficult principles of Anangu Law to get Europeans to understand or, often, to believe, is that some places are dangerous if not treated properly, some activities are dangerous if not engaged in properly, and some knowledge is dangerous if it is made public or it if is used in any context by the inappropriate people.[10]

> Knowledge of a site or ceremony is part of the substance of the *tjukurpa* and inappropriate use of that knowledge in itself threatens to unleash the powers of which it is a part.[11]

It is critical to the right to practice religion

4.7 Maintaining the restrictions on knowledge associated with sacred areas, sites and objects is critical to ensure that Aboriginal people are able to enjoy their fundamental right to maintain and practice their religion.[12] Requiring

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[7] Consultations in South Australia with PWYRC; ATSIC, sub 54; NSWALC, sub 43; White, sub 22; Nayutah, sub 20.

[8] NPYWCAC, sub 29.

[9] CLC, sub 47.

[10] NPYWCAC, sub 29.

[11] NPYWCAC, sub 29.

[12] International human rights are discussed in Chapter 3.

Aboriginal people to divulge restricted information, and failing to protect it if it is revealed undermines Aboriginal religious beliefs and practices.[13]

Revealing restricted knowledge may undermine its significance

4.8 Sites, areas and objects derive part of their power from the secrecy surrounding them.[14] Requiring Aboriginal people to reveal restricted knowledge may detract from that power and undermine their significance.

Restrictions on knowledge form the basis of social relationships

Role of restrictions in Aboriginal society

4.9 In general terms, customary law restrictions on information and knowledge about an area, site or object underpin and define social relationships.[15] Social relationships:

> ... are made between people by creating and stipulating the gaps and discontinuities between them. By assuming an uneven distribution of sacred knowledge, people create functional relationships of ritual specialization. People with specialized secret knowledge must be called in to perform ceremonies necessary for other persons who lack such knowledge. Obligations are created between people based on their differences, rather than their similarities.[16]

4.10 Weiner makes the point that among the different clans and lineages that constitute local territorial groups, knowledge of mythical journeys and linked dreaming sites may be discontinuous, fragmented and selectively distributed. In this context the point of social communication is "to release the evidence of knowledge in a controlled and allusive way, to show the proof that it exists rather than the knowledge itself".[17] He also makes the point that in a context where social relationships take this form:

> [W]e would then find the clearest evidence for the intactness of Aboriginal society, whether it be in South Australia or northeast Arnhem Land, in the surfacing of disputes over the possession of secret knowledge and restricted access to territorial and cosmological mythopoeia.[18]

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[13] See, for example, Baldwin Jones, sub 18.

[14] See for example H Morphy " 'Now you understand': An analysis of the way Yolngu have used sacred knowledge to retain their autonomy" in *Aborigines, Land and Land Rights* Peterson, N and Langton, M (eds) Australian Institute of Aboriginal Studies 1983, p 111.

[15] See for example Rose, sub 36.

[16] Weiner, J F "Anthropologists, historians and the secret of social knowledge" in *Anthropology Today* Vol 11 No 5, October 1995, p 5.

[17] Weiner, J F "Anthropologists, historians and the secret of social knowledge" in *Anthropology Today* Vol 11 No 5, October 1995, p 6.

[18] Weiner, J F "Anthropologists, historians and the secret of social knowledge" in *Anthropology Today* Vol 11 No 5, October 1995, p 6, citing Keen, I *Knowledge and Secrecy in an Aboriginal Religion* Oxford UP 1994.

Bell also makes the point that sites do not exist in isolation from other sites in the area; "indeed their significance lies partly in the web of interrelations with other sites and the way in which men, women and children are drawn together in their use and maintenance".[19]

Failure to respect restrictions undermines Aboriginal culture

4.111 Against this background, requiring Aboriginal people to make restricted knowledge public, either to non-Aboriginal people or to other Aboriginal people, undermines the complex web of traditional social relationships. Submissions support this view:

> Adequate notification of sites/areas locations and issues surrounding individual areas may go against customary law and cause serious problems with the community.[20]

Because restrictions on knowledge play such a key role in sustaining the continuity of social, kin, and country relations in time and space, Rose states that "this nation cannot afford to deal inappropriately with this issue".[21]

Heritage will be lost unless information is secure

4.112 Aboriginal people will be reluctant to seek protection for their cultural heritage or put information before a reporter if the customary law restrictions on that information are not respected.[22] A number of submissions commented on the damage to Aboriginal confidence in heritage protection laws caused by the failure to respect restricted information in the Hindmarsh Island (Kumarangk) case. Without respect and security for information relating to the significance of sites, Aboriginal people may let their sites be destroyed. This is one reason why requiring restricted information to be produced in court is not in the public interest.[23] In other cases, Aboriginal people will only decide to give information at the last minute when there appears to be no other way to secure protection. It is not in the interests of Aboriginal people or the Australian community generally that important Aboriginal sites are damaged or destroyed because of the failings of the legal system. It is not in the interests of miners or developers that they are not informed about the existence of a site or area of significance which needs protection until the project is well advanced and changes are difficult and expensive to make.

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[19] Bell, D "Sacred Sites: The Politics of Protection" in *Aborigines, Land and Land Rights* Peterson, N and Langton, M (eds) Australian Institute of Aboriginal Studies 1983, p 287.

[20] Nayutah, sub 20; CLC, sub 47.

[21] Rose, sub 36.

[22] See for example, KLC, sub 57, p 6.

[23] See Willheim, E "Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs" (Case Note) in *Aboriginal Law Bulletin* Vol 3 No 69 August 1994.

Maintaining customary law restrictions on information and knowledge is the Aboriginal way of protecting and caring for an area, site or object

4.13 Secrecy and significance are inextricably linked. Information and knowledge about important or sacred Aboriginal sites is by its nature restricted. The restricted knowledge is part of the substance of the site and its traditions. A key obligation of a person who is responsible for caring for and protecting the site is to protect and keep restricted knowledge about it.

> One of the major difficulties that Anangu face when attempting to convince Europeans of the seriousness of these areas of the Law is that the entire body of information concerning why some things and some actions are 'dangerous' is restricted, in other words secret. Those things, those actions, together with the knowledge of what they mean is, to us, *miilmiilpa*, in English 'sacred'. One of the responsibilities of *nguraritja* for country is to safeguard knowledge about it and ensure that it remains restricted.[24]

4.14 An anthropologist working with Arrernte people at Alice Springs discussed the reasons why in the case of a planned development in the area Aboriginal people did not reveal information about their sites until the bulldozers were moving in. She says that Aboriginal people prefer to protect their sites themselves. Although Aboriginal people made a steady stream of statements concerning the existence of sacred sites in the area it was not complete. She says:

> ... custodians of sites only divulged as much as they thought necessary to impress the outsider with the importance of the area ... It was not that they had set out to thwart development by withholding information in a capricious fashion but rather that, in accordance with their law, they were protecting sites by not disclosing their whereabouts because no direct threat was perceived.[25]

4.15 From the Aboriginal point of view then, the key to protecting their significant sites and areas is maintaining the customary laws about information and knowledge about the site. This Aboriginal view of protection therefore must be the starting point for any law which aims to protect areas, sites and objects significant to Aboriginal people according to their traditions.

KINDS OF RESTRICTIONS ON INFORMATION AND KNOWLEDGE

Matters that should not be made public

4.16 The customary law restrictions on information can take a range of forms:

> Under traditional law, custodians are obliged not to disclose certain categories of information to certain categories of people, and in other cases, custodians are obliged to refuse to divulge details of their ownership of sites and information pertaining to them.[26]

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[24] NPYWCAC, sub 29.

[25] Bell, D "Sacred Sites: The Politics of Protection" in *Aborigines, Land and Land Rights* Peterson, N and Langton, M (eds) Australian Institute of Aboriginal Studies 1983, p 288-289..

[26] CLC, sub 47, p 17.

Individuals and the hierarchy of knowledge

4.17 A number of writers and submissions point out that not every person with traditional links to land can speak with equal knowledge and authority concerning his or her country.[27] Neate makes the point that local rules govern who can speak and what they can speak about. He also says that there are reasons why people who do have knowledge may not wish to speak about it. Willingness to speak may depend on the context. For example, a person may feel unable to speak in the presence of other people who stand in certain kinship relationships or may be subject to a 'speech ban' following a related person's death. They may wish to leave the talking to another who is more senior in the hierarchy of knowledge, or who is of the other gender, and so is the proper person to ask.[28] Neate warns of the danger of falling into the trap of asking for information from younger people who are likely to be the most articulate in English and appear to be the most relaxed in proceedings. He says:

> While this may be the most convenient approach ... it may give rise to embarrassment for the witness and result in incomplete or inaccurate answers being given. Younger men and women do not know the content of the secret law and it is extremely inappropriate to ask questions bearing on it. Their perceptions of the operation of that law differ from those of the senior people whose understanding is based on fuller knowledge.[29]

Gender restrictions

4.18 Increasing attention is being given to the separate spiritual life of women, and to the important role that women play with men in jointly observing the law that has come from the Dreamtime. Although they may share knowledge, men and women may have distinct and separate responsibilities for the ritual maintenance of this heritage.[30] Although women and men know much of each other's ritual business, it is not for public discussion or acknowledgment. Constraints on communicating information in a public setting may vary from women's feelings of inhibition about

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[27] See for example Neate, Graeme "Indigenous Land Law and Cultural Protection Law in Australia: Historical Overview and some Contemporary Issues" Paper delivered to ATSIC-AGS Legal Forum 18 May 1995, p 52.

[28] Neate, Graeme "Indigenous Land Law and Cultural Protection Law in Australia: Historical Overview and some Contemporary Issues" Paper delivered to ATSIC-AGS Legal Forum 18 May 1995, p 52.

[29] Neate, Graeme "Indigenous Land Law and Cultural Protection Law in Australia: Historical Overview and some Contemporary Issues" Paper delivered to ATSIC-AGS Legal Forum 18 May 1995, p 53.

[30] Bell, D *Daughters of the Dreaming* 1983, p 34.

speaking about the care of sites in front of a large number of men to more formal restrictions where information is particularly secret or sacred.[31]

> Men and women's business must be kept separate. No man should be able to view any information pertaining to women's business and have no rights to determine issues relating to protection or management of women's sites. The same can be stated for men's sacred business, no women should be allowed any information on these places or objects or have the authority to determine management. ... If information is written down it must not be seen by the opposite gender.[32]

4.19 Wootten comments that since Aboriginal women can, under traditional law, discuss some issues only with women, just as Aboriginal men are gender-bound in respect to certain kinds of information, non-Aboriginal people who wish to discuss matters with Aboriginal people must ensure that consultants of the appropriate gender are engaged.[33] The reliability of a report from a female departmental representative about the significance of an area in a male initiation ritual was a factor in the Broome Crocodile Farm Case.[34]

Sanctions for revealing restricted information

4.20 Aboriginal communities may impose serious punishments on a person who breaches customary law restrictions on secret or sacred information. This may include total social isolation.[35]

STANDARDS FOR RECOGNISING CUSTOMARY RESTRICTIONS ON INFORMATION

There should be standards

4.21 If heritage protection laws are to meet the needs and expectations of Aboriginal people, they should respect and recognise customary law restrictions on information which are an essential part of the culture which they aim to protect. There should be standards for this. Both State and Territory law and Commonwealth laws should comply with them. The way the Commonwealth complies may not be exactly the same as State and Territory law because the Commonwealth law operates as a last resort.

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[31] Neate, Graeme "Indigenous Land Law and Cultural Protection Law in Australia: Historical Overview and some Contemporary Issues" Paper delivered to ATSIC-AGS Legal Forum 18 May 1995, p 55.

[32] Nayutah, sub 20.

[33] Wootten *Junction Waterhole (Niltye/Tnyere-Akerte)* s 10 report, p 31.

[34] See Chaney *Broome Crocodile Farm* s 10 report, p 46.

[35] See for example Bell, D "Sacred Sites: The Politics of Protection" in *Aborigines, Land and Land Rights* Peterson, N and Langton, M (eds) Australian Institute of Aboriginal Studies 1983, p 282

Standard 1

Heritage protection laws should respect Aboriginal customary law restrictions on the disclosure and use of information about Aboriginal heritage.

4.22 The law should not require Aboriginal people to break customary law in order to protect their sites. On the contrary, the starting point of laws protecting heritage should be respect for the customary law restrictions on the knowledge and information that underpins the significance of the heritage site. The *Native Title Act 1993* (Cth) includes provisions to this effect.[36] Without that respect, laws aiming to protect heritage are more likely to destroy than protect. Part of the traditional significance of an area, site or object may depend on the restrictions on knowledge and information about it. If it is a condition of protection that people must reveal secret knowledge in these circumstances, this may reduce or destroy the significance of the area or object and thereby destroy its value as cultural heritage. In addition, the requirement to reveal information undermines Aboriginal social relationships and the credibility of customary law. It may expose Aboriginal beliefs to public trivialisation or accusations of fabrication by people who do not understand them and who cannot recognise that there may be value systems other than their own. Aboriginal people will be reluctant to seek protection of the law in some circumstances.

Protection is not a gift

4.23 It has been suggested that protection is benefit, in exchange for which Aboriginal people must reveal secret information.[37] However, there is no doubt that all Australians benefit from Aboriginal culture in terms of identity and also economically, for example, from tourism. Our national airline uses Aboriginal motifs on its aircraft to promote itself and our country. The Northern Territory relies substantially on Aboriginal culture to attract tourists. Protection is not a gift to Aboriginal people; it recognises and respects their right to enjoy their own culture and religion. It is unfair if society widely uses Aboriginal culture when it suits commercial goals of business and tourism (including, for example, the promotion of the Olympics) but is unwilling to protect Aboriginal culture when it appears to conflict with these interests.

[36] The *Native Title Act 1993* (Cth) requires the Federal Court and the Tribunal, in conducting inquiries or proceedings to take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, s 82(2), s 109 (2). It also provides that the Court and the Tribunal are not bound by technicalities, legal forms or rules of evidence, s 82(3), s 109(3).

[37] Eg, Palyga, subs 1 and 31; Burchett J in *Tickner v Chapman* (1995) 57 FCR 451.

Standard 2

Procedures under heritage protection laws should minimise the amount of information Aboriginal people need to give about significant areas or sites to ensure protection and avoid injury or desecration.

4.24 The best way to respect customary law and to avoid the need for stringent protection is to minimise the amount of information Aboriginal people need to provide to achieve protection, for example by using work clearance, rather than site identification.

Heritage distinguished from land rights

4.25 Some cases[38] and submissions[39] have suggested that revealing restricted information about a site or area is essential if Aboriginal people want the protection of the general law. Comparisons have been drawn with land rights claims and the way restricted information is handled there.[40] In the case of land rights and native title these claims are "intimately concerned with the verification of sacred sites" and the claims may have to be tested by inquiry.[41] In these cases title to land is at stake. Heritage protection, however, does not directly affect ownership rights. It may result in protection for a site or object or, more likely in the case of a site or area, negotiated development. Different procedures than those applying to land rights, or native title cases, are justified, provided the rules of procedural fairness are respected.

Existence of secret knowledge is the issue

4.26 If significance of a site, area or object is to be assessed, the emphasis should be on establishing the existence of sacred knowledge and restrictions which may in themselves be relevant to the issue of significance, rather than on extracting all the relevant details about why the site or object is significant.[42] Revealing the details of a sacred story associated with a site does little to help non-Aboriginal people, or even Aboriginal people not from the area, assess the significance of the a site.

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[38] See for example *Tickner v Chapman* (1995) 57 FCR 451 at 478-479; (1995) 133 ALR 226 at 254, per Burchett J.

[39] AMEC, sub 48, p 24-25; Palyga, sub 32, p 20.

[40] Palyga, sub 32 p 20.

[41] Woodward J in *Aboriginal Sacred Sites Protection Authority v Maurice: Re the Warumungu Land Claim* (1986) 10 FCR 104 at 115.

[42] See for example ALRM, sub 11; ATSIC, sub 54; Consultations in South Australia with PWYRC.

Standard 3

The laws and related procedures must ensure that customary law restrictions on information received for the purpose of administering heritage protection laws or received in related proceedings are respected and observed.

4.27 Where Aboriginal people provide information about their areas, sites or objects which is secret and subject to customary law restrictions such as age, gender or more general restrictions, legislation and related legal and administrative procedures should provide as much protection as possible to ensure that those restrictions are observed and the wishes of the Aboriginal people about what should happen to the information are observed. This principle should underlie all aspects of heritage law, and also apply to other laws that have an impact on Aboriginal heritage. A discussion paper on *Evidence of Aboriginal Gender-based secret material in land rights claims* sets out one approach to this issue.[43] Restricted information should not be publicly available. For example, it should not be available for release under Freedom of Information legislation.[44] Before Aboriginal people provide restricted information, they should be informed about the circumstances in which the receiver of that information may be required to disclose the information to any other person. That is, they should be informed of the extent to which customary restrictions will be able to be maintained in future and the uses to which such information might be put. The law should limit to the minimum possible the circumstances in which such information may be required to be disclosed.[45] There should be offences for unauthorised disclosure. Information of this sort provided in the course of mediation or negotiation should also be protected. Legislation should ensure respect for customary law restrictions on information provided during legal proceedings related to heritage protection.

Standard 4

Heritage protection legislation should specifically provide that a claim for public interest immunity may be made for restricted information.

[43] Gray, Justice Peter (Aboriginal Land Commissioner) *Evidence of Aboriginal Gender-based Secret Material in Land Rights Claims: Discussion Paper* 1995. The *Aboriginal Land Act 1991* (Qld) has provisions dealing with this issue.

[44] *Freedom of Information Act 1992* (Qld) s 42(1)(j) provides for non-disclosure of information which could reasonable be expected to prejudice the well-being of a cultural resource.

[45] See for example, the *Senior Report* (pp 115-116): it recommends that in certain circumstances the Minister not be entitled to sacred or secret information. See also the *Aboriginal Heritage Act 1988* (SA), which requires the Minister to consult before he or she authorises the disclosure of information contrary to Aboriginal tradition: s 35(2).

4.28 In some cases the courts have accepted the argument that the production of secret and confidential information about Aboriginal heritage is not in the public interest.[46] In another case, while it was recognised that it should be open to the heritage authority (in that case, the NT Aboriginal Sacred Sites Protection Authority) to claim public interest immunity in resisting an order for production of documents concerning sacred sites, that claim had to be weighed against other public interest issues and would not necessarily prevail.[47] Justice Woodward said that:

> In my opinion, the proper protection of minority rights is very much in the public interest, as is respect for deeply held spiritual beliefs. In particular, the rights and beliefs of the Aboriginal people of Australia should be accorded a special degree of protection and respect in Australian courts. Thus I can well imagine a court finding on balance, for example, that the outrage in the Aboriginal community caused by forced disclosure of information about a sacred site, would outweigh the importance in that particular criminal or civil triall of precisely identifying the place or explaining why it was sacred.[48]

4.29 This is known as the 'public interest immunity' argument. In the case in question the Full Court upheld the Commissioner's findings that the detriment of disclosure was in the circumstances outweighed by the detriment to the public interest of non-disclosure and that disclosure on a restricted basis should be permitted. The law should provide that, if courts are considering requiring the disclosure of information contrary to customary law restrictions, the holders of such information should be able to argue that it is contrary to the public interest to disclose that information. The onus should be on the person seeking to have the information produced to establish that the public interest in disclosure outweighs the public interest in protecting the confidential information.

RECOMMENDATIONS:
STANDARDS FOR PROTECTION OF INFORMATION
State, Territory and Commonwealth heritage protection laws should meet standards for protecting restricted information:

4.1 Heritage protection laws should respect Aboriginal customary law restrictions on the disclosure and use of information about Aboriginal heritage.

4.2 Procedures under heritage protection laws should minimise the amount of information Aboriginal people need to give about significant areas or sites to ensure protection and avoid injury or desecration.

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[46] *The Western Australian Museum v The Information Commissioner* (Supreme Court of WA, unreported, No 1478 of 1994 and SJA 1055 of 1994 delivered 28/1/94, per White J). See also ATSIC, sub 54; MNTU, sub 17; Baldwin Jones, sub 18.

[47] See for example *Aboriginal Sacred Sites Protection Authority v Maurice: Re the Warumungu Land Claim* (1986) 10 FCR 104.

[48] See eg *Aboriginal Sacred Sites Protection Authority v Maurice: Re the Warumungu Land Claim* (1986) 10 FCR 104 at 114.

4.3 The laws and related procedures must ensure that customary law restrictions on information received for the purpose of administering heritage protection law or received in related legal proceedings are respected and observed.

4.4 Heritage protection legislation should specifically provide that a claim for public interest immunity may be made for restricted information.

CHAPTER 5:

EFFECTIVE INTERACTION WITH STATE AND TERRITORY LAWS

> The key role in indigenous policy must be played by national governments. Sub-national (eg State, provincial territory) authorities around the world are invariably reluctant to act unless and until forced to do so by national bodies.[1]

5.1 This chapter deals with the interaction between Commonwealth laws and the laws of the States and Territories. Its focus is on State and Territory laws as the primary protection of heritage and on the problems that arise for the Commonwealth, for Aboriginal people and others where those laws do not provide effective protection, and where there is duplication and delay due to lack of clear procedures at State, Territory and Commonwealth level. It asks what can be done by the Commonwealth to encourage more effective State and Territory laws, by developing minimum standards and by introducing accreditation and recognition procedures. It also discusses other steps to be taken by the Commonwealth to improve the interaction between Commonwealth laws and processes and those of the States and Territories.

ROLE OF STATE AND TERRITORY LAWS

5.2 The terms of reference ask the Review to consider the effectiveness of interaction between Commonwealth and State and Territory indigenous heritage protection legislation. One of the objectives of the review process has been to seek greater co-operation between Commonwealth and State and Territory Governments in addressing indigenous heritage issues.

The Act preserves State and Territory laws

5.3 The 1984 Act was introduced to provide a remedy of last resort, when State and Territory laws are not effective to protect a site or area from the threat of injury or desecration. When the Bill was introduced into Parliament in 1984 it was explained that State laws would operate concurrently with the Commonwealth Act wherever possible:

> The Commonwealth is not attempting to cover the legislative field in this area of heritage protection. The Bill expresses an intention not to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with it. In practice the Commonwealth sees this as legislation to be used as a last resort. The processes for the making and continuation of declarations will ensure

[1] Jull, P *A Sea Change: Overseas Indigenous-Government Relations in the Coastal Zone* 1993, p5.

> that full recognition will be given to relevant State and Territory laws, and co-operation will be sought from State and Territory Governments.[2]

In keeping with this objective, the Commonwealth Act requires that the Minister consult the State or Territory Minister as to whether the laws of the relevant jurisdiction provide effective protection of the area or object in question before making a declaration under the Commonwealth Act.[3] The basis of the Commonwealth Act is that primary protection will be provided under State and Territory laws.

Balance to be maintained

5.4 The Review has proceeded on the basis that the primary role of State and Territory laws is to be maintained, with the Commonwealth law continuing to act as a last resort mechanism. Most submissions did not challenge the respective roles of State/Territory and Commonwealth laws in heritage protection,[4] though almost universally they wanted the interaction of those laws to be improved,[5] areas of overlap to be clarified, and better co-operation between the State level and the Commonwealth level.

> It is accepted that there also needs to be an established mechanism for co-operation between State and Commonwealth agencies providing for referral of a matter under the Commonwealth Act (where necessary) after procedure under the relevant State legislation has been completed.[6]

Primary role of State and Territory laws

States and Territories manage land use

5.5 The main threat to Aboriginal cultural heritage (areas) comes from development and other changes in land use, for example, mining, building, agricultural or grazing purposes. Land management is the primary responsibility of the States and Territories and is governed by State and Territory laws about planning, development and land use, not by Commonwealth laws.

Heritage protection should be part of planning process

5.6 The most effective way to protect Aboriginal cultural heritage would be to integrate consideration of heritage issues in the planning process, alongside issues such as the environment and general heritage. In principle, States and Territories are better placed than the Commonwealth to ensure that Aboriginal

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[2] Hansard, 9 May 1984, 2131: see Annex II. Section 7 provides for concurrent operation. On the effect of s 7 see NSWALC, sub 43, p5.

[3] Section 13(2), (4) and (5). A declaration under the Commonwealth Act is to be revoked if the State or Territory law makes effective provision for the protection of an area.

[4] VicG, sub 68.

[5] AMEC, sub 48, p18.

[6] WAG, sub 34.

concerns about significant areas and sites are taken into account in the planning and development stage and to enforce compliance with heritage protection laws.

> In practice, site protection issues involve diverse matters many of which turn on the details of highly particular, local contexts. An agency organised at the national level would find it difficult to sustain the required grasp of local detail. The primary legislative responsibilities for Aboriginal sacred site protection should remain with the States and Territories.[7]

> The key policy and planning processes impacting on Aboriginal heritage are State focused issues, for example, resource and land management, the management of cultural property and infrastructure development. The States are best placed to give Aboriginal heritage an appropriate place in policy and planning processes.[8]

Concerns about State and Territory laws

Lack of effective protection

5.7 Virtually all submissions from the Aboriginal community complaineed of the inadequacy of State and Territory laws to protect their heritage. Analyssis of the heritage protection laws of the States and Territories[9] shows that there are wide differences in the laws and procedures, and in the level of protection provided. The deficiencies most often complained of, and which are apparent in several jurisdictions, are these:

- Some protection regimes have 'relics' based definitions of heritage aand narrow objectives, linked to scientific purposes.[10]

- Several States do not incorporate Aboriginal heritage protection in legislation governing the planning and development process, or establish appropriate procedures of consultation, negotiation or disppute resolution.[11] As a result, developers destroy sites of whose existence they are ignorant.[12]

- Few States/Territories recognise Aboriginal self-determination in regard to their control over or involvement in heritage protection.[13] Few SStates have independent bodies constituted by Aboriginal people to assess sites and play a role in site protection. Where Aboriginal heritage bodies are

[7] AAPA, sub 49, p13.

[8] SAG, sub 65, p3.

[9] Annex VIII.

[10] Rose, sub 46; AAA, sub 61.

[11] du Cros, sub 17, pp9-10; Cribb, sub 23; AAA, sub 61; White, sub 22; Qld consultations.

[12] Hofman, sub 4.

[13] Cribb, sub 23; Rose, sub 46; FAIRA, sub 51; Goolburri, sub 13.

established, they may have inadequate powers and insufficient resources to carry out their tasks independently.[14]

- Legislation does not protect Aboriginal beliefs, customs and traditions.

- Confidential information is not protected from inappropriate disclosure in several States. The Commonwealth Act in particular authorises the Minister to inquire into the validity of indigenous beliefs[15]

- Heritage protection laws are not effectively enforced.[16]

- There is no provision for the recognition of agreements between Aboriginal custodians and developers/land owners, and no mechanisms to encourage agreements.

- Laws do not ensure that the wishes of traditional custodians are taken into account when decisions are made concerning protection of areas and sites. Those decisions depend to a great extent on political considerations.

Changes in practice

5.8 There have been changes in the practice and procedures adopted by some States and Territories to overcome the gaps in their legal protection.[17] Links have been established between heritage and planning and environmental processes so that the current procedures need to be understood to measure the levell of protection, as well as legislation. These procedures sometimes involve consultation processes to seek the views of Aboriginal communities about activities and developments which may affect Aboriginal sites.[18] The Review was informed of proposals which would, if implemented, affect the constitution of Aboriginal heritage bodies in Western Australia and South Australia and improve their effectiveness. But these changes have not yet been incorporated in legislative measures. Because of the developments mentioned, the level of legal protection in some States is difficult to assess. Nevertheless the consistent pattern of submissions from the Aboriginal community was that the laws are inadequate and in some cases they were seen as diiscriminatory.[19]

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[14] *Senior Report*, p187, points out that resourcing is a key factor.

[15] Goolburri, sub 13; Grabb and Mancini, sub 14.

[16] FAIIRA, sub 51.

[17] These are noted in *Impact Evaluation*, p9.

[18] Rose, sub 46, mentions the appointment of cultural officers by Aboriginal communities to work with organisations, such as Telstra.

[19] Goolburri, sub 13.

Lack of uniformity

5.9 There are great differences in the level of legal protection provided by State and Territory laws. They do not conform to a single pattern, either as regards their subject matter (what is protected) or as regards their procedures and mechanisms. This causes problems to some Aboriginal communities whose sites run across borders.[20] It also makes the level of legal protection difficult to assess.

EFFECT ON INTERACTION WITH COMMONWEALTH LAW

Commonwealth law is necessary as a last resort

5.10 The problems encountered in the application of State laws mean that there is a continuing need for the Commonwealth legislation to provide a final recourse where State and Territory laws fail to provide adequate protection of Aboriginal cultural heritage.[21] It would not only show a total disregard of Aboriginal concerns to remove the protection of the Commonwealth law from cultural heritage, it would also leave the protection of that heritage to State and Territory laws which are inconsistent and in need of reform.

Resort to Commonwealth law increased

5.11 Ineffective State protection also places a greater burden on the Commonwealth Act. Its 'last resort' approach depends on the existence of an appropriate primary level of protection. If that primary level of protection is ineffective or uncertain, resort may be had to the Commonwealth Act, in effect, to replace the State or Territory regimes. As submissions pointed out, the failings of State laws contribute to the problems of interaction.

> Problems with interaction between State or Commonwealth Acts is in large measure a consequence of inadequate State Acts. The current Federal legislation operates with the heterogeneous schemes applying to Aboriginal sites and heritage in different States and Territories. In this context, the Federal scheme becomes more an additional agency for site protection than an agency of last resort for custodians.[22]

> The diversity of the laws, and the inadequacies of both laws and procedures mean that a greater burden falls on the Commonwealth process and that the parties concerned undergo additional delays and costs.[23]

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[20] WA consultations; CLC sub 47, p18 calls for a single regime to deal with this.

[21] This is strongly supported by ATSIC, sub 54, pp3, 7-8; and KLC sub 57.

[22] AAPA, sub 49, p13.

[23] ATSIC, sub 54, p4: the main concern is the ineffectiveness of State and Territory government legislation and processes.

Sources of applications

5.12 It should be noted that applications under the Commonwealth Act are far more frequent from some States than from others. The great majority of matters have come from three States: NSW, Queensland and Western Australia. However, when the proportion of the Aboriginal population is considered in relation to the number of applications it appears that Western Australia and Queensland are somewhat over-represented. The sources of applications, by State are outlined in the following table.

State/Territory	Areas subject to applications	per cent of Aboriginal people
Queensland	33	26
New South Wales	28	27
Western Australia	21	16
South Australia	8	6
Northern Territory	6	15
Tasmania	2	2
Victoria *	1	6
ACT	-	1
Total	99	100

* In Victoria there are legal obstacles to the use of the Commonwealth Act.

OTHER INTERACTION PROBLEMS

Potential for political clashes

5.13 The impact of the Commonwealth Act on Commonwealth/State relationships has given rise to a number of political differences.[24] Since, in practice, applicants are expected to go through the State process before applying to the Commonwealth, most applicants seeking action at Commonwealth level have not been satisfied by the State or Territory process.[25] The Commonwealth is asked to take a view different from that taken by the State or Territory government and, in effect, to override State law. The potential for

[24] *Senior Report*, p194. The decision is inherently political: Goldflam, Russell "Between a Rock and a Hard Place: The Failure of Commonwealth Sacred Sites Protection Legislation" in *Aboriginal Law Bulletin* Vol 3 No 74 June 1995.

[25] *Interaction* 16.

both legal and political clash is obvious.[26] State and Territory Governments have expressed concern that their decisions are subject to 'appeal' to the Commonwealth Minister. As the Federal Court said:

> ... it was intended by the legislation to allow the Commonwealth Minister to intervene to protect a site in a case in which he or she takes a view of the relevant public and private interests different from that taken by the State Minister.[27]

The *Broome Crocodile Farm* case and the *Hindmarsh Island (Kumarangk)* case are examples of open political conflict between the Commonwealth and the States on heritage issues. The case of the *Old Swan Brewery* was marked not only by Commonwealth/State conflict but also by political conflict within the State. The existence of the Commonwealth last resort safety net and the political nature of the exercise of discretion make conflict of this kind inevitable. Reforms should aim to reduce the potential for such conflict.

Delays, costs and divisiveness

5.14 Other interaction problems arise from the actual processes under the Commonwealth Act. Procedural and other inadequacies of the Commonwealth law, and unclear, uncertain boundaries between the State and Territory process and the Commonwealth process have caused delays and other problems for applicants, developers and the States. The potential for duplication of procedures is seen by some as divisive and as having potential to create hostility between Aboriginal communities and landowners /developers.[28] The availability of a further process under the Commonwealth Act can extend the time for approving development and adds to the cost.[29] Matters may go to court, which compounds these difficulties.[30]

RECOGNITION OF INTERACTION PROBLEMS

One Nation

5.15 The need for a review of the interaction between Commonwealth State and Territory laws protecting Aboriginal cultural heritage has been a matter of concern for some time.

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[26] AAPA, sub 49, pp8-9 refers to the political context of the decision. Finlayson, sub 40, points to political volatility and political tensions.

[27] *Tickner v Bropho* (1993) 40 FCR 183 at 224; (1993) 114 ALR 409 at 450, per French J. He observed that the decision is of a political character and "subject to compliance with the requirements of lawfulness, fairness and rationality, is not amenable to judicial intervention". Carr J endorsed the views of French J in relation to the character of the Minister's decision: *State of Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 37 ALD 633 at 659.

[28] WA consultations.

[29] AMEC expressed concern about cost and delay, not so much about protection: WA consultations.

[30] Palyga, sub 1, complains that claimants have "two bites of the cherry" and calls for a single process.

> The Prime Minister suggested in his *One Nation* statement of 26 February 1992 that there was scope for improved integration of State/Territory and Commonwealth decision making in this area. He indicated that the Government would initiate action to obtain intergovernmental agreements on the joint development of co-operative mechanisms to streamline the process for assessment of Aboriginal heritage concerns. There was a very poor response from the States and Territories to this Commonwealth proposal.[31]

Im the second reading of the Native Title Bill, in 1993, the Prime Minister said that the Commonwealth would over the next two years review heritage protection laws and ask the States and Territories to do the same.[32]

The Interaction Working Party

5..16 The Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA) recognised the need for close co-operation on these issues when it set up a Working Party of officers in 1994. The terms of reference of the Working Party covered the interaction of the Commonwealth Act with State and Territory laws and the development of a national framework of standards and processes for adoption as a bilateral agreement. This was to be done in consultation with Aboriginal and Torres Strait Islander communities. The Review notes, however, the concern of Aboriginal organisations and communities that they so far have been excluded from participation in that process.[33]

Examination of State and Territory laws recommended

5..17 The Report of the Working Party recommends that a detailed examination of the relevant legislation within each jurisdiction be undertaken, taking into account the agreed national framework of guidelines, principles and processes outlined in the report (referred to in this report as 'the Guidelines').[34]

Action contemplated by some States

5..18 Some States have been working on the reform of their heritage protection laws. A major report on the reform of Western Australia law by Clive Senior was made available to the Review.[35] New South Wales has a current review process, based on the Report of a Ministerial Task Force in 1989;[36] this may lead to reform of its laws. South Australia has informed the

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[31] ATSIC sub 54, p8.

[32] Hansard 119, col 2882. See Annex II.

[33] CLC, sub 47, p23.

[34] The Report was presented to the meeting of Aboriginal and Torres Strait Islander Affairs Ministers, 20 October 1995.

[35] *Senior Report.*

[36] NSW Ministerial Task Force on Aboriginal Heritage and Culture *Report on Aboriginal Heritage and Culture* 1989.

Review, in a late submission, that it intends to introduce a Bill to reform its legislation later in 1996.[37] The Bill would lie on the table for consultation for some months. Tasmania is expecting to publish a Discussion Paper in the near future.

Little information on contemplated changes

5.19 In none of the cases mentioned are the details of the Government proposals available to the Review. Few States and Territories have shown any great willingness to move forward on these issues during the period of this Review. For example, the discussion papers envisaged for NSW and Tasmania have not yet been published. There has been no indication as to whether the Western Australian Government will implement the Senior Report. There are as yet no proposals for reform in Queensland. Few States were able to provide the Review with an analysis of their laws against the Guidelines.[38] The projected meeting of the Working Party on Interaction which had been arranged during the Review was cancelled at short notice.

Need to encourage reform at State/Territory level

5.20 Reform of State and Territory laws is a necessary part of improving the system of heritage protection in which the Commonwealth Act plays the role of last resort. Improving State and Territory laws and procedures would help to increase confidence of Aboriginal people in the State and Territory protection system and reduce the need to invoke the Commonwealth legislation.

> The Land, Heritage and Environment Branch considers that the most effective long term strategy to reduce the recourse to the Commonwealth's Act is improving the confidence of Aboriginal people in State processes. The degree of change required to achieve more confidence differs from jurisdiction to jurisdiction.[39]

> We consider that this [greater co-operation] can be achieved primarily by State and Territory governments acting to improve their legal, administrative and decision making processes in relation to indigenous heritage protection in such a way that indigenous people will have greater confidence in using those processes rather than appealing to the Commonwealth.[40]

Co-operative measures should be the aim

5.21 Because of its national and international obligations to indigenous people, the Commonwealth has an obligation to take appropriate steps to ensure that State and Territory laws are as effective as possible. Its own laws should be reformed in a way that does not undermine State and Territory

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[37] SAG, sub 65.

[38] Victoria and the ACT were notable exceptions, although the submissions from Victoria and Queensland were too late for detailed consideration.

[39] *Interaction*, Appendix E p5.

[40] ATSIC, sub 54, p7.

processes or discourage their use. But at the same time it needs to be made clear that amending the Commonwealth Act in isolation will not achieve the goals of effective heritage protection. Ideally, the Commonwealth and the States and Territories would co-operate in establishing complementary regimes based on common standards and with consistent procedures.[41]

> From the number of applications received since the enactment of the Heritage Protection Act in 1984 it is evident that greater co-operation is needed between Commonwealth and State and Territory governments in addressing indigenous heritage issues if conflicts, such as the one at Hindmarsh Island, are to be avoided in future.[42]

> From the viewpoint of a resource company that operates nationally the ideal would be uniform law in all jurisdictions with the Commonwealth providing a safety net.[43]

5.22 The Commonwealth should actively encourage States and Territories to revise and up-date their Aboriginal heritage protection laws in accordance with agreed standards, so that they can fulfill their proper role as the primary means of protecting Aboriginal cultural heritage.

SUPPORTING THE DEVELOPMENT OF MINIMUM STANDARDS

Work in progress to establish minimum standards

5.23 The Working Party on Interaction had been asked by the Ministerial Council to report on "a national framework of guidelines to promote the co-operation of State, Territory and Commonwealth heritage legislation and decision making processes."[44] Its terms of reference asked it to:

> Develop and recommend a national framework of standards and processes for adoption as a bilateral agreement between States, Territories and Commonwealth for Aboriginal and Torres Strait Islander heritage decision making.

The consultations undertaken by this Review revealed that with few exceptions,[45] there was strong support for a reform of State and Territory laws

[41] SAG, sub 65, p3; NSWG, sub 55, p2; Jones, sub 6.

[42] ATSIC, sub 54, p 7.

[43] CRA, sub 9.

[44] *Interaction* p35, "Broad Guidelines for Aboriginal Heritage Legislation": these are reprinted in Annex VI.

[45] SAG, sub 65, p3, says that in view of the diversity of history, culture and identity of Aboriginal people, uniform national or state Aboriginal heritage legislation is not likely to be the most effective way to pursue protection objectives.

and for the adoption by the States and Territories of minimum standards.[46] The Guidelines of the Working Party are a first step in this process.[47]

Need to consult Aboriginal people

5.24 Discussions concerning Guidelines and model laws have, up to this point, been limited to the government administrators. The terms of reference of the Working Party called for involvement of the Aboriginal community in this process.[48] They should, as envisaged, play a leading role in developing the Guidelines and model laws.[49] It is understood that the Working Party will be replaced with a new committee comprising representatives from each Commonwealth, State and Territory agency administering indigenous cultural heritage legislation. Its objectives will be to recommend best practice and co-ordination of functions.

Commonwealth to contribute to and support this

5.25 The Commonwealth should contribute to the reform of State and Territory laws by actively supporting the process begun by the Working Party on Interaction to develop agreed minimum standards as the basis for model or uniform heritage protection laws. It should also ensure that Commonwealth law conforms with these standards.

RECOMMENDATION: REFORMING STATE AND TERRITORY LAWS

5.1 A goal of Commonwealth heritage protection law and policy should be the reform of State and Territory laws. This goal should be pursued by legal and political means.

RECOMMENDATION:
MINIMUM STANDARDS FOR STATE AND TERRITORY LAWS

5.2 The Commonwealth Government should support and encourage the process of developing, in consultation with State and Territory governments, the Aboriginal community, and other interested parties, agreed minimum standards as the basis for uniform or model laws on Aboriginal cultural heritage protection, for adoption by the States and Territories and by the Commonwealth, where relevant. Resources should be allocated to support this process.

Elements which should be incorporated in minimum standards are considered in the next chapter.

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[46] NSWG, sub 55, p4; FAIRA, sub 51, p22; AAPA, 49, p1; AHC, sub 52, attachment 2, p3. *Exploring for Common Ground* also made proposals for national standards: p32; Jones, sub 6; Goolburri, sub 13; ALSWA, sub 56.

[47] See Annex VI.

[48] See *Interaction*, p3, term 4: Ensure that appropriate representatives of the Aboriginal and Torres Strait Islander communities are involved in addressing the above issues, in particular formulating the recommended national framework of guidelines.

[49] Goolburri, sub 13 calls for this.

RECOGNITION AND ACCREDITATION OF STATE AND TERRITORY LAWS

Accreditation of State processes

5.26 The NSW Government submission drew attention to the Intergovernmental Agreement on the Environment of May 1992, which provides for the Commonwealth and the States to approve or accredit their respective environmental impact assessment processes and to give full faith and credit to the results of such processes when exercising their responsibilities.[50] In 1996 the Commonwealth agreed to change its administrative procedures to allow the accreditation of State processes which satisfy agreed requirements. Where a proposal is subject to assessment legislation of both the Commonwealth and a State or Territory, the normal means of assessment would be through a State assessment process accredited by the Commonwealth. The Commonwealth would retain final decision making for any accredited process. An analogy can be made with section 43 of the *Native Title Act*, under which the Commonwealth Minister may give effect to laws of a State or Territory dealing with the right to negotiate provided that the Minister is satisfied that those laws comply with specified standards.

How accreditation would work: deciding significance

5.27 Accreditation procedures could be adopted in the area of heritage protection. For example the question whether a site is significant according to Aboriginal tradition arises under both State law and Commonwealth law. Where that issue is substantially the same under State law as under the Commonwealth Act, and has been determined at State or Territory level by an approved process, it would be an unnecessary duplication for the question to be reconsidered by the Commonwealth. The minimum standard for such a decision might require that it be made by an independent, adequately resourced body constituted solely or almost exclusively by Aboriginal people nominated by and representative of Aboriginal communities. Where that standard is met and the criteria for the law are compatible with the Commonwealth standards, the Commonwealth could accept the decision on significance made by the State body. If an application were made for protection under the Commonwealth Act, the question for the Minister would then be limited to the balancing of competing interests in the exercise of an essentially political discretion.

Consistent with intentions of legislation

5.28 This approach would be consistent with s 7, which preserves the law of a State or Territory which is capable of concurrent operation, but would take it one step further by, in effect, adopting the State process for the purposes of the

[50] INSWG, sub 55. The Federal Minister should be able to recognise administratively the adequacy of State legislation thus removing the Commonwealth from the process in those jurisdictions.

Commonwealth Act. The proposal is in keeping with the original intentions of the Commonwealth legislation to encourage the reform of State and Territory laws.

> The Commonwealth wants to encourage States and Territories to use such legislation as they have in the interests of the Aboriginal and Islander people for whose benefit it was passed. Where that legislation is inadequate the Commonwealth will, through this legislation, encourage changes to be made.[51]

Recognition of this kind would be an added encouragement to States and Territories to bring their laws and practices into conformity with minimum standards.[52]

Support for bilateral approach

5.29 Accrediting State/Territory laws and processes would also be consistent with the "bilateral agreed joint approval processes" mentioned when the Working Party on interaction was established, and with the co-operative approach underlying that exercise.[53] It was supported in submissions.[54]

> Consideration could be given to accrediting State processes (in a similar manner to that contemplated under the Intergovernmental Agreement on the Environment) where State legislative mechanisms are capable of meeting Commonwealth requirements and obligations imposed under the Act. This may involve the development of State and Federal heritage agreements, or may require the development of a national agreement of Aboriginal heritage management principles ... [55]

Other options

5.30 Another option would be for the Commonwealth to refer an issue to the relevant State/Territory agency for determination if the matter comes to the Commonwealth before that agency has dealt with the issue. For example, the question of significance may not have been determined, or the Aboriginal persons with authority to speak for a site may need to be established. The Commonwealth could also recognise or accredit State/Territory consultation or mediation processes which met established standards. The possibility of referring matters to accredited State/Territory bodies would be an added incentive to reform State and Territory laws, and to establish Aboriginal cultural heritage bodies whose decisions could be recognised for the purposes of State and Commonwealth laws.

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[51] Hansard, 9 May 1984, 2132. See Annex II.

[52] AAPA, sub 49.

[53] *Interaction*, p3.

[54] CLC, sub 47, p24.

[55] NSWG, sub 55.

RECOMMENDATION: ACCREDITATION AND REFERRAL

5.3 The Commonwealth should accredit for the purposes of the Act determinations and procedures under State/Territory laws which comply with minimum standards. It should provide, where appropriate, for the referral of matters to State/Territory agencies or bodies which meet minimum standards.

RECOMMENDATION:
RECOGNITION OF DECISIONS ON SIGNIFICANCE

5.4 The Commonwealth should accredit or recognise for the purposes of the Act decisions concerning the significance of a site by State/Territory Aboriginal cultural heritage bodies that meet the required standards and which apply definitions comparable with the Commonwealth definition.

SHOULD THE COMMONWEALTH IMPOSE NATIONAL STANDARDS?

Calls to impose standards or to by-pass the States

5.31 Some submissions called for the introduction of Commonwealth laws which would operate as an alternative, rather than as a back-up, to State and Territory processes where they do not meet required standards. Others called for the Commonwealth to legislate to impose minimum standards of protection of cultural heritage which would override State and Territory laws which do not conform to those standards.[56] Another view, along similar lines, was that indigenous people should have the option to seek site protection under Commonwealth legislation without having first to employ deficient State/Territory legislation.[57] Indigenous peoples might use this option where they felt more comfortable with that than with the State process, especially in situations where they fear that the State government will not be impartial to a site protection request.

> Indigenous Peoples should be able to have a choice as to which process they feel would be most beneficial in achieving the protection of their site or object. This can be crucial where the State government have a direct interest in a development.[58]

It was suggested that comprehensive legislation of the kind proposed could be regarded as a special measure under the *Racial Discrimination Act*, and would be consistent with international instruments concerning the protection of religion and culture.

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[56] MNTU, sub 17, p7 calls for mandatory protection; ALRM, sub 11, p1; PWYRC, sub 12; Qld consultations; CLC, sub 47, p24; PC, sub 28, p 8; ALSWA, sub 56; NT consultations; *Recognition, Rights and Reform* para 6.20.

[57] *Recognition, Rights and Reform*, para 6.20; ATSIC sub 54, p8.

[58] FAIRA, sub 51.

Duplicating State processes

5.32 A difficulty with the proposal is that, unless the States co-operated by enacting complementary laws, the Commonwealth would have to set up comprehensive machinery to deal with all aspects of development where Aboriginal heritage was an issue. The Commonwealth would become the main regulator of that heritage; this would have wide ranging effects, not considered here.[59] Such a step has wide ranging effects

Commonwealth must seek alternative solutions

5.33 At this stage the proposals for the Commonwealth to take over primary responsibility for heritage protection must be considered incompatible with the role of the Commonwealth as a last resort mechanism in the protection of Aboriginal heritage. It would undermine efforts at greater co-operation and consultation on these issues. The fact that the suggestion has been put forward is, however, a measure of the frustration that many Aboriginal people experience under the current situation in several States. The Commonwealth must meet these concerns by finding more effective ways to negotiate with States and to encourage them to reform their legislation.[60] This is an urgent concern. The proposal for the Commonwealth to 'take over' should not be completely discounted in the longer term as a solution to the current difficulties if it ultimately proves impossible to gain the support of the States for necessary reform measures. The Commonwealth has a legal and moral responsibility to ensure that changes are implemented.

Imposing standards in particular areas

5.34 Although it is not recommended that the Commonwealth 'take over' primary responsibility for heritage protection, there are certain standards which the Commonwealth could implement directly in certain situations,, falling short of comprehensive heritage protection, to fill the gaps left by State and Territory laws. These are considered in the following chapter.

[59] CLC, sub 47, p18.

[60] Goolburri, sub 13.

CHAPTER 6:

MINIMUM STANDARDS FOR CULTURAL HERITAGE LAWS

6.1 This chapter deals with the minimum standards for State, Territory and Commonwealth laws and procedures dealing with the protection of Aboriginal cultural heritage. Those minimum standards should be the basis of the accreditation procedures recommended in the preceding chapter. Commonwealth legislation should also conform with these standards where they are relevant. Matters covered include: objectives of laws, definition of cultural heritage, protection regimes, site assessment, planning and development procedures, confidentiality issues, access to areas, effective enforcement and compensation.

Need for minimum standards

6.2 The objectives of national heritage protection policies cannot be met solely by reform of the Commonwealth legislation. That legislation needs to be complemented by State and Territory legislation which conforms to minimum standards of protection.[1] Uniform standards are necessary to avoid the Commonwealth Act being used as an alternative protection mechanism instead of as a last resort. They would be the basis of any scheme to accredit or recognise State and Territory laws. In the preceding chapter it is recommended that the Commonwealth Government should support and encourage the development of agreed minimum standards for Aboriginal cultural heritage protection as the basis for uniform or model laws in the States and Territories.

Elements of minimum standards

6.3 This chapter discusses some of the key elements which should form the basis of minimum standards. The Broad Guidelines for Aboriginal Heritage Legislation developed by the Interaction Working Party, which have been supported in principle by some participating States,[2] are drawn on as the basis for minimum standards.[3] The Report also draws on the legislative schemes now operating in the Northern Territory and the outline scheme recommended for adoption in Western Australia. In the discussion reference is made to the Overview and Summary of State and Territory Laws on Aboriginal Cultural Heritage, in Annex VIII.

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[1] AAPA, sub 49, p10.

[2] WAG, sub 34. The Aboriginal Affairs Department and Aboriginal Affairs Minister endorse the Broad Guidelines for Aboriginal Heritage Legislation [No 6], as presented by the Interaction Working Party.

[3] *Interaction*, p35; the Guidelines are in Annex VI.

Commonwealth law to conform

6.4 The minimum standards outlined in this Chapter should also be reflected in the Commonwealth Act where they are relevant to its application, bearing in mind that its objective is to provide a mechanism of last resort, not a comprehensive scheme to deal with all aspects of heritage protection. Aspects of Commonwealth law are discussed in later chapters.

WHAT SHOULD BE THE OBJECTIVES OF HERITAGE PROTECTION LAWS?

Protection of heritage to benefit Aboriginal people

6.5 The purpose of the Commonwealth Act is to protect areas and objects because of their significance to Aboriginal people.[4] To this extent it is a law for the benefit of Aboriginal people, though, of course, protecting Aboriginal heritage is also an important community purpose. The Commonwealth Act can be distinguished from some State and Territory laws which protect sites and relics because of their archaeological significance.[5] The stated purpose of legislation is an important statement of principle which is relevant to the interpretation of the Act and to questions such as standing.[6] It was submitted to the Review that the function of Aboriginal protection laws should be to:

> ... protect sites in the first instance in accordance with the requirements of custodians as the purpose of this kind of legislation is to recognise and prevent a specific form of harm, namely the form of harm arising to Aboriginal people in respect of their association with sacred sites.[7]

Another view was that heritage laws should be framed in such a manner as to constitute a special measure under the *Racial Discrimination Act 1975*. [8] They should be consistent with international law instruments concerning freedom of religion and cultural expression.[9] It should also be recognised that protection of Aboriginal heritage may also serve wider purposes in relation to national and world heritage.

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[4] 1986, p 2420, Hansard (see Annex II): the Act is intended to cover areas and objects of cultural or spiritual significance which Aboriginal and Torres Strait Islander people closely identify with today.

[5] They were introduced by the lobbying of archaeologists: AAA, sub 61; Rose, sub 36.

[6] In one case under the WA Act, the standing of Bropho was judicially doubted on the way to a finding that he had not been denied procedural fairness: (1991) 5 WAR 75 at 90-92; see also *Onus v Alcoa Aust Ltd* (1981) 149 CLR 27, in which standing was accorded to Aboriginal people to enforce the Victorian Act.

[7] AAPA, sub 49, p14.

[8] CLC, sub 47, p25.

[9] CLC, sub 47, p 25.

Principle: laws should benefit Aboriginal people and society

6.6 The principle and purpose which should be reflected in all Aboriginal cultural heritage laws is that those laws are intended to benefit Aboriginal people, and in doing this, to benefit the whole society.[10]

WHAT SHOULD BE PROTECTED: DEFINING ABORIGINAL CULTURAL HERITAGE

Definitions of heritage not uniform

6.7 At present State and Territory laws have quite different definitions of Aboriginal cultural heritage. Some laws, including the Commonwealth, protect areas and sites which are significant in accordance with Aboriginal tradition.[11] The laws of other jurisdictions have definitions which are narrower, at least in their application, and which focus on relics or do not give weight to Aboriginal values.[12] Some laws fail to recognise that areas and sites of contemporary Aboriginal significance should be protected.[13] Some Aboriginal people have applied for protection under the Commonwealth Act because a particular site did not fall within the definition of the State law.[14] This is an area where the Review considers that the Commonwealth Act should be the basis for a minimum standard.

Scope of the Commonwealth Act

6.8 The Commonwealth Act protects from injury or desecration areas (and objects) that are of particular significance to Aboriginal people in accordance with Aboriginal tradition:

> 'Aboriginal tradition' means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships; (s 4)

The particular significance of a site may derive from its sacred qualities and also from its legal status, in terms of traditional Aboriginal law. It is generally considered that the Act has a broad coverage in regard to areas and that it brings in contemporary Aboriginal values which are part of their evolving traditions.[15] The Guidelines of the Working Party favour a definition based on contemporary Aboriginal traditions on the lines of the Commonwealth Act.[16]

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[10] compare *Senior Report*, p51.

[11] The Northern Territory, South Australia, Victoria (Part IIA) and the ACT have definitions comparable with that of the Commonwealth.

[12] NSW, Queensland, Western Australia and Tasmania.

[13] AAPA, sub 61.

[14] for example Harding River Dam (WA); Century Zinc (Qld).

[15] NSWALC, sub 43: the definitions are broad enough. *Interaction*, pp24 ff.

[16] *Interaction*, p35, para 6.1.

> Protection under the Act shall be aimed at all aspects of contemporary Aboriginal traditions, inclusive of archaeological and traditional sites. In relation to this criteria it is considered that the definitions in the Commonwealth Act do provide an appropriately inclusive approach.

Submissions raised questions about the application of the definition to certain kinds of site, and about the meaning of tradition. These must be considered if the definition is to form the basis of a minimum standard.

Scope of area or site, cultural landscapes

6.9 The definition in the Commonwealth Act extends to any areas which are of significance to Aboriginal people. The term 'areas' was chosen, rather than 'sites', to allow for flexibility.[17] For example, it would enable a 'buffer zone' to be protected in the vicinity of a site of particular and secret significance. Some submissions called for the Act to be limited to 'sites' as this would be more precise. [18] However, it was made clear when the Act was introduced that it was not meant to close off huge areas, and that the Act was not intended to be an alternative to land claims procedures:

> The Minister will not be making declarations with respect to vast areas of land in de facto recognition of a claim which Aboriginals may wish to make under another law.[19]

These observations, and the requirement that an area be of particular significance, help to define the application of the legislation in particular cases, and to ensure that heritage protection focuses on an area or site which can generally be understood as such. No change is recommended.

Significance according to Aboriginal tradition

6.10 Some submissions thought that the reference to Aboriginal tradition should be limited to ancient traditions, or that the benefit of the law should be limited to initiated Aboriginal people.[20] Others were strongly of the view that indigenous culture should be accepted as a dynamic force, and that the definition of cultural heritage should allow for the evolution of tradition over time:[21]

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[17] Second Reading speech, Senator Ryan: see Annex II. CLC, sub 47, p10.

[18] MCA, sub 27.

[19] Second Reading speech, Senator Ryan: see Annex II.

[20] AMEC, sub 48, criticise 'tradition' as too wide and abstract. PGA, sub 7, want tradition to be defined as the 'lore of initiated tribal Aboriginal people'.

[21] NSWG, sub 55, law should reflect evolving tradition.

> It changes. It adapts to and incorporates new things. It can lose language, place, religion, and not die ... culture must be measured against the experience of living people who identify with it.[22]

The legislation of South Australia and the ACT expressly include in their definition traditions that have evolved since European settlement.[23] The opinion of the Review is that the benefit of the Act should not be limited to a eurocentric view of people living traditionally,[24] and that the current Act is wide enough to cover the evolution of culture and tradition. Particular significance may attach to sites where tradition has been diluted; remaining sites may even take on a special significance as a link with culture. The Act does not specify that any degree of antiquity must attach to the observances, customs and beliefs which may obviously change over time, although the word 'tradition' in its ordinary meaning carries the notion of being handed down from generation to generation.[25] The desire of Aboriginal people to preserve and protect their cultural heritage is witness to the fact that custom and tradition can retain their importance and their continuity and, at the same time, accommodate change:

> Tradition is embedded in practices and observances of currently existing Aboriginal communities; it allows for 'cultural change' as the context of the present is continuously shifting. However, the inclusion of 'traditions' and 'custom' within the definition support the ordinary understanding that traditions are carried over in continuity with past beliefs and practices.[26]

No change to the Commonwealth Act is recommended on this point.

Damaged or abandoned areas

6.11 An issue was raised as to whether a site which has been abandoned, such as where the sacred objects have been removed, could be considered to have continuing significance.[27] Concerns were also expressed about the application of the law to damaged sites; it was said that in some cases protection under the Act had been refused because of the extent of damage to a site.[28] There does not

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[22] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report July 1994-June 1995* AGPS 1995, pp39-40.

[23] The *Senior Report* recommends that this approach be adopted in WA.

[24] The Wootten *Iron Princess* s 10 report, p23 notes with disfavour the view of SA Chamber of Mines and Energy that sites can be of particular significance only to traditional owners still practising their culture. He pointed out that importance can remain, while significance and use change. See also Menham *Old Swan Brewery (Goonininup)* s 10 report, p34. See *National Aboriginal and Torres Strait Islander Survey: Australia's Indigenous Youth*, 1996, ABS. This study shows that 83% of young Aboriginal people believe in the importance of tribal elders and that they have strong links to their culture, language and ancestral homelands; seventy per cent recognise their homeland.

[25] Wootten *Junction Waterhole (Niltye/Tnyere-Akerte)* s 10 report, p66.

[26] AAPA, sub 49, p18.

[27] PGA, sub 7.

[28] for example, in the Helena Valley case.

knowledge is known to survive within the present day Aboriginal community. Another submission suggests that ethnographic and archaeological sites should receive different but complementary treatment in the same legislation.[37] It is acknowledged that a site which has no significance to living Aboriginal people, may, in fact, still merit protection on the basis of its archaeological importance. However, the Commonwealth Act should remain, as now, directed to the protection of areas and sites which are of particular significance to Aboriginal people.

> **RECOMMENDATION: HERITAGE BASED ON SIGNIFICANCE**
> 6.1 Minimum standards for State and Territory Aboriginal cultural heritage laws should include a definition of Aboriginal cultural heritage which is at least as broad as that of the Commonwealth law. That definition should extend to areas and objects of significance to Aboriginal people in accordance with tradition, including traditions which have evolved from past traditions. It should also extend expressly to historic and archaeological sites.

WHAT KIND OF PROTECTION REGIME SHOULD APPLY?

6.14 Protection under the Commonwealth Act is provided only when an application is made in face of a threat. Under some State and Territory laws there is a level of automatic protection for some heritage sites which is sometimes called 'blanket protection'. The Guidelines of the Working party on Interaction proposed that:

> Aboriginal sites [should] be given blanket (or automatic) protection if they fall within the definition of the Act. 6.2

Blanket, or automatic protection means that all areas and sites falling within the legal definition of heritage are automatically protected by sanctions which make it an offence to cause damage or desecration to the site or area. Blanket protection does not depend on whether a site has been assessed or recorded. Its effect is to impose a 'duty of care' on all those whose actions may threaten damage or desecration to a site or area to make reasonable inquiries. Unless the protection is absolute (which is rarely the case) there must also be procedures to deal with applications for permission to proceed with development which may threaten injury to an area or site. These procedures, and the existence of penal sanctions make it necessary to establish procedures to enable the significance of the site to be assessed.

Significance of blanket protection

6.15 Effective interaction between Commonwealth and State/Territory laws depends to a great extent on the application of blanket protection to sites falling

[37] CRA, sub 9.

the resources to carry out their responsibilities comprehensively.[42] Neither Queensland, NSW, Tasmania or ACT have independent Aboriginal heritage bodies.

Proposals of the Working Party

6.18 The Guidelines developed by the Interaction Working Party recognise the claim of Aboriginal people to be involved in site assessment and proposed that there be an independent Aboriginal-controlled heritage body with responsibility for site evaluation and for the administration of the Act:

> High level of involvement of Aboriginal custodians in the administration of the Act and decisions affecting sites. In particular:
>
> > The body responsible for evaluation and recording sites to be independent.
> > Control of the body by Aboriginal custodians.
> > Information provided to it shall be on a confidential basis.[43]

The need for Aboriginal heritage bodies has been described in this way:

> An essential part of any scheme is the creation of an authoritative body able to evaluate applications from Aboriginal people to have their sites officially recognised ... [and] to provide advice on the significance of a disputed cultural area ... Such a body must therefore have credibility, both with Aboriginal custodians and the Government.[44]

Requirements for Aboriginal heritage bodies

6.19 The Review is of the opinion that all States and Territories should establish independent Aboriginal heritage bodies to administer protection regimes, and to be responsible for site assessment. Factors which need to be considered in establishing such a body are these:

- Is the body independent and do the Aboriginal members have effective control over the relevant decisions concerning sites?
- Are the members representative of local Aboriginal communities with responsibility for heritage issues?[45]
- Is there a gender balance to enable gender-sensitive issues to be dealt with appropriately?[46]

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[42] The *Senior Report* recommended a new independent body for Western Australia, which would be linked to local heritage committees.

[43] Guidelines, 6.8: see Annex VI.

[44] AAPA, sub 49, p14. Palyga, sub 1 was critical of the State process as bureaucratic and closed.

[45] It should notify the local community when sites are discovered: *Recognition, Rights and Reform*, para 6.21.

[46] There must be adequate male and female representation to deal with gender specific issues, and the reception of information in a culturally appropriate manner: CLC, sub 47, p24.

- Does the body have autonomy, resources and expertise, including access to its own advisers, including anthropologists and archaeologists?[47]

Assessment should be separated from questions of land use

6.20 The question whether an area or site falls within the protection of the legislation may have to be decided either at the time when its registration is under consideration or, more often, at the time when the area or site is threatened by development. It was submitted to the Review that a key element in site protection should be the separation of the recognition of sites from questions relating to land use which may threaten that site.[48] Aboriginal heritage bodies should have responsibility for site assessment and protection, while the power to determine land use, and to permit development which may injure a site, should be exercised by the executive, in practice, the Minister.[49] That is the pattern in NT, WA and SA and it is supported by the Review, not only for States and Territories, but also for the Commonwealth[50].

RECOMMENDATION: ABORIGINAL CULTURAL HERITAGE BODIES

6.3 Minimum standards for State and Territory legislation should include the establishment of Aboriginal cultural heritage bodies with responsibility for site evaluation and for the administration of the legislation. They should:

be independent;
be controlled by Aboriginal members representative of Aboriginal communities;
have gender balance;
have adequate staffing, expertise and resources;
have access to independent advisers, eg anthropologists, archaeologists.

RECOMMENDATION: ASSESSING SITES A SEPARATE ISSUE

6.4 Minimum standards for State and Territory laws should provide for assessments relating to the significance of sites and areas to be separated from decisions concerning land use. The former should be the responsibility of Aboriginal heritage bodies; the latter the responsibility of the executive.

[47] CLC, sub 47, p24. Adequate resources must be provided to administer the Act: AAPA, sub 49, p13; Du Cros, sub 67, p12 suggests that Aboriginal communities should also be funded.

[48] AAPA, sub 49, p2.

[49] Only the Minister could authorise exemptions: AAPA, sub 49, pp2, 3 and 14.

[50] See Chapter 8.

COMPETING LAND USE: PLANNING PROCEDURES AND SITE CLEARANCE

Development remains a potential threat

6.21 Blanket protection of significant Aboriginal areas under State and Territory law is not necessarily permanent even where a site has been recognised, assessed and recorded. Aboriginal cultural heritage is subject to the potential threat of development of all kinds. Every State and Territory which provides blanket protection, makes it possible for land owners/developers to apply for permission to proceed with projects which could disturb or injure an Aboriginal area. In all jurisdictions the executive, usually the Minister, retains the right to be the final arbiter on issues of competing land use.[51] In exercising discretion in such matters the Minister has to weigh up the interests of the Aboriginal community, the developer, and the community generally.

6.22 The Guidelines of the Working Party establish that site protection should be included in the planning process and that any decision to override protection should comply with certain procedural safeguards.[52]

> Constraints shall be placed on the powers of Executive Government to override protection of sites in particular to ensure that the views of Aboriginal custodians have to be taken into account, and that the relevant decision-maker is required to give reasons, whether the decision is subject to judicial review, and review by Parliament. [Guideline 6.3]
>
> Inclusion of site protection procedures in planning processes. [Guideline 6.6]

Competing interests

6.23 Aboriginal people want a system which ensures that they have a genuine right to be consulted and to negotiate about the protection of significant areas and sites, and that their interests and wishes are given proper weight when decisions are made which affect those areas or sites. Developers want certainty and avoidance of delay and cost in proceeding with their projects. State and Territory Governments are seldom content to see their planning and development laws and procedures 'second-guessed' by applications under the Commonwealth Act. This is a cause of friction, uncertainty and delay. State and Territory Governments want their approval processes to operate without prolongation or intervention from the Commonwealth.

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[51] *Interaction*, p67.

[52] See Annex VI: Guidelines 6.3 and 6.6.

> unless some flexibility is built into the laws. The appropriate person to make these decisions is the relevant Minister because his or her decisions are responsive to the political system. To maximise this 'political' aspect, the Minister's decisions and the reasons for decision should be tabled in the relevant Parliament and in this way be available for public comment.[59]

Need for early intervention recognised

6.26 Some States have recognised the need to change procedures, even though their legislation has not been updated:

> There are strong arguments for the development of administrative processes to encourage negotiation between affected parties and developers at an early stage in development projects with a view to reaching agreement on issues of concern to indigenous people. In this way the protection of indigenous cultural heritage is placed within a framework of mediation and consultation at an early stage.
>
> For example a 'work area clearance' process has been developed in Queensland to enable the accommodation of a particular project's needs and the indigenous cultural heritage interests likely to be affected by that project.[60]

Department of Communication and the Arts: principles and guidelines

6.27 The Indigenous Heritage Programme of the Department of Communication and the Arts has developed a set of principles and guidelines for the protection, management and use of Aboriginal and Torres Strait Islander cultural heritage places in wide consultation with indigenous communities, State and Territory agencies and land managers.[61] This set of principles is proposed for use by all State and Territory governments, land management bodies, funding agencies, land authorities, local government, Aboriginal and Torres Strait Islander community groups, land holders, miners, developers and anyone else who may be making decisions about indigenous sites. Their premise is that Aboriginal and Torres Strait Islanders have a primary role in making decisions about the use of their culturally significant places. The Commonwealth could play an active role in advancing the adoption and implementation of these Guidelines by encouraging local government planning authorities, and all other agencies involved, to incorporate them into their practice and procedures.

Minimum requirements for procedures

6.28 Consideration of submissions and other proposals in this area leads to the conclusion by the Review that there should be minimum standards for the planning and development process. The elements of those standards are these:

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[59] AAPA, sub 49, p13.

[60] QldG, sub 69.

[61] DCA, sub 62, attachment A.

Legislation should integrate cultural heritage issues with planning and development procedures, to ensure early identification and consideration of Aboriginal cultural heritage issues.[62]

An effective consultation/negotiation process between developers and relevant Aboriginal communities should be facilitated by an independent Aboriginal heritage body.[63] For example, that body might help to identify the relevant Aboriginal community.[64]

The consultation/negotiation process should have the objective of agreeing on work area clearance.[65]

Legislation should encourage heritage protection by recognising agreements between land users/developers and relevant Aboriginal groups.[66]

Negotiation procedures should minimise the disclosure of confidential information to avoid identification of sites.[67]

There should be provision for women to be consulted separately, and to be consulted by women if necessary.[68]

If the process of negotiation does not lead to a resolution of the issues within a reasonable time frame, an independent Aboriginal heritage body should assess the significance of the site.

The advice of the independent agency, and the wishes of the Aboriginal community should be considered by the responsible authority, usually

[62] CLC, sub 47, p24; FAIRA, sub 51, p21; *Exploring for Common Ground*, p32. The MNTU, sub 17, p7 supports action to ensure that those with knowledge and concern for their culture are approached to ascertain if a proposed development is likely to affect areas of objects of significance. NTSC, sub 38, p6; NLC, sub 66, para 4.3.

[63] *Interaction*, pp12, 18, 29 and 33. The Northern Territory precedent gives a role to land councils, but it is expressed as assisting Aboriginal traditional custodians. Such work area clearance must be based on consultations with Aboriginal community members identified by the local representative body under the *Native Title Act*: CLC, sub 47, p24.

[64] *Interaction*, p18 identifies these problems: Who will be, in Aboriginal groups, the people qualified to decide custodianship ... How to verify information about a site, especially when it is disputed by another group. *Senior Report*, p183: the Aboriginal heritage body should resolve disputes between custodians.

[65] It is acknowledged that in some situations site protection will be the goal. The Northern Territory Act has a specific reference to site avoidance and protection as an aim of negotiation and agreement: s 10 (a).

[66] *Interaction*, p27 and p35, Guideline 6.5.

[67] PC, sub 28, pp7-8; NT consultations; CLC, sub 47, p24; *Interaction* p35, Guideline 6.9.

[68] PC sub 28, p8. The Northern Territory legislation makes provision for gender balance in the composition of the AAPA.

the Minister, who should give a reasoned decision. Only compelling public interest should justify injury to a site.[69]

The interests of both Aboriginal people wishing to protect heritage sites and persons who wish to develop land are served by defined time limits which ensure that the procedures described are carried out expeditiously, and not prolonged unnecessarily.[70]

The Review acknowledges that principles of a similar kind have been introduced in some jurisdictions (as noted in the Annex VIII).

RECOMMENDATION:
STATE AND TERRITORY PLANNING PROCESSES
6.5 Minimum standards for State and Territory planning and development processes should include these elements:

Integration of Aboriginal cultural heritage issues with the planning and development process from the earliest stage.

An effective consultation/negotiation process for reaching agreement between developers and the Aboriginal community facilitated by a responsible Aboriginal heritage body.

The objective of negotiation should be to reach agreement on work clearance or site protection.

Legislative recognition of agreements between land users/developers and relevant Aboriginal groups.

Minimum disclosure of confidential or gender specific information through the use of a work area clearance approach.

Separate consultation of Aboriginal women.

An independent Aboriginal heritage body should determine whether a site is significant and should make recommendations concerning its protection.

Decisions overriding protection should have regard to the wishes of Aboriginal people, should be supported by compelling reasons of public interest and be subject to accountability.

Procedures should be carried out expeditiously and within reasonable time frames.

[69] *Interaction*, p35, Guideline 6.3.

[70] WAG, sub 34, p3; *Senior Report*, p164; *Interaction*, p36, Guideline 6.12. *Recognition, Rights and Reform*, para 6.20 seeks incentives to complete deliberations and determination re protection of threatened areas within realistic time frames.

RECOMMENDATION: ADOPTING DCA GUIDELINES

6.6 The Commonwealth Government should actively encourage the adoption of the *Guidelines for the Protection, Management and Use of Aboriginal and Torres Strait Islander Cultural Heritage Places*, developed by the Department of Communication and the Arts (Cth), by all relevant Commonwealth, State and Territory agencies and by local authorities involved in land management and decisions concerning cultural heritage.

CUSTOMARY LAW RESTRICTIONS ON CONFIDENTIAL INFORMATION

Importance of protection at State and Territory level

6.31 The best opportunity to develop heritage protection practices and procedures that respect customary law restrictions on information occurs at the development planning stage. If early consultation, negotiation and work clearance practices are adopted at this stage, the need to identify specifically, and give information about, important areas or sites will be avoided. Resort to Commonwealth protection which, because it is declaration based, must involve some level of site identification, will be minimised. State and Territory law and practice should protect restricted information about areas, sites or objects held by State or Territory authorities or produced to courts or tribunals or disclosed in negotiation or mediation procedures.

Minimising the disclosure of restricted information about sites

Planning procedures: preference for work area clearance approach

6.32 Submissions and consultations show that Aboriginal people generally prefer a 'work area clearance' approach rather than a site identification approach when a development affecting their heritage is proposed.[71] This involves local Aboriginal people investigating the proposed development area and deciding if it will affect any sites there. If there are no sites affected, the work area is clear. If there are, the decisions become how the development can accommodate the protection of the site, whether destruction or disturbance of the site should be approved or whether the development should proceed at all.[72] This approach avoids Aboriginal people having to identify to the developer each site likely to be damaged.

State and Territory law

[71] See for example, ALRM, sub 11; PC, sub 28; CLC, sub 47.

[72] *Interaction*, p32.

6.33 Procedures in some States and Territories encourage work area clearance rather than site identification. But other than in South Australia and the Northern Territory, this is a matter of practice rather than law.[73]

Meeting the Standard

6.34 Chapter 4 proposes standards for dealing with customary law restrictions on the use of information. To meet the standard, State and Territory planning processes should adopt a work area clearance approach where development is proposed.

General protection for restricted information

Concerns

6.35 In the course of recording or registering a site, or for planning purposes, Aboriginal people may provide restricted information to a State or Territory authority or an anthropologist or other researcher. Concern was expressed in consultations that in some States this information is not protected and could be used to disadvantage Aboriginal people.[74]

State and Territory law

6.36 The Northern Territory and South Australian legislation have provisions giving general legal protection for this information. For example, in South Australia it is an offence to divulge information about an Aboriginal site, object or remains or about Aboriginal tradition, in contravention of Aboriginal tradition without authority, s 35(1).[75] Some States and Territories place restrictions on access to the register in some situations.[76] Queensland protects secret or sacred information given during survey or research work permitted under the Act, s 31. [Further information on State and Territory laws is in Annex VIII]

Meeting the standard

6.37 At State and Territory level, heritage legislation should provide general protection for secret or restricted information provided in confidence for the purposes of the legislation.[77] There should be provisions dealing with storage

[73] See Fergie, D "Whose Sacred Sites? Privilege in the Hindmarsh Island Bridge Debate" in *Current Affairs Bulletin* Aug/Sept 1995, pp 20 ff; Hancock, N *Aboriginal Law Journal* 1996 21 1 p 19.

[74] Chapter 4 discusses this.

[75] The Minister may give authority to divulge information s 35(2), and did so in the Hindmarsh Island (Kumarangk) case.

[76] ACT s 54, Tasmania (in practice), Victoria s 21V, WA (in practice). Queensland protects information gathered in survey or research work, s 31.

[77] See for example, South Australia.

of and access to such information, especially in cases of gender restrictions. There should also be the specific protections covering the matters set out in the standards. This means that State and Territory heritage legislation should have a provision similar to s 38 of the *Northern Territory Aboriginal Sacred Sites Act 1989*. State and Territory Freedom of Information Acts should be amended to exempt from release information provided by Aboriginal people to government agencies for the purposes of the heritage act.[78]

Most States and Territories do not have gender-specific provisions

Concerns

6.38 Submissions and consultations show strong concern that the law should protect information that is subject to gender restrictions.[79]

State and Territory law

6.39 Procedures have been developed under the NT land rights legislation to deal with gender restricted information.[80] The Northern Territory also makes provision for its protection authority to have an equal number of men and women, so that women's (and men's) issues can be dealt with without the need to break tradition concerning women's and men's sites. No other State or Territory has any legal provisions dealing with gender issues.

Meeting the standard

6.40 Authorities or committees assessing the significance of Aboriginal sites should have an appropriate gender balance to enable them to handle appropriately any gender restrictions on information they receive.

Recognising customary law

6.41 Model laws should ensure generally that confidential information provided or gathered for the purposes of heritage protection, for example for the assessment and recording of sites, is protected from disclosure. This should cover information which is restricted to persons of one sex.

> RECOMMENDATION: CONFIDENTIALITY
> 6.7
> Minimum standards for the States and Territories should include confidentiality provisions to protect information provided in the course of administering State and Territory heritage protection laws from

[78] These changes were recommended by the *Senior Report*; see p117-118.

[79] See for example PC, sub 28; KLC, sub 57.

[80] See Gray, Justice Peter (Aboriginal Land Commissioner) *Evidence of Aboriginal Gender-based Secret Material in Land Rights Claims: Discussion Paper* 1995.

disclosure contrary to Aboriginal tradition, (without specific authorisation).

Such laws should prohibit any requirement to provide information where to do so would be contrary to Aboriginal tradition.

Such laws should provide for the protection of information which must not, according to Aboriginal tradition, be disclosed to persons of one particular sex.

ABORIGINAL ACCESS TO CULTURAL SITES

Management and access fundamental to heritage protection

6.42 Aboriginal management of, and access to, their sites is of fundamental importance to the maintenance of their culture and religion. It ensures that they can protect their sites according to their law and custom. This is reflected in the draft Declaration on the Rights of Indigenous People, Articles 12 and 13, which speak of the right of access to religious and cultural sites.[81]

Standard in Interaction Guidelines

6.43 The standards set by the Interaction Working Party Guidelines recognise this by including the basic principle that Aboriginal people should be given control over the day-to-day functioning of those aspects of the legislation that affect their interest in cultural sites, and set the standard of a high level involvement of Aboriginal custodians in the administration of legislation and in decisions affecting sites. Two aspects are considered here, access and heritage agreements.

Provision for access to sites

6.44 A particular concern of Aboriginal people is that they may be denied access to their significant sites. The Northern Territory has a comprehensive law to ensure access to sacred sites. In South Australia the Minister may authorise access. In some States, the use of sites for traditional purposes is preserved or recognised, in for example, WA, SA, Qld, Tas, but without any specific way to enforce access. Some pastoral leases, or legislation governing pastoral leases, provides for access to sites.[82] Victorian legislation allows access to place notices on sites which are protected by a declaration.[83] Other States and Territories make no specific provision for access to sites.

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[81] See Chapter 3.

[82] The *Pastoral Lands Management Act* (SA), s 43.

[83] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 21G(2).

Submissions on access

6.45 Concerns about the lack of access were raised in submissions:

> ... certain aspects of our culture have deteriorated significantly, we believe that this is due almost totally to the fact that we've been prevented from accessing our traditional Homelands and that migaloo (white people) have prevented us from accessing those traditional Homelands because they believed it was and is to their benefit and their right to do so.[84]

This submission is typical of what many Aboriginal people feel about the issue of access. Other submissions proposed that the law should provide for Aboriginal people and their advisers to have a right of entry to private and Crown land for the purpose of visiting sites of particular significance.[85]

Moves to improve access

6.46 The Senior Report recommends that custodians and delegates should be given access to Crown land for the purpose of visiting significant Aboriginal areas, Aboriginal remains or objects for the exercise of cultural or spiritual activities in accordance with Aboriginal tradition. He recommends that access to sites on private land should be a matter for private agreement between the land owner and the relevant Aboriginal people, but should be encouraged.[86] This recommendation forms the basis of minimum standards. The Review agrees.

> RECOMMENDATION: ACCESS TO SIGNIFICANT SITES
> 6.8 Minimum standards should include provisions to ensure the right of access of Aboriginal people to significant sites on Crown land for the purposes of their protection and preservation and for traditional purposes.

HERITAGE AGREEMENTS

Benefits of general heritage agreements

6.47 There is general support for processes which encourage agreements between government authorities, land holders and Aboriginal custodians about protection of heritage including work area clearance for development, management of areas where there are important sites, and access for traditional purposes.[87] The benefits of agreements are that they can cover a much wider

[84] Darumbal, sub 39; also Broome and Perth, WA consultations.

[85] See for example CLC, sub 47, p25.

[86] *Senior Report*, p75.

[87] CRA, sub 9. Custodians should be able to make private agreements for the use of a declared site.

range of issues than can be covered under the Commonwealth Act or heritage protection legislation. They can, for example, include a comprehensive approach to development in a large area. The Broome Rubibi agreement and the Cape York agreement are examples. They provide Aboriginal people with the opportunity to negotiate on their own terms outside the framework of 'whitefella law'.

The Interaction Guidelines

6.48 The Guidelines refer to the need for incentives for agreements. They say there is a need for:

> Incentives for private land holders to assist Aboriginal heritage protection eg by private agreements between custodians and land holders as provided for by Part II A of the Commonwealth Act. [Guideline 6.5]

Provisions in State and Territory legislation

6.49 Provision is made in the legislation of NT, Victoria[88] and South Australia for agreements concerning the protection of heritage. The Victorian provisions (s 37A, 37B) have not been used, but there is at least one agreement in South Australia. Heritage agreements can be made between the Minister and the owner of the land on which an Aboriginal site or object exists. Any traditional owners or their representatives must be given an opportunity to become parties to the agreement, s 37A. Such an agreement attaches to the land and is binding on the current owner and occupier.

6.50 The *Senior Report* makes recommendations to increase the use of agreements.[89] Aboriginal people should be involved in, and approve, agreements between the authorities and land owners. This should be a minimum standard for State and Territory laws.

Commonwealth law and heritage agreements

6.51 The Commonwealth Act is at present directed to the protection of sites which are under threat. This approach does not lend itself readily to general agreements concerning the management of areas and sites, other than in the context of threats. Proposals are made in Chapter 9 for the legal recognition of agreements which resolve applications under the Act for protection.

EFFECTIVE ENFORCEMENT

Criminal sanctions are considered ineffective

6.52 Most States and Territories make it an offence to damage or interfere with Aboriginal sites or objects. Some of these laws are still based on the

[88] Part IIA, s 21K of the Act.

[89] *Senior Report*, pp84-86.

protection of relics, while others protect areas and objects which are significant to Aboriginal people.[90] The inadequacy of the penal provisions has been referred to in many commentaries and was also raised in a number of submissions.[91] Particular concerns are lack of effective enforcement, lack of authority for Aboriginal people to take enforcement action, the difficulty in proving that persons knew they were damaging a sacred place[92], and inadequate penalties. The Guidelines of the Working Party call for:

> Effective enforcement (penalties, prosecutions, onus of proof, defences). [Guideline 6.4]

6.53 Several submissions drew attention to the inadequacies of penalties under State and Territory legislation.[93] They are in many cases lower than under the Commonwealth Act. Penalties are criticised as an insufficient deterrent, without other factors, such as the certainty of prosecution and the damage to reputation that might ensue.[94] The MCATSIA Report on Interaction noted the need for a national standard for reasonable penalties, and a daily penalty for non-compliance.[95]

More effective measures

6.54 Submissions proposed that responsibility for prosecutions be given to Aboriginal community organisations and that they be funded for that purpose[96] The Senior Report recommended that the proposed Aboriginal heritage protection agency or traditional custodians should be able to institute proceedings, that penalties for breach and continuing breach be increased, that courts have moratorium powers, that defences be limited, that inspectors have powers, and that the Crown be bound.[97] Minimum standards for model laws should follow that approach, and include effective criminal sanctions, and effective enforcement mechanisms, including the option for Aboriginal organisations or individuals to initiate prosecutions, and to receive funding for that purpose.

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[90] See Annex VIII.

[91] CLC sub 47, p25. Offence provisions for breaches and adequate penalties for breach. *Recognition, Rights and Reform*, para 6.20, seeks adequate penalties and power to invoke penalties.

[92] Nayutah, sub 20 (defence of no reasonable knowledge); several State lAws provide for a defence when the defendant did not know, or could not reasonably be expected to have known that the place or object was protected.

[93] Nayutah, sub 20; Gurang, sub 44; FAIRA, sub 51.

[94] *Interaction*, p25 noted that severity of penalty is not always the bottom line as conviction could damage a company's business connections.

[95] *Interaction*, p26: the Commonwealth and SA could be the models.

[96] MNTU, sub 8, p8.

[97] *Senior Report*, pp40, 196-214.

RECOMMENDATION: EFFECTIVE CRIMINAL SANCTIONS

6.9 Minimum standards for State and Territory laws should include:
criminal sanctions with adequate penalties, and limited defences;
provision to ensure that criminal sanctions are effectively enforced; and
provision to enable Aboriginal people to act as inspectors, to monitor compliance and to launch prosecutions.

COMPENSATION

Constitutional requirements and the Act

6.55 The Constitution guarantees that where the Commonwealth acquires property interests, compensation on just terms must be paid to the persons thereby affected (section 51(xxxi)).[98] The ambit of this protection is not precisely known.[99] The Act provides that where a declaration would result in the acquisition of property from a person otherwise than on just terms, there is payable to the person by the Commonwealth such reasonable amount of compensation as is agreed upon between the person and the Commonwealth or, failing agreement, as is determined by the Federal Court, s 28.

Effect of declarations

6.56 In the second reading speech, it was stated that where the interests of a person or company are significantly affected by the making of a declaration, the government will determine what compensation is payable according to the merits of the case.[100] It appears at this stage that declarations made under the Act in relation to areas and sites do not effect an acquisition of property interests for the purposes of the provision, and that there is therefore no obligation on the Commonwealth to compensate those affected by the making of a declaration. On the other hand, the Commonwealth has, in some cases, purchased objects to avoid the possibility of a liability for compensation arising as a result of a long term declaration.[101]

Complaints and submissions: developers

6.57 Declarations relating to land may fall short of acquisition while nevertheless adversely affecting the interests of a property owner.

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[98] Similar restrictions apply in the NT and ACT.

[99] *The Commonwealth v Tasmania* (1983) 46 ALR 707. The key distinction is between permanent deprivation and limits on use.

[100] Hansard, Senate 6 June 1984: see Annex VI.

[101] for example, the Strehlow collection.

Submissions from development interests suggested that if a person's property interests are affected by the protection of Aboriginal cultural heritage (for example, by restrictions on the use to which land may be put), then compensation ought to be paid:

> If this legislation is to be perceived by the entire Australian community as fair, just and ultimately warranted, the Act must be amended to afford any individual, company or organisation adversely affected as a result of this legislation, the right to claim full compensation from the Commonwealth Government.[102]

Solicitors for the developers in the Hindmarsh Island (Kumarangk) case said that the nation should bear the cost, rather than the landowner / developers.[103] Other submissions supported the view that landowners should be compensated for the adverse effect of declarations.[104]

An issue of standards

6.58 It appears to the Review that the question of compensation cannot be considered solely in relation to the Commonwealth Act. A far greater proportion of Aboriginal cultural heritage is protected under State and Territory law than under Commonwealth law, which operates only as a last resort. Applications are frequently made to the Commonwealth to protect sites when the State or Territory government has overridden protections that would otherwise apply. The protection afforded by State and Territory law may preclude development in some situations. Developers may be refused permission to proceed with developments which would injure or desecrate an area of significance to Aboriginal people. If the question of compensation is to be considered, then the impact of State and Territory law ought to be taken into account and a uniform standard developed. At present most States and Territories would not give compensation when a development is prevented because of environmental or heritage concerns, including Aboriginal heritage.[105]

Compensation for traditional owners

6.59 Aboriginal people who commented on the issue of compensation in submissions argued that fairness would require that if compensation were to be payable where property interests were adversely affected, then the interests

[102] AMEC, sub 48, p16: similar submissions from CRA, sub 9; and MCA, sub 27.

[103] Palyga, sub 1.

[104] WA consultations.

[105] These issues were considered in the *Senior Report*, which recommended that no compensation should be payable except in the case of permanent deprivation of pre-existing property rights, p173.

of Aboriginal people in cultural sites, land and objects should receive similar treatment:[106]

> If any sites, places or objects are desecrated, then some form of recompense must be granted to the Indigenous community or family as the situation requires. If an aggrieved person who has land resumed or who has or shows that they will be disadvantaged financially through protection of Indigenous cultural sites can be compensated it should follow that Indigenous people be compensated.[107]

This is also a question which needs to be considered in the context of State and Territory laws. These laws already protect many significant Aboriginal areas by penal sanctions, though it is unclear whether these sanctions are effective or whether they are enforced. Compensation for desecration or injury to sites may be an alternative means of enforcing the relevant laws.[108] The Commonwealth law also provides for penal sanctions but there are so few areas now protected by declarations under the Commonwealth Act, only one in fact, that enforcement, criminal or civil, is not a major issue.

[106] CLC, sub 47.

[107] Nayutah, sub 20. Submissions supporting the claim for compensation came from NLC, sub 66; KLC, sub 57; and CLC, sub 47.

[108] The *Senior Report*, p173 recommends that compensation be paid to traditional owners permanently deprived of use or enjoyment of a significant area as the result of exercise of a ministerial discretion.

CHAPTER 7:

THE COMMONWEALTH ACT AND MINIMUM STANDARDS

> The quality of state heritage protection legislation is irrelevant when there is no will to implement it or effectively resource its administration. This is why an over-riding and 'back-up' Commonwealth Act is absolutely essential.[1]

Chapter 6 identified and discussed the minimum standards which heritage protection legislation should have. This chapter discusses how these standards should be reflected in the Commonwealth Act. It deals with

confidentiality;
access to sites; and
enforcement provisions.

IMPLICATIONS OF MINIMUM STANDARDS FOR COMMONWEALTH ACT

Standards to be basis for uniformity and accreditation procedures

7.1 The minimum standards outlined in the preceding chapter are intended as the basis for developing a uniform national approach to the protection of heritage. They should also be the basis of an accreditation process under which the Commonwealth would recognise certain State and Territory procedures in order to avoid duplication and delay. To meet the goals of a uniform approach, the Commonwealth Act should also reflect minimum standards where they are relevant to its application, bearing in mind that its objective is to provide a mechanism of last resort, not a comprehensive scheme to deal with all aspects heritage protection. Commonwealth law cannot parallel each standard which should apply at State and Territory level. Nevertheless it must conform with the same principles so far as possible. In some situations, Commonwealth law could apply a general standard, in the absence of equivalent legislation in the State or Territory.

CONFIDENTIALITY OF INFORMATION SUBJECT TO CUSTOMARY LAW RESTRICTIONS

Introduction

7.2 Chapter 4 outlined standards that heritage protection laws should meet in regard to protecting restricted information. Chapter 6 looked at the application of these standards in State and Territory laws. This chapter makes proposals to

[1] Draper, sub 59.

ensure that the Commonwealth meets these standards. It takes into account the fact that the Commonwealth process does not allow for the work area clearance approach available under planning processes at State or Territory level and that the applicant must give (albeit the minimum necessary) information about the general location of the area or site to be protected.

Areas in which the Commonwealth does not meet the standards

Respect for customary law restrictions does not underpin the Act

7.3 The need to respect customary law restrictions on information and to protect any information held subject to such restrictions is not recognised in the Commonwealth Act. There is only one provision in the Act relevant to the protection of confidential information. Section 27 gives a court dealing with proceedings arising under the Act the power to exclude the public or specified persons from a court sitting (that is, to hold proceedings 'in camera') if satisfied that it is desirable to do so in the interests of justice or the interests of Aboriginal tradition. It also gives the Court power to make any other orders it thinks fit to prevent or limit the disclosure of information about the proceedings. This leaves a number of gaps in protection. For example, a number of submissions are concerned that restricted information provided under the Act should have the support of a public interest immunity exemption where a party or the court is seeking to have it produced as evidence in court proceedings.[2]

Limits of s 27 protection

7.4 The power under s 27 to hold proceedings 'in camera' and to limit the disclosure of information about proceedings applies only to proceedings under the Act. It does not apply to proceedings under the *Administrative Decisions Judicial Review Act 1977* (Cth) which is the Act under which the Minister's decision to make, or not to make, a protective declaration is generally challenged.[3] Nor does the section limit the circumstances in which the court can require a person to disclose restricted information to the court and to those present in the court.[4]

No protocols for s 10 reporters dealing with restricted information

7.5 The Act does not include guidelines for s 10 reporters who receive information which is subject to customary law restrictions, and which is provided to support an application for protection or in relation to the application. Information may include both secret men's and secret women's

[2] ATSIC sub 54; MNTU, sub 17; Baldwin Jones, sub 18; KLC, sub 57.

[3] ALRM, sub 11, PWYRC, sub 12.

[4] See *Chapman v Tickner* (1995) 55 FCR 316 at 371; (1995) 133 ALR 74 at 126; (1995) 37 ALD 1 at 48 per O'Loughlin J.

business. There is no guarantee of continuing confidentiality, a factor which may inhibit use of the Act.[5]

Information given in confidence is not protected

7.6 The Act requires the reporter to pass on all information provided by way of representations to the Minister, who is required to read and consider all such representations. This is so, even if the information was provided to the reporter on a confidential basis.[6] The Act does not regulate the circumstances in which disclosure might occur,[7] or prohibit the unauthorised access to, or disclosure of restricted information once it is held by the administering authority. It has also been strongly argued that people likely to be affected by an application for protection should have access to all these submissions, including confidential information, as part of procedural fairness.[8] The Federal Court has endorsed that view.[9]

Aboriginal people may be forced to provide confidential information

7.7 Recent cases[10] have held that for procedural fairness purposes, detailed information about the location and circumstances of an area's significance (which may be confidential) must be provided by Aboriginal people when they apply for a declaration, and that information must be publicly advertised for the purposes of a s 10 report. This may involve a breach of customary law, if revealing the location of a site is forbidden and is in any event a major cause of concern.[11]

Obligation to report remains may violate custom

7.8 Section 20 (which requires people finding Aboriginal remains to report the finding to the Minister) may require an Aboriginal person to report the location of Aboriginal remains contrary to cultural and spiritual beliefs. Submissions ask that the section be amended so that it does not require reporting in these circumstances.[12] The Review agrees.

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[5] ALRM, sub 11.

[6] *Tickner v Chapman*, Full Court, Federal Court, December 1995.

[7] The Full Court of the Federal Court in the *Broome Crocodile Farm* case observed that the reporter might impose strict conditions to preserve confidentiality to the greatest extent: *Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia* (unreported, Full Court of the Federal Court, 28 May 1996). However, these lack any legal sanction.

[8] See Palyga, sub 32.

[9] In the *Broome Crocodile Farm* case.

[10] The *Hindmarsh Island (Kumarangk)* and the *Broome Crocodile Farm* cases.

[11] ALRM, sub 11.

[12] NSWALC, sub 43, p4.

Need for a Commonwealth provision prohibiting disclosure of information

Protection from disclosure

7.9 To meet the standard requiring adequate protection of restricted information, the Act should be amended to protect information provided for the purposes of the Act from unauthorised disclosure contrary to customary law restrictions. Protection should include appropriate storage. Where gender restrictions apply the legislation should require that these be observed by officers and by the Minister. Where the Minister seeks access to gender-restricted information, the legislation should require the Minister (where appropriate) to delegate responsibility for reading the information to a Minister of the gender allowed by the restrictions. Aboriginal information subject to customary law restrictions supplied for the purpose of an application, mediation or a report under the Act should be available only to:

- the officers or members of the agency who process the application or prepare the report or carry out the mediation (subject to any gender or other restrictions that may apply under customary law);

- the Minister (but the circumstances in which he or she would need to see it should be minimised) or delegate of the relevant gender, if gender restrictions apply.

7.10 The information should not be accessible to anyone else or disclosed in any other circumstances, except with the consent of the relevant Aboriginal people or, if they do not consent, with the consent of the Minister after he or she has consulted with the applicant and is satisfied that the public interest in supplying the information outweighs the damage to Aboriginal interests in doing so. This is similar to a provision in the South Australian Act which requires the Minister to consult with Aboriginal people before authorising disclosure of information subject to customary restrictions. Provision should be made for the appropriate storage of information.

RECOMMENDATION: PROTECTION FROM DISCLOSURE

7.1 (a) The Commonwealth Act should be amended to include a provision which protects information provided for the purposes of the Act from unauthorised disclosure contrary to customary law restrictions. The Act should require the Minister to respect gender restrictions on information to which he or she seeks access.

7.1 (b) Section 20 (1) of the Act should be amended to ensure that it does not operate to interfere with the cultural and spiritual beliefs of Aboriginal people.

Protocols for s 10 reporters and mediators

7.11 Aboriginal people seeking protection for their areas or sites may wish, or feel the need, to give restricted information to the reporter to establish the significance of the site or object. It is important that the reporter knows how to handle this information in a sensitive way. There should be protocols to help the reporter covering such matters as:

- informing the Aboriginal people about what protection can be provided for the information in written or oral form, and the circumstances in which it could be released;
- whether restricted information if given orally needs to be or should be recorded;
- respecting gender restrictions and limiting who else is present when restricted information is revealed or discussed;
- emphasising that the existence of restricted information is the issue, rather than the detail of what it is;
- how restricted information should be handled in the report.

RECOMMENDATION: INFORMATION PROTOCOLS
7.2 There should be protocols for s 10 reporters and mediators covering how they should receive and handle information subject to customary law restrictions.

Restricted information should be exempt from release under FOI

7.12 It is not appropriate that information subject to customary law restrictions should be available to the public under Freedom of Information legislation. It would defeat the purpose of other measures taken to limit the availability of restricted information.

RECOMMENDATION: EXEMPTION FROM FOI
7.3 The *Freedom of Information Act 1982* (Cth) should be amended to provide that information about Aboriginal heritage provided for the purposes of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and that is subject to customary law restrictions should be exempt from disclosure.

Protections in relation to court proceedings should be extended

7.13 The protection offered by s 27 of the Act to information subject to customary law restrictions should be extended to apply to any court proceedings in relation to the Act or in relation to information collected or provided for the purposes of the Act. In addition the Act should include provisions similar to those in the *Native Title Act* s 82 (2) which require the Federal Court in conducting proceedings in relation to the Act, to take account

of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.

> **RECOMMENDATION: COURT PROCEDURES**
> 7.4 The protection offered by s 27 of the Act should be extended to any court proceedings in relation to the Act or in which access is sought to information collected or provided for the purposes of the Act. The Act should also require the Federal Court in conducting proceedings in relation to the Act to take account of the cultural and customary concerns of Aboriginal people and Torres Strait Islanders.

Public interest immunity should be available

7.14 The Act should be amended to limit the circumstances in which a court can require an Aboriginal person or an agency holding restricted information about Aboriginal heritage to produce that information for the purpose of proceedings. For example, the Aboriginal person or authority seeking to withhold restricted information provided for the purposes of the Act should be able to argue that it is in the public interest not to give the information. Because of the particular importance to Aboriginal people of respecting restrictions on confidential information, it is important that State and Territory legislation have similar provisions. If they do not, the Commonwealth could extend its legislation to apply in relevant court proceedings in State or Territory courts. These provisions would be a special measure under the *Racial Discrimination Act* 1975 (Cth).[13]

> **RECOMMENDATION: PUBLIC INTEREST IMMUNITY**
> 7.5 The circumstances in which a court can require an Aboriginal person or an agency holding restricted information about Aboriginal heritage to produce that information should be limited by the provision of a claim to a public interest immunity. The Commonwealth provisions should extend to proceedings under State and Territory law in relation to matters arising under the Commonwealth Act.

Protection for information in mediation

7.15 The *Evidence Act* protects from court hearings information revealed in the course of a negotiated or mediated settlement. This should apply to mediation under the Act.

Other recommendations dealing with respect for customary law restrictions

7.16 Chapters 4, 5, 8 and 10 also deal with customary law restrictions or information.

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[13] *The Aboriginal Legal Rights Movement Inc v The State of South Australia and Stevens (No 2)* (unreported, Supreme Court of South Australia, 28 August 1995.

ACCESS TO AREAS AND SITES

The Standard

7.17 It was proposed in the preceding chapter that minimum standards should include provisions to ensure the right of access of Aboriginal people to Crown land for the purpose of protection and preservation of cultural sites and for traditional purposes.

Commonwealth could provide for access

7.18 When the Minister makes a declaration to protect an area or site, the declaration shall:

> ... contain provisions for and in relation to the protection and preservation of the area from injury or desecration. (s 11)

Bearing in mind that the objective of the Commonwealth Act is to ensure the protection of areas and objects which are of significance to Aboriginal people, it appears to be an anomaly that the Commonwealth Act provides for protection without making specific provision for Aboriginal people to have access to the area or site, whether it is on public or privately owned land. Ideally, access to significant sites are matters for negotiation and agreement between land owners and Aboriginal people. Where an application for a declaration under the Act leads to a process of negotiation or mediation, access and involvement in management are matters that could be included in agreements which should be given legal effect.[14] There is, however, a case for making it clear in the Act that the Commonwealth Minister could include in a declaration provisions concerning access to land for the purposes of site protection and preservation, as well as for traditional purposes.

> RECOMMENDATION: ACCESS FOR PROTECTION OF HERITAGE
> 7.6 Section 11 should be amended to clarify that a declaration may include provisions concerning access to a site for the purposes of inspection, protection and preservation of an area and for traditional purposes.

ENFORCEMENT AND PENAL PROVISIONS

Minimum standards

7.19 The minimum standards recommended in Chapter 6 for the enforcement provisions in State/Territory laws should involve criminal sanctions with adequate penalties, and limited defences, provision to ensure that criminal sanctions are effectively enforced and provision to enable

[14] See Chapter 9.

Aboriginal people to act as inspectors to monitor compliance and to launch prosecutions.[15]

Commonwealth enforcement provisions

7.20 The penal provisions in the Commonwealth Act protect only those few areas and objects which are covered by declarations. There appear to have been no prosecutions under the Act, and no proceedings under s 26 for an injunction to prevent breach. Nevertheless, the Commonwealth provisions should be reviewed to ensure they meet the minimum standards recommended for the States and Territories. Areas of concern are defences and penalties.

Defence of ignorance

7.21 In proceedings under the Act for breach of a declaration, persons are not to be convicted or committed for trial where there is evidence that the defendant neither knew, nor had reasonable grounds for knowing, of the existence of the declaration, "unless it is proved that the defendant knew, or ought reasonably to have known of the existence of the declaration": s 24 (3). Early criticisms of the Act were made on the ground that persons could be prosecuted when they did not know they were in breach;[16] current submissions argue that ignorance of the law should not be a defence or a bar to being committed for trial under the Act, and that removal of that provision would bring the enforcement of orders made under the Act into line with the enforcement of other Acts.[17] Declarations made under the Commonwealth Act are published in the *Gazette* and in a local newspaper (s 14 (1)(a)). There seems to be no good reason why gazettal should not be regarded as sufficient notice to persons that an area or object is protected. In respect of most matters required to be gazetted, ignorance should at the most be a ground of mitigation.[18]

RECOMMENDATION:
7.7 That subsection 24 (3) be repealed.

Penalties for contravening declarations

Current levels

7.22 Current penalties for contravening declaration made under the Commonwealth Act are $10,000 or imprisonment up to five years for an

[15] See Chapter 6; see also *Interaction*, pp25, 40.

[16] *DAA Review*, p8; the response was that persons who breach a declaration innocently would not be prosecuted.

[17] NSWALC, sub 43, p4.

[18] Australian Law Reform Commission *Multiculturalism and the Law*, ALRC 57, 1992, paras 8.26-27.

individual, $50,000 for a corporation. In summary jurisdiction, the penalties are $2,000 or imprisonment up to 12 months for an individual, and $10,000 for a corporation (ss 22, 23). The penalties in the States and Territories are either at this level or, in many cases, lower.[19] The Guidelines of the Working Party (6.4) call for "Effective enforcement (penalties, prosecutions, onus of proof, defences)". In Chapter 6 it was recommended that minimum standards for model laws should include adequate penalties and limited defences.

Submissions on penalties

7.23 Some submissions called for the Commonwealth penalties to be substantially increased.[20] Others considered the penalties excessive given the subjective definitions used to define 'desecration' and 'Aboriginal tradition'.[21] It is noted, however, that the penal provisions in the Commonwealth Act apply only to areas protected by a declaration; there is only one declaration in force at present.

RECOMMENDATION: REVIEW PENALTIES
7.8 Penalties under the Commonwealth Act should be reviewed to bring them into line with current values.

Power to prosecute

7.24 A present, most questions concerning prosecution would arise under State and Territory laws. So far as prosecution under the Commonwealth Act is concerned, it is not a major issue at this stage. The new agency recommended in this Report to administer the Act should have power to prosecute for offences under the Act.

RECOMMENDATION: PROSECUTIONS
7.9 The agency recommended by the Review to administer the Commonwealth Act should have power to initiate prosecutions for breach of declarations under the Act.

[19] See Annex VIII.

[20] NSWALC , sub 43, p4; MNTU, sub 17, p8.

[21] AMEC, sub 48.

CHAPTER 8:

DECIDING SIGNIFICANCE: AN ABORIGINAL ISSUE

> Aboriginal people construct knowledge based on local factors - most usually, local features of country. Aboriginal knowledge is grounded in a particular place and cannot be transferred from one place to another without losing its validity.[1]

> The production of evidence to settle a dispute is itself expecting a European process to produce a European outcome.[2]

8.1 This chapter considers how to establish, for the purposes of the Commonwealth Act, that an area or object is a significant Aboriginal area or object, and that it is under threat of injury or desecration. It considers the subjective nature of these issues, how they should be decided and the role and responsibility of Aboriginal people in relation to such decisions. The discussion focuses on areas and sites, but is also relevant to the consideration of significant Aboriginal objects.

'PARTICULAR SIGNIFICANCE' IS AN ABORIGINAL ISSUE

The Act applies to significant Aboriginal areas

8.2 Before the Minister can exercise discretion whether or not to make a declaration to protect an area or site, he or she must be satisfied "that the area is a significant Aboriginal area" and "that it is under threat of injury or desecration," ss 9 (1) (b) and 10 (1) (b). These terms relate to the definitions in s 3 (1):

> 'significant Aboriginal area' means:
> an area of land in Australia or in or beneath Australian waters;
> an area of water in Australia; or
> an area of Australian waters;
> being an area of particular significance to Aboriginals in accordance with Aboriginal tradition;
>
> 'area' includes a site;
>
> 'Aboriginal tradition' means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships;

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[1] Baldwin Jones, sub 18.

[2] Allington, sub 16.

Chapter 6 of the Report looks at the scope and coverage of the provisions set out above.

Aboriginal perspective is the key issue

8.3 The question whether an area or object is of 'particular significance' to Aboriginal people has three related elements: to whom the area is significant, the nature of the significance, and its degree. The Act is structured in such a way that each of these elements must be considered from the perspective, understanding and experience of Aboriginal people. They are matters which a non-Aboriginal person (even an anthropologist) can understand, if at all, only by communication with Aboriginal people.

Issue depends on Aboriginal tradition

8.4 The question whether an area or object is of 'particular significance' to Aboriginals must be considered from the perspective of Aboriginal people. It depends upon their custom and traditions.

> Other concepts of heritage legislation simply do not accord with indigenous cultural values. For example in registering and/or declaring an area significance is given in some legislation to the issue of relative importance of an area or site. Yet in Aboriginal and Torres Strait Islander society the issues of significance and cultural importance are settled not by objective and global references, but by reference to traditional law and custom or, in contemporary situations, by a largely consensus judgment influenced by the views of elders in the community.[3]

The particular significance of a site may derive from its sacred qualities or from its legal status in terms of Aboriginal customary law, though the distinction between these two values is itself eurocentric.

> For traditional landowners, such a distinction would probably be contrived, if not meaningless - the domains of the sacred and the secular have not been compartmentalised as in non-Aboriginal society.[4]

As has been pointed out, Aboriginal people who have special knowledge or experience of the customary laws of their community should be recognised as entitled to give evidence on such matters.[5] Customary law traditions, as has been explained,[6] include important restrictions on the transmission of knowledge about significant sites and the beliefs related to them.

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[3] *Recognition, Rights and Reform*, para 6.9.

[4] CLC, sub 47, p11.

[5] Law Reform Commission *The Recognition of Aboriginal Customary Laws* (ALRC 31) AGPS 1986, Vol 1, para 642: also, beliefs and perceptions a matter of fact, para 640.

[6] See Chapter 4.

Changing traditions do not end significance

8.5 The benefit of the Act is not limited to people living traditionally. Even where tradition has been diluted as a result of dispossession and displacement, areas and sites may retain their special significance for Aboriginal people. Their obligation to protect the area remains, and its significance may even be enhanced, where the site is one of the few remaining links with culture. Nor does a site necessarily lose its significance to Aboriginal people if it undergoes change or damage. The question of significance can be resolved only by reference to Aboriginal people themselves, to their understanding of their "traditions, observances, customs or beliefs".

Subjective nature of 'particular significance' is recognised

8.6 The meaning of 'particular significance' in the Act has not been the subject of judicial decision. However, there is a similar expression in the *World Heritage Properties Conservation Act 1983* (Cth). Under s 8(3) an Aboriginal site is a site, the protection of which is of particular significance to the people of the Aboriginal race. In the *Tasmanian Dams* case, Justice Brennan stressed that significance was a matter for Aboriginal people:

> The phrase 'particular significance' in s 8 cannot be precisely defined. All that can be said is that the site must be of a significance which is neither minimal or ephemeral, and that the significance of the site may be found by the Aboriginal people in their history, in their religion or spiritual beliefs, or in their culture. A group of whatever size who, having a common Aboriginal biological history, find a site to be of that significance are the relevant people of the Aboriginal race for whom the law is made ... Of course, an issue remains as to whether the sites proclaimed under s 8 are in truth sites of particular significance to the people of the Aboriginal race. That is a question of fact that can be resolved by evidence if need be. [7]

Reporting on 'significance' as a subjective issue

8.7 The Minister's decision under the Act as to whether an area is a significant Aboriginal area is informed by the section 10 report which must deal with the question of the 'particular significance' of the area to Aboriginal people. The reporters appointed under s 10 of the Act have generally approached the issue as a question of fact, but as an issue essentially subjective in nature.[8] For example, Justice Stewart, in reporting on Coronation Hill, decided not to develop a definition but to report on:

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[7] *The Commonwealth v Tasmania* (1983) 57 ALJR 450 at 539.

[8] Saunders *Hindmarsh Island (Kumarangk)* s 10 report, pp28-30 pointed out the difficulty in trying to establish traditions by mechanisms with which we are familiar.

> whether the area is of significance to Aboriginal people in accordance with their traditions and to report on the evidence that touches on the degree and intensity of belief and feeling that exists in relation to the area under discussion.[9]

Saunders, in the Hindmarsh Island (Kumarangk) Report, took a similar approach:

> ... it is sufficient to report to the Minister on whether the area is of significance to Aboriginal people in accordance with their traditions and to report on the evidence that touches upon the degree and intensity of belief and feeling that exists in relation to the area.[10]

Significance depends on the Aboriginal perspective

8.8 The question of significance can be considered only through communication with Aboriginal people about their understanding and experience concerning the area. It is an issue which should be seen as peculiarly within the competence of Aboriginal people to determine.

> The primary source of this evidence is the people themselves.[11]

8.9 The National Aboriginal Sites Authorities Committee (NASAC), which represents State and Territory site protection agencies, confirmed this in a resolution which distinguishes between 'archaeological' and 'traditional' sites. It noted that the relative significance of traditional sites could be assessed only by the Aboriginal custodians:

> 'Aboriginal' site has a number of meanings including the following:
>
> (a) sites which comprise the objectively observable manifestations of past Aboriginal culture which have a value as the material evidence of the original and ancient occupation of this continent by Aboriginal people. The relative significance of such sites may be accorded on the basis of scientific inquiry and general cultural and historical values. NASAC refers to sites in this category as 'archaeological sites'.
>
> (b) sites which are the tangible embodiment of the sacred and secular traditions of the Aboriginal peoples of Australia. Such sites may include sites defined in (a) above. The relative significance of these sites *may only be determined by the Aboriginal custodians.* NASAC refers to such sites as 'traditional sites'.[12]

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[9] Stewart *Kakadu* s 10 report, para 3.14.

[10] Saunders *Hindmarsh Island (Kumarangk)* s 10 report, p20. She regarded her approach as compatible with what Brennan J said in the *Tasmanian Dams* case, and with Menham's *Old Swan Brewery (Goonininup)* s 10 report.

[11] Menham, *Skyrail* s 10 report, p 6.

[12] This resolution of 1990 is quoted in Ritchie, D "Principles and Practice of Site Protection Laws in Australia" *in Sacred Sites, Sacred Places* Carmichael, D (ed) Routledge 1994, p227 and 233.

PROBLEMS IN ESTABLISHING SIGNIFICANCE

Protection may involve destruction

8.10 Dealing with the question of 'particular significance' in the framework of Australian common law is not without its difficulties. Establishing significance is part of the process which can lead to the making of a declaration. Those who oppose the application for protection, the landowner/developer, may consider that it is their right not only to know all the details of the relevant beliefs and customs, but also to have an opportunity to question and challenge their genuineness, their validity. There is judicial support for the view that information relied on to support a claim must be revealed to interested parties:

> Aboriginals, just like all their fellow members of the community, if they wish to avail themselves of legal remedies must do so on the law's terms. To take away the rights of other persons on the basis of a claim that could not be revealed to the maker of the decision itself would be to set those rights at naught in a way not even the Inquisition ever attempted.[13]

Aboriginal people are faced with a dilemma. In order to seek the protection of the Act for a site which is significant to them, they may be asked to reveal information about that site, which their tradition requires to be kept confidential. The confidentiality of information is discussed in Chapter 4.

Current Act creates adversary situation

8.11 The current Act, and its interpretation by the Federal Court,[14] put in direct opposition the interests of Aboriginal people in maintaining the secrecy of culturally sensitive information and the interests of opponents of a declaration (eg, State and Territory governments and developers) who seek an opportunity to challenge the claim of significance and test its validity. It has led to the creation of an adversary situation around the issue of 'significance'.

Minister's decision is second hand

8.12 Under the Act the Minister has to be personally satisfied that the area or site is a significant Aboriginal site before making a declaration of protection. A difficulty with this requirement is that the Minister does not, and in practical terms could not in most cases, have a real opportunity to assess the credibility or sincerity of the applicants. He/she must rely to a considerable extent on the s 10 report. This is, in a sense, a second hand approach to an important issue.[15]

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[13] *Tickner v Chapman* (1995) 57 FCR 451 at 478-479; (1995) 133 ALR 226 at 254, per Burchett J.

[14] In cases such as the *Hindmarsh Island (Kumarangk)* case and the *Broome Crocodile Farm* case.

[15] Finlayson, sub 40.

In addition, the Minister does not necessarily have any expertise or experience in dealing with matters of Aboriginal tradition and belief.

Role of Aboriginal people is not recognised

8.13 The current approach fails to recognise a special role for Aboriginal people in determining the question whether a site is of particular significance. It is, in this regard, inconsistent with minimum standards under which Aboriginal people would be closely involved in the evaluation of sites.[16] Developing the law along those lines would be a way of incorporating Aboriginal values into the legal system, and would be consistent with the ALRC report on recognition of Aboriginal customary law.

New approach needed

8.14 The Act could better achieve its purposes if a way could be found to establish the particular significance of an area, without at the same time destroying the traditions which are the basis of that significance.[17] It does not follow that mere assertion by an Aboriginal that a site is of particular significance according to tradition should be sufficient to establish that fact. A new approach to the issue needs to be developed, one which provides reasonable protection of the confidentiality of tradition and belief, and also ensures that the procedures adopted are fair to Aboriginal people and to other people who may be affected by the decision. That approach should have as its aim an assessment of the degree and intensity of the belief of Aboriginal people concerning the site. It should ensure that the assessment is made by a properly qualified body with relevant experience and that the role of Aboriginal people in the determination is recognised.

DETERMINING SIGNIFICANCE IN OTHER JURISDICTIONS

Aboriginal determination of 'significance'

8.15 In some State and Territory processes the assessment of a site or area, and the question of its significance, are not the responsibility of the Minister but are assigned to independent bodies which are representative of Aboriginal people.[18] The Minister does not review the question whether the site is significant, but considers only whether to continue or to withdraw the protection of a place or area.

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[16] see Annex VI: Guideline 6.8.

[17] Saunders *Hindmarsh Island (Kumarangk)* s 10 report, pp 28-30: noted that it was difficult to establish tradition by mechanisms with which we are familiar.

[18] See Annex VIII.

Northern Territory: the AAPA

8.16 The Northern Territory Aboriginal Areas Protection Authority (AAPA), which has a largely Aboriginal membership nominated by Aboriginal land councils, determines itself whether a site falls within the protection of the Act, and whether the proposed acts for which consent is sought can be carried out without damaging the site. The Minister does not review its decision concerning the status of the site, but decides whether or not to grant a permit for acts to be done which may damage the site.

Victoria: local Aboriginal communities

8.17 In Victoria, under Part IIA of the Act, a local Aboriginal community can decide that a place or object is a place of particular significance to Aboriginal people, and can advise the Minister that it considers a declaration of preservation should be made. The Minister's function is not to review that decision to decide whether "in all the circumstances of the case, it is reasonable and appropriate that a declaration be made for the preservation of the place or object" (s 21E).

Other States and Territories

8.18 There are Aboriginal heritage bodies in Western Australia and South Australia. Though not constituted in the same way as in the Northern Territory, they exercise similar functions.[19] New South Wales, Queensland, Tasmania and the Australian Capital Territory do not have bodies of this kind.

Submissions

8.19 Submissions[20] and consultations support the view that the questions concerning the particular significance of a site should be considered separately from any question relating to the future use or protection of that site:

> The question whether or not a particular place is significant ... should be separate from the question of what activities or work should be permitted on that land. These distinct issues are often blurred. The issue of the significance of the site is then inextricably bound with the question of determining the final land use decision. The blurring is often quite deliberately oriented to a political decision as to whether a particular area will qualify to be protected or not. Proceeding in this manner does enormous harm to relations between Aboriginal custodians and the wider population.[21]

[19] The *Senior Report* recommends that a new representative body be established in WA, to replace the current body. South Australia is moving administratively towards making its own body more representative.

[20] AAPA, sub 49, p16; AHC, sub 52, p6-7 emphasises that significance should be assessed separately and before any decision on future use. The AHC also submitted that there was a need to involve Aboriginal custodians.

[21] AAPA, sub 49, p16.

SEPARATING THE ISSUE OF SIGNIFICANCE

8.20 The opinion of the Review is that the assessment of the significance of an area or site should not remain the personal responsibility of the Minister but should be determined separately from the question of protection. This can be best achieved by ensuring that the assessment is the exclusive responsibility of a competent and authoritative body or agency established for that purpose. The Minister would rely on the assessment of significance in the manner established without inquiring into that issue. This would leave intact the Minister's responsibility to weigh up competing interests in order to determine whether to grant protection of the site or area. Any change of this kind should also give Aboriginal people a more significant role in the assessment of significance. The following sections consider some options for determining 'significance'.

WHO SHOULD DECIDE SIGNIFICANCE?

Decision may be made in State/Territory

8.21 In some matters which are the subject of applications to the Commonwealth Minister, the question of 'significance' may already have been determined at the State or Territory level by the relevant Aboriginal heritage body. That was the case with the Old Swan Brewery (Goonininup) in Perth and the Junction Waterhole (Niltye/Tnyere-Akerte) at Alice Springs:

> In practice, the review process under Territory law from application to decision by the Minister is likely to take closer to six months and may be longer. It should be stressed that in such cases the ground work in establishing the significance of the site by the Authority has been done prior to the triggering of the review so that the review process is built on a foundation of consultation and research which in many cases, has been built up over years.[22]

This is an area where it should be possible to recognise and accredit the State or Territory process for the purposes of the Commonwealth Act, where it meets minimum standards.

> Under a national model in which State and Territory legislation was working effectively, the Federal Minister would not be called upon to routinely determine significance, but rather the degree to which the imperative to protect a site should be given pre-eminence over other considerations for use of the area.[23]

The case for doing this has been fully argued in Chapter 5, where it is recommended that the Commonwealth should accredit or recognise for the

[22] AAPA, sub 49.

[23] AAPA, sub 49, p9.

purposes of the Act decisions concerning the significance of a site by State/Territory Aboriginal cultural heritage bodies that meet the required standards and which apply definitions comparable with the Commonwealth definition.

Reference to a State/Territory body

8.22 Another option would be to refer the question of significance to the relevant agency in the State or Territory, where it has not already been determined by that body, provided that the body is constituted according to minimum standards. A recommendation is made in Chapter 5 about referral to accredited State/Territory process.

A Commonwealth heritage body?

8.23 At this stage, many applications come from States such as NSW and Queensland which do not yet have independent Aboriginal heritage bodies. The 'particular significance' of areas and sites in States and Territories which do not have an approved process will have to be settled at Commonwealth level until such time as they meet minimum standards. Should a national Aboriginal cultural heritage body be established, comprising Aboriginal custodians nominated from representative organisations, to take on responsibility for site assessment? The advantages of this approach are that it would recognise the self-determination of Aboriginal people, and their particular understanding of the issues involved in the decision. But there are also problems and obstacles to this approach.

Hard to replicate State/Territory agencies

8.24 A national body, set up for the purposes of the Act could not be a true parallel to the current State and Territory bodies. They are permanent bodies with a continuing role in the assessment and recording of sites. The members of those bodies, and their staff, have knowledge of local communities and continuing links with them. They deal with many cases each year. In contrast, there are at present about 10-12 applications each year under the Commonwealth Act. It would be difficult for the Commonwealth to establish a national Aboriginal heritage body with effective links to all regions of Australia or to provide it with staff and resources familiar with the communities and conditions of each region. It was submitted to the Review that it would be difficult to obtain a panel with an appropriate gender balance and seniority that would have the respect and support of Aboriginal people from all parts of Australia.[24] A panel of Commonwealth experts sitting in judgment over their colleagues in the States and Territories may be counter-productive. There would also be significant costs associated with establishing a permanent body of this nature.

[24] AAPA, sub 49.

Duplication of functions to be avoided

8.25 In any event, an important objective of heritage protection laws is to develop a co-operative approach, and to avoid duplication of functions.[25] The first priority is to encourage all States and Territories to meet minimum standards by establishing effective Aboriginal heritage bodies for the purpose of site assessment as part of their primary role in heritage protection. A specialist Commonwealth body should only be considered if it proves impossible to persuade the States and Territories to establish appropriate bodies of this kind.

Conclusions: need for a new Commonwealth process

8.26 While many situations may be resolved by reference to an existing State or Territory process, there will be cases where the assessment of an area has to be made for the purposes of the Commonwealth Act. In Chapter 11 of the Report, proposals are put forward for the establishment of an independent expert Aboriginal Cultural Heritage Agency, which would have responsibility for the management of applications under the Act. In keeping with the earlier proposal to separate the question of 'significance' from that of site protection, that body would be responsible for the question whether the area is of particular significance to Aboriginal people in any matter which could not be dealt with by referral to a State or Territory agency. The following section outlines the procedures which should be adopted.

PROPOSED PROCEDURE FOR THE COMMONWEALTH

Principles for assessment

8.27 The procedures adopted to assess whether a site is of particular significance as an Aboriginal site should be in accordance with these principles:

- The Commonwealth should rely on the assessment made by an accredited State or Territory agency where appropriate.
- The issue of significance should be considered separately from the question of site protection.
- An independent body with appropriate expertise should determine the issue in a culturally appropriate manner.
- Principles of confidentiality of Aboriginal traditional information should be respected.
- Aboriginal people should be given a major role in establishing the significance of a site.

[25] *Interaction*, p3.

- The Minister should rely on the assessment of significance in the manner established without inquiring into that issue.

An expert agency

8.28 The constitution of the agency proposed by this Report to administer the Act is described in Chapter 11. It would include Aboriginal people and others with knowledge and experience of Aboriginal heritage issues.[26] It would be an 'expert' body in the sense that its members would have recognised qualities and skills. It would of necessity be constituted in an ad hoc manner for particular cases though it would inform itself by consultation with the relevant Aboriginal community. It would also seek information from anthropologists with real knowledge of the particular Aboriginal community and individuals concerned, provided that their involvement is supported by the Aboriginal community itself.[27] It may seek discussions with Aboriginal members of State or Territory heritage bodies and others with relevant experience or skills in the areas of site protection legislation.[28] As a permanent agency, it should develop an appropriate information base about heritage issues. It could, for example, establish locally-based reference groups.[29]

An ad hoc panel?

8.29 A proposal made in submissions was to provide for an ad hoc team comprising Aboriginal custodians (with appropriate background in the area under dispute) along with similarly qualified experts experienced in preparing reports of the kind required under the Commonwealth Act. Such expertise could be assembled by seconding staff from State and Territory sites protection agencies as and when required. It is suggested that under this model, a Commonwealth Minister would be assured of obtaining advice from both Aboriginal people and relevant experts with particular skills in the areas of site protection legislation.[30] While no specific recommendation is made on this proposal, the new agency should be able to inform itself on issues by the most appropriate means. In Chapter 11 it is recommended that an Aboriginal Cultural Heritage Advisory Council should be established to advise the proposed agency on issues arising under the Act, and in particular on the procedures to be followed and the persons to be consulted in making assessments for the purposes of the Act. This Council should be constituted by Aboriginal people, in such a way as to strengthen links with local Aboriginal communities which have responsibility for heritage issues.

[26] The reporter should have formal qualifications and experience in indigenous heritage: AMEC, sub 48, p24.

[27] ALRM, sub 11, PWYRC, sub 12 caution against anthropologists becoming gatekeepers for reports. Only applicants and custodians can speak for country. The same caution was expressed in respect of archaeologists in Rosita and Greer, sub 37.

[28] AAPA sub 49, p12.

[29] Baldwin Jones, sub 18.

[30] AAPA, sub 49, p12.

Role for Aboriginal people

8.30 The question whether an area is of particular significance according to Aboriginal tradition is a question which, as stressed earlier, should be based on an assessment of the degree and intensity of the belief of the local Aboriginal community connected with that site.

> The issue should not be whether, judged by the norms and values of our secular culture or our religions, the sites are important, but whether they are important to Aboriginals in terms of the norms and values of their traditional culture and beliefs. In other words the issue is not whether we can understand and share the Aboriginal beliefs, but whether, knowing they are genuinely held, we can therefore respect them.[31]

The independent agency should closely consult the Aboriginal community and in particular the traditional owners/custodians.[32] The assessment of significance should be based on the participation of the relevant Aboriginal community, communities or individuals and any anthropological reports or information provided with their consent.

Respect for confidentiality

8.31 The procedures adopted by the agency to determine the issue of significance should respect the confidentiality of Aboriginal information and avoid the need for unauthorised disclosure of information. Although there is a body of opinion that all information about Aboriginal heritage should be made available for assessment purposes, in order to maintain credibility,[33] the fact is that non-Aboriginal people have little or no competence to express an opinion about the significance of an area or site to Aboriginal people, and seldom have any basis on which to challenge their credibility. The threat of exposure of confidential information to persons not culturally entitled (and opposed to the protection sought) would deter such submissions at all and undermine the Act.[34] The essential issue is the competence and credibility of the agency responsible for the determination.

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[31] Wootten *Junction Waterhole (Niltye/Tnyere-Akerte)* s 10 report, p19.

[32] MNTU, sub 17, p5 calls for a body to be established to act on instructions from custodians.

[32] Baldwin Jones, sub 18 supports local reference groups.

[33] AMEC, sub 48, p24: all information about Aboriginal and Torres Strait Islander heritage should be accessible to the relevant authorities and experts, regardless of its cultural sensitivities. It should be maintained in confidential State registers. The Commonwealth Minister should have access under the Act. It must be available for assessment in this way to maintain credibility.

[34] CLC sub 47, p17.

No adversary procedure

8.32 The issue of significance should not be exposed to an adversary procedure, or to review by the courts on the subjective question of fact. In particular, religious beliefs should not be exposed to this kind of scrutiny. Protection of significant sites does not have the same consequences as the establishment of a claim to land rights, and need not be dealt with by the same kind of procedures.[35] These issues are not exposed to an adversary procedure in State and Territory jurisdiction and there would be no need to do so at Commonwealth level, taking into account that the question of significance would be determined by an independent body with appropriate expertise and that it would be considered separately from the question of protection. Only in the most exceptional circumstances would a challenge to the question be necessary.

Independent assessment to be basis of Minister's decision

8.33 The opinion or conclusions of the agency as to the significance of a site should be binding on the Minister. This is entirely consistent with the Guidelines and with the practice adopted in those States and Territories which have established independent Committees for site assessment. It would avoid most problems about confidentiality of information and any need for a Minister of a particular sex to be appointed.

Jurisdictional fact

8.34 The Review has some concerns that, if the opinion of the agency establishing the significance of an area or object for the purpose of making declarations were to be considered a question of jurisdictional fact, this would result in the courts engaging in broad factual inquiries directed at determining this issue for themselves and might be used to undermine the policy objective of separating out that issue. The Review therefore considers that the Act should contain a clear statement of intention to the effect that the decision of the agency as to whether an area or object is one of significance should be conclusive. This is not to suggest that judicial review on administrative laws grounds should be excluded; rather that in addition to detracting from the policy objectives noted earlier, a jurisdictional fact approach would increase uncertainty by opening up the decision on significance to challenge as a factual question even where there is no other suggestion of legal error on the part of the agency.

[35] AHC 52, p9: significance should not be examined in a court, in a way not culturally appropriate.

SOME SPECIAL ISSUES

Differing views about significance

8.35 Cases will arise from time to time where there are differences of opinion between Aboriginal people as to who should speak for an area or who has a genuine interest in particular sites in that area.[36] There may also be differences of opinion about the significance of sites:

> In an old culture which is in a fairly fragmented state there will be differing knowledge among different people and in some cases quite restricted knowledge of areas of particular significance. Some changes will be presented as longstanding and permanent.[37]

These cases represent a small proportion of applications to the Commonwealth Minister, but they present considerable difficulty.

Part of traditional life

8.36 Differences of these kinds arise as a normal part of traditional life, where groups live in and are responsible for overlapping areas. There may be more than one set of custodians, each with a recognised interest. The background to differences were explained in a submission from the Northern Land Council in this way:

> The custodians may be a different or a wider group of people than the traditional Aboriginal owners. Eg an important sacred site has dreaming lines radiating from it and passing through extensive areas of country belonging to different groups of Aboriginals. All of those groups may contain members who share some kind of responsibility for the site, but who are not necessarily under a primary spiritual responsibility for the site. When custodians who are not traditional owners have been consulted in preference to those with primary spiritual responsibility this causes disputes and weakens the protection.[38]

Differences may also result from causes such as displacement and dispossession.[39] The result is that different groups may hold entirely different, but nevertheless sincere, beliefs about an area or site. These factors should not be used against Aboriginal people.

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[36] Such differences have been noted by reporters: Chaney *Broome Crocodile Farm* s 10 report generally from pp28-55; Menham *Old Swan Brewery (Goonininup)* s 10 report, pp2, 7 and 29; Wootten *Junction Waterhole (Niltye/Tnyere-Akerte)* s 10 report, p41-42.

[37] Chaney, sub 19 refers to his *Broome Crocodile Farm* s 10 report, paras 4.24, 4.25 and 14.1, and says that there will be differing Aboriginal views on significance, even where there is a clear traditional association with some particular mythology.

[38] NLC, sub 66.

[39] Wootten *Junction Waterhole (Niltye/Tnyere-Akerte)* s 10 report, pp69-70; Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report July 1994-June 1995* AGPS 1995, p54 and p58.

Resolve issues according to Aboriginal culture

8.37 The fact that inconsistent claims are made does not necessarily mean that an adversary procedure should be conducted, or that evidence should be tested in open court by cross-examination. The *Hindmarsh Island (Kumarangk)* case has shown the destructive nature of that process for Aboriginal people; it should be avoided where possible. It is not necessary to turn an issue primarily directed to the exercise of a ministerial discretion into an inquiry as to who has the primary right to land.[40] What is needed is a procedure to enable the issues to be assessed in a manner appropriate to Aboriginal culture.[41] Ideally the question should be dealt with at State or Territory level. State Aboriginal heritage committees should have procedures, such as those recommended in the Senior Report, to deal with these issues.[42]

Assessing the range of beliefs

8.38 An assessment would not necessarily have to decide which of two groups had the better claim. It may not be possible to resolve that question.[43] It might appropriately report on the views of all relevant people:

> It is fundamental to Aboriginal knowledge that the views of each individual count, and that the whole view can only be obtained by adding up all the various individual views. It is culturally destructive and assimilationist to suggest that any one Aboriginal person can speak for a large number of other Aboriginal people.[44]

The essential question as far as the Commonwealth is concerned is whether the area is an area of particular significance to a group of Aboriginal people, and the degree and intensity of their belief about that place. If the area is considered to be significant to that group, then even if another group of individuals has a different opinion, it would be open to the Minister to make a declaration under the Commonwealth Act. The fact of differing opinions could, of course, be taken into account.

Agency to develop a procedure in consultation

8.39 The agency should seek the advice of the advisory council as to the best procedure to adopt where there are differences of the kind mentioned.

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[40] See the observations of Wilcox J in *Bropho v Tickner* (1993) 40 FCR 165 at 172-174.

[41] Chaney *Broome Crocodile Farm* s 10 report, para 16.20: need for Aboriginal community to establish its own authority as to who may speak. See Neate, G "Determining Native Title Claims – Learning from Experience in Queensland and the Northern Territory" (1995), 69 ALJ 510 from 518.

[42] The *Senior Report* recommends that the Western Australian AHPA determine the significance, extent or existence of a site, the impact of a proposal on a site, and the right to speak for an area: pp 140-3.

[43] Sutton, sub 2: the search is for 'reliability', not the 'truth'.

[44] Baldwin Jones, sub 18.

Flexibility should be permitted, for example, through the appointment of more than one reporter.[45] There may be some cases which are suitable for reference to a committee or panel of local Aboriginal people for consideration.

Contradictions

8.40 A similar approach could be adopted in the case where allegations are made that Aboriginal people have expressed contradictory or inconsistent opinions. This issue was dealt with in the Report of the Resource Assessment Commission.[46] To meet arguments that the concerns were not traditional but of recent origin, that inquiry drew on reviews showing a consistent incidence of Aboriginal concern over access and disturbance to sites in the area.[47] It concluded that past contradictions should not detract from the weight of custodians' current views.

Protection should not be denied

8.41 The Minister should not refuse to handle an application just because other Aboriginal people do not agree with the application. The fact that the area is not significant to one local group does not mean that it is not significant to others. The important issue is that if an application meets the necessary requirements, it is treated as any other application would be. As with other sites, protection should be provided, if necessary while these processes occur. It should not be the role of these processes to resolve disputes among Aboriginal people about the significance of their heritage or whether it should be protected. These disputes should be resolved by Aboriginal people among themselves. Where differences of opinion do arise those differences can be taken account of during the reporting process.

ESTABLISHING INJURY OR DESECRATION

8.42 In addition to being satisfied that the area is a significant Aboriginal area, the Minister has to be satisfied that the area "is under threat of injury or desecration." The Act provides that:

> (2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:
> (a) in the case of an area:
> (i) it is used or treated in a manner inconsistent with Aboriginal tradition;

[45] Finlayson, sub 40.

[46] Resource Assessment Commission *Kakadu Conservation Zone Inquiry Final Report Volume 1* 1991. See also Stewart *Kakadu* s 10 report, pp 22-24. Levitus, sub 45 describes the approach of the Resource Assessment Commission to the questions of historic length of beliefs, contradictions about belief and the role that anthropological evidence played.

[47] Resource Assessment Commission *Kakadu Conservation Zone Inquiry Final Report Volume 1* 1991, para 7.52.

(ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
(iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or

(b) in the case of an object - it is used or treated in a manner inconsistent with Aboriginal tradition; and references in this Act to injury or desecration shall be construed accordingly.

(3) For the purposes of this Act, an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.

8.43 The question of injury or desecration is closely linked to the question whether the area is significant according to Aboriginal tradition, to the nature of that significance and to the effect on tradition of the proposed acts constituting the threat. The assessment of the way in which the threatened action is inconsistent with Aboriginal tradition, or adversely affects the significance of the area in accordance with tradition should be dealt with in the same manner as the question of significance.

RECOMMENDATIONS ON DECIDING SIGNIFICANCE

BASIS OF ASSESSMENT

8.1 The question whether an area or site should be considered an area or site of particular significance according to Aboriginal tradition should be regarded as a subjective issue to be determined on the basis of an assessment of the degree of intensity of belief and feeling of Aboriginal people about that area or site and its significance.

RELYING ON STATE/TERRITORY ASSESSMENT

8.2 Where an assessment has been made of substantially the same issue [concerning the particular significance of an area] in the State/Territory process, it should be possible to rely on that assessment in the Commonwealth process.

REFERRAL TO ACCREDITED STATE/TERRITORY PROCESS

8.3 If a State or Territory Aboriginal Cultural Heritage Committee is constituted according to minimum standards and has the function of assessing the significance of an area according to Aboriginal tradition, there should be an accreditation process to allow the matter to be referred by the Commonwealth to that agency for consideration.

AN ABORIGINAL CULTURAL HERITAGE COMMITTEE

8.4 If the States and Territories do not consider establishing appropriate bodies to deal with heritage issues, the Commonwealth should establish an appropriately constituted Aboriginal Cultural Heritage Committee, to ensure that Aboriginal people are given a major responsibility in establishing the significance of a site.

SEPARATING ISSUE OF SIGNIFICANCE

8.5 The issue of significance should be considered separately from the question of site protection.

ASSESSMENT BASED ON ABORIGINAL INFORMATION

8.6 Where an assessment of significance of an area or site has to be made, it should be based on information provided by and consultations with the relevant Aboriginal community, communities or individuals and on any anthropological reports or information provided with their consent.

ASSESSMENT TO BE BINDING ON MINISTER

8.7 The opinion or conclusions of the agency recommended in Chapter 11 as to the significance of a site should be binding on the Minister.

DIFFERENCES OF OPINION

8.8 (a) The agency recommended in Chapter 11 should develop, with the advice of the recommended advisory council, procedures to be used, if necessary, to deal with situations where there are differences of opinion between Aboriginal people as to who has responsibility for an area.

8.8 (b) The agency recommended in Chapter 11 should report on whether there is a group to whom the area is an area of particular significance, and the degree and intensity of the belief about that place. If there are differing opinions among Aboriginal people on that question, these opinions should be included in the agency's report.

EFFECT OF THREAT

8.9 The assessment of the way in which the threatened action is inconsistent with Aboriginal tradition or adversely affects the significance of the area in accordance with tradition should be dealt with in the same manner as the question of significance.

CHAPTER 9

ENCOURAGING AGREEMENT: THE ROLE OF MEDIATION

9.1 Under its terms of reference the Review has been asked to look at two aspects concerning mediation. These are:

- whether there is adequate scope under the Act for applications to be successfully resolved through mediation (term xi); and
- whether the Act makes appropriate provision for the protection of areas and objects while mediation or reporting processes are under way (term x).

9.2 This chapter considers the role of mediation in heritage protection, how it fits in with the Act and State/Territory procedures and what the problems and outcomes have been. It examines how mediation and similar procedures (including early intervention and consultation) can be made more useful to resolve the tensions between the competing goals of developers seeking certainty and confidence in planning developments, and Aboriginal people seeking to protect sites that are important to them. It looks at the standards that should apply to these procedures.

THE ROLE OF MEDIATION IN THE ACT

What is mediation?

9.3 Section 13(3) of the Act authorises the Minister to nominate a person to consult with persons he considers appropriate with a view to resolving, to the satisfaction of the applicant or applicants and the Minister, any matter to which the application relates. This section is used to bring together applicants and interested parties, for example, the developer and State/Territory agencies for mediation, which is the process where an independent third party helps people in dispute to come to an agreement.[1] Justice French, President of the National Native Title Tribunal describes the process of mediation as follows:

> It requires that the parties should identify their own and others' real interests and objectives, consider a variety of options to accommodate those interests, develop criteria of legitimacy to test the fairness of agreements which might emerge from the process and consider what are the likely best alternatives to a negotiated outcome. In the context of a native title application, they would be either litigation or abandonment of the application.[2]

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[1] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report July 1994-June 1995* AGPS 1995, p 107.

[2] Justice French "The Role of the Native Title Tribunal" in *Native Title News* Vol 1 No 2 1994, p 15.

Mediation under the Act and State/Territory law and practice

9.4 State and Territory laws may provide for mediation and dispute resolution. For example, the *Northern Territory Aboriginal Sacred Sites Act 1989* provides that an applicant for permission to develop may request a conference with the custodians, and either party may request that such a conference be held in the presence of the Aboriginal Areas Protection Authority (AAPA) or a member of the AAPA.[3] Planning procedures may require developers to approach the traditional custodians to seek agreement about a proposed activity. The relevant Minister may be required to consult before consent to develop is given. One question that arises is: should similar processes be repeated when an Aboriginal person applies for protection to the Commonwealth if the parties have exhausted comprehensive and appropriate mediation and consultation procedures at State or Territory level.

How mediation has been used under the Act

What is effective mediation?

9.5 In the context of protection of Aboriginal cultural heritage the Review considers that mediation is effective if:

- it is genuine on the part of both parties and reasonably expeditious so that protection can continue without undue delay or expense;
- agreement is reached;
- the agreement is implemented by both parties; and
- Aboriginal heritage is protected to the satisfaction of the applicant.

Appointment of mediators

9.6 Out of 111 cases[4] the Minister appointed a mediator or mediators in the 22 cases listed below. In three of these cases the Minister appointed two mediators, a male and a female.

- Point Lookout, North Stradbroke Island (Qld) 1984
- Oyster Cove, Hobart (Tas) 1985
- Bennet Brook 1, Perth (WA) 1985
- Moreton Island, Brisbane (Qld) 1987
- Yass Burial Site, (NSW) 1987
- Old Swan Brewery (Goonininup), (WA) 1988
- Angel Beach Housing, Ballina (NSW) 1988
- Arukun, Cape York (Qld) 1989
- Bright Point, Magnetic Island (Qld) 1989
- Coen (Qld) 1989
- North Creek Bridge, Ballina (NSW) 1991

[3] Sections 20(3) and (4).

[4] A case may involve a number of applications.

- Junction Waterhole (Niltye/Tnyere-Akerte) (NT) (a male and a female) 1991
- Strehlow Collection, Adelaide (SA) **check year?** 1993
- Iron Princess, Whyalla (SA) **check year?** 1992
- Moana Beach, Adelaide (SA) (a male and a female) 1993
- Cast of Truganini's Death Mask (Tas) 1993
- Century Mine, Carpentaria (Qld) 1994
- Lakes Barrine and Eacham (Far North Qld) 1994
- Bow River Diamond Mine, Kununurra (WA) (a male and a female) 1994
- Broome Crocodile Farm (WA) 1994
- Boobera Lagoon, Moree (NSW) 1994
- Ban Ban Springs, Gayndah (Qld) 1995

Cases where agreement reached

9.7 Of the 22 cases in which a mediator was appointed, and about which the review had sufficient details, formal agreement was reached in seven cases. These were:

- Iron Princess, Whyalla (SA)
- Moana Beach, Adelaide (SA)
- Strehlow Collection, (SA)[5]
- Point Lookout, North Stradbroke Island (Qld)
- Bow River Diamond Mine, Kununurra (WA)
- Angel Beach Housing, Ballina (NSW)
- North Creek Bridge, Ballina (NSW)

Case Study – Bow River Diamond Mine, WA, 1994

9.8 The applicants started writing to the Commonwealth Minister in July when the mining company applied to the State Minister for consent to explore and mine on a station in the Kimberly region where there were sites which had been recognised as significant in ethnographic and archaeological surveys. The applicants kept the Commonwealth Minister informed about the progress of State proceedings. The relevant State heritage committee (ACMC) recommended that the Minister not grant consent. However, the State Minister consented to exploration. When the mining company told the applicant that they proposed to proceed on the basis of the consent, the applicant asked for a s 9 declaration. The Commonwealth Minister did not make a declaration but instead the Minister's office asked the mining company to stop exploration activity voluntarily. The Minister appointed two mediators. The mining company did not agree to stop ground-disturbing activity while mediation took place. The applicants filed for an injunction in the Supreme Court of WA. The mining company then agreed to stop work

[5] For details on this case, see Chapter 12.

and enter mediation under the Act. The parties reached agreement as a result of the mediation.

Cases in which agreement implemented

9.9 Of the cases in which agreement was reached, it has been implemented in only four. These were the Strehlow Collection, Point Lookout, Bow River Diamond Mine and North Creek Bridge cases.[6] Reasons for non-implementation appear to include circumstances in which:

- there was later dispute about the terms of the agreement; and
- it involved costs that the State/Territory government was not willing to pay and the agreement depended on a large amount of funding from a government agency (not a direct party to the agreement) which made a decision not to pay it.

Cases in which no agreement was reached

9.10 No agreement was reached in nine[7] of the cases the Review has details about. Reasons for failure to reach agreement appear to include:

- unwillingness of a party to negotiate or protect, particularly where a State or Territory government is involved;
- the costs involved in protecting heritage; and
- that there was no incentive to reach agreement.

Other outcomes

9.11 If judged by the number of agreements reached and implemented, mediation under the Act does not appear to have been highly effective as a means of resolving applications or of protecting heritage. However, in some cases, although no agreement was reached, or the agreement was not implemented, the parties benefited from speaking face-to-face for the first time, and a greater understanding of each other's views and the reasons for them was achieved. For example, in the Iron Princess case (in which the agreement was reached but not implemented) the mediation process provide machinery for ongoing co-operation between BHP and the Aboriginal community.[8]

Factors influencing a successful agreement

9.12 Agreements appear to be more likely to be reached in cases where the activity of concern has halted during mediation because there is either a s 9 declaration, a s 12 application, or an injunction, or because the company has

[6] See Table following, page 132.

[7] In two of the cases, mediation is still going on: see Table following, page 132.

[8] Wootten *Iron Princess* s 10 report (1993), page 17.

agreed to halt operations during the mediation. This was the case in five of the six cases in which agreement was reached. Of the nine cases where agreement was not reached, activity continued at least to some extent during mediation in four cases, activity had not yet started in four others and in only one case the activity of concern had been halted (voluntarily).[9] This supports the view that declarations should be in place while mediation occurs. It protects sites and also provides an incentive to the party whose activity is of concern to negotiate. It could be said to even up the balance of power, which more often favours development interests.

Cases where damage occurred during mediation

9.13 There appear to be a number of cases where the effectiveness of mediation can be questioned because activities of concern continued during mediation and damage occurred during that time. These are:

- Century Mine
- Boobera Lagoon
- Lakes Barrine and Eacham

These are all recognised as significant sites.

Case study – Lake Barrine and Lake Eacham, North Queensland, 1994[10]

9.14 The Dulgubarra Aboriginal Corporation applied for a s 10 declaration in March 1994. It was claimed that Lakes Barrine and Eacham, significant Aboriginal areas were being injured and/or desecrated by expanding tourist activities including lake cruises and swimming. The applicants wanted a role in the management of the national park to enable them to protect the site. ATSIC commissioned a research report. A mediator was appointed in September 1995. The activities have continued in the meantime and no agreement or resolution of the matter has been reached after two years.

Mediation at State/Territory level

9.15 In some cases mediation occurred at State/Territory level after application was made under the Commonwealth Act. These include Skyrail and Coorlay Lagoon. In the case of Coorlay Lagoon the site was unprotected during State mediation (which was unsuccessful) and further damage to the site occurred.[11] In the case of the Pinnacles, Broken Hill, State mediation processes are continuing and the application remains open while this occurs.

[9] See Table following, page 132.

[10] See Annex VII for further details.

[11] Draper, sub 59.

Details of s 13 Mediations

NAME	Year	Outcome of s 13 mediation	s 9 declaration during mediation?
Junction Waterhole (NT)	1991	(a male and a female) – no agreement reached	Before and after but not during mediation
Iron Princess, Whyalla (SA)	1993	Agreement reached but not implemented	No, but company agreed no to mine
Moana Beach, Adelaide (SA)	1993	Agreement reached but not implemented	No, developer agreed to halt while mediation
Strehlow Collection, Adelaide (SA)	1992	Agreement reached and implemented (see Ch 12)	A number of s 12 declarations
Oyster Cove, Hobart(Tas)	1985	Unclear if agreement reached as result of mediation	No
Cast of Truganini's Death Mask, Hobart (Tas)	1993	Negotiations over purchase of maskunsuccessful	No
Arukun, Cape York (Qld)	1989	Agreement not reached	No, company agreed to restrain its activities
Ban Ban Springs, Gayndah (Qld)	1995	Not yet completed	No, pumping continued during mediation
Century Mine, Carpentaria (Qld)	1994	Not yet completed	No, some activity cont. during mediation
Bright Point, Magnetic Island (Qld)	1989	No formal agreement	Yes, 2, developer agreed to halt temporarily
Moreton Island, Brisbane (Qld)	1987	No agreement reached	No, drilling continued with monitor
Lakes Barrine and Eacham, (Far North Qld)	1994	No agreement reached	No, damaging activities continue during mediation
Point Lookout, North Stradbroke Island (Qld)	1984	Agreement reached	No
Coen (Qld)	1989	Completed but outcome unknown (case still open)	No
Bennet Brook, 1, Perth (WA)	1985	Options developed but no agreement reached	No, proposal only
Bow River Diamond Mine, Kununurra (WA)	1994	(a male and a female) Agreement reached	No, but there was an injunction which started mediation
Broome Crocodile Farm (WA)	1994	No agreement reached	Yes, 2
Old Swan Brewery (Goonininup) (WA)	1988	No agreement, applicant rejected appointment	Yes
Angel Beach Housing, Ballina (NSW)	1988	Agreement reached, but not implemented	No, but no activity during mediation
North Creek Bridge, Ballina (NSW)	1991	Agreement reached, not known if implemented	Not known
Boobera Lagoon, Moree (NSW)	1994	Not yet completed	No, activities threatening site continue
Yass Burial Site, (NSW)	1987	Completed but outcome unknown	Yes
Lake Victoria, Mildura (NSW)	1995	Mediation appointment being considered	Not yet

Advantages of mediation

It resolves disputes to everyone's satisfaction in some cases

9.16 Although under the Act mediations have not had a high rate of success, in some cases it has resolved the dispute in a way which satisfies both parties.

Case study – North Creek Bridge, Ballina NSW 1991

9.17 There was a bitter legal dispute between the Jali Local Aboriginal Council and the Ballina Shire Council over the building of a bridge over North Creek in East Ballina. The eastern approach to the Bridge threatened to destroy one of the State's most important shell middens (believed to be 12,000 years old) and to damage a site known as the Fish Trap. The Commonwealth Minister appointed two mediators under the Act. As a result of the agreement reached in the mediation the Council agreed to build a protective barrier next to the eastern approach works of the bridge which would prevent tides or floods scouring away the midden. A special culvert would protect the Fish Trap.[12]

Inclusion in Act
enables Aboriginal people to bargain from a position of strength

9.18 The Land, Heritage and Culture Branch of ATSIC considers that section 13(3) has been one of the less apparent strengths of the legislation. A mediator has been appointed under this section where there has been a reasonable likelihood that the applicant and other parties may be able to find a solution without the Minister making a declaration. The threat of a declaration has brought the parties to the negotiating table in some cases. The Heritage branch cites Century Zinc Mine (Qld), Bow River Diamond Mine (WA) and Ban Ban Springs (Qld) as examples of this.[13] The Central Land Council also considers that the deterrent effect of the act may have helped to bring the parties together.[14] However, in the Bow River case, the applicant had to get an injunction before the mining company would negotiate.[15] The agreement in Ban Ban Springs has not been implemented.

Establishes lines of communication and avoids future disputes

9.19 Mediation has helped to establish a basis for future relationships in some cases.[16] Wootten in the Iron Princess case commented that:

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[12] The Jali had initiated proceedings in the NSW Land and Environment Court. The agreement reached at the mediation was lodged with the Court in January 1991 and was the basis for the proceedings being discontinued. The agreement makes provision for a joint Committee of Management with an on-going role to resolve disputes.

[13] ATSIC, sub 54.

[14] CLC, sub 47, p 12.

[15] See case study, para 9.8.

[16] Wootten *Iron Princess* s 10 report (1993), p 17.

> The value of the agreement lies not only in the resolution of the immediate problems, but in providing machinery for ongoing co-operation between BHP, the major economic institution in the area, and the Aboriginal community.[17]

This may be particularly important where there is going to be an ongoing relationship with the developer. In the case of Iron Princess, an Aboriginal committee was to be established which would work with BHP to survey other areas with a view to avoiding any future disputes. A similar result was achieved in the North Creek Bridge case where an outcome of the mediation was to provide a framework for ongoing consultation.[18] Face-to-face mediation with members of an Aboriginal community may help to educate developers about Aboriginal heritage concerns.[19] Parties may be less likely to take entrenched positions, and more likely to resolve issues amicably. One submission says that:

> ... to date there have been a number of declarations which have resulted in much controversy, intensive media attention and antipathy between the various interested parties, which places a great strain upon applicants. Mediation is therefore an important step in the process and there should be emphasis on this aspect of the process, as long as this does not compromise the interests of applicants.[20]

9.20 Some submissions from farmers, miners and developers support an approach which enables them to talk directly with Aboriginal people.[21] Reporters dealing with contentious issues have observed that mediation may facilitate co-operation between Aboriginal and non-Aboriginal people by overcoming distrust in the early stages of a development.[22]

Greater participation and control

9.21 Mediation has the potential to give Aboriginal people greater participation and control over decisions about, or proposals affecting, their heritage. One submission says that it achieves cultural heritage decisions which reflect Aboriginal values:

> Reform provisions should not merely 'take into account' the wishes of Aboriginal groups, but rather seek actively to facilitate their wishes, through allowing them to negotiate agreements with and through parties which fully recognise the significance to them of sacred sites and cultural heritage.[23]

Outcomes more likely to last

9.22 The Aboriginal and Torres Strait Islander Social Justice Commissioner supports mediation and negotiated outcomes in native title claims in

[17] Wootten *Iron Princess* s 10 report (1993), p 17.

[18] See above, para 9.17.

[19] MNTU, sub 17; ALSWA, sub 56.

[20] CLC, sub 47.

[21] See for example CRA, sub 9; AMEC, sub 48, p 30; NFF, sub 53, p 4.

[22] See for example, Saunders *Hindmarsh Island (Kumarangk)* s 10 report (1994), p 52.

[23] MNTU, sub 17, p 6.

principle. Agreed outcomes are more likely to endure and will have a better effect on the relationships of the parties than outcomes decided by a court. Where parties make an agreement to resolve a dispute they own the outcomes and have an investment in its success.[24]

Enables a wider range of positive options to resolve disputes to be developed

9.23 Legal solutions, or protective declarations, can only respond to the immediate crisis. In many cases, there are much wider heritage protection issues of which the immediate dispute is a small part. This was so in the Broome Crocodile Farm case, where the s 10 reporter and mediator said:

> A mediated outcome to this dispute remains the better option, but such an outcome may not be possible. Whatever the outcome of this particular dispute however, every effort should be made to achieve an Aboriginal/Government agreement on the correct approach to be adopted for Aboriginal Heritage protection in this important area ...[25]

Even within the confines of a particular dispute, there is a potential for a wider range of options to be developed to resolve the dispute.[26] The Association of Mining and Exploration Companies sees mediated resolutions of applications as "infinitely more preferable than a formal declaration".[27]

WHAT ARE THE PROBLEMS AND CONCERNS WITH MEDIATION?

Concerns about mediation

Sites are non-negotiable

9.24 One submission raises problems about mediating over sites:

> Fundamentally mediation over spiritual convictions is nonsensical to Anangu custodians. Negotiating over sites is very different to negotiating over land and offering areas vacant of sites for exploration or farming activity in return for some economic gain. Sites are simply non-negotiable areas, any negotiations would always be in the context of the shadow of development proposals.[28]

Gender imbalance

9.25 One submission says that gender balance within Anangu society would also cause problems in mediations over sites.[29]

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[24] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report July 1994-June 1995* AGPS 1995, p 107.

[25] Chaney *Broome Crocodile Farm* s 10 report(1994), p 5.

[26] See Saunders *Hindmarsh Island (Kumarangk)* s 10 report (1994), p 52; ALSWA, sub 56.

[27] AMEC, sub 48.

[28] PC, sub 28.

[29] PC, sub 28.

Aboriginal people need resources for effective negotiation

9.26 Submissions are concerned that to negotiate effectively Aboriginal people need resources to commission surveys and reports.[30] Structures necessary to support effective mediation include providing Aboriginal people with the resources and time to work out what they want out of the mediation.[31] In the *Iron Princess* s 10 report, Wootten emphasises the importance to the Aboriginal people involved in the mediation of having access to professional advice and assistance. He commented that without that advice and assistance it would have been much more difficult for him to ensure that the Aboriginal people understood the proceedings and the issues, and were aware of their implications.[32]

May be culturally inappropriate

9.27 Behrendt raises a number of concerns about mediation as a dispute resolution mechanism where Aboriginal people are involved. She says that for cultural reasons "the aspect of neutrality for Aboriginal and Torres Strait Islander mediators can be tenuous because of mediator family ties and alliances, being known to the disputants or knowing too much about the nature of the conflict".[33] In her view, a model of dispute resolution that fits Aboriginal culture and values should be adopted for disputes involving Aboriginal people.[34] One submission is concerned that mediation processes, although important, have not given appropriate consideration to affiliated Elders or their proposed representatives.[35]

Mediation may be inconsistent with the objects of the Act

9.28 The Review was told of concerns that heritage protection may be compromised in the process of mediation. For example, one submission says that there is a danger that where the applicant has asked for a s 10 declaration the matters that must be considered in a s 10(4) report may be overlooked in a mediation and the applicants forced into a compromise which does not appropriately preserve and protect areas or objects of particular significance to Aboriginal people.[36] Another submission gave the Moana Beach case as an example of this. It says:

> ... the Aboriginal cultural significance of the site was never a central feature of the mediation process – the extent and nature of the area of cultural significance

[30] Nayutah, sub 20; see also Behrendt, L *Dispute Resolution within Aboriginal Communities as a step towards Self-determination and the Recognition of Sovereignty* (unpublished paper), p 54.

[31] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report* July 1994-June 1995 pp 112-116.

[32] Wootten *Iron Princess* s 10 report (1993), p 22.

[33] Behrendt, L *Dispute Resolution within Aboriginal Communities as a step towards Self-determination and the Recognition of Sovereignty* (unpublished paper), p 52.

[34] As above, also at p 52.

[35] Mutthi Mutthi, sub 50.

[36] ALRM, sub 11.

> should have been the baseline of the mediation process, rather than being cast as the negotiable currency of forging a compromise. In the end, all of the pressure to compromise was on the Kaurna – to give up their cultural heritage, ancestral burials etc. The developers never swerved from their adherence to a high profit margin and maximum development of the Aboriginal site they had already partially destroyed ... There was nothing to work with to achieve a compromise, except the badgering of the Kaurna to accept cultural destruction.[37]

The submission says that the State insisted that any agreement be cost neutral, but that the compromise reached was not cost neutral, and is believed to have fallen through leaving the site still under threat.

It comes too late in the process

9.29 The late stage in the process that mediation occurs under the Act may be a reason why mediation did not succeed in a number of cases. Positions may be entrenched or the development may be too far down the track. It may come after lengthy State/Territory planning processes.[38] For this reason mediation is not attempted even though reporters hold the view that mediation may have been possible at an earlier stage. This was the case in Skyrail. A mediator was not appointed, but the reporter commented:

> A mediation process, begun earlier in the development, may have led to an agreed approach between the Aboriginal people and the developers. Instead there has been until very recently something of a standoff between them. From the Aboriginal viewpoint this owed a lot to a sense of frustration and disempowerment over the development of the project ... While there is a perception that the Djabugay people were opposed to the construction of the Skyrail ... the Djabugay people put it to me that they were not anti-development but wanted to ensure a proper process of negotiation with them early in the development proposal over the use of the land ...[39]

Other reporters agreed that a mediation or consultation process much earlier might have avoided the crises that resulted in the delays in projects and the stress for applicants that go with applications under the Commonwealth Act.[40] In the case of the Hindmarsh Island (Kumarangk) case, the time for mediation had passed by the time an application under the Commonwealth Act was made. Entrenched mistrust and ill feeling as well as the lack of time available for mediation (with the threat of immediate resumption of construction once the s 9 declarations had expired) made any prospect of mediation impossible.[41]

No protection while mediation proceeds

9.30 Submissions were concerned that often the action threatening the sites, objects or areas in question continues while mediation proceeds.[42] For

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[37] Draper, sub 59 p 2-3.

[38] KLC, sub 57, p 12.

[39] Menham *Skyrail* s 10 report (1995), p 57.

[40] Wootten *Iron Princess* s 10 report (1993), p 21.

[41] Saunders *Hindmarsh Island (Kumarangk)* s 10 report (1994), p 52.

[42] White, sub 22; Goolburri, sub 13; Nayutah, sub 20; CLC, sub 47; ALSWA, sub 56.

example, one submission says that there is no legislative protection for the area or object,[43] other than perhaps a verbal agreement to remove the threat. It pointed out that the Minister has tended to appoint a mediator instead of making a s 9 or s 10 declaration. While the Minister may consider that the threat of a declaration may be an incentive to developers to engage in mediation, from the view point of Aboriginal people mediation is not possible unless the threat is removed or suspended.[44] Appointing a mediator without ensuring that a site is protected may result in the applicant having to take separate legal action to get the activity stopped, as in the Bow River case,[45] or in damage to the site while mediation occurs. The negotiating position of Aboriginal people is reduced if the site is being injured.

There are no mediation protocols

9.31 One submission was concerned that the Act does not provide protocols for mediation.[46]

Agreements are not enforceable

9.32 Agreements reached as a result of a s 13 mediation process are not enforceable. This is of concern because at least half the agreements reached under the Act were not implemented.[47] Some submissions say that agreements reached after mediation should be made enforceable under the Act.[48]

HOW TO MAKE BETTER USE OF MEDIATION AND OTHER PROCESSES TO REACH AGREEMENT

A role for negotiation

Support for negotiation and agreements

9.33 There are many situations where site protection is compatible with proposed development and where negotiation and compromise is possible. Aboriginal people say they want to negotiate rather than be consulted. They want to take part in the decision affecting their site. To meet this need, legislation should encourage heritage protection through negotiation and agreement between land users/developers and relevant Aboriginal groups. It may encourage participation in mediation if the resulting agreement has a recognised status. Some mining companies have developed their own protocols for reaching agreement with Aboriginal people. Aboriginal

[43] CLC, sub 47.

[44] ATSIC, sub 54.

[45] ALSWA, sub 56.

[46] White, sub 22.

[47] MNTU, sub17.

[48] ATSIC, sub 54; MCA sub 27; CRA sub 9; KLC sub 57.

communities should be supported in the process by the relevant Aboriginal heritage body.

Few provisions for negotiation at State/Territory level

9.34 At this stage, only the Northern Territory Aboriginal Areas Protection Authority has the express function of facilitating discussion between custodians and developers, with a view to agreeing on appropriate ways of avoiding and protecting sacred sites. Senior has recommended that a mediation process be included in the consultation stage of development approval procedures in Western Australia.[49] While other jurisdictions may in some cases arrange for negotiation, it is not accepted as a legal standard, or as an essential part of heritage protection.

Mediation should be a part of processes under the Act

Support for mediation

9.35 The Review's consultations and submissions support the view that mediation and negotiation should be a first step or at least an important step in the heritage protection process.[50] Mediation is a way of giving Aboriginal people greater control over their heritage. It can avoid the stress and trauma associated with the intervention of an outside person who has no intimate knowledge of the area, site or object to determine whether to protect the heritage. If properly structured it has the potential to result in agreements that all parties can rely on. It can open the lines of communication and create ongoing working relationships. To achieve these objectives it must be structured in such a way as to avoid the failings now evident and recognise that some conflicts of interest may be irreconcilable and non-negotiable. Care must be taken to ensure that it helps Aboriginal people to achieve their aspirations in relation to their heritage.

Current provisions need revision

9.36 Since the current Act was drafted, mediation has become more prominent. Given the general support for its inclusion in heritage protection processes and the Commonwealth Act,[51] and the pitfalls unless it is used with care, the Review has concluded that the current provisions of the Act are not adequate. They do not specifically refer to mediation and there are no provisions about procedures or protocols to be followed. The changes that are proposed could be partly realised without legislative change, but ideally they should be included in the revised legislation.

RECOMMENDATION: A MEDIATION PROCEDURE

[49] *Senior Report*, p 138.

[50] Nayutah, sub 20; ALRM, sub 11, PWYRC, sub 12; NQCAC, sub 33; AMEC, sub 48; Palyga, sub 1; ALSWA, sub 57.

[51] See for example ALRM, sub 11; CLC, sub 47; ALSWA, sub 56; KLC, sub 57.

9.1 The Act should provide for a specific mediation procedure, which should be offered to parties before a reporting procedure leading to a declaration is considered.

Mediation should be voluntary and available in all cases if parties agree

Introduction

9.37 Mediation should be offered to parties, but it cannot be forced on them.[52] Undue delay, and waste of resources may result if the parties are not genuinely interested in reaching agreement. The dispute may not be suitable for mediation if parties are bitterly opposed and in entrenched positions, or if the dispute has already gone through a consultation process and a mediation process without success.

Mediation should be voluntary

9.38 Mediation should be voluntary. It should be available to any applicant if the parties to the application agree. At the moment when an applicant asks for a s 9 or s 10 declaration it is left entirely to the Minister to decide what action he or she will take. This may include appointing a mediator under s 13(3). Applicants should have the option of asking for a mediator to be appointed when they make their initial application.

RECOMMENDATION: MEDIATION TO BE VOLUNTARY

9.2 Mediation under the Act should be voluntary. Applicants should have the option of asking for a mediator to be appointed when they make their initial application.

Appointment of mediators acceptable to parties

Flexibility

9.39 The Act should adopt a flexible approach to the issue of who can be a mediator. The mediator/s should not be appointed unless he, she or they are acceptable to the parties involved. It should be possible to appoint more than one, for example, a male and a female, or an Aboriginal person and a non-Aboriginal. The mediator may or may not be an Aboriginal person, depending on what the parties want and agree to. The agency proposed in Chapter 11 would draw from a panel of mediators. In some cases it may be useful for the mediator to undertake the report if mediation is unsuccessful. In others, it may cause problems of confidentiality or other difficulties.[53] Interested parties should be consulted in advance about whether, they would be prepared to have that person undertake a reporting process if the mediation is unsuccessful. However, they should still have the right to reject that person as

[52] See for example CLC, sub 47; ALRM, sub 11, PWYRC, sub 12.

[53] See Chaney, sub 19, who favours a separation of these roles; but note that Wootten was asked to perform both roles at the same time in *Iron Princess* case.

a reporter later on if they change their mind when the mediation is over. The agency should ask at the time of application if there are likely to be gender or other cultural issues arising and take these into account in proposing a mediator.[54]

RECOMMENDATION: AN AGREED MEDIATOR

9.3 A mediator should be nominated only with the agreement of the parties. A mediator should not be the reporter unless the parties accept this.

Provision for flexible, culturally appropriate mediation

Flexible dispute resolution

9.40 There should be flexibility in the Act as regards the dispute resolution processes to be set up. It should allow, for example, conferences, one-on-one negotiation or a more culturally appropriate dispute resolution process. Procedures should be adapted to minimise disclosure where there are gender or other restrictions on information discussed during a mediation or negotiation. For example, there should be provisions for women to be consulted and negotiated with separately, and by a woman if necessary.[55]

RECOMMENDATION: MINIMISING DISCLOSURE

9.4 The Act should allow flexibility in mediation and negotiation procedures and those procedures should be capable of adaptation to minimise disclosure of restricted information, and in particular, gender restricted information.

Time frames for mediation

Adequate time, but not too much delay

9.41 The time frames allowed for in the mediation process should ensure that the parties are able to prepare a negotiating position. They should allow time for the applicant community to be informed of the progress of the mediation/ negotiation. Mediation, or attempts to encourage mediation, cannot go on indefinitely especially if damage is continuing, or, on the other hand, a project is being held up. There should be a time limit beyond which mediation processes can continue only if the parties agree. The issue of time limits and interim protection is discussed in Chapter 10.[56]

RECOMMENDATION: TIME FRAMES FOR MEDIATION

[54] See the Practice Directions of the Northern Territory Aboriginal Land Commissioner.

[55] PC, sub 28, p 8.

[56] CLC, sub 47 argues there should be no time limit.

9.5 Time frames should ensure that the parties have adequate time to prepare a negotiating position but not so as to allow the procedure to result in undue delay in resolving the issue.

Protection for heritage during mediation

Interim protection needed

9.42 Mediation should not be used as an excuse for continuing to damage a site. The area under threat should be protected while mediation occurs.[57] The case studies suggest that an agreement is more likely to be reached where there has been a temporary halt to a project which is damaging a significant area or site. The situation that has occurred in some cases where sites have been damaged during long drawn out mediation should not be allowed to continue. Protection should apply. In conjunction with a reasonable time frame this will encourage the parties to negotiate in good faith.

RECOMMENDATION: PROTECTION DURING MEDIATION
9.6 Significant areas should be protected from continuing injury or desecration while mediation takes place. The protection should last until mediation is successful, though a perty may choose to end the process at any time..

The Review makes more specific recommendations about this in Chapter 10.

Agreements should be enforceable

Making agreements enforceable

9.43 There is support for recognition of privately negotiated agreements from Aboriginal people[58] and organisations representing farmers[59] and miners.[60] A number of submissions suggest that agreements reached under the Act should be enforceable.[61] At the moment they are not, and a number of agreements reached have not been implemented. It is not reasonable to expect people to put a lot of effort into reaching a settlement if it is not enforceable. One way of making them enforceable would be to provide for registration of agreements with the proposed agency and to provide that registration gives an agreement contractual force.[62] The agency would examine the agreement to see that it is consistent with the purposes of the Act, that is, to protect heritage, and if so, register it. Breach of the agreement would attract civil liability, for example, damages. This approach is adopted in s 41 of the *Native Title Act 1993* (Cth) in

[57] CLC, sub 47; ATSIC, sub 54; Nayutah, sub 20.

[58] See for example Darumbal, sub 39; MNTU, sub 17, p 11.

[59] NFF, sub 52, p 6.

[60] MCA, sub 27, para 3.8.

[61] See for example, KLC sub 57.

[62] Chapter 11 discusses the proposed agency.

relation to agreements about native title reached under the Act. The main benefit of this approach is that, unlike declarations, the Act will support the enforcement of positive obligations in relation to heritage, for example, to consult, to involve Aboriginal people in management or to give access to important sites.

> RECOMMENDATION: REGISTERING AGREEMENTS
> 9.7 The Act should provide for the registration of agreements reached under its negotiation or mediation processes. To be registered, the agreement must be consistent with the purposes of the Act. The effect of registration will be to give the agreement the force of a contract. Breach of the agreement would give rise to civil liabilities.

State or Territory dispute resolution processes should be recognised when they meet minimum standards

Early access to dispute resolution needed

9.44 Ideally negotiation and mediation should occur at the planning stage, when the issues are with States and Territories. If they do not provide appropriate processes for this many disputes may be beyond mediation by the time a person applies under the Commonwealth Act.

Recognising State and Territory processes that meet standards

9.45 To avoid duplication, and to encourage State and Territory governments to establish appropriate processes, the Commonwealth Act should recognise State and Territory processes where they exist and meet minimum standards. Where the parties to an application under the Commonwealth Act have been through accredited negotiation or mediation processes, the Commonwealth mediation process would not be available unless all the parties agree. The minimum standards for models laws recommended for State and Territory planning and development processes include these elements:

- the planning and development process should be integrated with consideration of heritage issues;
- a responsible Aboriginal heritage body should facilitate an effective consultation/negotiation/mediation process for developers and appropriate Aboriginal people;
- the objective of negotiation should be to reach agreement on ways of protecting sites (ie heritage protection agreements, not development agreements);
- legislation should encourage heritage protection by recognising appropriate agreements between Aboriginal people and the land user/developer;
- the disclosure of restricted (including gender-restricted) information should be minimised by a work clearance approach.[63]

[63] The issue of protecting restricted information is covered in Chapter 4.

In its review of Western Australian heritage protection legislation the Senior Report proposes a detailed model procedure for consultation, negotiation and dispute resolution which includes most of these elements.[64]

> RECOMMENDATION: ACCREDITING MEDIATION PROCEDURES
> 9.8 State and Territory mediation procedures that meet minimum standards should be accredited and recognised by the Commonwealth heritage protection procedure. The Commonwealth mediation process should be available if there is no accredited State or Territory process.

[64] See *Senior Report* pp 131-154.

CHAPTER 10

MAKING THE ACT MORE EFFECTIVE: BETTER DECISION MAKING

> This [information] suggests a need for some kind of guidance – whether legislative, informal, or a combination – to delineate more clearly how applications are considered, and when parties can expect an outcome. It seems particularly inappropriate that judicial enforcement be the only guaranteed means for applicants to achieve some certainty, in relation to the operation of legislation enacted for their benefit.[1]

Process in need of reform

10.1 The aim of this part of the report is to address the need identified above by the Commonwealth Ombudsman and to deal with a range of issues concerning the decision-making process provided for in the Act. In doing so, the Review explains why it rejects the suggestion that a more formal, quasi-judicial approach should be taken to resolving applications under the Act. The framework for decision making provided in an Act that was introduced as an interim measure is no longer adequate to achieve its stated purpose or to deal in a timely and fair way with the various interests at stake. Recent court decisions mean that the processes required under the Act involve a level of formality and an adversarial emphasis that it appears was not originally intended, but which have become necessary in an attempt to ensure that all interested persons are treated fairly within the framework provided. The Review considers that an informal approach should be retained and that improvements can be made in dealing with all interests involved. An outline of the process recommended by the Review may be found in the Summary of the Report.

SUMMARY OF ISSUES RAISED

Comments about political nature of decisions

10.2 The need to minimise the political dimension of decision making under the Act is one that all informants of the Review agree on. Aboriginal interests generally argued that the Act has not worked effectively to preserve and protect Aboriginal heritage. For them, the consequences of the political nature of the decisions have included:

- the dearth of declarations;
- the success of several legal challenges to the validity of those that were made; and

[1] Submission 41, Commonwealth Ombudsman, page 8-9

- the failure of the Act to preserve and protect heritage in the face of large-scale developments.

Development interests say that:

- the Act has caused them additional costs and delay;
- competing land use interests and the broader benefits to the community of economic development have been given inadequate weight; and
- the Minister has sometimes effectively acted as an advocate of Aboriginal interests.

Other issues generally agreed

10.3 There is general agreement on the need for greater accountability for decisions made under the Act. All informants of the Review agree that there is a need for a clearer procedural path for dealing with applications under the Act, although there is a variety of suggestions as to how this should be achieved. There is also general agreement that more uniform laws and practices are desirable, to minimise duplication and to make the whole subject of Aboriginal heritage protection more comprehensible and accessible.

Aboriginal issues

10.4 Aboriginal interests generally were strongly concerned to ensure that the process remain uncomplicated and easy for all Aboriginal people to use, if required, and that it respect their different circumstances and cultures. In addition, the Act should ensure that an area can be protected pending attempts to resolve applications by agreement or a final decision.

Development issues

10.5 Development interests generally argued that there should be a more rigorous process for 'testing' Aboriginal claims of significance. All relevant information should be exchanged between persons interested in a possible declaration. There were also calls for the process to be along quasi-judicial lines and for a right of appeal against decisions of the Minister.

CONTEXT IN WHICH COMMONWEALTH DECISIONS ARE MADE

'Last resort' role of Commonwealth

10.6 It was intended when the Act was introduced that the Commonwealth Act would operate as a 'safety net' and as a 'last resort' where State/Territory laws did not provide effective protection of Aboriginal heritage. The Minister can make a declaration under the Act only if there is a threat of injury or

desecration to an area: therefore, tensions may be running high between the various interested persons. There is potential for conflict between the Commonwealth and the relevant State/Territory, particularly where it has a vested interest such as a financial interest in a development. As ATSIC notes in its submission:

> ... the Commonwealth is only involved in matters which are not resolved through State processes, which usually means it has to deal with matters of a more complex and often potentially more contentious nature.[2]

The Review recommends in Chapter 5 that the Commonwealth Act continue to operate as a 'last resort': it also makes proposals for the improvement of 'first resort' laws and practices so as to reduce the need for recourse to the Commonwealth Act. In some applications, the Commonwealth acts effectively in an 'appeal' role in relation to decisions made by State/Territory governments. In order to inform what is essentially a political decision in such circumstances, the Minister needs to be sure that all interested persons have had an opportunity to express their views as to whether a declaration should be made.

Broad and unstructured discretion

10.7 The Minister's decision whether to make a declaration is based on an extremely broad and relatively unconstrained discretion. No particular process or criteria are included in relation to 'Emergency' declarations under s 9 of the Act and the list of matters to be included in the report preceding any declaration under s 10 is non-exhaustive but refers to 'the effects the making of a declaration may have on the proprietary or other pecuniary interests of persons other than the [relevant] Aboriginal or Aboriginals ...'.

Decisions must balance Aboriginal heritage and other interests

10.8 Judicial comments indicate, by reference to the statutory purposes of the Act,[3] that although high value is to be accorded to the protection of Aboriginal heritage, the establishment of the preconditions whereby the Minister 'may make a declaration' is facultative, rather than protection being mandatory once those preconditions are established. Thus it was said, in the context of an application under s 10, that:

> The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 was enacted for the benefit of the whole community to preserve what remains of a beautiful and intricate culture and mythology. Its protection is a matter of public interest. There will, however, be occasions on which that objective will conflict

[2] Submission 54, ATSIC, page 12.

[3] Section 4 of the Act provides: "The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition."

> with other public interests. The public interest in the provision of safe, convenient and economic utilities may in some cases only be advanced at the expense of areas of significance to Aboriginals. The question whether a declaration should be made which would adversely affect public or private interests is a matter within the discretion of the minister who is required to evaluate the competing considerations and make a decision accordingly. It follows that the statutory purpose does not extend to unqualified protection for areas of significance to Aboriginals. The Act provides a mechanism by which such protection can be made available. Over and above that, it accords a high value to such protection for heritage areas threatened with injury or desecration. That high statutory value is a factor required to be given substantial weight in the exercise of ministerial discretion under s 10.[4]

Consultation with cabinet

10.9 The Second Reading Speech to the Bill which became the Commonwealth Act contained the comment that:

> When deciding whether to make a declaration in respect of an area or object the Minister will take into account such other matters as he considers relevant. This will allow the weighing of competing interests in each case. Honourable senators should note that cabinet will be consulted, where practicable, before each declaration is made.[5]

Generally speaking, the Minister consults cabinet before making a declaration. This gives other ministers an opportunity to argue for or against the making of a declaration. An argument in one case that this practice is inappropriate and that the Minister was overborne as a consequence was rejected judicially, although it is clear that the Minister remains personally responsible for the decision and must exercise independent judgment:

> Many decisions committed to Ministers by statute have political implications; no doubt that is why they are committed to Ministers rather than to public servants ... The political implications of a prospective decision include not only its likely electoral consequences ... , but also its compatibility with the philosophy, policy and program of the government. These are matters about which a Minister is entitled to have the views of other members of the government, even though he or she has ultimate individual legal responsibility for what is decided. It seems to me that, at least where a statute empowers a Minister to make a decision relating to a matter of general community concern as distinct from determining the legal rights of a particular person and where the statute does not specify any precise procedures or criteria, the Minister is entitled to consult other members of cabinet before determining the appropriate decision.[6]

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[4] *Tickner v Bropho* (1993) 114 ALR 409 at 449, per Justice French.

[5] Senate Hansard, 6 June 1984. Page XX.

[6] *Bropho v Tickner* (1993) 40 FCR 165 at 175, per Justice Wilcox.

WHAT OVERALL PROCESS SHOULD BE ADOPTED?

Recent changes to the way applications must be processed

10.10 Challenge has been made in recent times to the informal nature of the decision-making processes followed under the Act. Decisions of the Federal Court[7] in which declarations have been successfully challenged have resulted in the development (or recognition) of quite demanding requirements under the Act. Much of the argument in these cases, which concerned notification and procedural fairness requirements (among other things) focused on issues of heritage significance: the recommended provision of a separate responsibility and process for determining these issues should assist in avoiding such arguments in future.

Calls for more formal process

10.11 However, the debate over these cases has led to some calls, notably from development interests, for a more formal and adversarial decision-making process to be adopted, with features such as public hearings and cross-examination, or in any event features involving greater 'testing' of Aboriginal claims. Faced with such calls in a recent case, one s 10 reporter commented that:

> ... it seems to me that this legislation does not lend itself to an adversarial approach. Indeed, the contrary would seem to be the case. I, as reporter, have no coercive powers whatsoever. I have no right to administer oaths. There is no protection against defamation, either for myself or for anyone else in the reporting process, whether that person be a member of my own team or someone furnishing a representation. These in my view are very significant restrictions. They lead me inexorably to conclude that it was never intended that a s 10 reporter would hold public hearings or take evidence from witnesses in a manner which mirrors the adversarial processes of the courts.[8]

The Review agrees with this conclusion and further considers that to provide for an adversarial process along these lines would prove both ineffective and inappropriate, for reasons which follow.

Need for informality (particularly in establishing significance)

10.12 Most submissions by Aboriginal interests, together with the Review's consultations with Aboriginal groups, indicate in very strong terms the need to keep the processes under the Act as simple and accessible as possible.

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[7] *Chapman v Tickner* and (on appeal) *Tickner v Chapman, State of Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* and (on appeal) *Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia.*

[8] Commonwealth Hindmarsh Island Report, Opening statement of Justice Mathews 9/2/96 (meeting of 'specially interested people').

Aboriginal interests note that formal processes should be avoided to the maximum extent possible, because of:

- the diversity and geographical spread of Aboriginal people (such that many are in remote locations);
- the disadvantaged status of many Aboriginal people;
- the fact that many Aboriginal people do not speak English or that English may be a second language for them;
- the need for time to consult and resources to participate effectively in decision-making processes under the Act; and
- the need for applications to continue to be able to be made orally.

Since the Act is intended to benefit Aboriginal people, the Review considers that great weight should be given to such comments.

> The many aspects of Indigenous cultural heritage requires consultation and negotiation with relevant owners or elders. It also requires appropriate cultural practices and beliefs to be considered during the visitation and discussion of sacred sites. The dispersion of Aboriginal and Torres Strait Islander society (a direct result of European control and domination) has meant that considerable time can be taken up during consultations in ensuring that all relevant people are involved in the process. As the Act relates specifically to Aboriginal and Torres Strait Islander culture, it is essential that aspects of these cultures are recognised under the heritage Protection Act.[9]

> The concern of the CLC is that the Act be accessible to all potential applicants and that initial processing of applications be done with all possible haste. Furthermore, there is the danger of applications being declared invalid if too much technical and complicated information is required. One must also bear in mind that many potential applicants will have either standard English as a second language or not at all, and if in remote areas may have limited access to legal or other assistance.[10]

Land claims analogy

10.13 One analogy often drawn upon in support of an adversarial approach is that of land claims in the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). There are two main suggested advantages of an approach similar to that adopted in dealing with Northern Territory land claims: that special provision is made there to provide access by interested persons to restricted Aboriginal information (on a restricted basis); and that the process is conducted in a quasi-judicial manner involving public hearings and featuring powers to take evidence on oath and to require questions to be answered and documents produced. It is stated that, apart from the fact that both processes deal with Aboriginal claims, both are administrative processes, the land claim process having been described by one

[9] Submission 50, FAIRA.

[10] Submission 47, Central Land Council, page 27.

Aboriginal Land Commissioner as an 'inquiring, reporting, recommending and commenting role' in advance of a final decision.

Heritage interests distinct from property interests

10.14 The interests at stake in the land claims setting are property interests: the Commissioner, although performing an administrative function, is required to recommend to the Northern Territory government whether traditional Aboriginal ownership of land is established and whether such ownership should be recognised by a grant under the Act for the benefit of the relevant Aboriginal claimants. The end product of this process may be the statutory recognition of a property interest in land. There has been judicial acceptance of this distinction in a decision concerning the Act:

> The *Commonwealth Heritage Act*, unlike the *Aboriginal land Rights (Northern Territory) Act* 1976 (Cth) and the *Native Title Act* 1993 (Cth) is not directed to concepts of use, occupation or ownership. ... the *Commonwealth Heritage Act*, in pursuing the preservation and protection from injury or desecration of areas, makes no reference to use, occupation or ownership. It is sufficient to set the declaratory process in motion if the Minister receives an application 'by or on behalf of an Aboriginal or a group of Aboriginals'. And the Minister's satisfaction, in terms of the area, is limited to one that is a 'significant Aboriginal area' ... There is no connecting link between the area and the Aboriginals or between the area and Aboriginal tradition that relies on use, occupation or ownership.[11]

Heritage protection not de facto land rights

10.15 Although land claims often involve a heritage component, the Commonwealth Act was not intended to provide de facto land rights through the making of declarations.[12] The Review considers it essential that the Act retains a capacity to provide for preservation and protection of Aboriginal heritage in areas where Aboriginal people may not be able to make out a land claim, in particular where links based on use, occupation or ownership may have been lost as a result of the dispersal and forced removal of Aboriginal people from their traditional lands. The body responsible for protection of sacred sites in the Northern Territory describes the interest of Aboriginal custodians in the protection of sites under Northern Territory law (the *Northern Territory Aboriginal Sacred Sites Act 1989*) as an 'administrative interest in the land' that 'does not necessarily imply anything about the usage of the land' and informed the Review that:

> The importance of sites of current spiritual importance extends further to the protection of sites on land, regardless of whether it may be claimed, regardless, in fact, of the form of title under which the land is held. It is assumed in the

[11] *Chapman v Tickner*, (1995) 55 FCR 316 at 356-357; (1995) 133 ALR 74 at 112 per O'Loughlin J.

[12] "I must make it clear from the outset that this is not interim land rights legislation nor is it intended to be an alternative to the land claims process". Second Reading Speech, Hansard, 6 June 1984, see Annex II.

> *Aboriginal Land Rights (Northern Territory) Act 1976* that the protection of sites normally will have no affect on land title.[13]

Recognition of the fact that heritage interests based on social values are mutable, that declarations may be varied or revoked, and that the granting of a declaration is not intended to amount to an acquisition of property all suggest that an analogy with land claims is unhelpful. That analogy does not compel the conclusion that a more adversarial approach should be followed under the Act.

Accommodation of interests and compromise

10.16 In any case, it is clear that accommodating Aboriginal interests through by using processes aimed at resolving applications through agreements (for example, through mediation) to remove threats was intended to be an important part of the process of resolving applications. And even if called upon to impose an outcome, the Minister has a range of options:

> The decision to make or refuse a declaration does not involve a choice between no protection and complete protection of the entire area claimed. A partial or conditional protection may represent an appropriate balance of interests.[14]

Ministerial discretion – advantages and disadvantages

10.17 There is a trade-off involved in leaving final decisions as to whether or not to protect in the hands of governments. Reliance on ministerial discretion has advantages as well as disadvantages for Aboriginal people (and others). As the Northern Territory Aboriginal Areas Protection Authority notes:

> There will be circumstances when exceptions to the rule of site protection will seem justified. Parliaments may be tempted to repeal legislation because of such cases unless some flexibility is built into the laws. The appropriate person to make these decisions is the relevant Minister because his or her decisions are responsive to the political system. To maximise this 'political' aspect, the Minister's decisions and the reasons for decision should be tabled in the relevant Parliament and in this way be fully available for public comment.[15]

The advantage of broad discretion for Aboriginal people is that it enables greater Aboriginal control over questions of significance, including a high level of local involvement with weight given to the views of custodians. It also makes it worthwhile for developers and governments to seek ways to resolve applications through discussion and agreements rather than through an imposed outcome, which may involve overriding the interests of one group or another. The disadvantage of broad discretion is that if political or other factors result in a lack of respect for Aboriginal interests, or if the government itself has financial or political interests in developments,

[13] AAPA, Submission 49, page 17.

[14] *Tickner v Bropho* (1993) 114 ALR 409 at 460 per French J.

[15] AAPA, Submission 49, page 14-15.

ministerial overriding of Aboriginal interests may take place too readily and without regard to principle.

Likely alternatives to flexible approach

10.18 Although removing discretion may appear advantageous to some Aboriginal people, a down side would most likely result: alternatives include either the repeal of protection laws or, as indicated by some submissions from development interests, laws with much narrower definitions and more formal processes (with detailed criteria by which all competing interests can be weighed in some structured manner). A better alternative may be to ensure that there is a degree of ministerial accountability and that determination of significance by an appropriate body be accepted within the decision-making process.

State/Territory protection discretionary also

10.19 As already noted, the protection offered to Aboriginal heritage under the Act is discretionary in the sense that it does not flow automatically upon establishment of the significance of an area or object. This is (in the end result) true in practice of protection offered at State/Territory level also, even where there is 'blanket protection' such that defined Aboriginal cultural heritage is protected presumptively (unless and until the protection is removed). That protection is backed up by criminal sanctions, and to that extent it is more effective in principle than the Commonwealth Act. But in practice, very often the significance of a site is not assessed until there is a proposed development that would affect the site. Such protection as is offered under State/Territory law may then be removed through a process of application to a minister for permission to proceed with the development.

Need for consistency with State/Territory approach

10.20 None of the States or Territories provides for a formal or adversarial process for determining either whether a site is significant or whether to protect it, nor has the intergovernmental Working Party suggested that it should be so. The Review considers that it is important that Commonwealth law and practice match as nearly as possible what is accepted as the model for States and Territories: it therefore considers that the process should continue to involve the Minister having ultimate responsibility according to a relatively informal process based largely on Aboriginal involvement. If a more formal, quasi-judicial process were seen as necessary at Commonwealth level, this would only be on the basis that a similar process was also desirable at State/Territory level.

Possible future development of criteria

10.21 The Review does not consider that it should suggest criteria by which a subjective and mutable heritage interest based on social values could be

weighed against specifically asserted proprietary and pecuniary interests. It can, however, suggest procedures which will encourage genuine efforts to reach agreement and ensure that, in the event of a decision being made, that all interests are fully expressed and considered. It may also be that with a more accountable and structured decision-making process, experience will enable fair and workable criteria to be developed. Any attempt to do so would require detailed consultation with all interested persons focused on that issue.

RECOMMENDATION:
10.1 A modified version of the existing, relatively informal process whereby the Minister ultimately determines whether and on what terms Aboriginal heritage should be protected should be retained in preference to a more formal quasi-judicial process.

'EFFECTIVE PROTECTION' AND THREATS

Interaction of laws: dealing with applications

10.22 Chapter 5 of the report deals with the interaction between Commonwealth and State/Territory laws in terms of broad policy. This section discusses that interaction in relation to the circumstances in which an application may be made for Commonwealth protection and in which that protection may be removed.

Need to focus on issues to be determined

10.23 The Review considers that decisions in individual cases should be made by involving all interested persons rather than on the basis of arrangements made between governments. It is also of the view that the determination of applications under the Act, if it proves impossible for an agreed resolution to be reached, should focus on the issues specified in the Act rather than on the adequacy or otherwise of different heritage protection laws and processes. The appeal role of the Commonwealth should concern the outcomes of applications for protection, not the process followed to date, although that subject will no doubt be of interest to the relevant State/Territory government whose decision may in effect be overturned.

References to State/Territory laws in the Act

10.24 The Act recognises the role of State/ Territory laws in several ways. Section 7 provides that the Act (apart from the part of the Act that applies only to Victoria) "is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act". The Act contains three further references to State/Territory laws, which concern both consultation during Commonwealth consideration of applications and the effects of State/Territory laws on protection provided under the Act:

- the Minister is obliged to consult the relevant State or Territory minister "as to whether there is, under a law of that State or Territory, effective protection of the area ...": s 13(2);
- the Minister is obliged to revoke a declaration of protection where satisfied "that the law of a State or of any Territory makes effective provision for the protection of an area ...": s 13(5); and
- a report for the purposes of an application for protection under s 10 must deal with "the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law.": s 10(4)(g).

Need for consistency in Act regarding 'effective protection'

10.25 Before discussing the meaning of 'effective protection' under the law of a State or Territory, there is an initial issue as to whether the different wording used in each of the three provisions referred to above is justified. In *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs*, Justice Carr commented that:

> It is possible that the draftsperson was seeking to distinguish, for slightly different purposes, between a state having effective legislation on its statute books and the extent to which that legislation might not, in particular circumstances, be availed of or applied to bring about effective protection. However, there does not seem to be a rational basis for drawing such a distinction which might have the result that in some circumstances it might be regarded as enough that there be effective provision for protection of an area and in other circumstances that there had also to be effective protection under the law of a state or territory for that area.[16]

The Review agrees that in order to promote understanding, as well as consistency and certainty in interpretation, it should be clear that the same concept of 'effective protection' is relevant for each of these purposes.

> RECOMMENDATION:
> 10.2 References in the Act to effective protection under State or Territory law should be consistent in language and policy.

Different approaches of State/Territory and Commonwealth laws

10.26 Each State and Territory has particular legislation that protects Aboriginal heritage: these generally do so presumptively (although the scope of such laws may differ to that of the Commonwealth Act). That is to say, provided Aboriginal heritage is within the scope of such State and Territory laws, governmental action (typically, following an application by a developer) is required in order to remove or diminish the protection offered by those laws. By contrast, the protection of Commonwealth law is available only as a

[16] *State of WA v Min for Aboriginal and Torres Strait Islaner* Affairs (1995) 37ALD 633 at 659 per Carr J.

'last resort': it must be specifically sought by application, and is premised on the existence of a threat.

Why does the Act refer to 'effective protection'?

10.27 The references in the Act to 'effective protection' recognise that State and Territory laws are the primary means by which Aboriginal heritage is protected in Australia: as such State and Territory governments are given the opportunity to comment on the effect of those laws when applications are made to the Commonwealth. The effect of those laws is relevant also to the continued operation of any Commonwealth declarations made. In addition to being in a good position to comment on the legal effect of their own laws, State/Territory governments may be able to inform the Commonwealth of possible changes in the application of those laws that may be under active consideration. Such comments might be relevant to the terms and duration of any declaration that the Commonwealth might make.

Effective protection goes to the issue of threat

10.28 One precondition of the making of a Commonwealth declaration is that the area for which protection is sought is under "serious and immediate threat of injury or desecration": s 9(1)(b), in relation to temporary declarations, or under "threat of injury or desecration": s 10(1)(b), in relation to long-term declarations. There is no requirement to make any finding in relation to effective protection: nevertheless, the presence or absence of effective protection is relevant to the question whether a threat of the relevant kind exists. In relation to revocation, where effective protection requires revocation of a Commonwealth declaration, the provision appears to reflect the intention to allow State/Territory laws to operate where there is no conflict with Commonwealth law.

Uncertainty as to meaning of 'effective protection'

10.29 There is at present some uncertainty as to whether the phrase 'effective protection' means actual protection of the area over which a declaration is sought or whether it might encompass a process under State or Territory law which could be viewed as effective.

Actual protection?

10.30 In *Bropho v Tickner*, Justice Wilcox observed that:

> The adjective 'effective' requires that the protection offered by the state or territory legislation be more than nominal or theoretical; it must be such as to ensure that the area will be protected under state or territory law. This is consonant both with the usual meaning of the word 'effective' and the scheme of the Act that, in such a case, a declaration is not to be made under the Commonwealth Act (s 13(2)) or, if made, revoked: s 13(5). It is not to be supposed

> that parliament intended that the protection of the Commonwealth Act should be denied by a statutory mirage.[17]

The comments of Justice O'Loughlin in *Chapman v Tickner* appear to be to the same effect:

> In some respects, one might question why the Federal Minister would need to consult with the State Minister about the effect of the State law: one might think that the relevant information would be available from conventional sources and from competent legal advice. But the answer seems to rest in giving to the State Minister an opportunity to express his views on the effect of the State law.[18]

A different view

10.31 An alternative approach to what is meant by 'effective protection' is that taken by Justice French in *Tickner v Bropho*:

> Given that the Commonwealth Act itself provides at best a mechanism for conferring protection on heritage sites which is subject to competing public and private interests, it could not be said that a State law which provides a like mechanism fails for that reason to provide effective protection. ... In this regard I respectfully differ from the view expressed by the learned trial judge when he held that the reference to effective protection under State or Territory law requires that the law must 'ensure that the area will be protected'. The reality is, I think, that it was intended by the legislation to allow the Commonwealth minister to intervene to protect a site in a case in which he or she took a view of the relevant public or private interests different from that taken by the State or Territory minister.[19]

Effective protection should mean actual protection

10.32 The Review considers that in order to provide an appeal role in relation to applications made under the Act, a determination should be made on the substantive issue of protection rather than on the nature of the process followed or the outcome reached at State/Territory level. If the decision-maker considers that the State/Territory outcome is the right one in the circumstances, he or she should make that determination after being informed in the manner provided for by the Act. The Review endorses the following submission comment:

> The only way State or Territory law could prevent a declaration being made and be consistent with the purposes of the Act is if State or Territory law currently protects the area or objects to the extent that the declarations sought are unnecessary. An Aboriginal community which finds its areas or objects under threat of injury or desecration typically would wish to invoke any protection available under the law, whether the law be of the Commonwealth, a State or a Territory. The protection of the significant area or objects is the critical issue not the origin of the law which provides the protection. ... [Suggested amendments along these

[17] *Bropho v Tickner*, (1993) 40 FCR 165 at 178.

[18] *Chapman v Tickner* (1995) 55 FCR 316 AT 345-346 per O'Loughlin J.

[19] *Tickner v Bropho* (1993) 40 FCR 183 at 224; (1993) 114 ALR 409 at 450 per French J.

lines] would ensure that the Minister's focus is on the actual protection of areas and objects of Aboriginal significance and not on the possibility or probability of protection under State or Territory law.[20]

The fact that both State/Territory and Commonwealth laws provide mechanisms whereby protection may be determined in a discretionary manner does not preclude such an approach. In particular, there may be effective protection under State/Territory laws in the absence of any exercise of discretion. Nor does such an approach detract from the intention of the Act that the Commonwealth Minister have the capacity to intervene where he or she takes a different view of the competing interests to that of a State or Territory minister. Rather, it means that any difference in view must be expressed in the determination of an application for Commonwealth protection.

RECOMMENDATION:
10.3 The Act should specify that effective protection of an area or object under the law of a State or Territory means actual and legal protection of indefinite duration.

'Threat' to include consideration of removal of protection

10.33 In order to complement the definition of effective protection recommended above and to reduce uncertainty in this aspect of the operation of the Act, the Review considers that 'threat of injury or desecration' should be defined so as to encompass any actual threat together with any State or Territory government process whereby the possible removal or diminution of what might otherwise constitute effective protection of an area is under active consideration.

RECOMMENDATION:
10.4 The Act should define 'threat of injury or desecration' to include active consideration by the relevant government of removal of what might otherwise constitute effective protection under the law of a State or Territory.

Case study: Tickner v Bropho

10.34 In dealing with a s 9 application by Bropho, the Minister considered the fact that development approval processes at State level were required to be followed to be relevant to whether the area was under 'serious and immediate' threat (he declined the application on this basis). It appears that at the point in time when he decided to refuse the application, the development had in fact been approved and work was set to recommence on the area (although there was no evidence that the Minister actually knew this to be so). The ensuing

[20] NSWALC, Submission 43.

litigation on this aspect of the case concerned the reasonableness (in the legal sense)[21] of the Minister's decision.

Immediacy of threats and State/Territory processes

10.35 Should the fact that processes are being followed at State/Territory level be regarded as relevant to whether a s 9 declaration should be granted or revoked, on the basis that the making of such a declaration is premised on the threat being 'serious and immediate'? The members of the Full Court of the Federal Court in *Tickner v Bropho* appeared to accept that this should be possible: what was at issue there was the reasonableness of the Minister's decision that there was no 'serious and immediate' threat in the circumstances. Two judges were of the view that the Minister's decision was unreasonable: according to Chief Justice Black, on the basis that the Minister should have made inquiries of the State, since crucially important information going to the heart of the Minister's responsibilities was available and should have been sought;[22] and according to Justice Lockhart on the basis (accepting the reasoning of the trial judge) that the foundation for the decision no longer existed.[23] Justice French considered that the Minister was under no obligation to make inquiries and that, since the Minister appeared to have been unaware of the change in circumstances in Western Australia, his decision was not unreasonable.[24]

Up to date information

10.36 The Review considers that while State/Territory processes are being followed it is possible that there is no 'serious and immediate' threat. However, the Review considers that, to avoid the unfortunate sort of circumstances described above and consistent with the purposes of the Act, the agency should seek up to date information if an application is to be declined on the basis of non-existence of a 'serious and immediate' threat.

> RECOMMENDATION:
> 10.5 The agency should seek up to date information when it is considering refusing to make a declaration under s 9 on the basis that there is no 'serious and immediate threat'.

[21] See the section on judicial review and in particular, comments about the 'unreasonableness' ground of review.

[22] *Tickner v Bropho* (1993) 40 FCR 183 ay 196-199; (1993) 114 ALR 409 at 422-425, per Chief Justice Black.

[23] *Tickner v Bropho* (1993) 40 FCR 183 at 210-211 ; (1993) 114 ALR 409 at 436-437 per Justice Lockhart.

[24] *Tickner v Bropho* (1993) 40 FCR 183 at 229-231; (1993) 114 ALR 409 at 455-457 per Justice French.

Obligation to consult

10.37 The Review also notes that it is likely in light of the decision of the Full Federal Court in *Tickner v Douglas* that, as with other decisions that affect interested persons, a decision to revoke a declaration would be subject to requirements of procedural fairness. This would likely be the case in relation to the exercise of the power in s 13(5) to revoke a declaration on the basis of protection under State/Territory law and to the more general power in s 13(6) to vary or revoke a declaration at any time. Consistent with the Review's recommendations in relation to procedural fairness and in order to make it clear on the face of the Act that consultation should occur in these circumstances, the review recommends that the Act be amended to require consultation before any variation or revocation of a declaration.

RECOMMENDATION:
10.6 The Act should require the Minister to consult interested persons before exercising any power to vary or revoke a declaration.

MAINTENANCE OF PROTECTION AND TIME LIMITS

Capacity to maintain protection critical

10.38 The possibility that a significant Aboriginal area may be injured or desecrated because of gaps in the protection offered by the Commonwealth Act is one major cause of concern that has been raised with the Review. The result of such concerns has been demands for a more effective capacity for the Commonwealth to provide what might be called 'interim protection' during Commonwealth processes, linked with demands for more effective 'emergency' protection (which might be likened to stop-work orders).

10.39 The operation of the Commonwealth Act depends on the existence of a threat to a significant Aboriginal area: if there is no effective means of preventing injury or desecration pending final determination of the issues involved, the purposes of the Act may be totally defeated. The most criticised features of the current Act in this regard include:

- the effective 60-day time limit within which the Commonwealth may be required to undertake a reporting process for the purposes of making a long-term declaration (since there may be no protection against an immediate threat should a longer decision-making period be required);
- the fact that it has been difficult to obtain effective interim protection during mediation and other processes aimed at resolving applications; and
- the general lack of time limits and adequate information explaining why there are delays in dealing with applications.

Need for prompt resolution in some circumstances

10.40 Provision of an effective capacity to maintain protection will also mean that, where interim protection is required and provided, there will rightly be calls for decisions to be reached in a timely and fair manner, and for heritage concerns to be raised as early as possible. The potential in these respects under the present Act may be illustrated by the following comment from a report under s 10:

> Both the applicants and the developer made plain to me their unhappiness at the time being taken to determine the application. The applicants have watched in frustration as development has proceeded and has made large-scale change to the landscape of the area. For Cedar Woods, who believed that they had followed all the appropriate processes and could proceed with the project, there has been uncertainty as to whether something would happen that would put the project at risk or even effectively stop it altogether.[25]

Emergency declarations

10.41 'Emergency' declarations may be made by 'authorised officers' under s 18 of the Act. Only two such declarations have ever been made. No application is required in order to make them. Like declarations under s 9, they are premised on the existence of a 'serious and immediate' threat of injury or desecration. The maximum duration of such a declaration is 48 hours. It is clear that the capacity to make such declarations is geared to dealing with circumstances that are of such urgency that it may be impossible otherwise to ensure that an area is protected if need be. The Second Reading Speech stated that:

> In some emergency situations where the Minister is unavailable to make a declaration according to the formal requirements of the Bill, an authorised officer will be able to make an urgent declaration which will remain in effect for no more than 48 hours.[26]

Comments on emergency declarations

10.42 Only a handful of submissions raised the question of s 18 declarations. A couple of those from development interests suggested that this power is no longer necessary or, at least, that there be qualifications specified in the legislation for 'authorised officers'. The particular issue of who might be authorised officers and what qualifications they should have is dealt with in the chapter dealing with the proposed new agency. A couple from Aboriginal interests considered that there remained a need for a capacity to deal instantly if necessary with immediate threats and therefore that authorised officers should be locally-based and able to act quickly.

[25] Jones Section 10 report on *Helena Valley*.

[26] Second Reading Speech, Senate, 6 June 1984, see Annex II.

> NSWALC believes that it is inappropriate that the Chief Executive Officer and State Managers of the Aboriginal and Torres Strait Islander Commission be authorised officers under the Act. The purposes of the Act would be much better served by authorised officers appointed under s17 being officers who may readily travel to the areas in question so that a determination may be made quickly.[27]

Capacity to make emergency declarations should be retained

10.43 The Review agrees that there is reason to retain such a capacity, even if it is rarely exercised (which has been the case to date). In this regard, the comments made to the Review by the Commonwealth Ombudsman, who has produced a discussion paper dealing extensively with the function and purpose of such declarations, are worth noting:

> In my view, s.18 is a fundamental part of the legislation, since the Act as a whole is intended to provide protection to areas and objects faced by immediate threats. This necessitates the delegation of authority to other officers to make temporary protection orders where, as a practical matter, the Minister (or tribunal or authority) cannot.[28]

The rationale for the capacity to make an emergency declaration under s 18 is well explained in the Ombudsman's discussion paper:

> Without the provision for a quick, 48-hour protection order, a site or object might no longer be in existence in 48 hours time when it comes to be considered for temporary or permanent protection by the Minister – even if the applications are lodged at the same time. It seems logical to me, and critical to the purpose of the Act, that applicants have the facility of a minimum 'cooling-off' period to enable the parties to consult, and/or more information to be gathered, and the Minister to consider an application for temporary protection.[29]

> RECOMMENDATION:
> 10.7 The capacity for authorised officers to make emergency declarations under s 18 should be retained.

Difficulties with s 18

10.44 The current wording of s 18, whereby such a declaration may be made where 'the circumstances of the case would justify the making of a declaration under s 9, but the injury or desecration is likely to occur before such a declaration can be made", has resulted in practical problems. As ATSIC informed the Review:

> ... authorised officers have been unwilling to make a decision where the Minister could possibly make a decision or where the Minister has not indicated that he would support a s 18 declaration.[30]

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[27] NSWALC, sub 43.

[28] Commonwealth Ombudsman, sub 41, p 3-4.

[29] Submission 41, Commonwealth Ombudsman, Attachment 1, p 6.

[30] ATSIC, Submission 54, p 14.

The Review considers that s 18 should be amended so that an authorised officer has the capacity to make a declaration without the need to speculate as to what another decision-maker may or may not do and how long it might take for that to happen.

> RECOMMENDATION:
> 10.8 Emergency declarations under s 18 should be able to be made immediately, if necessary, where the authorised officer is satisfied as to significance and threat and without reference to whether the agency is considering or may be able to make another form of declaration.

Follow-up action

10.45 Another issue concerns what should be done following the making or request for an emergency declaration: if there is no speedy follow-up action to consider whether protection is required, the purposes of the Act again may be defeated. This issue was considered in the Ombudsman's discussion paper. She explained her position to the Review as follows:

> An important practical issue raised, was the relationship between s.18 declarations and s.9 declarations, and the utility of a s.18 declaration of a s.18 declaration if a s.9 declaration is not also promptly made. In my view, this problem could be solved by simple amendment to require that if a s.18 declaration is made, then the Minister (or tribunal or authority) *shall* make a decision as to a s.9 declaration prior to the expiry of the initial declaration (or otherwise that the initial declaration shall be extended until such time as the s.9 decision is made. Similarly, if a s.9 declaration is made specifically to enable the preparation of a s.10 report, then it would seem sensible that the Act provide that that declaration *shall* remain in force until the s.10 decision is made.[31]

The Review agrees that there needs to be some mechanism to ensure that consideration is given as soon as possible to the question whether further protection may be necessary in these circumstances. It considers that an effective way of ensuring that this occurs is for the authorised officer to be required to contact the agency as soon as possible after being requested to make, or making, an emergency declaration.

> RECOMMENDATION:
> 10.9 Where an authorised officer is asked to make, or does make, an emergency declaration, he or she should be obliged to inform the agency of that fact as soon as possible.

Four days protection

10.46 A final issue concerning s 18 declarations is that of duration. Some submissions suggested that such a declaration should be capable of being made for longer periods (three or four days), so as to deal adequately with

[31] Commonwealth Ombudsman, sub 41, p 4.

circumstances such as long weekends. To some extent, the capacity to act fully independently should assist in alleviating this concern, but there remains a need for the agency to be contacted and to be able to act. Since the Minister has power to vary or revoke declarations, and given the purpose of such declarations, the Review considers that a s 18 declaration should be able to be made for a period of up to four days (ninety-six hours).

RECOMMENDATION:
10.10 Emergency declarations under s 18 should be able to be made for a period of up to four days (96 hours).

Threshold test of satisfaction – emergency and temporary declarations

10.47 The Act at present provides the same test of satisfaction for the decision-maker in relation to s 18, s 9 and s 10 declarations: where the relevant decision-maker 'is satisfied that' the area is a significant Aboriginal area and that it under threat of injury or desecration ('serious and immediate threat of injury or desecration' for s 9 and 18), 'he may make a declaration'. It seems unusual that the same degree of satisfaction as to significance (in particular) applies in the case of emergency and temporary declarations as to long-term declarations, for which a reporting process is provided. Comments to this effect were made by two judges of the Full Federal Court in the Hindmarsh Island (Kumarangk) case.[32]

Practical consequences?

10.48 Although it is unclear whether this factor is responsible for delays in dealing with applications for temporary protection, it does appear to have had some practical consequences. In discussing s 9, one submission (and there are others to like effect) comments that:

> This section is not developed sufficiently to allow it to be used specifically for the protection of our cultural areas. Even though the Act states that an application for an ED may be given orally, it is my experience that it must be given in writing and must have sufficient information to determine if in fact the site/s, area/s are significant and are in 'serious' and 'immediate' danger. This section is a contradiction in itself. This section needs to be reconsidered in the light of how much information is required for an ED and how long it may take an Indigenous community to enlist the help of specialised persons. The time it takes to make a formal report/application and have it sanctioned by the local Elder, sent to the Heritage branch and then have it assessed, may in fact allow the 'immediate danger' to become the destruction of an area.[33]

Need for a lower threshold of satisfaction

10.49 The need for a lower threshold of satisfaction for the decision-maker considering whether to make emergency or temporary declarations as opposed

[32] *Tickner v Chapman* (1955 57 FCR 451 at 474 per Burchett J and 485 Per Kiefel J.

[33] Nayutah, sub 20.

to long-term protection is another issue that the Ombudsman raised with the Review:

> A further important issue, is the utility of either s.18 or s.9 if the legislation places too heavy an onus on the responsible decision-maker, in relation to either significance of the area or object, or the immediacy or seriousness of the threat. If the decision-maker is required to be conclusively satisfied as to each, then there will be many situations where a declaration *cannot* be made, even though sufficient significance and threat *probably* exist. The lightening of this onus, to reflect a 'precautionary principle' in relation to temporary emergency applications, would appear to be the only way to lend utility to these provisions – otherwise, by the time steps are made to conclusively assess the significance of areas or objects, they may have already been destroyed.[34]

The Review agrees with this reasoning, and notes that when the Victorian provisions (Part IIA) were inserted into the Act in 1987, such a distinction was made. Thus s 21C of the Act, which concerns emergency declarations to preserve Victorian Aboriginal cultural property, permits the making of a declaration if the relevant decision-maker 'has reasonable grounds for believing' that the place or object is under threat of injury or desecration. The Review considers that ss 18 and 9 should be amended along these lines to provide for a lower threshold of satisfaction.

> RECOMMENDATION:
> 10.11 The standard of satisfaction as to significance and threat applying to decision-makers for the purposes of s 18 and s 9 declarations should be lower than that currently applying in relation to s 10 (and other) declarations. It should be based on the decision-maker having 'reasonable grounds to believe' that an area or object is significant and that there is a 'serious and immediate' threat to it.

Interim protection and other temporary protection – s 9

10.50 The relationship between temporary protection under s 9 and long-term protection under s 10 is not as clear as it might be, and the way applications have been processed has not assisted in this regard. In the Second Reading Speech it was stated that:

> Where a declaration may be made in respect of an area for a period of more than 30 days, the Minister will be obliged to receive and consider a report prepared by an independent person dealing with the range of issues that such an application may raise.[35]

The implications of this statement may be as follows: that a more complex process (the reporting process provided for by s 10) should be followed when the effects of a declaration are or may be considerable, namely when a declaration that is to extend for a period beyond 30 days is sought; that if a report were necessary for that reason, it should be prepared within a period of

[34] Commonwealth Ombudsman, sub 41, p 4.

[35] Second Reading Speech, Senate Hansard, 6 June 1984, see Annex II.

30 days, which could be extended to a total of 60 days by further declaration; and that if a declaration is sought in order to remove a threat of only limited duration (less than 30 days), a less complex process would suffice.

Preserving the status quo

10.51 The first Federal Court decision dealing with an application under the Act concerned s 9 and contained the following statement:

> The purpose of a s 9 declaration is to preserve the status quo of a significant Aboriginal area which is under immediate threat of injury or desecration until the [Minister] decides whether to make a more permanent declaration under s 10. Of its nature, like an interlocutory injunction, a s 9 declaration will be made in circumstances of urgency where the issues and conflicting interests cannot be fully examined. Although the Act is remedial legislation, there are likely to be conflicting interests of a sensitive nature to be considered by the [Minister] in the cases that come before him under s 9. The [Minister's] task is to balance the various competing interests and views before deciding whether or not to make an emergency declaration.[36]

Effective interim protection

10.52 What should it mean when the idea of 'interim protection' is invoked, as it has been by the Federal Court in the decision referred to above: is it consistent with the purposes of the Act for the decision-maker to have such a broad discretion in relation to interim protection? The Review considers that the Act should be amended to reflect the view that the purpose of interim protection is to preserve the status quo of a significant Aboriginal area until such time as an application under s 10 is determined. As has been noted, the level of satisfaction required should be less, and the exercise of discretion to provide interim protection should not be exercised in a way that defeats the purposes of obtaining a report under s10 (discussed later). With this in mind, the Review notes that ongoing injury or desecration should be considered to comprise a 'serious and immediate' threat of further injury or desecration: that this is so appears to be the reason for s 3(3) of the Act.[37]

> RECOMMENDATION:
> 10.12 The Act should provide that the purpose of short-term (30-day) declarations under s 9 where an application has also been made for a s 10 declaration in relation to the same area (interim protection) is to maintain the status quo in relation to the area pending determination of the s 10 application.

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[36] *Wamba Wamba Local Aboriginal Land Council v Minister Administering the Aboriginal; and Torres Strait Islander Heritage Protection Act 1984* (1989) 86 ALR 161 at 170 per Lockhart J.

[37] "(3) For the purposes of this Act, an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated."

Extending interim protection

10.53 Where the agency is satisfied that there is a 'serious and immediate threat' to an area and that interim protection is warranted, in the absence of changed circumstances that situation will usually persist until the resolution of the related s 10 application. The potential length of time that this process may cover depends on the time limits set for the reporting process and the circumstances in which the Commonwealth should proceed to a reporting process rather than permitting other action to take place. These are each discussed shortly. Nonetheless, on the principle that the capacity to provide and extend interim protection is central to the purposes of the Act, there does not appear to be any reason to require the agency to reconsider whether protection should be extended at unduly short intervals. As discussed later, interested persons will have an opportunity to make representations before any declarations are made (including those extending interim protection) but unless the circumstances have changed, or the threat has been removed, extensions would normally be made. The Review considers that a period of up to 60 days for a declaration extending interim protection is an appropriate balance of these considerations.

RECOMMENDATION:
10.13 Section 9 declarations in the form of interim protection should be capable of extension for periods of up to 60 days at a time pending determination of the s 10 application.

Need for these applications to be determined speedily

10.54 Although s 9 may have been intended to provide for 'interim protection', applications for protection have been made under this section for temporary protection only (unconnected with an application under s 10. The operation of s 9 as a form of interim protection has also been undermined by the extensive delays in reaching decisions on them (173 days on average, on the best available estimate),[38] such that it can become difficult to sustain arguments based on urgency. Given that a 'serious and immediate threat' is a precondition to the making of a declaration under s 9, it detracts from its purpose if such applications are neither granted nor refused within a reasonable period. The Review considers that applications for these declarations should be dealt with speedily. If they turn out not to require action, they may be refused: there is nothing to prevent further applications from being made as required.

RECOMMENDATION:
10.14 The agency should be required to determine an application for protection of an area under s 9 as soon as is practicable and in any event within 28 days.

[38] Office of Evaluation and Audit, *Impact Evaluation* : Heritage Protection Policy ATSIC, p 44.

Interim protection not indefinite

10.55 Fears that interim protection may be capable of indefinite extension are answered in two ways: (i) the Review does not propose that it be mandatory: interim protection will be available, as at present, only where there is a 'serious and immediate' threat; and (ii) there will be time limits in place to ensure that a decision is made by the Commonwealth as soon as is practicable, with any delays clearly justified.

Length of interim protection too short

10.56 The potential duration of interim protection, rather than the basis by which it is determined, attracted most comment in submissions to the Review. This was due no doubt to the failure of recent long-term declarations to withstand judicial scrutiny on grounds of lawfulness. The Act currently permits a maximum period of 60 days guaranteed protection against serious and immediate threats. It is arguable that a new application could be made for protection under s 9 so as to permit a fresh declaration, but this possibility has not been tested and is fraught with danger. Rather, efforts to complete the prescribed decision-making process under s 10 have sometimes been rushed in order to meet the effective 60-day deadline. The possible implications of this were set out by Justice O'Loughlin in the Hindmarsh Island (Kumarangk) case as follows:

> It needs to be emphasised that these two sections in combination, impose a time constraint on the Minister which can, when one considers the totality of the situation, be quite severe. When the Minister decides to make an interim declaration under s9 (before he then has before him an application for a permanent declaration under s10), he has, in reality, no more than sixty days within which to implement the requirements of the statute and make his final decision with respect to a s10 declaration. Within that time, the Minister must choose a suitable reporter who, in turn, must publish the existence and purpose of the application and invite interested persons to furnish representations. The Act specifies that interested persons are to have, at least, fourteen days before they are required to furnish their representations. The reporter is then required to give *"due consideration to any representations so furnished"*: par10(3)(b). In the particular circumstances of this case, that meant that Professor Saunders had to consider over four hundred such representations and compile her report so that, if considered appropriate, the Minister would have sufficient time to make the s10 declaration before the expiry of the sixty day period.[39]

10.57 Many submissions commented on the extreme difficulties in fact faced by the reporter and the Minister in that case and on the potential for other complex and sensitive cases, involving large numbers of public representations, to arise in future.

[39] *Chapman v Tickner* (1995) 55 FCR 316 AT 332; (1995) 133 ALR 74 at 88-89 per O'Loughlin J.

Case study – Broome Crocodile farm

10.58 Some of these difficulties may again be illustrated by reference to the Broome Crocodile Farm case. Eleven days of the effective 60-day time limit on the s 10 decision-making process had passed before the Commonwealth Minister appointed a person (in this case) as both mediator and reporter in relation to the s 10 application. A further seven days passed before the State government was contacted. Three weeks had passed by the time that a notice was published in the relevant newspaper calling for representations from interested members of the public. In these circumstances, the report was effectively required to be prepared, considered by the Minister (along with representations attached to it) and a decision made within a period of between five and six weeks, to ensure that protection continued pending the final decision. This was in a context in which it was clear that the development was likely to proceed as soon as possible. Again the process did not survive close judicial scrutiny, it being held among other things that procedural fairness had been denied in relation to claims and information relevant to the question of significance which was provided to the reporter late in the reporting process. In the process of rejecting Commonwealth arguments that belated efforts to provide procedural fairness in relation to this material (including an offer to make material available and to defer making a decision provided the developer gave an undertaking not to commence work until that was done), the judge stated that:

> ... to accede to this submission would be to give tacit support to the establishment of inefficient and unfair administrative decision-making processes. The basis of the submission is that the Commonwealth minister had run out of time. This does not seem in the particular circumstances of this matter, a very persuasive excuse for denying procedural fairness where, had time not been of concern, procedural fairness in that form would otherwise have been extended to the parties concerned.[40]

This decision was upheld by the Full Federal Court on appeal, and these comments were endorsed. In so far as the comments concern the need to appoint a reporter promptly in such circumstances (and, as his Honour suggested, to separate the mediation and reporting functions), the Review has no issue with them: the need for an available pool of people capable of performing such functions, rather than reliance on ad hoc appointments, is discussed in Chapter 11.

Impractical requirements

10.59 However, the Review considers that the statutory requirements are impractical. To mandate a fixed time limit which is inadequate (at least in some cases) for the resolution of complex and sensitive issues, in the context of an Act the purpose of which is to protect Aboriginal heritage which is under

[40] *State of WA v Min for Aboriginal and Torres Strait Islaner* Affairs (1995) 37ALD 633 at 681 per Carr J.

threat, places the decision-maker in an invidious position. Subject to the above qualification in respect of commencing the reporting process more speedily (which may not have made any difference to the late provision of the material in question), the Review considers that the Minister here sought in good faith to overcome the dilemma that faced him at the end of the process.

Need to promote finality

10.60 Declarations under s 10 have the capacity to affect interested persons to a great extent. Determining issues of significance can involve sensitive matters and the protection of significant areas from threats, where established, is the purpose of the Act. The reporting process may follow various attempts at State/Territory level and under the Act to resolve the issues involved in an application and it is therefore particularly important that decisions on these applications are well informed and considered so as to promote the finality of any decision taken.

10.61 Having rigid time limits at the end of the reporting process is not conducive to good decision making and is therefore not in the interests of anyone involved. Some further flexibility should be built into the process so that it is able to cope better with difficult applications. This will mean that 'final' Commonwealth decisions will be more likely to survive legal challenge. It also means that some of the heat generated between competing interests as a consequence of the 'ticking clock' itself will be taken out of the process. None of this is to suggest that the Commonwealth should be able to take as long as it likes to reach a decision: rather, that there be more realistic time limits and some flexibility built into them in order to cater for particularly difficult cases.

Factors going to time limits – s 10 process

10.62 What sort of time limit, then, should be in place in relation to the reporting process established by s 10? That question, of course, depends on what must be done during the process. The Review understands that at present, as the reported cases (among others) demonstrate, much of the process of dealing with s 10 applications is spent debating issues of significance and the adequacy of State/Territory laws and processes. The Review has addressed these issues separately. Until such time as the Commonwealth is able to rely on accredited assessments of significance conducted at State/Territory level, the Act must provide sufficient time for both an independent assessment of significance and for the other matters relevant to the exercise of the Minister's discretion to be reported on, and for the Minister to consider those matters and decide applications under s 10.

What sort of time limit is required?

10.63 Various time limits were suggested in submissions to the Review. These varied from the current 60 days (combined with an obligation on the Minister to decide within that time),[41] to 18 months:

> ... in practice a permanent order under s10 may take up to 18 months to obtain. This effectively creates a time gap where no protection is available. It is therefore suggested that extensions of s9 declarations are made available on a month by month basis where there is danger of damage to the site.[42]

Based on experience to date in administering the Act, ATSIC supports a capacity to extend an emergency declaration at 60-day intervals for up to six months. This is also the period favoured by the Aboriginal Areas Protection Authority of the Northern Territory, which notes that considerable work may be involved and goes on to suggest that:

> In the light of the above, it is recommended that in instances where the Federal Minister is asked to determine significance according to Aboriginal tradition and that this situation arises because [of] inadequate State or Territory legislation, then the power of the Minister to grant urgency declarations for a period of six months or more would be appropriate. Such a procedure would provide an incentive for State and Territory Governments to enact laws compatible with the national standard.[43]

Notional limit of six months appropriate

10.64 The Review considers on the basis of this information that, where the proposed Commonwealth agency is required to assess significance (that is, to determine or reconsider the issue), an outer limit of six months is the best estimate available of a realistic and appropriate time limit for the conduct of the reporting process in difficult cases. Consistent with the views expressed above, however, the Review favours some flexibility in the form of the obligation to decide, and would see that period as a notional limit only. As the Commonwealth Ombudsman has submitted:

> ... to my mind the problem of delineating time limits will not be solved by simply inserting legislative deadlines, but rather by ensuring that an entire administrative scheme is developed. Timelines are better developed as a question of official procedure – against which a review body, court or parliament can judge performance – than locked in legislation, raising the possibility that a simple breach of the deadline provision may throw the lawfulness of the entire process and final decision into doubt.[44]

[41] NSWALC, Submission 43.

[42] Submission 55, New South Wales Government, page 5.

[43] Submission 49, AAPA, page 11.

[44] Commonwealth Ombudsman, sub 41, p 3.

Separate obligations on agency and Minister

10.65 To ensure that decisions are made within a reasonable time frame, there should be a separate obligation on the agency to report to the Minister as soon as is practicable and another on the Minister to determine the application as soon as is practicable. The Review further notes that the Commonwealth decision-making process is not necessarily set in train immediately following receipt of an application for protection under s 10. Attempts may be made to facilitate agreements between interested persons, and applicants may be required to await the outcome of certain processes conducted at State/Territory level. These matters are discussed shortly.

> RECOMMENDATION:
> 10.15 The agency should be required to report to the Minister as soon as is practicable after instigating a reporting process under s 10. A notional outer time limit of six months may be appropriate, but this should not be set in legislation. The Minister should be required to determine an application under s 10 as soon as is practicable after receiving a report under that section.

Deferral of instigation of reporting process

10.66 The approach recommended by the Review to the meaning of 'effective protection' under State/Territory law and to the issue of what constitutes a 'threat' for the purposes of the Act will make it clearer when the Commonwealth is able to deal with applications for protection. It will also mean that the Commonwealth process should take into account the fact that there may be an actual threat to heritage during the period when State/Territory Aboriginal heritage protection and development approval processes are being followed.

Obligation to obtain report not immediate

10.67 The Review does not believe that the obligation to commission a report (where it arises, the next matter dealt with in this chapter) should oblige the Commonwealth to do so immediately or within any specified period. The point at which it will be appropriate to do so will depend on the circumstances of individual applications. Applications under s 10 may be made in circumstances when the threat is real but not immediate, and the best way to resolve such applications may be to seek an agreed resolution (with Commonwealth involvement, through mediation) or to allow State/Territory processes to proceed, where they may result in effective protection of the area in question, or protection otherwise sufficient to accommodate the interests of the applicants. On the other hand, where an area is under immediate threat, a reporting process should be instigated promptly (with interim protection in place, if necessary).

RECOMMENDATION:
10.16 The agency should be obliged to instigate a reporting process in response to an application under s 10 unless there is a specific justification for postponing such action.

Other processes may lead to protection

10.68 There may also be other processes taking place alongside questions of heritage protection, such as native title or other land claims, and world or other heritage assessment processes at either State/Territory or Commonwealth level. They may hold out some prospect of removing a threat for the purposes of s 10: for example, a world heritage process might remove a threat to a significant Aboriginal area, even if the area is outside the world heritage area. Unless and until a threat becomes 'serious and immediate' and a decision must be made on a s 9 application, there should be no requirement on the agency to instigate a reporting process. To do so would be to duplicate processes (in some cases) and in any event to expend resources where that may be unnecessary.

Perspectives on deferral

10.69 From the perspective of Aboriginal applicants, the point at which a reporting process is begun may be less important than the capacity to protect areas pending final determination of applications. As one submission notes:

> The Minister should only be able to decide not to deal with or to defer consideration of applications if and only if both:
> some interim protection is in place for the threatened area or object; and
> some other process for resolution of the matter is in train.[45]

From the point of view of land owners and development interests, there is a need for applications to be determined with minimum cost and delay.

Need to minimise duplication

10.70 The approach recommended by the Review aims to avoid duplicating processes where there is a prospect that an application will be resolved by other means within a reasonable time, such as under State/Territory processes or through mediation processes conducted with Commonwealth involvement. Where there is no such prospect or those processes fail, the Commonwealth must proceed with its own decision-making process. As soon as it is clear to the agency that no other process holds out any prospect of resolving an application within a reasonable time, the Commonwealth should proceed to instigate a reporting process. The agency should take into account the views of any interested persons that are involved in preliminary processes under the Act (in relation to s 10 applications) in ascertaining the prospects of resolving an application within a reasonable time.

[45] MNTU, sub 17.

RECOMMENDATION:
10.17 The agency should be able to defer instigating a reporting process in response to an application for protection under s 10 where there is no immediate threat to the area in question and where there is a prospect that other processes, whether under State or Territory laws or under other Commonwealth laws, will resolve an application within a reasonable time. Once a threat becomes serious and immediate, the agency should instigate a reporting process promptly.

A particular problem with the current process is that there does not appear to be any principled justification for or explanation of delays, even if they occur for good reasons. The agency therefore should be required to report on what is being done to advance the determination of those applications, along with the reasons for any delays. This issue is dealt with briefly in Chapter 11.

OBLIGATIONS TO DETERMINE APPLICATIONS

Is protection mandatory?

10.71 The Minister is not bound to make a declaration. In the *Wamba Wamba* case in 1989 the Federal Court was asked whether, once the preconditions for the exercise of the discretion to make a declaration – that the area in question is a significant Aboriginal area and that it is under serious and immediate threat of injury or desecration – are established, the Minister was bound to make the declaration. Justice Lockhart noted the provision whereby the Minister may extend a s 9 declaration for up to a further 30 days if "satisfied that it is necessary to do so"[46] and commented that:

> The language of that provision clearly demonstrates that the [Minister's] power to extend is facultative not imperative. It would be odd if the power to make the initial declaration was not also facultative.[47]

Section 9 applications

10.72 In the case of s 9, no process is specified in the Act for informing the Minister so that he or she can be satisfied as to whether an area is significant and whether it is under threat. In practice, ATSIC makes inquiries of the relevant applicants and provides advice to the Minister. There is likewise no process specified for applications under s 12 for protection of significant Aboriginal objects.

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[46] s 9(3) of the Act.

[47] *Wamba Wamba Local Aboriginal Land Council v Minister Administering the Aboriginal; and Torres Strait Islander Heritage Protection Act 1984* (1989) 86 ALR 161 at 170 per Lockhart J.

Section 10 applications

10.73 In the case of s 10, the Minister must be satisfied as to the same two preconditions of significance and threat (albeit that the threat need not be 'serious and immediate') and in addition, must receive a report in accordance with s 10(4) of the Act before he or she may make a declaration. In the case of s 10, the resources involved in commissioning a report have led to serious questions being asked as to whether and in what circumstances an application may be refused without the need to first obtain a report. This is an issue the Review has been asked to consider.

Must a report be commissioned under s 10?

10.74 The questions raised in *Tickner v Bropho* were: is it necessary for the Minister to make a finding as to significance and threat in every case before he or she is able to determine an application; and does he or she have to get a report under s 10(4) in order to do so? The Court was faced with the argument of the Commonwealth that it was a valid exercise of discretion to refuse an application under s 10 without making a conclusive determination on the issues of significance and threat and without obtaining a report. The basis upon which this argument was put was that it was open to the Minister to refuse an application in those circumstances where there were discretionary matters of overwhelming national interest or financial considerations weighing against the making of a declaration.

Report required to inform discretion

10.75 The Full Federal Court was unanimous in rejecting the Commonwealth's argument. Thus according to Chief Justice Black, who also noted the role of interested members of the public providing representations and the relevance of that role in informing the Minister's exercise of discretion:

> It may be that considerations that lead a minister to conclude in a particular case that no declaration should be made will properly be described as matters of the national interest, but it should not be forgotten that the purpose of the Act reflects the parliament's identification of another element of the national interest. The Act does not, in my view, allow for an assumption that one aspect of the national interest may prevail without any consideration of the element of the national interest that the Act reflects.[48]

Justice French likewise focused on the need to recognise, if not give effect to, the competing interests and importantly noted that the Act permits compromises in final decisions:

> The possibility may be accepted that a situation could arise in which there is a public or private interest of such weight that it would take priority over the public interest in the preservation of an area of significance to Aboriginals. That

[48] *Tickner v Bropho* (1993) 114 ALR 409 at 421 per Black CJ.

> possibility does not support the proposition that the minister could ever conclude, without investigation of the matters arising under s 10(1)(b), that no form of partial or conditional protection were possible. The balancing of interests which the Act contemplates allows for the possibility of compromise which involves recognition if not satisfaction of all relevant interests.

Report required to establish preconditions?

10.76 A majority of the Court further held that it was necessary to obtain a report following receipt of a valid application for protection under s 10.[49] In other words, a report is required in order to inform the Minister's satisfaction as to significance and threat, as well as to inform the exercise of the ultimate discretion. Justice French, on the other hand, appears to have considered that the Minister could decide before commissioning a report that one of the preconditions was not established and refuse an application on that basis (on his view, the obligation to commission a report arises after having established the preconditions and in order that the discretion whether to make a declaration is properly informed).[50] The Chief Justice had this to say on the matter of the relationship between the report and the preconditions:

> The provisions of s 10(1)(b) and s 10(1)(c) are closely linked, in that the report referred to in s 10(1)(c) inevitably bears directly upon the questions the minister is required to address by virtue of s 10(1)(b), as well as upon matters going to the exercise of his discretion.[51]

Suggested clarification under current approach

10.77 The Review received a submission to the effect that the subsections referring to the preconditions – s 10(1)(b) – and the report – s 10(1)(c) – should be reversed in the Act, to indicate that the report is intended to inform the Minister's satisfaction on the preconditions.[52] This would be a sensible amendment to clarify the intention of the current Act, as interpreted by the Federal Court: that in applications under s 10, the role of the report is to inform the Minister's decision on both the preconditions and the exercise of the discretion whether to make a declaration. The Review agrees that the report should, if the current approach were to be retained, inform both of these parts of the decision-making process. However, the issue would not arise under the Review's recommendations, since the preconditions will have been determined by the agency.

Report mandatory

10.78 The upshot of *Tickner v Bropho* is that the Minister is bound to commission a report in response to each valid application for protection under

[49] *Tickner v Bropho* (1993) 114 ALR 409 at 420-421 per Black CJ, at page 434-435 per Lockhart J.

[50] *Tickner v Bropho* (1993) 114 ALR 409 at pages 458 and 460 per French J.

[51] *Tickner v Bropho* (1993) 114 ALR 409 at 420-421 per Black CJ.

[52] KLC, sub 57.

10. The Review considers that this principle, and the reasoning on which it is based, is a sound one. Subject to the exceptions noted in the following paragraphs, (including promoting resolution of applications by agreement), the Review considers that this obligation should be given statutory recognition.

RECOMMENDATION:
10.18 The agency should be obliged to prepare a report to assist the Minister to determine each valid application for protection under s 10 unless the application is determined beforehand in one of the ways specifically provided for in the Act.

Frivolous and vexatious applications

10.79 What then constitutes a valid application, and what, if anything, needs to be done to address the implications of this decision for the administration of the Act? These issues were all canvassed in *Tickner v Bropho*. The Commonwealth argued that commissioning a report is a time-consuming and expensive process, and that this should not be necessary in the case of frivolous and vexatious applications and 'repeat' applications. The minimum requirements in the Act regarding applications is that they be made "orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration."[53] One judge suggested that a frivolous or vexatious application would not be "an application within the meaning of s10";[54] another that "s 10 is enlivened only by a bona fide application which answers the description in s 10(1)(a)".[55] Chief Justice Black simply took the view that administrative inconvenience did not mean that Parliament had intended to exclude the obligation.[56]

Power to decline frivolous or vexatious applications

10.80 Although, as Justice Lockhart indicated,[57] it would be difficult in this area to conclude that an application was made frivolously or vexatiously (given that the purposes of the Act are clearly stated and that it is a beneficial piece of legislation), the Review considers that there should be a power to dismiss an application if made frivolously or vexatiously. An application that is "no more than a repetition, on precisely the same grounds, of an application that had been rejected a short time earlier"[58] might be capable of characterisation as such an application.

[53] Sections 9(1)(a) and 9(1)(a) of the Act respectively for temporary and long-term declarations.

[54] *Tickner v Bropho* (1993) 114 ALR 409 at 435 per Justice Lockhartat.

[55] *Tickner v Bropho* (1993) 114 ALR 409 at 459 perJustice French.

[56] *Tickner v Bropho* (1993) 114 ALR 409 at 421 per Chief Justice Black.

[57] *Tickner v Bropho* (1993) 114 ALR 409 at 435 per Justice Lockhart.

[58] *Tickner v Bropho* (1993) 114 ALR 409 at 421 per Chief Justice Black.

RECOMMENDATION:
10.19 The agency should have power to decline an application that is frivolous or vexatious.

Repeat applications

10.81 As for other 'repeat' applications, the comments of the Federal Court on this subject may be of assistance:[59] they should be dealt with in a practical fashion. In particular, it should be possible to rely on an earlier report on the same area, as suggested by Justice French, unless there are substantially different circumstances or information available. If a precedent for dealing with repeat claims is needed, albeit in a different context, clauses 5 and 6 of the Practice Directions issued by the Aboriginal Land Commissioner under the *Aboriginal Land Rights (Northern Territory) Act 1976* might provide a starting point.

Need to formalise withdrawals or determine applications

10.82 There have been other administrative difficulties in disposing of applications under s 10. The Review was informed by ATSIC that:

> It is our experience, that after consultation with State or Territory Governments or mediation with parties that would be affected by a possible declaration, that some applications are resolved without the Minister making a decision. In those circumstances, if the applicant does not withdraw the application the it remains open, notwithstanding that a resolution has been negotiated. Engaging consultants to prepare a report for the Minister to decide these applications is very expensive for ATSIC and cause disruption to many parties. Where a matter has been resolved, it is obviously a waste of time and resources for a consultant to be engaged and submissions called for.[60]

The Review appreciates that the obligation to carry out a reporting process incurs considerable costs. It also considers that the processes of seeking an agreed resolution of applications prior to embarking on a reporting process should be encouraged. Nonetheless, it might be suggested that, if an application has been resolved to the satisfaction of interested persons, the applicants ought be willing to withdraw their application and it should be determined.

Effective agreements should assist

10.83 One reason why it may have been difficult to dispose of applications by agreement is that agreements made at present have no binding effect and have sometimes been broken even where they have been relied on to justify refusal of or delay in dealing with applications. In the absence of fixed time limits, it is therefore easy to understand why people are unwilling to withdraw

[59] *Tickner v Bropho* (1993) 114 ALR 409 at 435 per Justice Lockhart, at 459-460 per Justice French.
[60] ATSIC sub 54 p 12..

applications. The Review hopes that its promotion of agreements, backed by legal sanctions as between the persons who make them, will encourage the resolution of applications under the Act. Where such agreements are reached and are determined by the agency to be consistent with the purposes of the Act, it should be clear that an application has been resolved, and the application should therefore formally be declined.

RECOMMENDATION:
10.20 The agency should formally decline an application that is resolved to the satisfaction of the applicants and withdrawn.

Failure of applicants to provide sufficient information

10.84 The Review considers that it should remain easy to make applications for protection under the Act. One concern raised by ATSIC during consultations was that some applicants fail to supply information sufficient to satisfy the requirements of a notice, as interpreted by the Federal Court in *Tickner v Chapman*. The argument is that it would be pointless to attempt to set a reporting process in train without sufficient information for that purpose. Any problem of this sort in the context of an application for temporary protection would be resolved under the Review's recommendations, by the requirement to make a decision within a specified period (28 days).

Information required in s 10 context

10.85 In the s 10 context, the broad purpose of providing information is to give interested persons an opportunity to comment, commensurate with the nature and extent of their interest, on whether a long-term declaration should be made. That opportunity need only be given at the point when a decision-making process is instigated, rather than beforehand, when attempts may be being made to reach agreements between the applicants and particular interested persons or when State/Territory (or other) processes are being followed. That might be some time after the application. Nonetheless, if an application is not resolved in that way, a decision-making (reporting) must be instigated.

Applicants must respond to reasonable requests for information

10.86 When the agency has decided that a reporting process must be instigated, applicants should be required to respond to reasonable requests of the agency to provide additional information where the agency is of the view that the information provided would not suffice to meet the legal requirements for procedural fairness or public notice purposes (discussed later). Otherwise, resources will be expended for no good reason. As a consequence, the agency should be empowered to dismiss an application for a long-term declaration if it is of the view that the information supplied to it by an applicant would not be sufficient to support the declaration sought and it

has given the applicant a reasonable opportunity to provide additional information.

> RECOMMENDATION:
> 10.21 The agency should have power to dismiss an application where it considers that the information provided to it by applicants would not satisfy the legal requirements specified in the Act and the applicants fail to respond to reasonable requests by the agency to provide additional information.

Factor in exercise of discretion – abuse of process

10.87 The Review considers that a mechanism is required in order to emphasise the 'last resort' role of the Commonwealth Act and to avoid possible abuse of process. The Act should not be used to impede developments that are well advanced by raising heritage issues at a very late stage when it would be reasonable to expect that those issues should have been raised earlier (ideally during State/Territory planning processes). Aboriginal people should be encouraged to raise their heritage interests as soon as possible, provided that there is a context where their interests are treated with respect. It is in the interests of all concerned that issues regarding Aboriginal heritage be raised early and dealt with in a timely manner, as recent litigation and political debate has shown.

Reasons for delay

10.88 The Review notes that there are often good reasons why Aboriginal people delay seeking protection of their heritage interests, and in this report recommends ways to address these concerns. For example, State/Territory planning processes may fail to involve Aboriginal people, and restricted information may be withheld until the latest possible moment because it is not properly respected or protected against disclosure. These concerns, which the Review examines in other parts of the report, may be exacerbated where State/Territory governments are actively and financially interested in developments that put Aboriginal heritage interests at risk.

Delay of limited current relevance

10.89 Given the beneficial nature of the Commonwealth Act, it is likely that a provision aimed at preventing abuse of the Act by reference to the lateness making of claims or the provision of associated information will have a limited role until such time as agreed minimum standards are in place and State/Territory processes and are accredited for the purposes of the Commonwealth Act (and that the Commonwealth Act itself meets the standards). Nevertheless, the Review considers that provision should be made to prevent possible abuse of the Act in the future: it therefore recommends that delay in making applications, claims and the provision of

new information should be taken into account in the exercise of discretion by the relevant decision-maker when considering whether and, if so, on what terms to make a declaration.

> RECOMMENDATION:
> 10.22 Delay in raising heritage interests, provided that there are mechanisms in place that respect those interests, should be a factor in the exercise of discretion whether to make a declaration by the agency or Minister (as the case may be).

MAKING AND RECORDING APPLICATIONS

Making applications should be easy

10.90 An application for protection under the Act may be made "orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration."[61] Submissions from Aboriginal interests argue that it is extremely important that the Act remain uncomplicated and easy to use. Many such arguments were made in the context of the 60-day limit on temporary protection, but several also relate specifically to the making of applications. The Review accepts that the extent to which an Act that is uncomplicated and easy for Aboriginal people to use can be guaranteed must take into account the interests of others: having said that, it considers that those interests are best catered for through establishing fair procedures rather than making it difficult for Aboriginal people to apply for protection. As noted by the Kimberley Land Council:

> ... it is important that applications continue to be able to be made orally. Many Kimberley Aboriginal people, especially older people, cannot read or write. The provision allowing oral applications gives Aboriginal people direct access to the process, without the need to seek representation or assistance.[62]

There is support for this view within government circles also:

> ... Amendments to the legislation could also recognise that communities may also require assistance in ensuring applications address the threshold matters prescribed in s9(1)(a) and s10(1)(a). It is inappropriate that applicants be rejected at the initial stage due to a failure to provide sufficient information.[63]

> ... in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, we would prefer to see an application process which does not deter indigenous people from making applications. The test of any application process involving

[61] Sections 9(1)(a) and 9(1)(a) of the Act respectively for temporary and long-term declarations.

[62] KLC sub 57.

[63] NSWG sub 55.

> indigenous people should be: is it simple, non-legalistic, affordable and, most importantly, culturally sensitive?[64]

Limits on who can apply?

10.91 Several submissions from development interests argued that the class of persons able to apply for protection should be limited. For example:

> An application should only be able to be made to the Minister by an Aboriginal custodian or custodians or persons duly authorised on their behalf. The Minister should be required to be satisfied that the application is made by or with the consent of the traditional custodian.[65]

The difference between the provision of protection under the Act and land claims has already been discussed. Although the Review accepts that the views of any custodians will be important in assessing issues of significance, it does not consider that the possibility of disagreement among Aboriginal people should be used to prevent easy access to the Act, including by non-custodians. In dealing with an argument that an applicant was not the proper custodian of the area in question, Justice Wilcox commented in one case that this was not relevant under the Act and that, if it were, what the consequences in terms of potential points of litigation would be (which the Review sees as unfortunate):

> ... as a matter of logic there might be more than one set of custodians, each with legal standing. Counsel ... agreed that such a dispute could only be resolved after extensive oral evidence. ... A proceeding primarily concerned with the validity of decisions made by the Minister for Aboriginal Affairs under the Aboriginal and Torres Strait Islander Heritage Protection Act would be turned into an inquiry as to the person or persons holding the primary custodial right to the subject land. That inquiry would involve much the same type of evidence as is adduced in support of claims under the Aboriginal Land Rights (Northern Territory) Act 1976, and would probably take as long to hear.[66]

It follows that the Review does not accept the need for limits on who can make applications under the Act: rather, the need for easy access and an appropriate mechanism for dealing with assessing issues of significance for the purposes of the Act dictate that for policy reasons this view should be rejected. The Review recommends that the current requirements in relation to applications for protection under the Act be retained.

> RECOMMENDATION:
> 10.23 Applications should be able to be made easily. A valid application is one that is 'made orally or in writing by or on behalf of an

[64] Chamarette sub 58.

[65] CRA sub 9.

[66] *Bropho v Tickner* (1993) 40 FCR 165 at 172-173, per Wilcox J.

Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration'.

Recording applications

10.92 As it will remain possible for applications to be made orally, there will be a need in some cases to organise to have applicants acknowledge the information as recorded by the agency.

> RECOMMENDATION:
> 10.24 The agency should be required to maintain a register of applications in written form: where applications are made orally, the agency should record what it is told and seek acknowledgment from the applicants of its record of the application.

A related difficulty is that the current delays in dealing with applications have led to repeat applications being made and new information being provided before a relevant decision is made. There are examples in the reported cases where two or more s 9 applications have been made in sequence in relation to the same area, with increasing urgency. This has sometimes led to confusion over where obligations to consult and to provide procedural fairness begin and end.[67] The quite strict time limits on dealing with applications for protection under s 9 should to a large extent overcome any such problems in this regard. In the s 10 context, questions have also arisen in some cases as to whether new bases of claims of significance and new information comprise an amendment of an existing application or a new application.[68] The agency should therefore be required also to record the information provided in support of applications and to ascertain whether that information constitutes an amendment to an existing application or a new application.

> RECOMMENDATION:
> 10.25 Where a new basis of significance or other new information is provided to the agency in relation to an area for which there is already an application registered, the agency should clarify whether the new information is part of the previous application or is provided in support of a new application, and deal with it accordingly.

PROCEDURAL FAIRNESS

Introduction

10.93 The way in which the courts have applied the common law rules of procedural fairness when interpreting the current Act has altered the decision-

[67] The *Broome Crocodile* case provides support for this concern.

[68] This was an issue in the *Hindmarsh Island (Kumarangk)* case.

making process under the Act so that it appears to no longer reflect what was originally intended. These rules are developed by courts in order to supplement whatever procedure is provided for expressly by statute so as to ensure that everyone with an interest in proposed administrative (government) decisions is treated fairly during the process leading up to the making of such decisions. This involves ensuring that interested persons are given an opportunity to put their case and to comment on the issues relevant to the proposed decision and that the decision-maker remains open to persuasion by them during this process.

Flexible content, subject to statute

10.94 The rules of procedural fairness are always subject to what is expressly provided for by statute: it is possible for a statute to provide a complete decision-making code, or to expressly exclude or limit the rules of procedural fairness. Since these rules are concerned with ensuring fairness, courts are loathe to limit them unless there is a clear expression of statutory intent to that effect. Within the statutory framework provided, the rules of procedural fairness have a flexible content according to the circumstances of individual cases, depending on a range of factors including the nature of the interests at stake and the urgency of the need for a decision.

Relevance of other recommended reforms

10.95 Two of the Review's recommendations are particularly relevant to the following discussion: the fact that the issue of significance should be assessed separately from the decision whether to protect (discussed in Chapter 8); and that protection against disclosure should be given under the Act to information contrary to Aboriginal tradition.

Two parts to declaration decisions

10.96 The Review's recommendations proceed on the basis that there are, in reality, two steps involved in the overall process of considering whether to make a declaration under the Act:

- an assessment of the Aboriginal cultural heritage significance of the area (an assessment that, of itself, has no automatic legal or practical consequences and is an issue to be determined primarily on the basis of Aboriginal information); and
- where it is established that an area is a 'significant Aboriginal area', a decision as to whether a declaration should be made and, if so, on what terms (this decision should be made in the light of other interests advanced in relation to the area in question and may have real legal and practical consequences).

The fact that the Commonwealth Act is a 'last resort' Act activated only where a threat to heritage values has already arisen has led to some blurring of this distinction, because there is pressure in some cases to resolve both aspects of the process speedily and therefore together, at least temporally.

Procedural fairness under the Act

10.97 Between February 1995 and May 1996 there was uncertainty as to the extent to which the rules of procedural fairness applied to decision making under the Act. Two decisions of single judges of the Federal Court handed down at almost the same time (February 1995), involved very different approaches to that question. It might be added that, prior to these two decisions, both of which were upheld on appeal to the Full Court of the Federal Court, such issues had not been litigated under the Act. The difference of view has now been resolved: however, the reasoning of each judge and the way in which the Full Court of the Federal Court resolved the different views must be considered, because the Review needs to be sure that the process it recommends deals fairly with the interests of those with an interest in decisions under the Act.

Reporting process as the extent of procedural requirements

10.98 One Federal Court judge[69] was of the view that the reporting process provided for by s 10 of the Act involves public participation through the provision of representations: his view was that it was intended by the legislature that this opportunity to participate represented the full extent of the procedures required to be followed. In other words, further processes (such as the holding by the reporter of interviews with some interested persons) were solely within the discretion of the reporter. On this view, there was no obligation to exchange information as between interested persons, to conduct interviews or hearings, or to allow interested persons to question the views being put to the reporter by others. The decision did not turn on this view of procedural fairness: rather, it was held (among other things) that the public notice was required to raise all the issues to be covered in the report: that the notice therefore required considerable detail; and that in the circumstances of the case the notice was flawed. In a sense, this decision could be considered as based on a breach of procedural fairness to the public at large (including interested persons) in that the notice did not put members of the public in a position to make meaningful representations. However, because the Act provides for the matters required to be included in a notice, the decision was cast as a failure to comply adequately with those provisions. On appeal, the Full Court of the Federal Court confirmed that the inadequacy of the notice was a basis for invalidating the declaration; it did not have to determine the broader procedural fairness issues.

[69] *Chapman v Tickner*, (1995) 55 FCRT 316, per Justice O'Loughlin.

Obligations to exchange information

10.99 The other judge[70] decided in effect that procedural fairness was not excluded under the Act and that it required certain interested persons (including the State and the developer in the particular case) to have access to written material relevant to their interests advanced by the 'other side' to the reporter. On this view, procedural fairness requires recognition of the fact that there is a 'contest' between certain competing interested persons as well as a broader process in which public participation is invited before a declaration may be made. Subject possibly to circumstances of urgency limiting the content of the requirements of procedural fairness in relation to s 9 applications, it was held that the same basic approach applies there also.

Purposes of procedural fairness and the public notice distinguished

10.100 The Full Court of the Federal Court has very recently resolved the conflict between the two decisions referred to in the course of deciding an appeal by the Commonwealth against the decision referred to immediately above. In a joint judgment, the Court upheld the view that the Act does not exclude procedural fairness and that, for some people at least, procedural fairness requires more than an opportunity to provide representations in response to a public notice. In doing so, the Court distinguished the purpose of the public notice from the purpose of the rules of procedural fairness, which are directed at those persons with particular interests in a decision:

> The statutory provision aims, as was emphasized in *Tickner v Bropho* and *Tickner v Chapman, (Norvill v Chapman)* to ensure a widely diffused public participation, so as to garner all the knowledge of the community. Thus the process of inquiry will have the potential to be enriched from many sources. The principle of natural justice aims, on the other hand, to focus on those particular individuals whose interests or legitimate expectations may be affected by the making of a declaration. Theirs is a special right protected by the principle, and the nature of the protection it requires them to have is much more specific than the public notification of notices in journals or gazettes. They are entitled, unless the statute excludes the right, to a proper opportunity to advance all legitimate arguments to avert a decision that might profoundly affect their interests. Such a proper opportunity involves proper notice of the case they have to meet.
> ...
> The scheme of the Act is not that a declaration will be made if the Minister is satisfied as to the question of significance, without input from others. And paragraphs (e) and (g) of s10(4) recognise that the effect a declaration may have on other persons' interests and the extent to which the land or objects might already be considered as the subject of protection are important matters for the

[70] *State of Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs*, (1995) 37 ALD 633 at 656 per Justice Carr.

> Minister's consideration. It follows that the reporter may well be involved in a process of fact-finding which places the reporter in dialogue with those whose interests may be affected and with State governments, or their agencies, which administer other legislation having similar purpose. So understood, to afford them the opportunity to contradict or comment upon issues raised which have the potential to influence the Minister's decision is consistent with and not at odds with the reporting and decision-making process envisaged by the Statute.[71]

Statutory recognition of interested persons

10.101 The Review considers that the Act should be amended to recognise, as the Federal Court has done, that there are people with particular interests in the processes leading to the decision whether a declaration should be made. The suggestion in the s 10 context that a public notice alone should suffice for that purpose should not be accepted given the serious consequences that making a declaration can have on particular people. The agency should be required to take reasonable steps to identify interested persons before any declaration decision so that they are aware of the fact that a decision might be made and are able to advance their interests in the way provided for by the Act. This is no more than to put into statutory form what, in the broadest sense, the requirements of procedural fairness normally entail.

> RECOMMENDATION:
> 10.26 The agency should be required to take reasonable steps to identify persons with an interest (in procedural fairness terms) in whether a declaration should be made before deciding whether to make a declaration under s 9 or providing a report to the Minister under s 10.

Section 9

10.102 In the context of applications under s 9, which should involve circumstances of urgency (given that they are premised on the existence of a 'serious and immediate threat'), the Review does not accept the argument that the obligation to provide such information to interested persons should be excluded. Rather, it accepts the view that, consistent with the usual approach of courts to questions of procedural fairness, the degree to which the obligation must be afforded depends on the circumstances of each case. As Justice Carr noted:

> The procedural fairness which is required for good administrative decision-making does not demand the impossible. It is necessary to be realistic and to take into account the particular circumstances in a practical manner.[72]

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[71] *Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia*, per Black CJ, Burchett and Kiefel JJ. (unreported, page 22-23).

[72] *State of Western Australia v Minister for Aboriginal and Torres strait Islander* Affairs (1995) 37 ALD 633 at page 656.

Under the Review's recommendations, initial s 9 declarations in particular (rather than declarations extending their operation) may have to be made in circumstances of urgency: courts may be expected to appreciate this, particularly in the case of interim protection, which is intended to maintain the status quo in relation to an area pending a final decision on a s 10 application.

How should the Act provide procedural fairness?

The more important question for the Review is to determine what ought to follow once interested persons have been identified. In many cases, some of the people most directly interested may have been involved already in dealings aimed at resolving applications by agreement or in heritage protection processes undertaken at State/Territory level. They may therefore have greater knowledge of the issues involved than other people, particularly the public at large. In what way should these and other interested persons be involved in the decision-making process? The Review has recommended that the agency should determine issues of significance primarily on the basis of information provided by Aboriginal people. The following discussion therefore focuses on the advancement of interests in the question whether a declaration should be made.

Opportunity to comment on specified notification requirements

10.103 As a result of the separate determination to be made by the agency of issues concerning significance, and because the Review considers that the processes to be followed under the Act should remain as informal and uncomplicated as possible, the Review considers that an appropriate level of fairness to interested persons requires that they have an opportunity to make representations in response to the information which must be provided by applicants in support of a declaration (specified notification requirements) and included (in a notice inviting representations from the public. Interested persons may have more to say about matters of significance and how they might be accommodated than would other members of the public. There is no reason why they should not put that information into the decision-making process via a written representation to the agency (in the s 10 context). However, the Review considers that the process should encourage other interested persons to focus on advancing their own reasons why a declaration should or should not be made.

10.104 The Review accepts that decisions whether to make declarations under the Act have the capacity to adversely affect the interests of land owners, developers and other interested persons. However, it does not accept the proposition that interested persons should be given an opportunity to contradict (other than through a specified opportunity to comment) every aspect of the process leading to the exercise of the discretion whether a declaration should be made. To permit more than this would achieve little but would work against the purposes of the Act.

RECOMMENDATION:

10.27 The Act should require the agency to provide interested persons with an opportunity to make representations in response to specified notification requirements before deciding whether to make a declaration under s 9 or providing a report to the Minister under s 10.

Keeping process simple

10.105 The opportunity for interested persons to comment on whether a declaration should be made is intended to inform the Minister's task, which is to balance the various public and private interests involved and to make a decision. The Review considers that exchanging representations is unnecessary in the context of a process that involves such a broad balancing of interests, particularly where (as is recommended) the report does not involve evaluating the merits of those representations or a recommendation whether a declaration should be made. Provision of representations from all interested persons should suffice to inform the Minister for these purposes. The decision-making process concerns protection of Aboriginal heritage, generally through involvement in planning processes, rather than by a more complex process such as a resource assessment process. The question whether other processes should be followed in particularly difficult cases should be at the discretion of the agency.

RECOMMENDATION:
10.28 The Act should reflect the principle that, unless expressly provided by the Act, the opportunity for interested persons to make representations in response to specified notification requirements is the only means by which they may comment on whether a declaration should be made. Any further processes should be entirely within the discretion of the agency.

RECOMMENDATION:
10.29 The Act should reflect the principle that, unless expressly provided by the Act, there is no obligation (and none shall be implied) on the agency or the Minister to provide interested persons, or members of the public who make representations in response to a notice under s 10, with information provided in support of an application under the Act.

Public notice process retained

10.106 The Review has explained that, in order to properly perform the balancing of competing public and private interests involved in the determination of s 10 applications where an agreed resolution has not proved possible, the Minister should receive input from as broad a range of interested persons as possible. People with a procedural fairness interest should be notified specifically by the agency. Nonetheless, the continued use of a public notice seeking representations serves two purposes: to enable any interested persons who may not have been notified by the agency to indicate their

interest and make representations; and to enable members of the public who are not interested persons (in procedural fairness terms) to comment on the issues raised by the application.

RECOMMENDATION:
10.30 The Act should continue to require publication of a notice so as to allow members of the public to provide written representations as to whether a declaration under s 10 should be made.

Representations to be provided through reporting process

10.107 This opportunity should be limited in the s 10 context to an opportunity to provide written representations to the agency within a specified period, for inclusion in a report to the Minister. This should be done at the same time as the reporting process, which should be retained in order to enrich the decision-making process in the way suggested by the Court.

RECOMMENDATION:
10.31 In the context of applications for protection under s 10, the opportunity for interested persons to make representations should be provided at the same time and in the same form as the reporting process (in writing).

What are the specified notification requirements?

10.108 The Federal Court provided extensive comments in the Hindmarsh Island (Kumarangk) case about the requirements applying to the notice required to be published in order to seek representations from members of the public in the s 10 process. The Review considers that a modified version of those requirements should form the basis of the specified notification requirements under the Act, but that the different use made by the judges of the current requirement to state in the notice the purposes of the application should be avoided by specifying the requirements more precisely. In drawing up the following requirements, the Review was conscious of the need to minimise the extent to which information that might be restricted according to Aboriginal tradition should be required to be disclosed. It was also concerned to ensure that the general nature of the basis of the significance claimed should be notified as a minimum requirement of fairness to interested persons.

RECOMMENDATION:
10.32 The Act should define the specified notification requirements as follows:
- the identity of the applicants
- an identification of the area sought to be protected
- a description, in general terms, of the significance of the area to the applicants

- a description of the threatening activity and a description, in general terms, of the injury or desecration that would result if the activity were to occur
- a description of the form of protection and preservation sought.

Requirements of notice to be specified

10.109 The requirements for the notice inviting representations from members of the public should also be specified. As this notice will focus on enriching the decision-making process rather than being directed at interested persons, its requirements need not be as stringent as those applying to notification of interested persons. In particular, the Review notes that disclosure of the details of sites of significance can amount to a breach of Aboriginal law and may cause distress. The need to do this should be minimised. The public notice should be able to express the location of the area sought to be protected in more general terms than the notification of interested persons.

RECOMMENDATION:
10.33 The Act should specify that the public notice contain the following information:
- the identity of the applicants (which might be in general terms only, in which case the notice should indicate a means of obtaining more detailed information in this regard)
- a reasonable identification of the area for which protection is sought
- a description, in general terms, of the significance of the area to the applicants
- a description of the threatening activity and a description, in general terms, of the injury or desecration that would result if that activity were to occur
- a description of the form of protection and preservation sought (noting the sorts of orders that might be made)
- the matters required to be dealt with in the report, being a list of the statutory requirements (this should suffice, since the above information should give enough case-specific detail to enable interested people to make meaningful submissions) and
- an invitation to provide written representations within 30 days after the date of publication of the notice and an address where representations can be sent.

Notifying interested persons

10.110 An attraction of the approach to notification taken by Justice O'Loughlin in the Hindmarsh Island (Kumarangk) case is that, by saying that interested persons have their opportunity to comment on whether a declaration should be made through a general call for representations, it is assumed that everybody has had that opportunity and that there is no need to divide people up into different classes of interest. As a result, provided the notice meets the

required standards in order for members of the public, including any interested persons, to make meaningful submissions, there is no chance that a declaration will be invalidated by reason of failure to notify someone with a relevant interest.

Who are interested persons?

10.111 A range of Aboriginal people may have an interest in the significance of the area: the relevant State/Territory government, developers, landowners and occupiers may have an interest in whether a declaration should be made. Consistent with later recommendations about ensuring that the relevant State/Territory government is contacted following receipt of a s 10 application, the Review considers that, to remove any doubt, the Act should recognise that they are interested persons. Depending on the circumstances of each case, there may be other interested persons. The task of notifying interested persons may be quite difficult and consideration may need to be given to deeming certain actions by the agency to amount to reasonable steps for the purpose of the obligation on the agency to take reasonable steps in this regard.

RECOMMENDATION:
10.34 In order to avoid any uncertainty, the Act should provide that States and Territories are interested persons for the purpose of the obligation to notify interested persons.

Avoiding invalidity

10.112 The approach of the Federal Court under the Act, and the Review's recommendations, have the effect that failure to notify interested persons may result in the invalidity of a declaration, depending on the extent of the person's interest and the reasonableness of the steps taken by the agency to identify all interested persons. One step that the agency could take in an effort to identify any interested persons that it may have for some reason not specifically notified would be to include a request in the public notice for any people who consider themselves to have a particular interest in the area sought to be protected to contact the agency or make a representation in which that interest is stated. Broad publication of the notice would be another. The actions of those interested persons who are involved in any preliminary processes aimed at resolving applications should also be taken into account in assessing the reasonableness of the steps taken by the agency. In any event, to avoid the possibility that the purpose of the Act is not defeated on technical basis, it should be provided that any failure to notify interested persons does not, of itself, result in invalidity.

RECOMMENDATION:

10.35 The Act should provide that failure to comply with the obligation to provide interested persons with an opportunity to provide representations in response to specified notification requirements does not, of itself, result in a declaration being invalid.

Notifying the relevant Aboriginal people

10.113 The Review considers that there is a particular need to ensure that all Aboriginal people who may have links with the area on question have an opportunity to provide any comments they have on issues of significance to the agency. One means of doing this is to require notification of a range of community groups including legal services, land councils, ATSIC offices and so on. Provision should be made for such notification to occur.

RECOMMENDATION:
10.36 The Act should provide for particular Aboriginal community groups in each State/Territory to be prescribed for the purpose of the obligation to notify interested persons.

Reaching Aboriginal people through the notice

10.114 In the context of the reporting process, the way in which the notice is published and distributed should take into account the diversity of Aboriginal people and groups so as to ensure that interested Aboriginal people are aware of the process to be undertaken (this might include use of Aboriginal media, radio and provision of the information to land councils, legal services and other Aboriginal groups in the relevant area). As one submission notes:

> The application may affect the interests of Aboriginal people who are not the applicants but who may have an interest in the protection of a site because of its relationship to other sites for which they are custodians. Since they are people who would have an interest in the application but not as applicants, it is suggested that the advertisement the Reporter must make should be advertised through Aboriginal media organisations and Aboriginal media generally. This should be done so that all communities affected can receive the advertisement and have adequate opportunity to decide whether to make representations or not.[73]

Notice of new issues

10.115 Problems have arisen under the Act to date in dealing with new information, particularly in relation to new bases of significance in support of a declaration.[74] Despite the fact that these issues are to be separately determined, it should be provided that, within the recommended framework, an ongoing reporting process may be altered to provide interested persons and

[73] ALRM sub 11/PWYRC sub 12.

[74] This was a main issue of concern in both the *Hindmarsh Island (Kumarangk)* case and the *Broome Crocodile Farm* case.

members of the public with an opportunity to comment on new information. This should be done by requiring further notification where the new information is beyond the scope of the specified notification requirements already notified. There should also be a capacity to publish a further notice in these circumstances (under the same requirements as the first in terms of publication and the response time for persons wishing to make representations).

RECOMMENDATION
10.37 The agency should be obliged to provide interested persons with an opportunity to make representations in response to new specified notification requirements where a new basis of significance or other new information is provided to the agency beyond the scope of the specified notification requirements already provided. In these circumstances, the Act should also provide a capacity for a new public notice to be issued.

FURTHER ASPECTS OF THE REPORTING PROCESS

Basic approach retained

10.116 Except for the fact that identified interested persons will be given specific notification of the reporting process being undertaken by the agency, the Review sees the process as following the form currently provided (except so far as reforms are recommended in the report). Other than where submissions raised major issues requiring consideration, the Review assumes that the current reporting process requirements would continue to apply in more or less the same form.

Consulting the State/Territory

10.117 The requirement to consult with the relevant State/Territory government for comment as to 'effective protection' should be retained. Several State/Territory governments or agencies have informed the review of their interest in having an opportunity to resolve applications before Commonwealth action is taken. For example:

> Applications received under the Aboriginal and Torres Strait Islander Heritage Protection Act should be referred back to the State or Territory Minister for review and for a Report [within a specified period]. If the issue is settled within this period then the report need not be forthcoming. The onus will lie with the State or territory to expedite the matter.[75]

[75] AAPA, sub 49.

> It is submitted that the Act should be amended to provide that, where under Sections 9 or 10 of the Commonwealth Act, an application has been submitted for protection of a specified area alleged to be under threat, the first action by the Federal Minister will be to initiate an inquiry into the manner in which (if at all) the matter has been dealt with under the relevant State/Territory heritage legislation.
>
> ...
>
> If after consideration of a report on the handling of the matter under the relevant State/Territory legislation the Federal Minister considers that due process has not been followed, under that State/Territory legislation, the application could be referred back to the State/Territory for attention within the confines of a specified time limit.[76]

The Review has explained why, in dealing with applications under the Act, the Commonwealth test should be actual protection rather than effective procedures. It should not adopt an approach based on the adequacy in broad terms of State/Territory laws. However, it accepts that States and Territories should have an opportunity to comment on whether their laws provide effective protection and agrees that in the case of s 10 applications, a report should be sought from the relevant State/Territory for this purpose and so that the State/Territory can provide any other comments relevant to the application. Among other matters, the involvement of the State/Territory at this point should assist the Commonwealth in identifying the persons most directly interested in an application, so that attempts may be made to resolve the application through agreement without the need for a more complex process.

> RECOMMENDATION
>
> 10.38 On receiving an application for protection under s 10, the agency should consult with the relevant State or Territory agency to ascertain whether there is effective protection of the area in question and to seek any further comments the State or Territory might wish to make in relation to the application. This should be done by requesting a report within a specified period.

Seeking agreements to resolve applications

10.118 An attempt to seek an agreed resolution of applications should be another early step taken by the agency in dealing with them. In these initial (pre-reporting) phases of dealing with s 10 applications, the emphasis should be on adopting processes that hold out the best prospect of resolving the application to the satisfaction of the applicants without the need for a more formal process to be conducted. This requires the involvement of the applicants and those interested persons without whose involvement the threat concerned cannot be removed. Wherever processes aimed at reaching agreements (such as mediation) are conducted, there should be no time limits

[76] WAG sub 34.

in place: the process is driven by those involved, as the following submission points out:

> A preliminary voluntary mediation upon application and before appointment of the reporter is proposed. There should be no time limits at all attached to this mediation as, depending on the nature of the particular matter and parties involved, the time frame necessary for mediation will be widely variable. Further, since the process is voluntary, it can be abandoned at any point by any of the parties, at which point the matter will be dealt with according to the usual procedures, which are bound by time limits.[77]

RECOMMENDATION
10.39 On receiving an application, the agency should investigate the prospects of resolving the application without the need for a reporting process, through agreement between the applicants and interested persons whose agreement the agency considers would be required in order to resolve the application (such as those whose activities pose the threat to the area in question).

Options for dealing with applications

10.119 After receiving a report from the relevant State/Territory, the Commonwealth should consider what step it should next take to process the application. In accordance with the principles outlined, the options include:

- indicating to the applicants that the outcome of specified State/Territory-level significance assessment and/or decision-making processes should be awaited before the Commonwealth will instigate a reporting process;
- inviting applicants to participate in a negotiation or mediation process if it appears that an outcome agreed as between interested persons might be reached (whether under the auspices of the State/Territory, the Commonwealth or jointly) before the Commonwealth instigate a reporting process;
- indicating to the applicants that the Commonwealth will await the outcome of processes taking place (such as world heritage or native title processes); and
- instigating a reporting process immediately.

The Commonwealth should inform the applicants and other interested persons, in writing, of its decision to instigate a reporting process.

RECOMMENDATION:
10.40 The agency should inform the applicants and other interested persons of its decision to instigate a reporting process and the point at which that decision was taken.

[77] CLC sub 47.

Other possible procedures

10.120 Other procedures than those specified in the Act, including any other opportunities to provide information for inclusion in the report, should remain within the discretion of the agency, which may otherwise inform itself as he or she sees fit: if relevant information is provided at a later stage, the reporter may refer to it in his or her report.

RECOMMENDATION:
10.41 The agency should consider the possibility of adopting other procedures to assist the decision-making process where it considers that to be appropriate. Other procedures that might be followed include:

- providing access to representations (subject to any confidentiality claimed) generally or as between interested persons or otherwise and
- providing access to a draft report to interested persons for comment.

10.121 The Act should provide that any record kept by or made for the reporter during any processes conducted at the discretion of the reporter does not constitute a representation required to be attached to the report: if this information is relevant to the issue of significance, that will be dealt with by the reporter and made the subject of the opinion of that person; if this information goes to whether or not a declaration should be made, the person has had an opportunity to provide it in writing and the reporter may refer to it in the report if he or she considers it to be relevant.

RECOMMENDATION:
10.42 The Act should make it clear that written records of information provided orally to the agency do not constitute representations in writing to be attached to the report.

10.122 The role of the reporter in relation to representations (in so far as they deal with arguments as to whether or not a declaration should be made) is to provide a fair summary of the arguments advanced in them, to the extent that they are relevant to the issues for the Minister to determine and balance – to present the interests advanced, rather than to give an opinion or recommendation to the Minister as to whether or not the declaration sought should be made.

RECOMMENDATION
10.42 The Act should make it clear that the role of the reporter in relation to written representations is to summarise them as they are relevant to the criteria upon which the report is to be based: the reporter should have no role in recommending or suggesting whether a declaration should be made.

The Minister's decision

10.123 In the opinion of the Review, the Minister's responsibilities under the Act need to focus on determining applications for protection under the Act (other than applications for interim protection). This should be done by relying on the report and the summary of representations contained in it in order to weigh the competing interests at issue. The Act currently provides that the report must attach all representations provided in response to the public notice, and before a declaration may be made, the Minister must have 'considered the report and any representations attached to the report'. The Review notes that in some cases, there may be hundreds of such representations made in response to the notice, and therefore that the content of that obligation has serious consequences for the Minister, who obviously will be a very busy person with a wide range of important responsibilities.

Current obligations too demanding

10.124 The Review agrees that it would be undesirable for the Minister to be required to spend large amounts of time reading representations that may be extremely numerous and lengthy and may be largely irrelevant to the issues to be determined. Under the present approach, where the Minister is required to both satisfy himself or herself of the preconditions to the making of a declaration (the issues of significance and threat), with the assistance of the reporter's comments on these issues and, in addition, consider (with a high degree of personal involvement) the representations made in response to the public notice, one might question what the point of having a reporter is. Many people with whom the Review has met, and several submissions, have argued that the requirements imposed on the Minister by the Act, as interpreted by the Federal Court in recent cases, are unrealistic.

> Nevertheless, in the recent cases of *Tickner v Chapman* and *Douglas v Tickner* a stringent standard of personal involvement was imposed on the Minister in the discharge of his or her statutory functions under the Act. With respect, achieving that standard would appear to be inconsistent with the onerous demands of modern-day Ministerial office.[78]

> Submit that the Minister should have a statutory power to delegate his responsibilities under Section 10 in reading representations and the report of the Reporter. The Act should continue to require him to consider the report and any summaries his assistants may make for him.[79]

Counter arguments

[78] CLC sub 47.

[79] ALRM sub 11/PWYRC sub 12.

10.125 The counter argument is that, if the Minister is to exercise a power that may have serious consequences for particular individuals, he or she should be required to do more than simply rely on a report provided in order to assist in that regard. The Review considers that the Minister ought, as in many other areas in which decisions are entrusted to Ministers, to rely on the summary of recommendations contained in the report in order to inform his or her balancing decision. Representations should still be required to be attached to the report forwarded to the Minister, and it would remain open to and sensible for the Minister to scan these and to read ones that appear from the report to be particularly important. It is to be recalled that the reporter (the agency) is required to deal specifically with the effects a declaration may have on the proprietary and pecuniary interests of people other than the applicants.

> RECOMMENDATION:
> 10.44 The Minister should be entitled to rely on the summary of written representations prepared by the agency without being required to consider them. The written representations should continue to be forwarded with the report.

Alternative approach

10.126 The Review has explained why there may be problems with making effective declarations under the Act if those involved in the reporting process are treated in different ways for different purposes. This is liable to be the case in particular when it may involve particular obligations on the ultimate decision-maker (the Minister). Nonetheless, if it were considered necessary in order to recognise the particular interests of those likely to be most seriously affected by the making of a declaration for the Minister to give specific attention to their representations, any obligation on the Minister to consider representations could be limited to those persons identified by the agency as interested persons prior to the publication of the notice.

IMPROVING ACCOUNTABILITY

Current accountability mechanisms

10.127 Broad political accountability (including public debate and the role of the media) and the publication of information about how the Act works and is administered, are two general means by which accountability for the administration of the Act is currently achieved. The latter subject is discussed further in Chapter 11, dealing with the proposed new agency. More formal accountability mechanisms consist of the following:
declarations are tabled in Parliament and are subject to tabling and disallowance;
the Minister is obliged to take reasonable steps to give notice, in writing, of the making of declarations to persons likely to be substantially affected by them;

the Minister is obliged to take reasonable steps to give notice to applicants, in writing, of the making of a decision refusing an application;
decisions under the Act are subject to judicial review, notably under the *Administrative Decisions (Judicial Review) Act 1977*;
interested persons may seek reasons for decisions under s 13 of the ADJR Act;
the Ombudsman may investigate the administration of the Act except in so far as they relate to the actions of the Minister.

Background

10.128 The Second Reading Speech to the Bill that became the Act contained the following comments about accountability for the making of decisions under the Act:

> Review by the Houses of Parliament will, in effect, be the only review of the merits of a Minister's decision to make a declaration. Of course, other administrative law remedies will still be available to people affected by a declaration.
>
> The Bill has no express requirement for the Minister to give reasons for that [a refusal] decision. It may be that reasons could be required of the Minister by an aggrieved applicant pursuant to the Administrative Decisions (Judicial Review) Act. In any case, the Minister has agreed that where he refuses an application for a declaration, he will provide reasons for that decision.[80]

Need for better mechanisms

10.129 Several submissions, in particular from developers, considered that there is a need for an appeals or review mechanism for declaration decisions. The Review does not consider that this is appropriate or would be effective if it could be done, for reasons linked to the nature of the decisions involved, as explained below. Nonetheless, the concern about lack of adequate accountability mechanisms, and the inadequacy of relying on parliamentary review, is one that most submissions appear to share, implicitly if not expressly, given the extensive criticism of delay, lack of transparency and speculation over why decisions are being taken. The Review considers that there are two main ways of improving accountability: strengthening the requirements to provide reasons for decisions; and by ensuring that the process leading up to the making of all declaration decisions is able to be reviewed by the Ombudsman.

Merits review?

10.130 The Review has explained its reasons for not recommending that a tribunal or authority make decisions concerning protection of Aboriginal heritage. Essentially, it is because there are no adequate criteria by which such

[80] Second Reading Speech, Senate, Hansard, 6 June 1984 ; see Annex II.

a complex decision involving quite subjective but strongly-held values on the one hand can be balanced with competing interests likely to include proprietary and pecuniary interests on the other. This is particularly the case when a process involves broad public involvement, as does the reporting process. Here the ultimate decisions are of a wide-ranging nature and have a further political dimension in that they may involve the effective overturning of decisions taken at State/Territory level. It follows that if these decisions cannot be properly vested in an administrative person or body other than the Minister, which the Review considers presently to be the case, there will be no way in which they can be subject to effective merits review, which involves the reviewing person or body 'stepping into the shoes' and remaking the decision of the original decision-maker.

10.131 The Review also has doubts about the utility of providing for merits review of interim declaration decisions: apart from anything else this might have the effect of adding to uncertainty and delay. The reasons for removing the responsibility for these decisions from the minister is to ensure that the minister's decision-making responsibilities under the Act focus on the most political decisions (the exercise of discretion in relation to applications under s 10) and to bring a more principled approach to bear upon the determination of interim protection. On the other hand, these decisions also have the capacity to adversely affect a person's interests, and prima facie there ought to be merits review or some other similar accountability mechanism in place.

Judicial review to remain available

10.132 Judicial review is the process by which courts ascertain the lawfulness of administrative decision making. At Commonwealth level, the availability of judicial review by the High Court of actions of 'officers of the Commonwealth' is entrenched in the Constitution[81] and the Federal Court has an equivalent jurisdiction under the *Judiciary Act 1903*.[82] Judicial review of Commonwealth decisions and conduct leading to decisions, being decisions of an administrative character made under an enactment, is also available on a simpler basis under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). Under the Review's suggested separation of significance assessment from the final exercise of political discretion, it appears to be clear that both aspects of the decision-making process would remain subject to judicial review. The Review sees no reason to exclude the Courts from considering whether the decisions mentioned are made in accordance with law.

> **RECOMMENDATION:**
> 10.45 All existing avenues of judicial review should remain available in relation to decisions made under the Act.

[81] Section 75(v), see also s 75(iii).

[82] *Judiciary Act 1903* (Cth), s 39B.

Reasons for decisions

10.133 The doubt expressed in the Second Reading Speech about whether reasons could be sought under the ADJR Act in relation to the Minister's decision regarding a declaration appears to have been based on the fact that, since those decisions have the noted features akin to regulations (they are subject to tabling and disallowance), they might not be administrative decisions for the purposes of that Act. Now that such decisions have been reviewed and even overturned by the Federal Court under that Act, that doubt would seem to have been removed.

Purposes of obligation

10.134 The Administrative Review Council, which provides advice to the Commonwealth Government on administrative law issues, recently noted that:

> The purposes served by the provisions of statements of reasons were described by the Council previously as including:
> - to overcome the real grievance persons experience when they are not told why something affecting them has been done; and
> - to enable persons affected by a decision to see what was taken into account and whether an error has been made so that they may determine whether to challenge the decision and what means to adopt when doing so ... .[83]

Content of requirement

10.135 The content of the obligation to give reasons takes the following form: a decision-maker is obliged to provide a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and giving the reasons for the decision. Since the Minister would be bound by the decision of the agency as to significance and the injury or desecration that would be suffered if the threatening activity occurred, the report would presumably be considered to form the reasons for that aspect of the final decision. That would leave the Minister (or agency, in the case of interim protection decisions) to explain what was taken into account in exercising discretion whether to make a declaration.

Need for awareness of right to request reasons

10.136 The right under the ADJR Act to request reasons for decisions is of limited use if people are unaware that it exists. In circumstances such as the present where the provision of reasons for decisions is an important means of

[83] Administrative Review Council, *Better Decisions: review of Commonwealth Merits Review Tribunals*, Report No 39, 1995, page 67.

providing accountability for decisions, such as where there is no determinative merits review available, it is particularly important that this right be known. Some applicants for protection, in particular, may be unlikely to know about the provisions of the ADJR Act.

RECOMMENDATION:
10.46 The Act should include a provision drawing attention to the fact that reasons for decisions under the Act may be sought under s 13 of the *Administrative Decisions (Judicial Review) Act 1977*.

Political accountability

10.137 In a scheme where political responsibility and parliamentary review form the only review of the merits of a decision, it is important not only that there be an obligation to provide reasons for decisions and that this obligation be clear to all interested people, but that reasons for (at least the major) decisions be subject to political scrutiny. As the Aboriginal Areas Protection Authority has commented to the Review:

> The force of political scrutiny operates most critically when a Minister has decided to make a declaration, and least critically when the Minister refuses an application. This stands in contrast to the responsibility of the Northern Territory Minister under the Review Procedure of the *Northern Territory Aboriginal Sacred Sites Act 1989*, who must notify those involved of his decision, whatever it might be, and his reasons for decision and lay this information also before the Legislative Assembly.[84]

The Review agrees and considers that the Act should require the tabling in Parliament of reasons for decisions by the Minister to make or refuse applications for declarations (being decisions other than on interim protection). In other words, where the Minister is called upon in the exercise of his or her discretion to (finally) determine an application under the Act, the reasons for that decision should be subject to this requirement. Other decisions under the Act (on interim protection, giving effect to agreements that dispose of applications and to dismiss applications) would remain subject to the ADJR Act requirement.

RECOMMENDATION:
10.47 Where the Minister is called upon to determine an application by exercising his or her discretion whether to make a declaration, reasons sufficient to comply with s 13 of the *ADJR Act* should be provided to the applicants and other interested persons and tabled in Parliament.

[84] AAPA sub 49.

Ombudsman review

10.138 The Commonwealth Ombudsman may investigate complaints relating to administration, including decision-making processes, and make recommendations to government for improvements. This role includes both responding to individual complaints and a broader function of commenting on systemic problems. Although the Ombudsman focuses on process issues rather than the decisions reached in individual cases, and ultimately does not have determinative powers, the power to examine the way in which people are treated in their dealings with government has been of considerable benefit in exposing inefficient or unfair practices and thereby leading to improved government administration.

Scope of Ombudsman's jurisdiction unclear at present

10.139 Although the scope of the Ombudsman's powers of investigation is very broad, there are limits and grey areas, one of which concerns the actions of ministers. At present under the Act, applications are received and dealt with by the Minister, through the Minister's office (often following initial contact with ATSIC). In these circumstances, the grey area in relation to the Ombudsman's powers extends further from the point of real ministerial involvement than perhaps should be the case. The Ombudsman has this to say in relation to that aspect of the Act:

> The removal of these functions from the Minister's office would afford an accountability mechanism that currently does not exist, in that my office would have the ability to consider any complaints concerning the receipt and processing of applications and associated administrative issues (unless specifically precluded). This would be comparable to the jurisdiction I already possess, to investigate complaints concerning the registry and administrative functions of the Native Title Tribunal (and, as you would be aware, the Federal and Family Courts). My Special Liaison Officer (Indigenous Communities) already takes a special interest in any such complaints, and I believe a jurisdiction in this regard could prove beneficial to both applicants and the general community.[85]

Further accountability mechanism appropriate

10.140 The Review endorses these comments. It considers that the administration of the Act would benefit from increased accountability in relation to the way applications are received and processed up to the point where the Minister is called upon, if at all, to resolve applications. This is one aspect of the reasoning for the Review's conclusion that an agency should be established to deal with such tasks (others are discussed in Chapter 11).

RECOMMENDATION:

[85] Commonwealth Ombudsman sub 41 p 2.

10.48 Responsibility for the receipt and processing of applications for protection under the Act should be removed from the Minister's office so that it is clear that the Ombudsman may investigate and report on issues of administration arising in relation to those functions.

CHAPTER 11:

AN ABORIGINAL HERITAGE PROTECTION AGENCY

11.01 The terms of reference ask the Review to report on the establishment of an authority, tribunal or commission and the resources required to administer the Act. This chapter outlines the way in which the Act is currently administered by the Minister and ATSIC, and recommends that a new independent agency be established. The cost and resource implications of this recommendation are considered. The option of a formal tribunal process was also discussed in Chapter 10; Chapter 8 considered the means of deciding questions of significance.

HOW THE ACT IS ADMINISTERED

Minister's exclusive powers

11.02 The Act is administered by the Minister for Aboriginal and Torres Strait Islander Affairs, with the assistance of the Land, Heritage and Environment Branch of ATSIC.[1] The power to make declarations of protection and certain other powers can be exercised only by the Minister. The powers and functions which cannot be delegated are:[2]

- making declarations under section 9, 10 or 12;
- consulting with the relevant Minister of a State or of the Northern Territory, s 13 (2);
- applying for an injunction to prevent breach of a declaration, s 26.

Other powers and functions

11.03 Other power and functions of the Minister under the Act can be delegated, s 31 (1). The delegation does not prevent the Minister from personally exercising a power or function. Other functions under the Act include:

- making emergency declarations under s 18 (authorised officer declarations);
- dealing with remains which have been reported or delivered to the Minister under s 20;
- initiating prosecutions for breach of a declaration under s 22;
- dealing with issues relating to compensation under s 28.

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[1] *Interaction*, Appendix E.

[2] Delegation in respect of powers under Part IIA, which applies in Victoria, are covered by s 21B.

- applications for legal assistance can be made to the Attorney-General, s 30.

Functions of the Land, Heritage and Environment Branch

11.04 The Land, Heritage and Environment Branch of ATSIC ('the Heritage Branch') provides advice and assistance to the Minister in the administration of the Act. Its activities include: dealing with applications for declarations of protection under sections 9, 10 and 12; investigating applications made under the Act; consulting with relevant State/Territory agencies and indigenous communities; obtaining legal advice; appointing consultants; providing advice to the Minister on all aspects of the administration of the Act; and preparing correspondence and documents for the Minister.

Applications under sections 9, 10 and 12

registering the application

11.05 Applications to the Minister for declarations under sections 9, 10 and 12 are sent to ATSIC for acknowledgment and recording in a register of applications. They are checked for validity: for example, that they are made by Aboriginal people and that they are not frivolous or vexatious.[3]

checking the basic information

11.06 The Heritage Branch makes inquiries of State/Territory authorities as to whether there is or could be legal protection of the site. It inquires about information which could establish whether the area covered by the application is a significant Aboriginal area. There might, for example, be reports prepared by archaeologists or anthropologists, or by State/Territory agencies. The Branch would usually inform the persons or companies who are the cause of the threat and who would be affected by a declaration. It may also make inquiries to verify the circumstances of the proposed development which constitutes the threat of injury or desecration.

advising the Minister

11.07 The Heritage Branch advises the Minister on the options available for dealing with an application and about State/Territory processes. The Minister must consult the relevant State/Territory Minister before making a declaration, s 13(2). This may be done at an early stage of the process.

appointment of reporters, mediators

11.08 If the matter might be resolved through negotiation the Minister may appoint a mediator. If mediation is not possible or is unsuccessful and an

[3] ATSIC, sub 54, p9.

application has been made under s 10 for long term protection of an area, the Minister would appoint a person to prepare a report under s 10 (4) of the Act. ATSIC advises on these matters and makes arrangements for the appointment of a reporter, placing newspaper advertisements etc.

Data: number of applications

11.09 The number of applications is not high. Since the Act came into force in 1984 there has been a total of 143 applications, including 124 under sections 9 and 10, an average of about ten each year. The highest number of applications in any one year were 21 in 1989, and 17 in 1994. There have been twelve applications in relation to objects.

Section	Number	Days *
s 9 area/immediate threat	75	173
s 10 area	49	310
s 12 object	12	234
s 18 immediate/48 hour	7	-

* days = the number of days taken to deal with the application.
No figures are available for s 18 applications.[4]

Costs

11.10 Costs of the administration of the Act are variable, depending on the number of applications, the cost of consultancies for mediation under s 13(3), or for reports under s 10(4). In recent years the costs have escalated due to litigation and the further process in the Hindmarsh Island (Kumarangk) case. A large sum was spent on the purchase of the Strehlow collection in 1994-95. Available figures for the programme costs over the last few years are these:

Years	Mediation and Reports ≠ $	Staff # $	Miscellaneous $	Total $
1992/93	38,189	-	-	38,189
1993/94	80,164	-	34,180	114,344
1994/95	110,961	152,370	928,160	1,039,121
1995/96 *	566,663	152,370	294,959	861,622

\# Staff: Four: 1 SOGB, 2 SOGCs, and 1 ASO2.
They may not spend all their time on this one programme.
≠ Cost of reports and mediations.
* Up to April 1996.
The figures do not include the costs associated with this Review.

[4] *Impact Evaluation.*

PROBLEMS IN THE ADMINISTRATION OF THE ACT

Undue delays and costs

11.11 There have been many delays and frustrations for applicants, developers and landowners. Some applications appear to have been registered for lengthy periods without any determination. They are left on a pending basis for months or years, without explanation. For Aboriginal people delay has sometimes appeared as denial. Decisions in some cases appear to have been postponed, on the basis that the area was protected under State/Territory law, even though continuing damage was being done to the site.[5]

> In the Helena Valley case, WA an application had been made in April 1993 under sections 18 (declined), 9 and 10. No declaration was made under s 9. A reporter was appointed in October 1993. Most of the area of significance was destroyed prior to the report to the Minister, in February 1994, and the Minister's decision in March 1994.

The failure of authorised officers to exercise their functions under s 18 has been a particular cause of criticism by the Ombudsman.[6] The delays and litigation associated with some cases has imposed high costs on parties.

Lack of transparent procedures

11.12 The procedures established by the Act have not worked effectively, and have not been adequately supplemented by delegated legislation or by comprehensive and widely available procedural guidelines. The lack of clear and transparent procedures to establish how natural justice requirements should be met in proceedings under the Act has resulted in several challenges to the Minister's actions in the Federal Court.[7] The Ombudsman does not have jurisdiction to investigate administrative actions by Ministers. However, the Ombudsman has identified as a major problem "the lack of a well-developed administrative scheme to support the operations of the Act."[8] The view of the Ombudsman is that the procedures or lack of procedures may have led to a situation that is unreasonable or oppressive.[9]

Lack of openness and accountability

11.13 There have been broad criticisms of the lack of openness in the procedures. This leads to a suspicion that political negotiations are conducted

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[5] see Annex VII, for example, the *Helena Valley* case

[6] Commonwealth Ombudsman, sub 41, Attachment 1 (Issues arising from the 1993-94 Helena Valley applications), pp 3-8.

[7] For example, the *Hindmarsh Island (Kumarangk)* and *Broome Crocodile Farm* cases.

[8] Commonwealth Ombudsman, sub 41 p2.

[9] Commonwealth Ombudsman, sub 41, Attachment 1, p9.

at ministerial level, the details of which are not publicly known, other than by the outcomes of applications.[10] Because much of the actual administration of applications is handled in the ministerial office, the Ombudsman cannot inquire into complaints which may relate to that part of the process. More open and accountable procedures may be preferable.

Minister burdened in an inappropriate manner

11.14 The current Act imposes a considerable burden on the Minister. The Minister must not only decide whether to make a permanent declaration of protection, but is also required to give attention to applications at the interim stage, to determine whether temporary protection is necessary. The Minister also has to make an approach to the State/Territory Minister. All these requirements can add to delays, as the Heritage Branch must usually await directions from the Minister before taking procedural steps. The Ombudsman doubted whether the Minister's office is the most advantageous place for applications to be received, registered and assessed, even if protection decisions are to remain the Minister's.

> In my experience, the administrative complexities that arise in the exercise of such functions, at least as evidenced in recent years, would fall more naturally to a body of officers who, whether dedicated full-time or part-time to heritage matters, could nevertheless perform these functions in a systematic way, one step removed from the heavy fluctuating and sometimes volatile workload of a Ministerial office.
>
> The removal of these functions from the Minister's office would afford an accountability mechanism that currently does not exist, in that my office would have the ability to consider any complaints concerning the receipt and processing of applications and associated administrative issues (unless specifically precluded).[11]

Potential conflict of interest

11.15 While it is not suggested that the Heritage Branch has carried out its duties other than with integrity and concern, there is a potential conflict of interest for ATSIC, due to the fact that it must advise the Minister on applications, while at the same time providing assistance to parties to prepare their cases.[12] The necessary institutional independence necessary to carry out functions under the Act may be at risk. It has been pointed out that circumstances have made the Minister, rather than Aboriginal and Torres Strait Islander people, the client of ATSIC's work in regard to heritage protection.[13]

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[10] Allegations of this kind were made in relation to the *Old Swan Brewery* case.

[11] Commonwealth Ombudsman, sub 41, p2.

[12] See for example the Lake Barrine case, where ATSIC commissioned a preliminary report prior to the Minister considering whether to appoint a mediator or s 10 reporter.

[13] *Impact Evaluation*, p52.

Diversion of resources

11.16 The demands of dealing with applications under the Act and the resources necessary for that purpose may divert the Heritage Branch from dealing with other broader aspects of heritage protection. Other specific functions of ATSIC in heritage protection include advising the Minister on the *Aboriginal Land Rights (Northern Territory) Act 1976* as a 'Department of State'. Under the *ATSIC Act 1989*, it also has functions to further cultural development and to protect cultural material which is sacred or significant, s 7(1)(g).[14] The Branch gives policy advice to the Aboriginal and Torres Strait Islander Commission on these and other heritage matters. However, it has not been able to advance its policy goals in these areas, partly because of the requirements of servicing the Act. There is a need for the Heritage Branch or another agency to play a role in developing Commonwealth policy in regard to heritage protection.[15]

COULD AN INDEPENDENT AGENCY ADMINISTER THE MINISTER'S POWERS UNDER THE ACT?

Calls for a new body to take over functions

11.17 The outline of the current situation suggests very strongly that there is a need for a thorough overhaul of the administration of the Act. Several submissions and commentaries on the Act have called for a new agency to take responsibility for the protection of Aboriginal cultural heritage under the Act.[16] Because the Minister has important powers under the legislation, the implications of transferring functions to a new agency and the effect on the original intentions of the Act need to be considered.

Main discretion must remain with Minister

11.18 A central pillar in the operation of the Act is that the decision whether or not to make a declaration to protect an area or object from injury or desecration is a ministerial discretion. As the Act now stands the Minister has to be personally satisfied about the significance of an area or object and about the threat before considering whether to make a declaration. This report has recommended that the questions of the particular significance of an area, (and the way in which that significance is affected by the threat) should be considered separately from any question relating to the future use or protection of that site, and that it become the responsibility of the authorised body or agency established for that purpose. This would leave intact the Minister's responsibility to weigh up competing interests in order to determine whether to grant protection of the site or area. The Review recommends that the final

[14] See Chapter 3.

[15] *Impact Evaluation*, p10.

[16] AHC, sub 52; Draper, sub 59; NSWG, sub 55; ATSIC sub 54, p17; ALSWA, sub 56; KLC, sub 57.

responsibility should remain with from the Minister. The decision concerning protection involves the exercise of an essentially political discretion, taking into account the interests of Aboriginal people, other interested parties and the public interest. It is a decision for which the Minister is and should remain politically accountable. As Wilcox J said in *Bropho v Tickner* "it is inherent in his responsibility that this disposition is inseparable from the broader political context."

Other powers of the Minister could be transferred

11.19 Other powers and functions under the Act may not need the Minister's personal attention. A number of decisions and actions which have to be taken in the course of dealing with an application which could be better placed in the hands of an independent agency. These include the question of interim protection, inquiries about the application and effectiveness of protection under State or Territory law and the appointment of a reporter or mediator. Transferring those matters to another agency would take pressure off the Minister and could contribute to a more effective process.

Interim protection

11.20 The effectiveness of the Act depends to a large extent on whether it can be used to prevent irreparable harm to significant Aboriginal areas while negotiations continue or inquiries are made. Natural justice issues have to be taken into account, but the most significant question is whether immediate action is necessary to prevent irreparable harm to an area or object. This is a question of principle which ought to be objectively and independently assessed at the earliest opportunity. The Review's recommendations to make interim protection more effective are discussed in Chapter 10. This is a matter which could with advantage be transferred to an independent body.

Effectiveness of State/Territory protection

11.21 In some cases the Minister appears to have become involved in lengthy discussions with his/her State/Territory counterpart, discussion of which the parties have no knowledge. These discussions may include attempts to get the State/Territory authorities to take protective action; some succeeded, but others did not. The long drawn out processes have, however, allowed damage to continue in some cases without any decision being taken about the significance of the area, the existence and nature of the threat or the effect of State/Territory law. This Report makes recommendations elsewhere which would require a more principled and open approach to the question whether State or Territory law provides effective protection. The question should be dealt with in a consistent and open manner away from the political process. Ideally it should be in the hands of an independent agency.

Appointing a mediator/reporter

11.22 The appointment of reporters and mediators is at present handled personally by the Minister, with the advice and assistance of the Heritage Branch.[17] Bearing in mind the important role played by the report and the recommendations of this Review which would require the person or agency responsible for the report to make an assessment concerning the significance of the area, it is important that there be as much independence and objectivity as possible in the nomination of the reporter. It should not be left to the personal choice of the Minister. An independent body should carry out the function of ensuring that a qualified person is nominated for the task.

Heritage Branch functions could be transferred

11.23 If certain of the Minister's functions were transferred to an independent agency, ATSIC's current functions in administering the Act, outlined above, should also be vested in that agency. For example, receiving and registering the application, checking the basic information and making inquiries of State/Territory authorities.

ADVANTAGES OF AN INDEPENDENT ABORIGINAL HERITAGE PROTECTION AGENCY

Effective administration of the Act

11.24 Putting the administration of the Act in the hands of an independent agency would avoid the procedural 'black holes' which now seem to occur in dealing with applications. Together with other changes which the Review recommends, it would ensure that every application followed a clear path, that issues of interim protection were dealt with, and that appropriate mediation or reporting procedures were set in motion without delay. The advantages of clear procedures, followed without unnecessary delay would benefit everyone affected by an application.

Minister relieved of administrative burden

11.25 The Minister would be relieved of the day-to-day administrative burden of dealing with applications, deciding on short term protection, and appointing mediators and/or reporters. The Minister would still play a part in negotiations with States and Territories, but would not need to make decisions concerning interim protection. The Minister would retain final responsibility for making declarations of protection under s 10 and 12.

Accountability

[17] ATSIC's role in this process was the subject of an (unsuccessful) allegation of bias on the part of the Minister in the *Hindmarsh Island (Kumarangk)* case at first instance.

11.26 The removal of responsibility for administrative functions from the Minister's office to an independent agency would ensure greater accountability, in that complaints about administration could be referred to the Ombudsman.[18]

ATSIC Heritage Branch: expanded role in heritage protection

11.27 If ATSIC were relieved of its administrative functions in respect of applications under the Act it could more readily be a source of information and advice to the Minister on the broader aspects of heritage protection policy, including the operation of the Act. As ATSIC points out, its knowledge of other issues concerning cultural heritage, such as native title, and its role in the promotion of cultural heritage, put it in a good position to provide this advice.[19] It could increase its influence on policy advice by working with other agencies.[20] ATSIC might also play a greater role in ensuring that the Aboriginal community had the necessary information and resources to take action under the Act.[21]

Necessary legislative amendments

11.28 There appear to be no obstacles in principle to the transfer of functions under the Act to an independent agency. The main legislative changes required would be in respect of short term declarations of protection under s 9, and in respect of the consultations with States and Territories concerning the effectiveness of any protection provided under their laws, s 13 (2). Recommendations in respect of both those issues made in Chapter 10 are consistent with vesting these powers in an independent agency.

MODEL FOR THE PROPOSED AGENCY

Administrative model preferred over tribunal

11.29 There is not a unanimous view as to the nature of any independent agency which might be established to administer the Act. Some support a tribunal which would conduct a hearing on the issues.[22] The Western Australian Government saw the need for an advisory body to the Minister, with professional knowledge concerning heritage issues, and to facilitate liaison with State/Territory government agencies.[23] Others support an expert independent administrative agency.[24] The ATSIC submission proposed the

[18] Commonwealth Ombudsman, sub 41, p2.

[19] ATSIC, sub 54, p16.

[20] *Impact Evaluation*, p33.

[21] This was recommended by the Ombudsman: sub 41, p3, Attachment 1, p9-10.

[22] AHC, sub 52.

[23] WAG, sub 34, p3; AAA, sub 61 supports an advisory body with a large majority of indigenous members and some with specific heritage management skills. This body could help to develop guidelines, consult State bodies, decide who should report, review reports and provide advice.

[24] Draper, sub 59: there is a need for a permanent, professional legal/anthropological administrative body more effectively constituted and resourced than the ATSIC heritage

creation of a statutory officer, a Commissioner for Indigenous Heritage Protection, "who would receive, investigate and report to the Minister on applications made under the Heritage Protection Act, and make findings."[25] The Review favours the administrative model rather than the tribunal model, for reasons which were more fully explained in Chapter 10. The objectives of the Act would be better served by encouraging reform at State and Territory level, and by retaining a simple procedure as a mechanism of last resort than by setting up elaborate procedures at Commonwealth level. An elaborate tribunal procedure, with the attendant delays, involvement of counsel and expense, would render the Act inaccessible to those who should be its beneficiaries.

Constitution and membership of agency

11.30 The size of the agency would be governed by the volume of work, discussed further below. To deal with the current workload, the new agency could be quite small. It is proposed that it be constituted in this manner:

- a full time principal member;
- a number of part-time members, located in all regions, who would be called on as and when required to conduct mediations or prepare reports;[26]
- a small permanent administrative staff.

Qualities for members

11.31 The qualities necessary for membership of the agency should include knowledge and understanding of Aboriginal cultural heritage issues, of Aboriginal customs and traditions and/or of the archaeological or anthropological significance of areas and objects in accordance with Aboriginal tradition. Members of existing tribunals could be considered as eligible for appointment as members of the Agency. Anthropologists, archaeologists and others with appropriate experience and expertise should be eligible. The principal member should have legal experience.

Aboriginal and Torres Strait Islander participation

11.32 The members of the agency should include a majority of Aboriginal and Torres Strait Islander people.[27] There should be gender balance among members.

Branch. NSWG, sub 55 supports a new administering authority. It would aim to enhance the progress of indigenous self-determination.

[25] ATSIC, sub 54, p17.

[26] Compare other tribunals, eg, part time commissioners of HREOC.

[27] Fourmile, H *Making Things Work: Aboriginal and Torres Strait Islander Involvement in Bioregional Planning* Consultant's Report 1995: proposes an Aboriginal Cultural Heritage Commissioner.

Mediators and reporters

11.33 Mediators and reporters who would exercise functions comparable to those now exercised should be drawn from the members of the proposed agency. The present functions of the reporter would extend to the assessment of the significance of the area, and the way in which that significance is affected by the threat of injury or desecration in addition to the present functions.

Administrative staff

11.34 The administrative secretariat of the agency, which is envisaged as quite small, should be located with the principal member. The staff, or a majority, should be Aboriginal or Torres Strait Islander people.

Authorised officers

11.35 Proposals concerning authorised officers, who may include members of the Agency, are discussed below.

FUNCTIONS OF THE AGENCY

Registration and preliminary inquiries

11.36 The proposed agency would receive and register valid applications according to established procedures. It would be responsible for seeking information from the applicant, from State or Territory authorities and from other parties who may be affected, about the area, the threat and its level of protection under State and Territory laws. It would act in accordance with procedures designed to ensure that there were no unreasonable delays.

Temporary declarations; interim protection

11.37 The agency should have power to make temporary declarations in accordance with principles and procedures set out in Chapter 10.[28] As to emergency declarations, see authorised officer procedures, below.

Inquire into State/Territory process

11.38 The agency would inform the relevant State or Territory of the application and ask for a report on what action has occurred under State/Territory law, the stage of any procedure at that level, and what protection is provided by the State or Territory.

Other inquiries

11.39 In some cases the agency may wish to consult the Australian Heritage Commission to ascertain whether an area for which protection is sought has been included on the Register of the National Estate as a part of the cultural

[28] These are designed to enable short term protection to be granted speedily and according to principle.

environment, or whether it is being assessed or has been[29] assessed for that purpose. The AHC could advise on the basis of any assessment which had been made, and might also be able to advise generally on the process of assessment of sites where no appropriate assessment had already been made.[30]

Nominate a mediator

11.40 Where mediation appeared likely to assist in the resolution of the issues, a member of the agency would be nominated to undertake this function. The appointment of a mediator would not be a ground for denying short term protection.

Nominate a reporter

11.41 Where a report was necessary to enable the Minister to exercise discretion under s 10 or 12, a member of the agency would be nominated to prepare the report. In principle, a member involved in a mediation should not take part in the reporting process, unless the interested parties agree to this.[31] The reporter would, inter alia, make an assessment of the significance of an area or object, and inquire and report on other matters relevant to the Minster's exercise of discretion under the Act.

Prosecution

11.42 Consideration should be given to vesting power in the agency to authorise prosecutions for breach of declarations made under the Act and applications for injunctions under s 26.[32]

Guidelines for procedures

11.43 The agency should issue guidelines concerning the procedures under the Act, to ensure a transparent process.

Agency to report annually

11.44 The agency should report to the Minister each year on its activities, and on applications made under the Act. It should publish summaries of the cases which have been dealt with and data concerning all cases.[33]

Costs of the agency

Volume of work is variable

11.45 The cost of the agency would depend to some extent on the volume of work. Increased recognition of heritage issues and Aboriginal awareness of the legal protections available to them following *Mabo*, and a more effective process which protects confidential Aboriginal information, could lead to an

[29] AHC, sub 52, p5.

[30] AHC, sub 52, p6 seeks an advisory role in the assessment of sites and areas. The NLC, sub 66, para 4.5, sees a possible role for AHC in making findings about sites.

[31] Chaney, sub 19. See also NSWALC, sub 43.

[32] Section 22.

[33] *DAA Review.*

increase in the number of applications. On the other hand, if reforms were made to the State and Territory laws in accordance with the recommendations in this report, it is possible that fewer people would need to use the Commonwealth procedure.

Number of members and staff

11.46 If the number of applications continued at its present rate, the agency would not require more than one full time principal member. There is no need to limit the number of other members; they would be employed according to a defined fee structure when engaged in functions under the Act. The staffing numbers would be similar to the present Branch.

Comparison with current cost

11.47 The current costs of the programme are set out earlier in this chapter. The actual costs cannot be estimated precisely because of variable factors. Instead a comparison is made of each element in the costs:

> *Principal member and members:*
> The salary of the principal member would be a new outlay. The fees of the other members would be comparable with those now incurred for reporters and mediators.
>
> *Expert reports and consultancies:*
> These costs would be similar to the current costs.
>
> *Salaries, offices etc*:
> These costs would be comparable with the present costs of the Heritage Branch, as shown earlier in this Chapter.
>
> *Other outlays:*
> There are currently some special outlays,[34] including the purchase of objects. The establishment of an agency would not affect these costs.

The tentative conclusion is that the new agency would involve some additional cost, but that this would not be substantial and might be offset by savings in efficiency resulting from other recommendations, for example by limiting the reporting process.

Other issues

Expert advice, resources

11.48 The need for anthropological or archaeological advice will undoubtedly arise in relation to some applications under the Act. Some s 10 reporters have stressed the need for adequate expert support to be readily available.[35] The

[34] Including the costs of this review of the Act and the cost of the second Hindmarsh report, and the cost of purchase of objects under threat for restoration to traditional owners.

[35] Saunders noted the need for such expertise in her *Hindmarsh Island (Kumarangk)* s 10 report,

agency should ensure that reporters appointed for the purposes of s 10 have access to independent expert advice when needed. Such experts should be nominated with the consent of the Aboriginal applicants or custodians, and should not, as sometimes happens, intrude into the situation at the request of outsiders.[36] Anthropologists and/or archaeologists could be appointed as members of the agency or employed as consultants where their advice is necessary. The budget for the agency should, as now, make provision for this.

Protection from defamation

11.49 Members of the agency and persons acting under their direction should be protected from liability for damages for or in relation to an act done or omitted to be done in good faith in the performance of any function or exercise of any power conferred on the agency or member.[37] Adequate legal protection against claims, including defamation is essential if persons are expected to take on these functions.[38]

ATSIC role in relation to Agency

11.50 The agency would remain in the 'portfolio' responsibility of the Minister and ATSIC, but would not be subject to direction by ATSIC.

Location of Agency

11.51 The location of the agency would need to be determined after consultation. Ideally, it should be located in an area from which a substantial number of applications are made at present, such as NSW or Queensland. Part-time members should be available in every region.

Legal and other assistance to applicants

11.52 At present ATSIC provides financial and other assistance to applicants who may need expert advice to prepare their case for protection under the Act. It should continue to do so. Some submissions called for more resources to go to communities for the performance of their heritage protection functions.[39] Applications for legal assistance are made to the Attorney-General, s 30.

Authorised officer procedures, ss 17, 18, 19

Concerns about the s 18 procedure

11.53 Under ss 17 and 18, authorised officers can be designated by the Minister, and have power to make 48-hour declarations in urgent matters. As there is no power for the Minister to make a temporary order in respect of objects, s 18 is the only recourse in urgent matters relating to objects.[40] There were early

p53; Chaney, sub 19, also noted the need for reporters to have adequate resources.

[36] Draper, sub 19.

[37] Compare the *Sex Discrimination Act 1984*, s 111, and other similar provisions.

[38] There is at least one case of a pending legal action against a s 10 reporter.

[39] MNTU, sub 17, p11.

[40] *DAA Review*, p50.

criticisms of the authorised officer procedures, on the ground that they would not be appropriate.[41] These concerns were hardly justified. There have been seven applications, but only two declarations.[42] In more recent years the concerns are that the authorised officer procedures are ineffective and that officers are not exercising the discretions that are conferred on them. These concerns are outlined earlier in this chapter. The Ombudsman has stressed that applicants are entitled to a decision on their application.[43] It was doubted whether the ATSIC State Managers were the most appropriate persons to have these functions.

Improving the procedure

11.54 Changes suggested by the Ombudsman included ensuring that there are suitable people located in most regions, so that they can be called on when needed. This is supported by submissions.[44] Following these criticisms, ATSIC has taken steps to appoint a wider range of authorised officers. This process should continue. Members of the agency could also have the function of authorised officers. In Chapter 10 it is recommended that an authorised officer inform the agency as soon as possible after making, or being requested to make, an emergency declaration.

Involving Aboriginal people as authorised officers

11.55 The authorised officer procedures provide a valuable opportunity to involve Aboriginal people directly in the administration of the Act, and to place responsibility for indigenous heritage in the hands of its owners.[45] A wide range of suitable Aboriginal people should be appointed as authorised officers, with a view to ensuring that such officers are located in all regions and are readily accessible to as many communities as possible. Those who should be considered for appointment include traditional custodians, Elders and those who already hold positions as inspectors or wardens under State or Territory legislation.

Applications under s 12: significant objects

11.56 The agency should have responsibility for dealing with the procedural aspects of s 12 applications and for providing any additional information and advice needed for the Minister's decision. In conformity with the Review's recommendations relating to procedures, and to decisions concerning the significance of areas, the agency should exercise the following functions in relation to objects:

- where appropriate, arrange for mediation;

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[41] *DAA Review* p8; authorised officers are not required to consult with the States.

[42] Bright Point, Sotheby's Auction No 1 (information drawn from ATSIC files).

[43] Commonwealth Ombudsman, sub 41, p4.

[44] NSWALC, sub 43, p12 calls for the appointment of authorised officers who are able to travel to areas readily. MNTU, sub 17, p8 wants more effective authorised officers.

[45] ATSIC, sub 54, p15.

- refer the application for the Minister's decision with an opinion on the question of significance, together with other any information necessary to the decision.

Recommendations concerning emergency declarations under s 18 would apply equally to objects.

AN ABORIGINAL CULTURAL HERITAGE ADVISORY COUNCIL

11.57 It is recommended that an Aboriginal Cultural Heritage Advisory Council be established to advise the proposed agency on issues arising under the Act, and in particular on the procedures to be followed and the persons to be consulted in making assessments for the purposes of reporting under the Act.[46] It could also have the function of advising the Minister on the operation of the Act. This Council should be constituted by Aboriginal people, in such a way as to strengthen links with local Aboriginal communities. Its membership could be drawn from such bodies as local Aboriginal heritage committees, State and Territory Aboriginal heritage committees, bodies such as land councils or representative bodies under the *Native Title Act*, which have responsibility for heritage issues in the States and Territories.[47]

ANOTHER OPTION: AN OPEN INQUIRY OR TRIBUNAL?

11.58 Some submissions have suggested that applications for declarations should be determined by a more formal inquiry procedure.[48] The need for this was thought to be greatest where the evidence about the site or other issues is conflicting. The Northern Territory Land Rights Tribunal and the Native Title Tribunal are suggested as possible models for an inquiry procedure. For reasons which have been discussed earlier,[49] it is not considered appropriate for issues relating to areas of significance to be dealt with by an open inquiry procedure or adversary process, with written submissions disclosed to all parties, cross-examination, etc. The reasons for this view relate partly to the question of confidentiality and partly to the distinction between heritage issues and land rights claims. In addition to these reasons there is another important factor, namely to ensure that Aboriginal people can actually use the procedure.

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[46] AAA, sub 61 seeks an advisory body with a large membership of indigenous people, members with heritage management and research skills. It could advise on the content of applications, who should report.

[47] NQLCAC, sub 33.

[48] Partington, G "Determining sacred sites – the case of the Hindmarsh Island Bridge" in *Current Affairs Bulletin* February/March 1995; Sutton, sub 2 (at least in sufficiently controversial cases); Palyga, subs 1, 32.

[49] See Chapters 8 and 10.

It cannot be assumed that every Aboriginal group which has a heritage interest would have the resources to undertake a complex legal procedure, or that they would receive support from a land council or representative body. Consultations revealed that there are groups with relevant heritage interests who do not wish to be represented in that way, or who could not get the support of a representative body to pursue a claim about a particular site. The Act should remain available for them to use without undue technicalities or complexities. It is strongly recommended that applications under this Act not be subjected to formal tribunal or inquiry procedures.

RECOMMENDATIONS:

AN ABORIGINAL HERITAGE PROTECTION AGENCY

11.1 The decision whether or not to make a declaration to protect a site or object from injury or desecration should remain as a discretion of the Minister.

11.2 A new permanent independent agency 'The Aboriginal Cultural Heritage Agency' should be established to administer the Act in all matters leading to the exercise of discretion by the Minister.

11.3 ATSIC's current functions under the Act should be vested in the new agency.

11.4 The new agency should be comprised of a full-time Principal Member; a number of part-time Members; and a small administrative staff.

11.5 The qualities necessary for appointment as a Member should include knowledge and understanding of Aboriginal cultural heritage issues and/or of Aboriginal customs and traditions and/or of the archaeological or anthropological significance of areas and objects in accordance with Aboriginal tradition.

11.6 The membership of the agency should include a majority of Aboriginal and Torres Strait Islander people, and should have gender balance. Anthropologists, archaeologists and others with appropriate experience and expertise should be considered for appointment.

11.7 Members of existing tribunals should be considered as eligible for appointment as members of the agency.

11.8 The Principal Member should have legal experience.

11.9 Members of the agency, other than the Principal Member, would be remunerated on a fixed scale.

11.10 Members of the agency should be protected against liability for acts done in good faith in the same way as members of tribunals.

11.11 The mediation and reporting processes under the Act should be carried out by the Members of the agency.

11.12 The functions of the agency should include:
- registration and preliminary inquiries;
- acceptance or rejection of an application;
- making emergency and temporary declarations;
- inquiring into State/Territory protection and procedures;
- conducting mediation and reporting processes.

11.13 Members who have conducted a mediation should not take part in the reporting process, unless the interested parties agree to this.

11.14 A wide range of Aboriginal people including custodians, inspectors, wardens, agency members and others should be appointed as authorised officers for the purposes of s 18.

11.15 The agency should issue guidelines concerning procedures for the assistance of applicants and interested persons.

RECOMMENDATION: ADVISORY COUNCIL

11.16 An Aboriginal Cultural Heritage Advisory Council should be established to advise the proposed agency and the Minister on issues arising under the Act, and in particular on the procedures to be followed and the persons to be consulted in making assessments for the purposes of the Act. This council should be constituted by Aboriginal people, in such a way as to strengthen links with local Aboriginal communities which have responsibility for heritage issues.

RECOMMENDATION: PROCEDURE FOR OBJECTS

11.17 The agency recommended to take responsibility for the administration of the Act should deal with applications relating to objects and determine the issue of significance before referring the matter for the Minister's decision whether to make a declaration.

CHAPTER 12:

PROTECTING ABORIGINAL OBJECTS

> In the vast majority of instances, Aboriginal and Torres Strait Islander cultural property is in non-Aboriginal cultural institutions, controlled by non-Aboriginal boards of governors, managed by non-Aboriginal directors and curators; researched by non-Aboriginal academics and publicly explained by non-Aboriginal staff and education officers.[1]

12.01 This chapter deals with the protection of significant Aboriginal objects under the Act. It asks whether any changes are necessary to ensure that Commonwealth law conforms with minimum standards for the protection of objects. It refers to concerns raised in submissions about the ownership and control of Aboriginal cultural property, its sale and export, and the return of such property to Aboriginal people.

PROTECTION OF ABORIGINAL OBJECTS UNDER THE ACT

Significance of objects to Aboriginal people

12.02 Many important cultural objects have been removed from the possession and control of Aboriginal people since European settlement, and are in private hands or in public museums. The possession, exhibition and use of these objects by non-Aboriginal people is a cause of great concern to Aboriginal people. Some objects have sacred significance and their possession by non-Aboriginal people is contrary to tradition and belief, and may cause deep offence and hurt to Aboriginal people. There is particular sensitivity in relation to Aboriginal remains and other objects associated with death.

How the Act applies to objects

12.03 The Act can be used, with some limitations, to protect significant Aboriginal objects from injury or desecration. It applies to objects which are significant according to 'Aboriginal tradition'.[2] 'Objects' include Aboriginal remains, defined below:

> 'Aboriginal remains' means the whole or part of the bodily remains of an Aboriginal, but does not include:
>
> (a) a body or the remains of a body:
> (i) buried in accordance with the law of a State or Territory; or

[1] Tandanya, sub 42.

[2] Defined in the same way as for areas.

(ii) buried in land that is, in accordance with Aboriginal tradition, used or recognized as a burial ground;

(b) an object made from human hair or from any other bodily material that is not readily recognizable as being bodily material; or

(c) a body or the remains of a body dealt with or to be dealt with in accordance with a law of a State or Territory relating to medical treatment or post-mortem examinations;

Applications to protect significant objects

12.04 The Commonwealth Act provides specific protection to Aboriginal objects only when a declaration has been made under s 12. An application can be made to the Minister for a declaration to preserve or protect a specified object or class of objects. The Minister must be satisfied that the object or objects are under threat of injury or desecration before making a declaration. Desecration could include the exhibition of sacred objects contrary to Aboriginal tradition, or their sale. No reporting process is required under s 12, but the Minister may need information and advice in order to determine the status of an object. Where there is a serious and immediate threat of injury or desecration, an emergency declaration can be made by an authorised officer under s 18 for a period of up to 48 hours. Such a declaration could be revoked by the Minister.

Declarations under s 12 and 18

12.05 There have been twelve applications under s 12 to protect Aboriginal objects. They related to eleven objects or groups of objects. Six declarations have been made in respect of three separate cases: Sotheby's Auction No 1, Pickles Auction No 2, and the Strehlow collection.[3] An authorised officer made a 48-hour emergency declaration in the Sotheby's case. There have also been two applications under s 18, one of which was granted.

Sotheby's, No 1, Sydney 1985

12.06 Significant Aboriginal objects were offered for sale by Sotheby's of Sydney. An emergency declaration was made under s 18 by an authorised officer. A declaration was made under s 12 for four weeks. The Australian Museum and a consultant anthropologist to the Central Land Council advised that the objects were significant. After the order was made the NSW Aboriginal Land Council acquired the objects.[4]

[3] Four declarations were made in respect of the Strehlow collection.

[4] *DAA Review*, p50; see also Annex VII for a summary of this case.

Pickles Auction No 2, Sydney 1986

12.07 A declaration was made under s 12 for four weeks. The applicant purchased the objects and returned them to the communities of origin.

Strehlow Collection, 1992, SA/NT

12.08 Objects and records which had been held by the South Australian State Government were in significant danger of desecration and the records were at risk of destruction. An application under s 18 was declined. A series of short term declarations were made under s 12 in 1993-95 to prevent the sale of the objects during negotiations. A s 13 mediator was appointed, and the matter was resolved. Funds were made available by the Commonwealth to enable the Central Land Council to purchase the objects.[5] The NT Government bought the records.

Other applications

12.09 Some applications under s 12 related to public auctions in NSW, where there are no laws to prevent the sale of Aboriginal objects. In one case the items were withdrawn from auction and returned to their owners.[6] In another a private sale resulted.[7] Other cases related to skeletal remains.[8] Summaries of several cases can be found in Annex VII, part B.

OWNERSHIP AND RETURN OF OBJECTS TO TRADITIONAL OWNERS

Current policies and programmes

12.10 Much indigenous cultural heritage material is held in museums, often contrary to the wishes of Aboriginal people. In addition, much has been taken overseas.[9] Consultations revealed that Aboriginal people are very dissatisfied with this situation.[10] They want material which is part of their cultural heritage to be identified, their interest in it recognised and the material to be returned to the traditional owners. Current policies and programmes of

[5] The cost was substantial – in the order of $900,000.

[6] Sotheby's auction No 2 1995.

[7] Lawson's auction 1987

[8] Tasmanina Aboriginal remains, 1984, see *A Review* p 17; Tasmanian remains, Tasman Peninsula, 1986; Murray Black collection, Melbourne 1987, below.

[9] Tandanya, sub 42.

[10] Fourmile, H "Tomorrow: The Big Picture – Cultural Ownership" (paper presented to The Future of Australia's Dreaming Conference, March 1992) discusses the vast amount of cultural heritage that is in museums, information, genealogies, photos, owned by the Crown of each State. *Recognition, Rights and Reform* para 6.22 covers these issues in some detail.

ATSIC and the Department of Communication and the Arts (Cth), which include the return of significant cultural property to Aboriginal and Torres Strait Islander people, are described in Chapter 3.

Legal framework

No uniform legal standards on return of objects

12.11 There are no uniform legal standards in relation to the ownership and return of significant Aboriginal objects. In some States there is provision for the compulsory acquisition of objects for return to their traditional owners.[11] The Commonwealth Act does not deal with the ownership and return of items of cultural property, except in the case of skeletal remains (see below). The Interaction Working Party agreed that legislation for the protection and return of significant objects should be part of the National Guidelines.[12]

Commonwealth legislation called for

12.12 Submissions to the Review called for Commonwealth legislation on this matter to back up current programmes to recognise ownership and return to Aboriginal people the control and management of their cultural heritage.[13] It was suggested that an ownership register be established, controlled by Aboriginal people.[14] The Western Australian Government submitted that the Commonwealth Act should deal with objects and the return of material from private and government collections within Australia, across State and Territory borders and from overseas collections.[15] Others have also sought national legislation to overcome problems of conflicting jurisdiction.[16]

Further review needed

12.13 The Review does not make recommendations about the ownership and return of cultural property. The matter requires further review.

Skeletal remains

Significance to Aboriginal people

[11] See Annex VIII, s 21L applies in Victoria.

[12] See Annex VI, 6.10: Legislation to also cover the protection and return of significant Aboriginal objects.

[13] GACLC, sub 13; CLC, sub 47, p45.

[14] GACLC, sub 13, p15.

[15] WAG, sub 34, p3.

[16] Kate Auty, "Aboriginal Cultural Heritage: Tasmania and La Trobe University" in (1995) *Aboriginal Law Bulletin*, vol 3, no 76, p20. She presses for national cultural heritage legislation to overcome problems of jurisdiction.

12.14 The definition of 'significant Aboriginal objects' under the Commonwealth Act includes Aboriginal remains. The treatment of such remains is a highly significant issue for Aboriginal people. There is considerable distress about the way such material has been dealt with in some cases, and concern to ensure the return of all material to the relevant Aboriginal community to be dealt with by that community. This concern has led to litigation and other action by Aboriginal people in Victoria and Tasmania.[17] The Commonwealth Act deals with these concerns by providing for the return of Aboriginal remains to Aboriginal people.

Duty to report/return remains

12.15 The Commonwealth requires a person discovering what appear to be Aboriginal remains to report that discovery to the Minister, s 20. The Minister must return the remains to an Aboriginal willing to accept them in accordance with Aboriginal tradition, or deal with them in accordance with the direction of such Aboriginals, or in the absence of such Aboriginals transfer them to the National Museum of Australia for safekeeping.[18] Equivalent provisions apply to Victoria.[19] ATSIC funds functions under these provisions and the safekeeping of culturally significant material returned to indigenous communities.

Applications under the Act to protect remains

12.16 The Commonwealth Act provides that where a declaration is made under s 12 (1) in relation to Aboriginal remains, it may include provisions ordering the delivery of the remains to:

a) the Minister; or
b) an Aboriginal or Aboriginals entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition. (s 12 (4))

Several applications have been made for declarations under s 12 to protect Aboriginal skeletal remains. These applications did not result in declarations being made. They establish, in fact, that the possession of Aboriginal remains is not considered to pose a threat for the purposes of the Act, even if in Aboriginal eyes it is a desecration.

Murray Black collection

[17] See the article by Auty referred to in the preceding footnote. Cases were brought by Jim Berg of the Koori Heritage Trust against a number of institutions in Victoria.

[18] The National Museum of Australia is prescribed in the Rules. See Atkinson, sub 5.

[19] Sections 21P and 21Q, in Part IIA of the Act.

12.17 The *Murray Black collection* consisted of over 800 skeletal remains. In 1987, an application was made under s 12 claiming that the remains, which were held by the Victorian Museum, were at risk of injury or desecration. The view was taken by the Minister that mere possession is not a threat and the application was declined. As a result of consultations undertaken by the Commonwealth with the support of Victoria, most of the skeletal material has since been returned to Aboriginal communities for burial.

Tasman Peninsula, 1986: Aboriginal remains

12.18 An application was made in respect of skeletal material found in Tasmania to prevent its scientific examination, as that was considered to be a desecration. The Tasmanian Government did not proceed with the examination, and the application was declined.

SALE AND AUCTION OF OBJECTS

Lack of uniformity in legislation

12.19 The possession, sale or exhibition of relics or Aboriginal objects without specific permission is prohibited in some, but not all jurisdictions. The lack of uniform State and Territory legislation has caused problems for both the Commonwealth and the States. In Sotheby's No 2, for example, persons were able to avoid the Victorian law restricting sale of Aboriginal artefacts by removing the items from Victoria to NSW where there was no such legislation. The Commonwealth was called on to fill the gap in the law. It provided funds to purchase the objects.

Restrictions on sale respect wishes of Aboriginal people

12.20 Victorian legislation prohibits the sale of Aboriginal objects without consent.[20] The policy in Victoria, when collections of Aboriginal artefacts come on the market, is to make these available to Aboriginal community organisations or to heritage organisations to purchase at an established valuation before authorising public sale. This policy recognises that the wishes of Aboriginal people should be respected and that the law should support the return of items which were the product of traditional cultural practices to the community. But not all States have laws to back up such policies. NSW is notable in its failure to cover this issue.

Permanent declarations could amount to acquisition

[20] See Annex VIII for details. These are defined as 'relics' under the legislation.

12.21 The Commonwealth Act is not the most effective way to deal with restrictions on the sale, exhibition or auction of significant objects. It requires an application for protection, whereas State laws, such as those of Victoria, impose direct restrictions. The Commonwealth has exercised its power only to make temporary orders, on the basis that it may be considered to have acquired an object if it effectively and permanently removes the right of the owner to deal with it. If permanent protection of objects is appropriate, steps have been taken to arrange for the purchase of the objects.[21] If protected objects are not bought the Commonwealth may be liable to pay compensation, s 28. ATSIC recently provided $900,000 to purchase the Strehlow collection and other items.

Possible Solutions

National legislation on the sale of objects

12.22 The submission of the Victorian Government to the Review proposed that the Commonwealth should overcome the lack of consistency by introducing comprehensive national legislation to regulate the buying, selling and export of significant Aboriginal objects, other than those made specifically for the purpose of sale.[22] The Victorian Government also submitted that there was a need to establish uniform national controls on the possession, display or control of Aboriginal skeletal remains.[23] National laws would discourage the removal of objects from one State to another where the laws were more favourable to sale or auction. Other submissions also proposed that the Commonwealth should legislate to prohibit the sale of significant Aboriginal objects anywhere in Australia without permission.[24] A precedent for this is the *Historic Shipwrecks Act, 1976* (Cth), which prevents the sale of objects/relics from shipwrecks.

Uniform State and Territory laws

12.23 There is obviously a need for comprehensive national legislation on this matter. The first option which should be pursued is to encourage the adoption of uniform laws by all States and Territories to control the purchase and sale of Aboriginal objects, other than those specifically made for the purpose of sale. A permit system, such as that operating in Victoria could be adopted as the standard, with the involvement and consent of Aboriginal people a necessary element in the application of the law.

National laws as a solution

[21] As in the Strehlow case.

[22] VicG, sub 68, p11.

[23] VicG, sub 68 (as currently provided for in section 26B of the 1972 Act).

[24] AHC, sub 52, Attachment 1, p8, calls for blanket protection of objects and a standard definition.

12.24 If a resolution of the problem cannot be found at State level, the Commonwealth may have to consider legislation in order to ensure that the wishes of Aboriginal people in regard to their cultural heritage are respected, and that there are comprehensive laws in place. The precedent of the *Historic Shipwrecks Act, 1976* could be considered, though shipwreck items are likely to be less numerous and more readily identifiable than significant Aboriginal objects. Furthermore, comprehensive laws to prohibit the sale of objects on a permanent basis may raise issues concerning compensation.

> RECOMMENDATION: SALE AND EXHIBITION OF OBJECTS
> 12.1 The Commonwealth should actively encourage the States and Territories to enact uniform national laws to regulate the sale and exhibition of significant Aboriginal objects. The wishes of Aboriginal people should be taken into account as the principal factor in deciding whether to consent to sale. Failing the introduction of uniform laws, the Commonwealth should enact legislation to apply where there is no relevant State or Territory law.

Agreements relating to cultural property

12.25 Where application is made under the Act for a declaration of protection, negotiation might in some cases lead to the return of the objects to traditional owners, or to agreement about the care and protection of the objects. The Commonwealth could encourage agreements by providing incentives or by recognising their legal status.[25] In other cases agreement might be reached about the care and protection of the objects, their use and exhibition. The Commonwealth could encourage agreements by providing for their legal status. It could follow the precedent of s 21K which provides for Cultural Heritage Agreements to be made in Victoria covering the preservation, maintenance, exhibition, sale or use of Aboriginal cultural property.

> RECOMMENDATION: RECOGNITION OF AGREEMENTS
> 12.2 The Act should provide for the recognition of agreements about the protection of significant Aboriginal objects which are or were under threat, and covering their preservation, maintenance, exhibition, sale or use, and the rights, needs and wishes of the owner and of the Aboriginal and general communities.

DEFINING 'SIGNIFICANT OBJECTS': CURRENT CULTURAL SIGNIFICANCE

Definition may not cover modern records of tradition

12.26 'Significant Aboriginal objects' are defined by the Act to mean objects of particular significance to Aboriginals according to Aboriginal tradition. It has

[25] Section 21K provides for Cultural Heritage Agreements in Victoria covering the preservation, maintenance, exhibition, sale or use of Aboriginal cultural property.

been suggested that the focus on Aboriginal tradition may leave out of account some items such as films, tapes, notes and documents which relate to indigenous cultural heritage. Some of these items may be of great significance to Aboriginal people. For example, there may be films or records of ceremonial practices, or other secret information of considerable significance, which is not recorded in any other way. Because of their nature, and the fact that they are not the product of traditional activities, they may fall outside the definition, while at the same time being subject to restrictions of a traditional kind.[26]

Recommendation to extend definition

12.27 The definition of 'significant objects' should be extended to include objects such as films, photographs and tapes, which are of significance to Aboriginal people because they record, describe or portray an aspect of Aboriginal tradition.

> RECOMMENDATION: RECORDS OF CULTURE
> 12.3 The definition of objects which can be protected under the Act should be extended to include objects which are of significance to Aboriginal people because they record, describe or portray an aspect of Aboriginal tradition.

RETURN OF MATERIAL TAKEN OVERSEAS

Legislative controls

12.28 The *Protection of Movable Cultural Heritage Act 1986* (Cth), which controls the export of significant objects of Australia's movable cultural heritage was discussed in Chapter 3. The main concern raised with the Review by Aboriginal people related to the volume of Aboriginal cultural material which has already been taken overseas. The Tasmanian Aboriginal Centre been especially active in negotiating for the repatriation of Aboriginal cultural property.[27] The Centre has asked for the support of the Commonwealth Government for their activities, and in particular for the active intervention of the Minister for Foreign Affairs with overseas governments to help in their efforts to secure repatriation. Such action would be consistent with developing standards in this area.[28]

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[26] ATSIC, sub 54, p6, has been advised that materials of this sort do not meet the definition and consequently cannot be protected under the Act.

[27] See TAC, sub 63: the Tasmanian Aboriginal Centre enclosed their submission to the Inquiry into Culture and Heritage by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs.

[28] Draft Declaration on the Rights of Indigenous Peoples, art 12, E/CN.4/SUB.2/1994/2/Add.1 (1994); E. Daes "Protection of Heritage of Indigenous Peoples: Final Report" UN Doc E/CN.4/Sub.2/1995/26 Library.

RECOMMENDATION: REPATRIATION OF OBJECTS

12.4 To fulfill 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.

CHAPTER 13:

PART IIA: VICTORIA

PART IIA OF THE COMMONWEALTH ACT

Victoria: unique legal framework

13.01 The heritage protection laws operating in Victoria include Part IIA of the Commonwealth Act. Part IIA is, in fact, the main legislation dealing with the protection of significant Aboriginal areas and objects in Victoria. It operates alongside the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972*. The provisions of Part IIA were enacted by the Commonwealth in 1987 at the request of the Victorian Government. Responsibility for its administration has been delegated to the Victorian Minister Responsible for Aboriginal Affairs. In practice Victorian Aboriginal people do not make use of the Commonwealth Act. Section 8A requires Part IIA to be used before any application for a declaration by the Commonwealth Minister will be considered. This situation is not entirely satisfactory as Victoria lacks control over Part IIA while, on the other hand, the Commonwealth may not have an interest in revising what is a purely local law.

Recognition of Aboriginal ownership

13.02 Part IIA is an innovative piece of legislation, based on exemplary principles. The Commonwealth Act which, in 1987, amended the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* to insert Part IIA contained this preamble:

> Whereas it is expedient to make provision for the preservation of the Aboriginal cultural heritage in Victoria:
> And whereas the Government of Victoria acknowledges:
>
> a) the occupation of Victoria by the Aboriginal people before the arrival of Europeans;
> b) the importance to the Aboriginal people and to the wider community of the Aboriginal culture and heritage:
> c) that the Aboriginal people of Victoria are the rightful owners of their heritage and should be given responsibility for its future control and management;
> d) the need to make provision for the preservation of objects and places of religious, historical or cultural significance to the Aboriginal people;

e) the need to accord appropriate status to Aboriginal elders and communities in their role of protecting the continuity of the culture and heritage of the Aboriginal people;

And Whereas the Government of Victoria has requested the Parliament of the Commonwealth to enact an Act in terms of this Act:
And Whereas the Commonwealth does not acknowledge the matters acknowledged by the Government of Victoria, but has agreed to the enactment of such an Act: ...

Recognition of Aboriginal control

13.03 The scheme of Part IIA is to give considerable power to local Aboriginal communities to protect their cultural heritage and to determine whether acts likely to affect that heritage should be authorised. In practice, some submissions suggest that the ideals of the legislation have not been fully met due, in part, to the under-resourcing of local Aboriginal communities.

ISSUES CONCERNING PART IIA

13.04 The problems arising from this unique situation were the subject of submissions from Aboriginal people in Victoria. They raised a number of concerns about the operation of Part IIA, though this part of the Act was not directly covered by the terms of reference.[1] The Review has not considered these issues in detail. The submission by the Victorian Government to the Review, which arrived at the final stage, also raised a number of issues concerning the application of Part IIA. In their view the present dual regime is both administratively cumbersome and fraught with problems of interpretation. Their approach is to replace Part IIA.

> 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.
>
> It is anticipated that such legislative changes should generally be favoured by the Commonwealth, as the enactment of effective Victorian legislation followed by the repeal of Part IIA would promote the role of the

[1] Atkinson, sub 5; VFF, sub 35; MNTU, sub 17.

> Commonwealth Heritage Protection Act as a nation-wide 'backstop' for protection of Aboriginal cultural heritage, to be called upon as a last resort when significant places or objects cannot be adequately protected by State or Territory laws.[2]

13.05 The Review has not considered the complex issues which arise in relation to the reform of Victorian law. Some of the points raised in submissions were:

- the effect of s 7A. Does it precludeVictorian legislation amending the *Archaeological and Aboriginal Relics Preservation Act 1972* or from introducing other legislation in relation to heritage.
- whether the definition of Aboriginal areas is broad enough,[3] and the meaning of 'particular';
- the need for financial incentives to encourage Aboriginal Cultural Heritage Agreements, s 21K;[4]
- the need for a State-wide Aboriginal cultural heritage body, rather than the general meeting of representatives of local Aboriginal communities, established under the Act;[5]
- the provision of a right of appeal against a refusal of consent for development or other acts which might damage heritage under s 21U;
- the need for legislation to support the register of historic places;
- limitation on the number of emergency declarations which can be made in succession under s 21C to avoid their use for extensive periods; and
- the question of limits on the fees which can be requested by local Aboriginal communities for consents given under s 21U.[6]

Issues relating to the Commonwealth Act

13.06 Some submissions concerned the application of the Commonwealth Act and the need for certain matters to be dealt with by a consistent national approach. Particular issues mentioned by the Victorian Government were:

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[2] VicG, sub 68, 6 June 1996.

[3] See Chapter 6.

[4] Also supported by VFF, sub 35.

[5] Atkinson, sub 5, p71, also supports a State-wide body.

[6] Another submission points out the lack of funding for local Aboriginal communities: du Cros, sub 67.

- the need for uniform and effective legislation to regulate the buying, selling and export of significant Aboriginal objects, other than those made specifically for the purpose of sale (and defined to include a considerably broader range of objects than is currently understood to fall within the scope of the Commonwealth *Protection of Movable Cultural Heritage Act 1986*; and

- the need to establish uniform national controls on the possession, display or control of Aboriginal skeletal remains (as currently provided for in section 26B of the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972*).[7]

These issues are mentioned in Chapter 12.

Section 8A: application of Part IIA to Victoria

13.07 Section 8A prevents the Commonwealth Minister from making a declaration in relation to an area or object in Victoria unless the Minister is satisfied that an application in relation to the area or object has been made to the State Minister and the application has been rejected; or that such an application would be inappropriate or could not be made.[8] Submissions to the Review complained that there is no requirement for the State Minister to deal with an application within a set time. As a result it is not clear at what point an application can be made to the Commonwealth. One case was referred to where the State Minister was said to have delayed a decision for up to two years. To overcome this problem consideration should be given to fixing a time limit for the State Minister to consider the matter, after which time, application to the Commonwealth Minister would no longer be barred. This should be taken into account in any reform of the legislation in its application to Victoria.

[7] VicG, sub 68, 6 June 1996.

[8] There are also restrictions on authorised officers acting under s 18.

MINISTER'S ANNOUNCEMENT OF THE REVIEW

Minister for Aboriginal and Torres Strait Islander Affairs
The Hon Robert Tickner MP

ELIZABETH EVATT TO HEAD REVIEW OF
INDIGENOUS HERITAGE LEGISLATION

Federal Aboriginal and Torres Strait Islander Affairs Minister, Robert Tickner, announced today that Elizabeth Evatt AC has been appointed to undertake a comprehensive independent review of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (the Act).

Mr. Tickner said that given the major changes in Aboriginal and Torres Strait Islander Affairs which have occurred since the Act was introduced 11 years ago, it was now appropriate to review the legislation.

"Ms Evatt has had an outstanding and distinguished career and is unquestionably exceptionally well qualified to conduct such a review.

"Ms Evatt will seek public submissions to her review and will consult widely in the preparation of her report to the Government.

"The Commonwealth will not be undertaking the review in isolation from State and Territory Governments and will urge that those Governments cooperate with a concurrent review of their own heritage legislation in conjunction with the Commonwealth review.

"One major objective of the review process will be to seek greater cooperation between Commonwealth and State/Territory Governments in addressing indigenous heritage issues.

"This cooperation can be achieved primarily by State and Territory Governments acting to improve their legal, administrative and decision making processes in relation to indigenous heritage protection in such a way that indigenous people will have greater confidence in using these processes rather than appealing to the Commonwealth," Mr. Tickner said.

The Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA) agreed in November 1994 that a working party be established to examine and report to Ministers on a National Framework of Guidelines to promote the cooperation of State, Territory and Commonwealth heritage legislation and decision making processes.

The Council for Aboriginal Reconciliation report *Exploring for Common Ground: Aboriginal Reconciliation and the Australian Mining Industry* recommended in 1993 that the Commonwealth establish national standards to ensure that heritage legislation across Australia has clear, consistent and efficient processes to identify and protect sites.

In addition, the need for the reform of indigenous heritage legislation was also recommended by the Aboriginal and Torres Strait Islander Commission in its social justice report to Government, *Recognition, Rights and Reform.*

"I have requested Ms Evatt to take into account the recommendations of all three of these reports in the context of the review.

"It remains the Commonwealth's policy that State and Territory Governments will continue to have primary responsibility for Aboriginal and Torres Strait Islander heritage.

"In commissioning this review there is no suggestion, however, that the Commonwealth will be in any way stepping back from its commitment to providing an effective safety net role in a cooperative framework with State and Territory Governments."

Mr. Tickner said the independent review conducted by Ms Evatt will ensure wide consultation with all stakeholders and would report back to the Government within six months.

Ms Evatt's cv is attached together with the terms of reference for the review.

20 October 1995

ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE (INTERIM PROTECTION) BILL 1984

Extracts from Second Reading Speech, 6 June 1984[1]

This Bill has two main purposes:

1. To preserve and protect areas in Australia and Australian waters which are of particular significance to Aboriginals or Islanders in accordance with their traditions; and

2. To preserve and protect objects, including Aboriginal and Islander human remains, which are of particular significance to Aboriginals or Islanders in accordance with their traditions.

It will fill a gap in the law of Australia which can allow sites of significance to be damaged, destroyed or desecrated, and can allow objects of significance, including Aboriginal human remains, to be traded, displayed or otherwise used in ways which are anathema to Aboriginals and their traditions.

The need for legislation to enable direct, immediate action by the Commonwealth has been highlighted by such events as Noonkanbah and a number of situations which have arisen during the life of this Government. Time and again the Commonwealth has been powerless to take legal action where state or territory laws were inadequate, not enforced or non-existent, despite its clear constitutional responsibility.

Occasionally there has been enough goodwill to deter people from proceeding in ways inconsistent with Aboriginal traditions and wishes. But goodwill is not always sufficient. The time for legislative action by the Commonwealth has come. In the eyes of Aboriginals such action is long overdue.

They have stressed to the Minister for Aboriginal Affairs the need for priority to be given to enacting legislation which can counter the real, and at times sudden, threats which are made to significant sites and objects. They have asked the Government to provide a means for arriving at solutions to important and often emotionally charged problems. Mr. President, this Bill is an answer to those requests. It will give the Minister for Aboriginal Affairs power to protect and preserve areas and objects from injury or desecration. Such injury or desecration encompasses a range of activity.

For example, the construction of a road through or near a significant Aboriginal area, entry by tourists to such an area in a way inconsistent with the entry restrictions of local Aboriginal tradition, or the construction of a dam near to such an area which will result in the inundation of that area, may each constitute injury or desecration of a particular significant Aboriginal area. In the case of a significant Aboriginal object, physical mutilation as well as public display of or commercial dealing with the object may constitute injury or desecration.

This Bill is the first part of a legislative scheme which this Government intends to enact to ensure the preservation and protection of the cultural heritage of Aboriginal and Torres Strait

[1] This text extracted from the Senate Hansard 6 June 1984. The speech (by Senator Susan Ryan) explains the principal features of, and reasons for, the legislation. Previously published in *A Guide to How the Act Works* Department of Aboriginal Affairs, AGPS, 1984.

Islander Australians. That scheme will give the Commonwealth Government a legislative framework in which to exercise the constitutional power and responsibility clearly given to the Commonwealth by the overwhelming majority of Australians in the 1967 referendum. This Government has shown itself willing to take on that responsibility and to act seriously in exercising it. The Bill before the Senate is further evidence of the Government's acceptance of that responsibility.

As the Minister for Aboriginal Affairs has stated publicly on a number of occasions, model land rights legislation is being prepared in consultation with Aboriginals throughout Australia. In the same way, the Bill before the Senate today has been prepared in response to requests from Aboriginal people and following consultation with them.

State governments and the mining and pastoral industries have also been given an opportunity to comment on the Bill. I acknowledge that there has been criticism of the time period in which comments were sought. It did nevertheless provide an opportunity which certain States have not been prepared to give the Commonwealth in relation to legislation prepared by those States impinging on matters for which the Commonwealth has a clear responsibility.

Some amendments were made to this Bill as a direct result of consultation with State governments. It is an interim measure which will be replaced by more comprehensive legislation dealing with Aboriginal land rights and heritage protection. As evidence of the Government's intention to legislate more comprehensively, the Bill before the Senate is expressed to have effect for no more than 2 years from the date of its commencement.

I must make it clear from the outset that this is not interim land rights legislation nor is it intended to be an alternative to land claim procedures. The Minister will not be making declarations with respect to vast areas of land in de facto recognition of a claim which Aboriginals may wish to make later under another law.

The Bill speaks of significant Aboriginal areas, and defines 'area' to include a site. The use of the word 'area' rather than site will allow flexibility in recognising what Aboriginals believe to be significant. It will save a narrow and artificial approach being taken to sites, for example, to discrete geological formations. Where a site is particularly secret and sacred there may be an area immediately adjacent to it where people ought not to go. Transgression of that space may be as offensive as entry to the site. It may also be thought to place people going there in physical danger. This Bill is worded to enable those situations to be accommodated. It is not meant to close off huge areas. It will not be administered in that way.

Scheme of Protection
Mr. President, the scheme of this Bill is a simple one, aimed at granting effective protection to areas and objects under threat of injury or desecration. Its key features are as follows:

1. Action will be taken only when the Minister has received an application by or on behalf of Aboriginals or Torres Strait Islander people.

2. The Minister will need to be satisfied that the area or object for which protection is sought is significant in accordance with Aboriginal tradition.

3. When deciding whether to make a declaration in respect of an area or object the Minster will take into account such other matters as he considers relevant. This will allow the weighing of competing interests in each case. Honourable senators should note that cabinet will be consulted, where practicable, before each declaration is made.

4. Where a declaration may be made in respect of an area for a period of more than 30 days, the Minister will be obliged to receive and consider a report prepared by an independent person dealing with the range of issues that such an application may

raise. These include the type and extent of any protection which should be granted and the effects which the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal applicants.

5. Declarations will set out particulars of the area or object to be protected. They will also contain provisions for and in relation to the protection or preservation of the area or object from injury or desecration. The Bill recognises that because areas vary in physical form and significance and size, different conditions may need to be applied to each. Because the types of activities which may be permitted on such areas will vary in accordance with local Aboriginal traditions, the activities governed by the declarations may also vary. For example, entry to an area may be unrestricted in one case and closely prescribed in another, depending on traditional rules governing access.

Similar comments can be made with respect to significant Aboriginal objects. As I mentioned earlier, while physical mutilation will clearly constitute injury or desecration of an object, the public display of or an attempt to sell such an object may be equally offensive in some cases. The provisions of declarations will be drafted bearing these things in mind.

6. Where Aboriginal human remains are involved, the Minister will be empowered to order the delivery of those remains to himself or to Aboriginal people entitled to them, and willing to accept responsibility for them, in accordance with Aboriginal tradition. This provision will enable the satisfactory disposal of remains held contrary to expressed Aboriginal wishes.

Consistent with the requirements of the Constitution, where this, or any other action under the Act, involves the acquisition of property, compensation will be payable to the person whose property is acquired.

7. Before making a declaration, the Minister for Aboriginal Affairs will be obliged to consult with his State or Territory counterpart to ascertain whether the law of that State or Territory offers effective protection. If it does, a declaration will not be necessary. I will refer to the relationship between this legislation and State and Territory laws in more detail later in this speech.

8. A declaration will be published in the Gazette and in local newspapers. It will take effect from the date of publication in the Gazette or a later date specified in the declaration. Reasonable steps will be taken to give written notice of a declaration to persons likely to be substantially affected by it. This will include advice to the relevant State or Territory Government.

9. Declarations will be treated in many respects like regulations. For example, a declaration will be laid before each House of this Parliament within 15 sitting days after it has been made. Either House may disallow the declaration within the statutory period. Review by the Houses of Parliament will, in effect, be the only review of the merits of a Minister's decision to make a declaration. Of course, other administrative law remedies will still be available to people affected by the declaration.

10. In some emergency situations, where the Minister is unavailable to make a declaration according to the formal requirements of the Bill, an authorised officer will be able to make an urgent declaration which will remain in effect for no more than 48 hours.

State and Territory Laws
As I have already said, Mr. President this Bill provides the legal basis upon which the Commonwealth can act where the law of a State or Territory does not provide the necessary protection. The lack of protection may arise from either an absence of effective legislation or an unwillingness to enforce the provisions of legislation capable of meeting the goals of this Bill.

The Commonwealth is not attempting to cover the legislative field in this area of heritage protection. The Bill expresses an intention not to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with it. In practice the Commonwealth sees this as legislation to be used as a last resort.

The process for the making and continuation of declarations will ensure that full recognition will be given to relevant State and Territory laws, and co-operation will be sought from State and Territory governments.

Where the Minister is considering whether to make a declaration in relation to an area, an object or a class of objects, he will be obliged to consult with the relevant State or Territory Minister to ascertain whether there is effective protection of the area, object or objects. In the case of Norfolk Island he will consult with the relevant executive member.

By reference to longstanding convention, he will consult with the Minister for Territories and Local Government where the Australian Capital Territory or an external territory, other than Norfolk Island, is concerned.

Although the Minister will be obliged to consult in this way, the mere failure to consult will not invalidate any declaration he may make.

Let me assure the House that all reasonable attempts will be made to consult with State and Territory colleagues. On occasions the relevant Minister may be unavailable to discuss the matter, and the urgency of the threat to the area or object may be such that the Minister for Aboriginal Affairs must take a decision without the benefit of such consultation. There may be occasions when a State or Territory Minister will refuse to consult. The Bill is framed to ensure that such refusal will not frustrate its proper operation.

Where a State or Territory has no law capable of providing effective protection, or no action is being taken to give effect to that law, the Commonwealth will act in appropriate cases. It is open to the States to ensure that effective heritage protection is offered by their legislation.

It is possible that State or Territory law may be capable of providing protection, but not with the same speed as Commonwealth law. The Bill provides that, in such a case, the Minister may make a declaration. Where, in that or other circumstances, the Minister is later satisfied that a State or Territory law does effectively provide protection to the subject matter of a declaration, he must revoke that declaration.

The rights of individuals under concurrently operating laws will also be preserved. Where a person may be prosecuted and convicted under this Act or a law of a State or Territory, nothing in this Act will render that person liable to be punished more than once in respect of the same act or omission. Nothing in this Bill will derogate from rights which a person may have to any remedy apart from this Act.

Mr. President, it will be clear from this summary that the Commonwealth wants to encourage States and Territories to use such legislation as they have in the interest of the Aboriginal and Islander people for whose benefit it was passed. Where that legislation is inadequate the Commonwealth will, through this legislation, encourage changes to be made.

Already some States have indicated a willingness to co-operate in the implementation of this legislation. Where the administrative functions are already being performed effectively by a State body willing to accept extra responsibility, the Bill provides a delegation power which will enable formal endorsement of those arrangements.

There are other matters, such as the notification of people who might be affected by a declaration, which could usefully be delegated to Commonwealth officials.

Mr. President, there is no suggestion that the decisions which must be taken by a Minister, and for which he will be held responsible, will be delegated. The Bill specifically excludes from delegation: the Minister's power to make declarations, the Minister's obligation to consult with his State or Territory counterpart, and the Minster's power to seek injunctions from the Federal Court.

The Bill before the House is intended to meet those situations where, for whatever reason, local law is inadequate. The Commonwealth has a clear constitutional responsibility to act. This Bill will give it a legislative base on which to act.

Enforcement and Penalties
The major offences which this Bill creates are breaches of the provisions of declarations. For example, it will not be an offence under this legislation to desecrate a significant Aboriginal area unless there has been a declaration in respect of it and the activity complained of is in breach of that declaration.

Thus, where the Minister has made a declaration containing provisions for the protection of an area from injury or desecration, and an individual person or a corporation contravenes a provision, that person or corporation will be guilty of an offence. A similar scheme will have effect in respect of significant Aboriginal objects.

In summary, the Bill provides that a person contravening a provision of a declaration will be guilty of an offence. The defendant may adduce his own evidence that he neither knew, nor had reasonable grounds for knowing, of the existence of the declaration. Such evidence may also be drawn out in the cross-examination or prosecution witnesses. Where there is that evidence, the prosecution will bear the onus of proving beyond reasonable doubt that, at the relevant time, the defendant knew, or ought reasonably to have known of the existence of the declaration. Unless the prosecution can discharge that onus, a person cannot be committed for trial or convicted of an offence.

Let me assure honourable senators: innocent picknickers, bushwalkers and campers will not be prosecuted. Where appropriate, fences and signs will be erected to mark areas which are the subject of a declaration. This will be in addition to Gazette and newspaper notices, and notices to persons likely to be substantially affected by the declaration. There will be nothing secret about a declaration. However, where a person genuinely does not know, and could not reasonably have known, of such a declaration that person will not be in any danger of being convicted.

Mr. President, the high penalties which this Bill sets out for breaches of declarations are an indication of the seriousness with which this Government views the need for heritage protection. The desecration of a site or object can strike at the very roots of Aboriginal beliefs and observances.

We would hope that, as declarations are made, those whose activities may be impeded or whose interests may be affected will respect the interests of the relevant Aboriginals or Islanders and observe the terms of the declarations. At the very least, the possibility of substantial financial penalties and imprisonment should act as a deterrent to those contemplating acting contrary to a declaration. No longer will it be a cheap option to destroy a site or sell an object.

Where people are willing to proceed in defiance of a provision of a declaration, injunctions and interim injunctions can be sought from the federal court by the minister. The range of conduct which may be subject to an injunction is widely drawn, as is the power of the court to restrain a person from engaging in certain conduct or require him to do something.

Company directors and employees will need to look closely at their position under this Bill. This intention of a member of the governing body, a director, servant or agent of a body corporate, or the knowledge of that person, will be deemed to be the intention or knowledge of the body corporate. Conduct engaged in by an individual on behalf of a body corporate shall be deemed to have been engaged in also by the body corporate.

I reiterate the hope that this legislation will promote genuine attempts to resolve conflicts which may occur in this area.

The Bill recognises that, in judicial proceedings arising under it, there may be occasions when it will be necessary for evidence to be given concerning a secret or sacred aspect of Aboriginal tradition. Where this is the case, people may be reluctant to give such evidence in proceedings which are open to the public and which may be reported.

Experience in Aboriginal land claim hearings in the Northern Territory has shown the benefit to the Aboriginal Land Commissioner and parties appearing before him of enabling Aboriginal people to give some evidence on a restricted basis. This Bill will enable courts to adopt a simillar approach. It is a further measure to ensure that the secrecy attaching to matters of particular significance to Aboriginals and Islanders is respected.

Conciliation and Compensation
To encourage attempts at the resolution of conflict, the Bill provides that, where the Minister has received an application for a declaration, he may request such people as he considers appropriate to consult, either with him or his nominee. This consultation could precede or follow the making of a declaration.

Where a declaration has been made, the resolution of the matter to the satisfaction of the applicant and the Minister may result in the revocation or variation of the declaration. Where there is resolution of the matter before the Minister has made a declaration there may be no need for a declaration, or a declaration may contain different provisions from those it might otherwise have contained.

Furthermore, the Bill provides for the Attorney-General to authorise grants of legal or financial assistance to people who wish to apply for a declaration, whose proprietary or pecuniary interests have been or may be adversely affected by a declaration, or against whom legal proceedings have been instituted.

In considering an application, the Attorney-General, or an officer authorised by him, will need to be satisfied that it would involve hardship to the person to refuse the application, and that all the circumstances make it reasonable for a grant to be made.

Mr. President, the Minister for Aboriginal Affairs has consulted members of the Australian Democrats, in respect of this Bill. Those consultations have proved to be beneficial and specific matters have been raised upon which comment should be made.

Reservations have been expressed about the provisions of clauses 16 and 28 of the Bill. Clause 16 provides that where the Minister refuses to make a declaration in respect of an area or object he shall take reasonable steps to notify the applicant or applicants of his decision. The Bill has no express requirement for the Minister to give reasons for that decision. It may be that reasons could be required of the Minister by an aggrieved applicant pursuant to the *Administrative Decisions (Judicial Review) Act.* In any case, the Minister has agreed that where he refuses an

application for a declaration he will provide reasons for that decision. That refusal will not prevent the applicant making a fresh application, perhaps providing more material in support of it.

The second matter involves the compensation provision in clause 28. That clause provides that, where there is an acquisition of property from a person by virtue of this legislation or a declaration made under it, the Commonwealth will pay a reasonable amount of compensation. Honourable senators will be aware that the constitution requires the Commonwealth to pay just terms where property is acquired. Where property is not acquired, that obligation does not exist. The Minister has agreed, however, that where the interests of a person or a company are significantly affected by the making of a declaration the Government will determine what compensation payment, if any, is appropriate according to the merits of that case.

Conclusion

Mr. President, this will be beneficial legislation, as other legislation remedying social disadvantage has been. Aboriginals and Islanders will be secure in the knowledge that areas and objects of particular significance to them can be preserved and protected. Where the remains of ancestors were stolen from graves and shamefully abused, this Bill will allow those remains to be returned to them.

As Mr. Justice Murphy recently observed as part of the High Court's judgment in the Tasmanian dams case: "The history of the Aboriginal people of Australia since European settlement, is that they have been the subject of unprovoked aggression, conquest, pillage, rape, brutalisation, attempted genocide and systematic and unsystematic destruction of their culture."

This Bill is an exercise of a Commonwealth constitutional power aimed at preserving what has survived that process. It falls within the kinds of benefit which such laws may properly confer.

But the benefit will not be confined to those local Aboriginals and Islanders whose areas and objects receive the direct protection of the law. In a wider and very real sense, the benefit will be felt by the whole community. The preservation and protection of this ancient and significant culture from the destructive processes which have been operating at different rates across this country can only enrich the heritage of all Australians.

I commend this Bill to the Senate.

SUBMISSIONS TO THE REVIEW

	SUBMISSION NO
Aboriginal and Torres Strait Islander Commission	54
Aboriginal Areas Protection Authority	49
Aboriginal Legal Rights Movement Inc	3
Aboriginal Legal Rights Movement Inc, endorsed by ATSIC Wangka Wilurrara Regional Council	11
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Association of Mining and Exploration Companies Inc	48
Atkinson, Wayne	5
ATSIC Patpa Warra Yunti Regional Council	12
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Central Land Council	47
Centre for Indigenous Rights and Critical Legal Enquiry Bond University	25
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Draper, Neale	59
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Faira Aboriginal Corporation	51
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Henry, Rosita and Shelley Greer	37
Hofman, Denise for NorthWest HEAT	4
Jones, CA for Monarto Social Justice Group	6
Kimberley Land Council	57
Levitus, Robert	45
Michel, Diane and John William McCain	15
Milne, Margaret Anne	10
Minerals Council of Australia	27
Mirimbiak Native Title Unit of the Victorian Aboriginal Legal Service Co-op Ltd	17

PERSONS AND ORGANISATIONS CONSULTED BY THE REVIEW

(organisations are listed by the location of their State or Territory, though in some cases consultations took place in Sydney)

AUSTRALIAN CAPITAL TERRITORY

Aboriginal and Torres Strait Islander Commission

Lois O'Donoghue
Andrew Jaggers, Fred Behr, Giff Jones, George Menham, Patricia Turner, Paul Kauffman

Administrative Review Council
Marcia Neave and members

Attorney General's Department (Commonwealth)
Ernst Willheim

Australian Heritage Commission
Brian Babbington, Celmara Pocock, Prue Gaffey, Robert Bruce, Rosemary Purdie, Sharon Sullivan

Australian Institute of Aboriginal and Torres Strait Islander Studies
Bill Jonas, Graham Ward, Mary Edmunds

Australian Nature Conservation Agency

Bancroft, Robyne

Bureau of Arts and Heritage
Gail Barry, Harriet Elvin, Paul Cohen

Department of Communication and the Arts (Cth)
Dawn Casey, Marilyn Truscott

Department of Prime Minister and Cabinet
Office of Indigenous Affairs
Michael Dillon, John van Burden, Sandra Ellims

Minerals Council of Australia
Barry Vellnagel, Noel Bridge

Minister for Environment, Land and Planning (ACT)
Gary Humphries, MLA

National Farmers' Federation
Robert Hadler, John McKenzie

Smyth, Dermot

NEW SOUTH WALES

Aboriginal and Torres Strait Islander Social Justice Commission, HREOC
David Allen, Mick Dodson

Andrews, Gavin

Behrendt, Jason

Bickford, Anne

Department of Aboriginal Affairs
Tony McEvoy

Domicelj, Joan

Environmental Protection Authority
Neil Shephard

Mathews, Justice Jane

Maurice, Michael

Minister for Aboriginal Affairs
Andrew Refshauge, MLA

Minister for the Environment
Pam Allen MLA

Mutthi Mutthi People
Cheryl Charles, Daniel Kelly, Mary Pappin

National Parks and Wildlife Service
Robyn Kruk, Michael Wright, Pam Hegarty

Nettheim, Garth

NSW Aboriginal Land Council
Sean Docker, Stephen Wright, Warwick Baird

Sykes, Roberta

Stewart, Justice D.G.

Wootten, the Hon Hal

NORTHERN TERRITORY

Aboriginal Affairs Protection Authority
David Ritchie, John Avery

ATSIC - Miwatj Regional Council
David Gulpilil, Henry Djerringal

ATSIC Northern Territory State Advisory Council
Banambi Wunungmurra- Miwatj, David Curtis - Tennant Creek,
John Liddle - Alice Springs, John Paterson - NT North Zone,
Lindsay Ah Mat - Yilli Rreung, Marie Allen - Garrack-Jarru,
Noel Hayes - NT Central Zone, Patrick Thomas, Jabiru

Central Land Council
Anne-Marie Donnelly, Annie Keely, David Avery, Olga Havenen, Russell Goldflam

Central Australian Aboriginal Legal Aid Service - Alice Springs
Bonita Liddle, Karen Liddle, Kerry Judd, Leah Billeam,
Lorraine Liddle, Maureen Abbott, Patricia Miller

Department of Lands, Planning and Environment
John Pinney - Deputy Secretary

Faculty of Aboriginal and Torres Strait Islander Studies, University of NT
Meeting of representatives of women's groups:
Brenda Shields, Cathie Nickels, Dot Monnisen, Eileen Cummings,
G. Dean, Jaki Adams, Karmi Dunn, Kathy Mills, Marcia Langton, Michele Clark, Robyn Rioli, Rosanne Brennan, Teresa Roe, Terry Elms

Fingleton, Jim

Junction Waterhole (Niltye/Tnyere-Akerte)
Custodians:
Christine Palmer, Georgina Palmer, Leonie Palmer,
Myra Hayes, Rose Furber, Ruby Rubintja, Teresa Webb
Agnes Palmer, Annette Williams, Doreen Mulleldad, Dorothy Neal,
Imelda Palmer, Lena Turner, Margaret Mary Turner, Marie Terese Palmer,
Phillipine Gorey, Rachel Palmer, Raelene Smith

Manbuynga Ga Rulyapa Ginytjirrang Mala
[Arafura Sea Steering Committee]
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Keith Djiniyini, Senwel Bidunga, Terry Yumbulul

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North Australian Aboriginal Legal Aid Service - Darwin
Rosanne Brennan and staff members

Northern Land Council
Alfred Djupandawuy, Anthony Lee, Denella Beer, Galarrwuy Yunupingu, George King, Gordon Noonan, Mary Yarmirr, Peter Miller, William Hall

Office of Aboriginal Development
Neville Jones

Northern Territory Minerals Council
Bruce Harvey, Grant Watt, Peter Walker

Pitjantjatjara Council Inc
Ernie Frank, Muntatjara Wilson, Munti Smith, Ruth Morley

Secretary, Topsy- Senior Larrakia Traditional Owner Elder

Stuart, Bobbie- Arrernte Custodian

Williams, Shaun

QUEENSLAND

Aboriginal and Islanders Catholic Council
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Aboriginal and Islander Child Care Service Inc
Val Merrypore

Aboriginal and Islanders Community Resource Agency
Carol Willie, Judy Tatow, Pricilla Isles

Aboriginal and Torres Strait Islander Corp for Legal Services

ATSIC Cairns and District Regional Council
Bill White, Nerelle Nicol

ATSIC South Eastern Queensland Indigenous Regional Council
Albert Bowie, Alwyn Hill, Beryl Wharton, Duncan Johnson, Graham Dillon, Greg Egert, Herb Bligh, Jeannie Barney, Malcolm Blow, Mary Graham, Norman Brown, Norman Fisher, Robbie Williams, Rudy Sandy, Santa Unmeopa, Steve Mam, Tomasina Mam

Biloela Aboriginal and Torres Strait Islanders Corp
Brent Zain, Colin Booth

Cape York Land Council
Archie Tanner, Sean Brennan

Central Queensland Land Council
Bruce White, Philip Pentecost

Cribb, Roger

Department of Family and Community Services
Ron Weatherall

Department for Environment and Heritage
Greg Wellard, Ross Jolfe

Darumbal Community Youth Service
Alan Holt, Delisa Giege, Suzanne Thompson

Darumbal Land Council

Dreamtime Cultural Centre
Ann Armstrong

Dulgubarra People
Doug Stewart, and other representatives

Fisher, N A (Cec)

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Craig Jones, Leah Talbot, Les Malezer, Marisa Menin, Noeleen Porter

Fourmile, Henrietta

Gangulu
Desmond Hamilton, Edna Ally, Joan Hamilton, Margaret Lawton

Girrngun Elders and Reference Group
David Lawerence, Paul Turpine, Philip Rist, Russel Butler

Gladstone Aboriginal and Torres Strait Islanders Co-op Society Ltd
Cedric Williams, Jackie Kenwood, Ken Nuggin, Marian Barnett

Goolburri Land Council
Bob Ellis, Bob Weatherall, Marguerite Bennett

Gubbi Land Council
Liz Bond

Gumbi Gumbi Aboriginal and Torres Strait Islanders Corp
Darryl Kaur

Gurang Land Council

Ilina TSI Corporation Research and Resource Centre
Belzah Lowah

Juwarki Kapu-Lug Aboriginal and Torres Strait Islander Corp
Edward Chubb

Marrie, Adrian

MIM Holdings Ltd
David Hughes

Minister for Environment and Heritage

Tom Barton MLA

Neate, Graham

Nhally Ghungalu Thoonidea
Patricia Leisha

North Queensland Land Council
John Ford, Tricia Price

Quandamooka Land Council
Penny Tripconi, Robert Anderson, Scott McDougall

Queensland Anti-Discrimination Commission
Ray Vallance

Tugulawa Aboriginal Women's Group
Josephine Sailor, Mary Butler

Woorabinda Aboriginal Council
Astrid Doolan

SOUTH AUSTRALIA

Aboriginal Legal Rights Movement Inc
Christopher Charles

ATSIC Patpa Warra Yunti Regional Council
Basil Sumner, Brian Butler, Fran Lovegrove, Garnie Wilson, Lewis O'Brien, Marj Tripp, Matt Rigney, Peter Rigney

Native Title Supporters Coalition
Anne Bourne, Betty Anne Sorrell, Brian McDermott, Chris Keating, David Hollingsworth, Justine Doherty, Linda Westphalen, Margaret Forte

Department of State Aboriginal Affairs
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Gallus, Chris MP

Minister for Aboriginal Affairs
Michael Armitage, MLA accompanied by Stephen Wade

Sutton, Peter

Western Mining Corporation Ltd
GR Witham

TASMANIA

ATSIC Tasmanian Regional Council
Mick Courto

ATSIC State Manager
Kerry Randriamahefa

Department of Environment and Land Management
Elizabeth Fowler, Rod Pearse

Department of Premier and Cabinet
John McCormick

Office of Aboriginal Affairs
Rodney Gibbins

Tasmania Aboriginal Land Council
Karen Brown

VICTORIA

Aborigines Advancement League (Vic)
Reg Blow

Atkinson, John

Atkinson, Wayne

ATSIC Tambukka Regional Council
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Ballarat and District Aboriginal Co-operative Ltd
Bill Blackall, Pete Lovett, Ted Lovett

Bendigo Dja Dja Wrung Aboriginal Association Inc
Stephen Bisouth, Warren Meeks

Brooks, Alistair

Department of Aboriginal Affairs
David Clark, John Vickers, Stewart Simmons, Terry Garwood

Koorie Heritage Trust Inc
Jim Berg

Melbourne Living Museum of the West Inc
Larry Walsh

Minister Responsible for Aboriginal Affairs
Michael John MLA,

Mirimbiak Native Title Unit of the Victorian Aboriginal Legal Service Co-op Ltd
AngusFrith, Christina Saunders, GuruJohal, Ian McNiven, Kate Auty, Ken Saunders, Lynette Russell, Sarah Gebert

Saunders, Cheryl

Swan Hill and District Aboriginal Co-operative Ltd
DougNichols, Mark Grist

Wurundjeri Tribe Land Compensation and Cultural Heritage Council Inc
Bill Nicholson, JonRoyle

Yorta Yorta Murray GoulburnRivers Clans Inc
Brian Andy, Ella Anselmy, Graham Atkinson, Ivy Cousins, Liz Hoffman, Michael Bell

WESTERN AUSTRALIA

Aboriginal Legal Service of WA
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Association of Miningand Exploration Companies Inc
GeorgeSavell, Tamara Mackay-Coghill

Chamarette, Senator Christabel

Chamber of Mines and Energy of WA
Mike Quigley, Simon Williamson, Tony Finucane

Chaney, the Hon Fred

Council for Aboriginal Reconciliation
Patrick Dodson

Department of Aboriginal Affairs
Craig Somerville, Irene Stainton

Gale, Fay

Goldfields Land Council Representative Body
Kado Muir

Jamdu Yawuru Women's Group
Angelina Brown, Barbara Glouczewski-Barker, Mary Manolis, May Torres, Theresa Barker

Kimberley Land Council
Ivan McPhee, Peter Yu, Michael O'Donnell, Michele Cannane

Kimberley Land Council Women's Executive
Charmia Samuels, Cissy Djiagween, Elizabeth Numi, Helen Clifton, June Dodson, June Oscar, Karen Koster, Kathy Watson, Kaye Koster, Mary Lou Bedford, Mary Tarran, Olive Knight, Patsy Ah Choo, Turkoi Mowaljarli

Minister for Aboriginal Affairs
Kevin Prince MLA
accompanied by Kevin Humphrey

Nyungah Circle of Elders

Pastoralists and Graziers Association of W A Inc
A.P. Boultbee, Henry Esbenshade

Robinson, Michael

Senior, Clive

Sussex Street Community Law Service Inc
Stephen Hall

Tonkinson, Bob

Yamatji Regional Council of ATSIC
Victor Mouranbine

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Senior, Dr C M *Old Swan Brewery Perth* A Report to the Minister for Aboriginal Affairs under Section 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (June 1989)

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Wootten, The Hon J H, AC, QC *Significant Aboriginal Sites in Area of Iron Princess Mine, Iron Knob, South Australia* Report to the Minister for Aboriginal Affairs under s. 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (1993)

Wootten, The Hon J H, AC, QC *Significant Aboriginal Sites in Area of Proposed Junction Waterhole Dam, Alice Springs* Report to the Minister for Aboriginal Affairs under s. 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (1992)

Wright, Richard *Significant Aboriginal Areas on Rottnest Island, Western Australia* Report to the Minister for Aboriginal Affairs under section 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (1991)

BROAD GUIDELINES FOR ABORIGINAL HERITAGE LEGISLATION.[2]

6.1 Protection under the Act shall be aimed at all aspects of contemporary Aboriginal traditions, inclusive of archaeological and traditional sites. In relation to this criteria it is considered that the definitions in the Commonwealth Act do provide an appropriately inclusive approach.

6.2 Aboriginal sites [should] be given blanket (or automatic) protection if they fall within the definition in [the] Act.

6.3 Constraints shall be placed on the powers of Executive Government to override protection of sites in particular to ensure that the views of Aboriginal custodians have to be taken into account, and that the relevant decision-maker is required to give reasons, whether the decision is subject to judicial review, and review by Parliament.

6.4 Effective enforcement (penalties, prosecutions, onus of proof, defences).

6.5 Incentives for private land holders to assist Aboriginal heritage protection (eg by private agreements between custodians and land holders as provided for in Part IIA of the Commonwealth Act).

6.6 Inclusion of site protection procedures in planning processes.

6.7 Act to bind the Crown and its authorities.

6.8 High level of involvement of Aboriginal custodians in the administration of the Act and decisions affecting sites. In particular:
The body responsible for evaluation and recording sites to be independent.
Control of the body by Aboriginal custodians.
Information provided to it shall be on a confidential basis.

6.9 Site clearance procedures for development on land minimises the amount of confidential information required to be revealed by Aboriginal custodian, (work program clearance vs site identification).

6.10 Legislation to also cover the protection and return of significant Aboriginal objects.

[2] Ministerial Council on Aboriginal and Torres Strait Islander Affairs *Working Party Report on Item 4.1: Aboriginal Heritage Interaction between States, Territories and Commonwealth,* 1995, p 35.

6.11 Site protection legislation should take into account the basic principle that Aboriginal people should be given control over the day to day functioning of those aspects of the legislation which affect their interest in Aboriginal sites.

6.12 The interests of both Aboriginal people wishing to protect Heritage sites and persons who wish to develop land are served by defined time limits as a process of decision making under relevant legislation.

6.13 The application of Commonwealth legislation requires transparency as outlined in section 3.2. of this report.

CASE STUDIES UNDER THE ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984

CONTENTS PAGE

This Annex is in two sections which deal respectively with applications made under the Act for the protection of areas (Part A) and objects (Part B). Both sections start with a brief overview of the basic data, followed by summaries of a number of cases that illustrate how the Act has been used; they are arranged on a State by State basis. The material is drawn from an analysis of ATSIC files done for the Review by Mr Roger Dobb, from reports made under s 10 of the Act, from court decisions relating to particular cases and from submissions to the Review and consultations.

PART A
AREAS: OVERVIEW OF DATA

Applications in respect of areas

Applications have been made under the Act in respect of 99 areas: the State breakdown is as follows:

Queensland	33
New South Wales	28
Western Australia	21
South Australia	8
Northern Territory	6
Tasmania	2
Victoria	1
Total	**99**

Some areas had more than one application, under ss 9, 10 or 18. The breakdown of applications is:

Section	No of Applications	Declarations
s 9	75	11 (5 cases)
s 10	49	4
s 18	7	1
Total	**131**	16

The actual number of applications is higher than shown, as the list does not include multiple applications made in respect of certain areas; data is missing for several matters.

Mediation

Mediators were appointed in 19 applications relating to areas:

Area	Locality	Year
Point Lookout	North Stradbroke Island, Q'ld	1984
Bennett Brook 1	Perth, WA	1985
Oyster Cove	Hobart, Tas	1985
Yass Burial Site	Yass, NSW	1987
Moreton Island	Brisbane, Qld	1987
Angel Beach Housing	Ballina, NSW	1988
Old Swan Brewery (Goonininup)	Perth, WA	1988
Arukun	Cape York, Qld	1989
Bright Point	Magnetic Island, Qld	1989
Coen	Qld	1989
Junction Waterhole (Niltye/Tnyere-Akerte)*	Alice Springs, NT	1991
Iron Princess	Whyalla, SA	1993
Moana Beach*	Adelaide, SA	1993
Century Mine	Carpentaria, Qld	1994
Lakes Barrine and Eacham	Far North Qld	1994
Bow River Diamond Mine*	Kununurra, WA	1994
Broome Crocodile Farm	Broome, WA	1994
Boobera Lagoon	Moree, NSW	1994
Ban Ban Springs	Gayndah, Qld	1995

* In these applications, two mediators were appointed, a male and a female.

Section 18

The only section 18 declaration made in respect of an area was in respect of Bright Point, Magnetic Island, Queensland, in 1989.

Section 10 reports

Section 10 (4) reports were requested by the Minister in 12 cases:

1988-89	Old Swan Brewery (Goonininup) Perth (s 9 and s 10 declarations)
1989	Murray Downs Golf and Country Club (Wamba Wamba) NSW
1989	Coronation Hill, Alligator River (Kakadu) NT
1990	Rottnest Island Burial Sites and Gaol, Perth
1991	Junction Waterhole (Niltye/Tnyere-Akerte) Alice Springs (s 9 and s 10 declarations)
1992	Old Swan Brewery (Goonininup) Perth
1993	Broome Crocodile Farm, WA (s 9 and s 10 declarations made)
1993	Helena Valley, Perth
1993	Iron Princess, Whyalla, SA
1993	Hindmarsh Island (Kumarangk) SA (s 9 and s 10 declarations made)
1994	Skyrail, Barron Falls National Park, Qld
1995	Hindmarsh Island (Kumarangk) SA [pending]

Section 9 and s 10 declarations

Section 9 declarations have been made in respect of*five* different areas. In respect of some areas, more than one s 9 declaration was made. In four of the five matters, long term declarations were made later under section 10:

Old Swan Brewery (Goonininup) Perth, WA
(s 10 declaration later withdrawn)

Junction Waterhole (Niltye/Tnyere-Akerte) Alice Springs, NT **(s 10 declaration for 20 years remains in force)**

Broome Crocodile Farm WA
(s 10 declaration overturned by Federal Court)

Hindmarsh Island (Kumarangk) SA
(s 10 declaration overturned by Federal Court)

In the fifth case, Boobera Lagoon, NSW a section 9 declaration was made, and the section 10 application is pending.

AREAS: CASE SUMMARIES

List of cases and order of treatment

The cases in this Annex are arranged on a State/Territory basis, and appear in date order for each State/Territory. An alphabetical list of all cases (including those which are summarised in the text of the Report) is given below:

CASE	STATE	YEAR
Ban Ban Springs	Qld	1994 -
Boobera Lagoon, Moree	NSW	1992 -
Bow River Diamond Mine (see Chapter 9, p)	WA	1994
Broome Crocodile Farm	WA	1993 -
Burleigh Mountain National Park	Qld	1985 - 1986
Casino Site, Cairns	Qld	1994
Coorlay Lagoon	SA	1989 - 1991
Craggy Point Fish Traps, Hinchinbrook Channel	Qld	1994 -
Helena Valley, Perth	WA	1993 - 1994
Hindmarsh Island (Kumarangk)	SA	1993 -
Junction Waterhole (Niltye/Tnyere-Akerte) Alice Springs	NT	1991 - 1992
Lakes Barrine and Eacham (see Chapter 9)	Qld	1994 -
Marandoo, Pilbara	WA	1992
Murray Downs Golf Course	NSW	1989
North Creek, Ballina (see Chapter 9)	NSW	1991 -
Old Swan Brewery (Goonininup), Perth	WA	1988 -
Skyrail, Barron Falls National Park	Qld	1994 -
Wallaroo Station	Qld	1984, 1988

Kinds of sites and areas

In most States and Territories the areas and sites for which protection was sought were rural or remote sites. An exception was Western Australia, where there was a considerable number of applications in regard to urban sites.

The nature of the sites varies considerably within and between States and Territories, as does the aspect of each site which makes it significant to Aboriginal people. Cases in the summary cover sites and areas which have cultural and spiritual significance, such as dreaming trails and

mythological sites; they include men's sites and women's sites. There are sites with physical features such as burial sites; middens; fish traps; sacred springs and scarred trees. The range of sites important to Aboriginal people extends to sites such as waterholes, rock shelters, camp sites, stone arrangements, bora rings and singing tracks. Historic sites, including massacre sites, are also be of significance.

Themes

The cases included in the summaries illustrate a number of issues and themes discussed in the report. A brief outline these issues follows, with an indication of the chapter in the report where the issue is discussed, and cases of relevance.

Positive outcomes of Commonwealth intervention - Chapter 2

The only area which now enjoys long term protection under the 1984 Act is *Junction Waterhole (Niltye/Tnyere-Akerte) NT.* However, even where a declaration was not made, there are some cases where the intervention of the Commonwealth helped to ensure better protection of the area in question or a mediated or negotiated settlement satisfactory to the parties. Examples are *Murray Downs NSW,* and *Burleigh Mountain, Qld.*

Other Commonwealth programs - Chapter 3

In some cases, protection of the area in question derived in whole or in part from action of the Australian Heritage Commission, or under the World Heritage Properties Conservation Act. Examples are: *Burleigh Mountain Qld, Craggy Point Qld* and the *Old Swan Brewery (Goonininup) WA.*

Confidential information - Chapter 4

In several cases there were issues about confidential information which, according to Aboriginal customary law, should not be disclosed other than in accordance with tradition: *Broome Crocodile Farm WA, Hindmarsh Island (Kumarangk) SA* and *Junction Waterhole (Niltye/Tnyere-Akerte) NT* are examples. In the last two cases mentioned there were specific issues concerning women's sites which required a gender-sensitive approach.

Commonwealth and State/Territory interaction - Chapter 5

Some cases are notable for the level of friction between the Commonwealth and the State and Territory Governments. A high level of conflict has arisen in regard to projects which have strong State backing or involvement. Examples are *Skyrail Qld, Craggy Point Qld, Old Swan Brewery (Goonininup) WA, Broome Crocodile Farm WA, Hindmarsh Island (Kumarangk) SA* and *Junction Waterhole (Niltye/Tnyere-Akerte) SA.* In other cases, conflict was generated by Commonwealth intervention after State processes had been completed. The potential for Commonwealth/State conflict was reduced in some situations because of the reluctance of the Commonwealth to intervene in a major project, as in *Marandoo WA.* Failure of the Commonwealth to intervene directly

did not necessarily mean that the matter was resolved at State/Territory level; the friction between the parties may have continued. In othere instances, there appears to have been a failure on the part of the Commonwealth to follow up State action to ensure that protection was satisfactory, eg, *Coorlay Lagoon SA.*

Conflicting definitions and approaches - Chapter 6

In some cases an application was made for protection under the Commonwealth Act because the State Act was too narrow in its definition or because a narrow approach was taken to the application of the law. For example, in *Ban Ban Springs Qld* and *Lakes Barrine and Eacham Qld,* the State Act could not provide protection. In other cases, the relics-based approach of the State legislation and practice may have limited the action which could be taken at State level, eg *Murray Downs NSW, Boobera Lagoon NSW,* and *Casino site, Cairns Qld.*

Differing views of Aboriginal people - Chapter 8

In several cases there were differing views among the Aboriginal community as to the significance of an area or its need for protection. In some cases these differences came to light at a late stage of a project, possibly because the consultation process had been too narrow, or because of reluctance to reveal information unless it became necessary. Cases where issues of this kind arose include: *Broome Crocodile Farm WA, Old Swan Brewery (Goonininup) WA, Marandoo ,WA Hindmarsh Island (Kumarangk) SA* and *Coorlay Lagoon SA.*

Problems of interim protection under the Act - Chapter 10

One area of uncertainty has been the scope of s 9. Should protection be given under that section when there is a threat which is serious and immediate? Declarations under section 9 been made in only five matters. In all but one, the s 9 declaration was followed by a section 10 report and declaration (the fifth matter is pending). In cases like *Wallaroo Qld, Craggy Point Qld, Marandoo WA,* the s 9 application was declined, because the project had not started, so that the threat was in the future, even where the work was soon to commence. In other cases, such as *Helena Valley WA* and *Coorlay Lagoon WA,* no temporary protection was provided, even though damage continued to occur throughout the period when the application was under consideration.

Recognised site - Chapter 8

In many cases the site in question was already recognised in whole or in part under the State legislation. Even in cases which otherwise involved a high level of conflict, the significance of the site was not a major issue. For example, *Murray Downs NSW, Burleigh Mountain Qld, Broome Crocodile Farm WA, Junction Waterhole (Niltye/Tnyere-Akerte) SA.*

Time limits - Chapter 10

The short time frame for the preparation of the s 10 report has presented problems for the reporter and the Minister in several cases, such *as Broome Crocodile Farm WA* and *Hindmarsh Island (Kumarangk) SA.*

Complex issues

In several cases, an application for protection was made as part of a broader claim by the Aboriginal community for greater involvement in the management of their heritage. *Skyrail Qld, Lakes Barrine and Eacham Qld, Casino site Cairns Qld, Boobera Lagoon NSW* and *Broome Crocodile Farm WA* all involved either a native title claim, or a claim to have a recognised role in the management of heritage.

Litigation

Several cases led to litigation in the State courts or in the Federal Court. In all but one of the cases where a s 10 declaration was made there were court challenges to the Minister's decision (the exception being *Junction Waterhole (Niltye/Tnyere-Akerte) NT*). Cases which led to challenges in the Federal Court are: *Murray Downs NSW, Old Swan Brewery (Goonininup) WA, Broome Crocodile Farm WA* and *Hindmarsh Island (Kumarangk) SA.* The last three cases were also the subject of litigation under State law.

QUEENSLAND

Data

Applications have been made for declarations of protection in respect of 33 areas in Queensland. This is the highest number for any State. The breakdown is as follows:

s 9 applications	16
s 10 applications	4
s 9 and s 10	11
no data	2
Total	**33**

No declarations have been made under section 9 or 10 in respect of areas in Queensland. In one case, *Bright Point, Magnetic Island,* a s 18 declaration was made (48 hour protection).

Areas and sites

The Queensland cases have been mainly rural in origin; six concerned mining. The kinds of area were: mythological sites associated with creation/dreamtime; a spring; middens; burial sites; initiation grounds; fish traps; scarred trees; occupation site; and rock art sites.

The Studies[1]

Wallaroo Station, 1984, 1988
Burleigh Mountain National Park, 1985 - 1986
Skyrail, Barron Falls National Park, 1994 -
Craggy Point Fish Traps, Hinchinbrook Channel, 1994 -
(Lakes Barrine and Eacham, 1994, see Chapter 9)
Casino site Cairns, 1994
Ban Ban Springs, Gayndah, 1994

Wallaroo Station 1984, 1988[2]

Section 9 application, September 1984

An application was made on behalf of the Biddyara people on 11 September 1984 for a declaration under s 9.

Nature of the threat

Parts of the Wallaroo Station had been recognised as Aboriginal sites under Queensland legislation; the sites included rock art. The basis of the complaint was that the construction of a gas pipeline by CSR would threaten the sites mainly because of its proximity to the sites, and because this would mean increased access to the area during and after construction of the pipeline.

Mediation

Prior to the application, there had been discussions between CSR and Aboriginal groups concerning the route of the pipeline and the protection of Aboriginal sites. There had also been discussions with the Commonwealth Minister, who had agreed that the Australian Institute of Aboriginal Studies (now AIATSIS) would visit the site to investigate it and report. Further discussions resulted in an agreement in September that CSR would employ Aboriginal rangers to monitor the construction of the pipte in the vicinity of the Station and that they would propose to the State Government that there be a longer route for the pipeline, avoiding the sites.

Application declined

The application for a s 9 declaration was declined by the Commonwealth Minister on 11 October on the basis that the threat was in the future, as the route for the pipeline had not yet been approved by the State Government. The Minister stated that he would be prepared to re-examine the matter when the route of the pipeline was decided.

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[1] Fact sheets on several Queensland cases (Wallaroo Station, 1984, North Stradbroke Island 1984, and Bloomfield River Case 1984) may be found in *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984: A review*, DAA, AGPS 1986, pp 44, 20 and 28.

[2] See also *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984: A review*, DAA, AGPS 1986, p 44.

Section 10 application, March 1988

A further application was made four years later on 14 March 1988 for a declaration under s 10. The basis of the claim was that there would be increased access to sites.

Outcome

No s 10 declaration was made. The company (not CSR at that time) had agreed to divert the pipeline to protect sites on the station, and had accepted agreed conditions, including the employment of Aboriginal monitors. The State Government had approved the route. The project was completed.

Observations

1. There appear to be continuing concerns among the Aboriginal community over increased public access resulting from the opening up of the area.

2. The circumstances of the case suggest that the applicants wanted permanent protection of the sites, plus interim protection from the immediate threat while the matter was being resolved. However, no application was made under s 10 until much later in the process, by which time the project had proceeded on the agreed basis. This suggests uncertainty over whether to use s 9 or s 10 or both. The use of interim and permanent protection declarations is discussed in Chapter 10.

Burleigh Mountain National Park, 1985 - 1986

s 9 application, December 1985

An oral application, followed by a written application, was made on 17 and 18 December 1985 on behalf of the Kombumerri Aboriginal Corporation for Culture. The application was for a s 9 declaration to protect a number of middens in the Burleigh Mountain National Park from threat of injury during the construction of footpaths and other works by the Queensland National Parks and Wildlife Service. On-site inspection during early December 1985 showed that substantial damage had already been done to the middens.

The site

The general area of the application was dominated by a Dreaming Place called Jabreen (Burleigh Mountain), which had been nominated for listing with the Australian Heritage Commission. Middens in the area contained substantial evidence of Aboriginal occupation over a long period. As part of its assessment process, the Australian Heritage Commission had consulted with the Kombumerri people about a number of sites on the mountain. The State had consulted with the Kombumerri people during the initial planning stages for construction of the footpaths.

Agreement to protect site

Following consultations by the Minister, the State agreed (temporarily) to halt the construction work, to form an ongoing committee, called National Parks Aboriginal Committee (Gold Coast Lowlands), to employ an archaeologist to oversee the remaining construction work and to restore the integrity of the damaged midden. The project was halted for a short time.

Application declined

A decision to decline the application was made on 14 April 1986.

Observations

1. The intervention by the Commonwealth had a positive outcome, in that it resulted in the State Government taking protective measures.

2. The case suggests that there could be a role for the Australian Heritage Commission in the assessment of significance in some circumstances. See Chapter 3.

Skyrail, Barron Falls National Park, 1994[3] -

Applications under ss 9 and 10, Nov - Dec 1994

An application was made by Djabugay Tribal Aboriginal Corporation under s 9 on 4 November 1994, and under s 10 on 7 December the same year. The claim was that commencement of work by Skyrail on tower sites 6 and 7 would endanger a significant Aboriginal area. (Skyrail is a tourist facility, consisting of an overhead cableway from Cairns to Kuranda, suspended from towers). The s 10 application added a further area, said to be under threat because of pressure from tourists after completion of the Skyrail project.

The site

The applicants had applied for a native title determination in respect of the area. This was subject to mediation hearings before the Native Title Tribunal. During the mediation hearings a Djabugay Elder separately identified the site of towers 6 and 7 as key areas significant in Djabugay history - being a place where ancestors had travelled and stopped.

The area claimed was part of the 'Wet Tropics World Heritage Area' which is managed by a Queensland agency under Queensland legislation.

There had been an environmental assessment under Queensland legislation and consultations with Aboriginal people about the path of the

[3]JG Menham, *Skyrail, Report to the Minister for Aboriginal and Torres Strait Islander Affairs*, 1995.

cableway. Some Aboriginal people supported the project. The adequacy of the consultation and the research done for the developer was challenged by the applicant. In particular, the applicants claimed that certain archaeological studies, which had concluded that there was no physical evidence of prior occupation by Aboriginal people, were invalid because Djabugay people had not been included in the consultations.

In evidence provided to the Native Title Tribunal, the Djabugay people claimed that the area contained a number of sacred sites, a burial ground, an initiation ground, a burial tree and other relics. The Tribunal commissioned a third archaeological report. Further investigation provided support for the claim of significance:

- the fact that the area is on the edge of the rainforest and close to water meant that it was likely to have been a camping ground for Aboriginal people;
- the area is relatively close to the important Djabugay site of Barron Falls;
- archaeological sites such as scar trees and stone arrangements indicate that it had been intensively used, and
- Elders believed that ceremonies had been held in the vicinity during living memory.

There was no suggestion that the area held mythological significance.

State consultations

Information was provided by the State Government in November 1994 and over a period of months thereafter.

s 10 reporter appointed April 1995

The s 9 application was declined by the Commonwealth Minister on 16 February 1995 apparently on the ground that the construction of the Skyrail was well advanced at the time of the application. Mr George Menham was appointed as a s 10 reporter on 9 April 1995. By that time construction was largely completed. Some steps were taken to reduce the impact of the project.

The Queensland Department of Environment and Heritage agreed to enter into discussions with Djabugay about co-operative management arrangements for the protection of the cultural resources and values of the National Park. Parallel mediation on native title is continuing.

Outcome following s 10 report August 1995

The s 10 report was received by the Minister on 24 August 1995. The reporter's view was that it would be open to the Minister to conclude that the area was of particular significance to Aboriginal people. The reporter thought that there were real possibilities that negotiations involving the Djabugay, the State Department and Skyrail might lead to a co-operative

resource management strategy and to appropriate protection. The Commonwealth could support this process.

Negotiations continue in relation to possible forms of Aboriginal involvement in controlling and managing access to areas of land impacted by Skyrail.

Observations

1. The application was made at a late stage in the project, perhaps because of a failure in the consultation process or because the Commonwealth Act can be called on to protect sites and areas which may not be accorded protection under the Queensland Act. The powers available under ss 9 and 10 are not, however, the most appropriate to deal with the concerns of the applicant about the management of the area and the effects of future public access.

2. The intervention of the Commonwealth led to considerable friction with the State Government. There was correspondence between the State Premier and the Prime Minister.

3. The s 10 process was used constructively by the s 10 Reporter to assist the parties to establish a negotiating process and to work out ways to ensure Aboriginal involvement in the management of the park. He stressed the need for applicants to be assisted with adequate resources to enable them to carry out anthropological assessments.

Craggy Point Fish Traps, Hinchinbrook Channel, 1994 -

Applications under ss 9 and 10, 25 August 1994

A written application was made under ss 9 and 10 on 25 August 1994 by Mr. Russell Butler (Banjin). He claimed that development proposals for a resort and marina at Port Hinchinbrook - which were then being considered for approval by Commonwealth and State Governments - did not take into account the impact that increased recreational boating and camping might have on a complex of stone-walled tidal fish traps at Craggy Point, at the northern end of the Hinchinbrook Channel opposite the proposed marina. He cited recent and continuing damage caused by boats anchoring in the vicinity of the fish traps, and the consequent damage to and removal of stone walls. He claimed that silt and mud from the dredging, which was proposed as part of the development, would be deposited on the fish traps and result in their being buried.

State consultations

The area had been identified by the State Government as an Aboriginal site, but was not listed by the State. Consultations with the parties commenced in August 1994 in relation to the dredging of the channel,

due to commence in December. There were also follow-up consultations on monitoring programs in November 1994 and August 1995.

World Heritage listing, November 1994

At the same time, there was a proposal to list the area as a World Heritage Area. An EIS was required as part of that process. This led to delays in the process. The Port Hinchinbrook Channel was proclaimed in November 1994 as a World Heritage Area. The fish traps, however, are located outside the boundaries of the proclaimed area.

Outcome: s 9 declined

The s 9 application was declined on 26 October 1995 when it appeared that the Minister for the Environment would approve dredging only if there were scientific studies showing that World Heritage Values could be protected in the Hinchinbrook Channel. The dredging was not proceeding in the meantime, so that the immediate risk was removed.

The s 10 application of 25 August 1994 remains unresolved, pending decisions whether the proposed development will affect world heritage values in the Port Hinchinbrook Channel.

Observations

1. The actual development was in the World Heritage Area, whereas the Aboriginal site was outside that area. It appears, however, that such protection as is afforded to the site is a side effect of the protection of the World Heritage Area, and does not derive from the significance of the site to Aboriginal people. The issues are further complicated by the role of the Great Barrier Marine Park Authority, which has some responsibility in the area. Linkages between the Act and the *World Heritage Properties Conservation Act* are considered in Chapter 3.

2. This matter generated tension between the State Government and the Commonwealth, and there was correspondence between the State Premier and the Prime Minister. The Queensland Government considered that it should exercise the primary role in heritage protection. However, it appears that the State had taken no action to involve Aboriginal people in consultations prior to the application.

Casino Site, Cairns, 1994

Application, January 1994

A written application under s 9 was made on 21 January 1994 by Tharpuntoo Legal Service Aboriginal Corporation on behalf the Yirrganydji Corporation.

The site

The application concerned the disturbance to land on the site of the proposed Cairns Casino (ANZAC Park) which the applicants considered significance and which was thought to contain Aboriginal remains and

artefacts. The site had not been recognised under State legislation as an Aboriginal site.

The *Cairns Casino Agreement Act 1993* (Qld) required the developer to engage an appropriately qualified heritage archaeologist to advise on and supervise excavations. An archaeologist had examined geomorphological records of the site to determine the probability of Aboriginal material being present, and assessed this to be low. During the initial stages of excavation the developer failed to allow Aboriginal monitoring of the project.

Native title claim

The Yirrganydji people lodged an application to the Federal Court seeking a declaration of native title over the same area, and sought an injunction to restrain the State from implementing provisions of its special legislation - the *Cairns Casino Agreement Act 1993*.

Outcome

At the time of the application under the 1984 Act no material had been yet been uncovered. Following the application the Yirrganydji traditional owners were permitted to monitor the excavation work and archaeological investigations, and were able to reassure themselves that there had not been any destruction of Aboriginal cultural material. Weekly meetings between the archaeological consultant, the traditional owners and the developer continued until the completion of the excavations.

The Federal Member, Mr Peter Dodd, facilitated mediation between the parties.

The excavations were completed early in 1994. The application was declined on 2 February 1994 on the basis that there was no threat.

Observations

1. The State procedures did not provide an effective form of consultation with Aboriginal communities about the development. Special legislation was enacted to enable the Casino to proceed; this took it out of normal procedures.

2. Aboriginal concerns went far wider than the monitoring of excavations. The site itself was claimed to be one of significance. That issue has not been dealt with.

Ban Ban Springs, Gayndah 1994

The application, 4 May 1994

Written applications under ss 9 and 10 were made on 4 May 1994 on behalf of the Wakka Wakka Jinda Aboriginal Corporation, Gayndah.

The area of significance

The applicant sought intervention by the Commonwealth Minister to prevent a farmer from using a bore pump to draw ground water for irrigating his peanut farm. This pumping was drying up Ban Ban Springs, a site which had considerable cultural significance for Aboriginal men and women over a wide area of central Queensland.

Ban Ban Springs is a registered Aboriginal site, with boundaries defined by the surface water reserve. Because the bore did not physically interfere per se with the actual area of the water reserve, the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* could not be used to provide protection against the pumping.

Consultations with the State Government

Following the application in May 1994, the State authority provided a full description of the cultural significance of the site, which is listed on the State inventory, and some history of Aboriginal custodianship of the area. The only State processes available to deal with the issue would be costly and lengthy.

Appointment of a s 13 mediator, 13 December 1995

The view was taken by the Commonwealth that the action of drawing ground water could constitute a threat of injury or desecration. Mr George Menham was appointed as a mediator on 13 December 1995. The applicant was concerned with the delay of more than a year between the application and the action by the Minister to appoint a mediator.

All relevant parties including the State authorities agreed to participate in an attempt at mediation under the Commonwealth Act. The suggested resolution would involve the provision of an alternative water supply to the farmer, thus enabling the Ban Ban springs to be restored. The effectiveness of that solution will depend in part on the willingness of the governments to provide funding - possibly in excess of $200,000. The matter remains unresolved.

Observations

The Queensland legislation is too narrow to provide effective protection to sites of this kind, as compared with the Commonwealth legislation. Nevertheless no declaration has been made under the Commonwealth Act as the question of the cost remains to be settled.

NEW SOUTH WALES

Data

Twenty eight areas have been the subject of applications in NSW, 14 under s 9, seven under s 10 and five under both sections. (Information is not available for two areas.)

s 9 application	14
s 10 application	7
s 9 and s 10	5
no data	2
Total	**28**

In one case, (*Murray Downs*) in which a s 9 declaration was sought, an application was also made for a declaration under s 18; this was declined. As mentioned earlier, some cases involved multiple applications under the same sections.

Areas and sites

The 28 sites which have been the subject of applications in NSW include several burial sites and remains. There were also waterholes, rock shelters, scarred trees, middens, initiation sites, massacre sites, camp sites, stone arrangements, bora rings and dreaming sites. Both men's sites and women's sites have been included among the NSW cases. Twenty six of the 28 sites were rural or remote.

The Studies[4]

Murray Downs Golf and Country Club, 1989
(North Creek Ballina, 1991, see Chapter 9)
Boobera Lagoon, 1992

Murray Downs Golf and Country Club, 1989[5]

The application: February 1989

A written application was made on 8 and 9 February 1989 by the Murray River Regional Land Council and the Wamba Wamba Local Aboriginal Land Council for declarations under ss 18 and 9 of the Act.

[4] See also *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984: A review*, DAA, AGPS 1986, for fact sheets on Plumpton site 160 1984, p38 and Bungowannah Sand Dune 1985, p 47.

[5] See Graeme Neate, *The Preservation and protection of Significant Aboriginal Areas on Murray Downs Golf and Coountry Club, New South Wales, Report to the Minister for Aboriginal and Torres Strait Islander Affairs under s 10 (4) of the ATSI HPAct 1984*, 1989.

The area and its significance

The application related to human remains uncovered in December 1988 during the construction of a clubhouse and bowling green. An archaeological survey, which had been carried out for the developer in 1986, had foreshadowed that a burial site might well be discovered in a sand dune in the centre of the development, because of the long history of Aboriginal occupation of the area, going back 30,000 years or more. The National Parks and Wildlife Service had recommended further monitoring of the construction works.

Agreement to secure archaeological report

The s 18 application was declined on the basis that the matter could be dealt with by negotiation. An agreement was reached between the Aboriginal applicant and the developer on 14 February that an archaeological investigation would be carried out and that Aboriginal monitors would be employed at the site. The archaeological report noted the distress and concern of Aboriginal people when the graves of their ancestors are disturbed. The Aboriginal people consider that the graves should be left in peace. The report proposed several options; one was the relocation of the club house, another was the removal and reburial of the remains in a nearby location on another part of the developer's property.

A further application under s 9 was made on 27 February 1989.

Applications declined

On 9 March, the developer gave certain undertakings to the Commonwealth Minister. One area where the graves had been found would not be developed as had been planned, but would be dedicated to the Aboriginal burial site. Another area would be dedicated to the reburial of other remains found during construction. The main project would proceed.

On the same date, 9 March, the Minister declined the s 9 application.

Application to Court April-May 1989

The applicants then applied to the Federal Court for an order setting aside the Minister's decision declining their s 9 application. They claimed that they were entitled to a declaration of protection once they had established the basic grounds, namely, the existence of a significant site and a serious and immediate threat of injury or desecration.

The Federal Court decided on 12 May that the applicants were not entitled to a declaration as of right, and that the Minister had a discretion whether or not to exercise the power under the Act to make a declaration. Provided he had, as was the case, exercised his discretion lawfully and reasonably and had considered relevant matters, his exercise of discretion could not be challenged.

Boobera Lagoon, Moree NSW, 1992 -

Section 9 applications, January 1992

An application was made on 13 January 1992 on behalf of Toomelah Boggabilla Local Aboriginal Land Council for a declaration under s 9 to protect Boobera Lagoon. The applicants believed that water skiing, and the large numbers of visitors which this brought to the Lagoon, constituted a threat to the cultural significance of Boobera Lagoon.

The area and its significance

A major part of Boobera Lagoon was registered as a Declared Aboriginal Place under NSW law. In addition to water skiing, other concerns related specifically to the access to the foreshores by campers, cattle agistment and the travelling stock route, all of which were said to damage the land and disturb the water of the lagoon. The applicants considered that local management arrangements affecting this significant Aboriginal cultural site were generally hostile to Aboriginal concerns. They sought ministerial action which might, following a parallel land claim under State legislation, result in the creation of a national park under Aboriginal control.

Following the initial 1992 application, State and local government authorities worked to incorporate Aboriginal concerns within the management plan for Boobera Lagoon and the adjacent lands. Little was achieved by the end of 1993.

Further applications and a s 9 declaration, March 1994

Three further applications were made under s 9 on 22 March, 27 April and 17 August 1994.

A s 9 declaration was made on 31 March 1994. The later applications were declined on the basis that the State had acted in the meantime to protect a burial ground by fencing an area 12m x 12m and erecting signs.

A s 10 application was made on 19 August 1994.

s13 mediator appointed, September 1994

The Hon Hal Wootten AC QC was appointed as a mediator on 23 September 1994. The State authorities have participated in the mediation. A report is to be made to the Minister.

Outcomes

A burial ground on the foreshore of the lagoon was protected by fencing and appropriate signs. No protection has been provided against the threats of injury and desecration which are said to occur as a result of water skiing activity, foreshore camping, or through the use by local landowners of the travelling stock route. The outcome of mediation is awaited.

Observations

1. As in the Murray Downs case, the relics-based approach of the State law did not address the broader concerns of the Aboriginal applicants.

2. The case also involves broader concerns of Aboriginal people about their lack of involvement in management decisions affecting a site of significance to them, and their desire to have a recognised role in the protection of their heritage. The process of mediation helped to ensure that their views were heard.

3. Intervention by the Commonwealth. helped to secure protection of a burial ground by fencing,

WESTERN AUSTRALIA

Data

Twenty one areas in Western Australia have been the subject of applications for declarations under the Act. The breakdown is this:

s 9 application	12
s 10 application	2
s 9 and s 10	7
Total	**21**

In four of these cases there were applications under s 18 (three were combined with s 9 and one with ss 9 and 10); none of these led to a declaration.

Areas and sites

The great majority of areas and sites were urban, rather than rural or remote. This is a special feature of the use of the Act in WA. Western Australia also has a high proportion of claims in respect of mythological sites including those in urban areas, such as the Goonininup site. In addition to mythological sites, applications were made in respect of such sites as a brook of spiritual importance, an initiation site, a singing track and a cemetery. Four related to mining.

The studies[6]

Old Swan Brewery (Goonininup), Perth, 1988 -
Marandoo, Pilbara, 1992
Helena Valley, Perth, 1993 - 1994
Broome Crocodile Farm, Broome, 1993 -
(Bow River Diamond Mine, 1994, see Chapter 9)

[6] See also *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984: A review*, DAA, AGPS 1986, for fact sheets on Harding River Dam p 24, Bennett Brook No 1 p 55, Swan River Boat Ramp p 59; Richard Wright, *Significant Aboriginal Areas on Rottnest Island, Western Australia, Report to the Minister for Aboriginal Affairs under s 10 (4) of the ATSIHP Act 1984*, June 1991.

Old Swan Brewery (Goonininup), Perth, 1988[7] -

Summary

Since 1988 there have been numerous applications under sections 9 and 10 in relation to an area which includes the precinct of the Old Swan Brewery (Goonininup). The applicants sought to prevent the further development of the site and to have it restored as a traditional Aboriginal site. At the time of consenting to development proposals, the State accepted that the area had significance for some Aboriginal people.

The Commonwealth Minister, after an attempt at mediation, appointed a s 10 reporter, and made a s 10 declaration. That declaration was later revoked, and for a time the matter was dealt with largely under State law.

Further applications were made to the Commonwealth Minister in 1992, when the State Government approved major developments at the site. The Commonwealth Minister declined to make declarations under either s 9 or s 10, but the Federal Court set aside this decision in 1993. The Minister then appointed a s 10 reporter. After receiving the report, the Minister declined to make a declaration in February 1994.

New applications followed; the matter remains unresolved.

The applications

The applicants are Robert Bropho, for the Fringe dwellers of the Swan Valley Inc, and Corrie Bodney, President, Ballaruk Aboriginal Corporation. In the period 1988-94 there were 15 or more applications for the protection of specific areas within the Old Swan Brewery (Goonininup) precinct. A number of these were parallel applications. The basis of the claims was that any development work would constitute desecration of the site.

The area and its significance

The significance of the site to Aboriginal people is based on Aboriginal mythology, centred on the complex of stories of the journeys of the Waugal, a Dreamtime being which is believed to have created natural forms. The water springs on the slopes of Mt Eliza, the Aboriginal site registered as Kennedy's fountain and the brewery site (known as Goonininup) are of particular significance to Aboriginal people because of their association with the Dreaming Track of the Waugal. The area is also of significance because of its historic use, during the colonial government of Western Australia, as a feeding station for Aboriginal people from the Swan River area.

Despite the modifications to the area, commencing in 1833 and continuing until the present, the applicants, who claim to speak for the area, state that the desecration which has occurred continues to cause

[7] See Dr CM Senior, *Old Swan Brewery Perth, A Report to the Minister for Aboriginal Affairs under section 10 (4) of the ATSIHP Act 1984*, 1989; JG Menham, *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Old Swan Brewery Area, Perth Western Australia*, November 1993 (s 10 report).

spiritual and cultural offence. It was acknowledged that some other Aboriginal people do not share the belief that desecration is continuing.

Under State legislation Goonininup and the Waugal Dreaming Track have been registered as Aboriginal sites within the meaning of the Aboriginal Heritage Act 1972 (WA). The statutory committee under that legislation, the Aboriginal Cultural Materials Committee (ACMC), has concluded on several occasions, with some dissent, that the site is a significant Aboriginal area and has recommended that approval not be given to proposed development. In each case the State Minister has exercised ministerial powers, under s 18 of the State Act, to consent to the work proceeding.[8]

The boundary of the sites was an issue. In the initial period of the applications there was also a serious dispute over who could speak for the area.

Further applications and declaration under Commonwealth Act

Applications were made to the Commonwealth Minister under ss 9 and 10 in 1988 and 1989. On 28 April 1989, the Minister appointed Mr Brian Egloff as a s 13 mediator; the mediator was rejected by the applicant. The Commonwealth Minister made three s 9 declarations in April-May 1989. These provided short-term protection before and during the preparation of the s 10 report.

s 10 report and declaration, June 1989

Dr Clive Senior was appointed on 11 April 1989 to prepare a report under s 10. He reported in June 1989. His report recommended that a declaration not be made. If one were to be made it should be made subject to the WA Government following the procedures set out in the State Act to the satisfaction of the Federal Minister. The Commonwealth Minister made a s 10 declaration on 21 June 1989.

Revocation of declaration

After the State Government undertook to be bound by its own legislation and to commit itself to follow the formal s 18 procedure, the Commonwealth declaration was revoked on 19 July 1989.

A further group of applications were made under the Commonwealth Act. They were declined because of the absence of threat.

Action under State legislation 1989 - 1990

In September 1989 the ACMC decided that development could proceed as it would not disturb the important ceremonial areas of the site. The Government consented to development. Disputation about the site continued and there was litigation in the State courts under State legislation. In proceedings begun by the applicant in October 1989, the

[8] For further details about WA legislation see Annex VIII.

High Court decided in June 1990 that the WA Development Corporation could not authorise its employees to ignore s 17 of the Aboriginal Heritage Act 1972 (WA).[9] To that extent the State was bound by its own Aboriginal heritage legislation.

In October 1990 the ACMC resolved that the significance of the site was such that the State Government should not proceed with its redevelopment plans.[10] The State Minister decided to give consent to the development in November 1990.

National Estate Register 1991

In May 1991 the site was listed on the National Estate Register for cultural and general historic reasons. Both Aboriginal and non-aboriginal associations were included in the Statement of Significance. The social significance of the precinct to Aboriginal people is described as follows: "the precinct is of social significance to Aboriginal people, and as a resting place for the Wagyl [Waugal], of religious significance to some of them."

Further applications under Commonwealth Act, 1992

In June 1992, the WA Government leased part of the land to Bluegate Nominees P/L to develop the site for various commercial and other purposes that might be approved by the Heritage Council of WA. On 11 August 1992 an order was made by the State Minister removing the site from the protection of the State Aboriginal Heritage and Planning legislation.

Further applications were made to the Commonwealth Minister on 18 August 1992 for declarations under ss 9 and 10. Work at the site had begun at that time, but ceased in September 1992 when the State Minister's order was disallowed by the Legislative Council.

Applications declined by Commonwealth Minister

The Commonwealth Minister declined the s 9 application on 11 November. His reasons, given later, were that since the State had to comply with its own development approval processes, the area was not under 'serious and immediate' threat. In the meantime, construction work had recommenced on 12 November 1992, under consent of the State Minister given on 22 October pursuant to s 18(3) of the Aboriginal Heritage Act 1972 (WA). It appears that at the point in time when the Commonwealth Minister declined the s 9 application (11 November), the development had in fact been approved and work was set to recommence on the area (although there was no evidence that the Minister actually knew this to be so).

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[9] *Bropho v WA* (1990) 171 CLR 1; see Annex VIII for details of WA legislation.

[10] From JG Menham, *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Old Swan Brewery Area, Perth Western Australia*, November 1993 (s 10 report), p 54.

On 7 January 1993, the s 10 application was declined by the Commonwealth Minister.

Federal Court challenges 1992 - 1993

The Minister's decisions declining the applications under ss 9 and 10 were challenged in the Federal Court. Wilcox J found the decision to decline the s 10 application invalid on February 1993. The decision of the Full Court, given in April 1993, upheld that decision and found for the applicant on two counts. The first was that it was unreasonable for the Minister to rely on the WA legislation to provide protection when, at the time of the Commonwealth Minister's decision, the Sate Minister had already consented to the development proceeding. It was found that the Minister had, in these circumstances, failed to take into account the existence of a serious threat to the area. The Court also held that the Minister is obliged to commission a s 10 report before deciding whether to make a s 10 application.

Appointment of s 10 reporter 1993 -

Following the Federal Court decision, the Minister appointed Mr George Menham on 27 July 1993 to prepare a s 10 report. At that time the development was at an advanced stage. Menham reported on 9 November 1993. His report did not accept the argument that the significance of the site was already destroyed, or that it could not continue despite changes in culture and tradition. He reported that it was open to the Minister to conclude that the site was of significance to some Aboriginal people; that conclusion was supported by historical and anthropological evidence and was confirmed for purposes of State legislation.[11] It was also open to the Minister to conclude that there had been considerable desecration of the site and that there was a continuing threat of desecration by virtue of the spiritual aspects of the site as elucidated by the applicant.[12] He concluded that the Western Australian legislation did not offer effective protection.

Application declined

The Commonwealth Minister decided on 1 February 1994 to decline the s 10 application. That decision was based, in part, on considerations relating to the proprietary and pecuniary interests of other parties.

Further applications 1994

Immediately following the Minister's decision to decline the applications, further applications were made on 4 February 1994. The Minister considered they were vexatious in that there had been no change to the circumstances.

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[11] Menham, *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Old Swan Brewery Area, Perth Western Australia,* November 1993 (s 10 report), p 7.
[12] Menham, *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Old Swan Brewery Area, Perth Western Australia,* November 1993 (s 10 report), p 8.

Observations

1. This case was complicated by a high level of political conflict at State level and between the Commonwealth and the State governments in relation to the site, and by the ultimate unwillingness of the Commonwealth to use its power to protect the site, despite the established status of the site and the threat to it. Considerable and detailed consultations were held at Ministerial level during the period of 1988-94, and also between the Prime Minister and the State Premier. The State Government had a strong interest in the development.

2. The case gave rise to some significant Court decisions concerning the Western Australian legislation and the Commonwealth Act. In addition to the matters mentioned above, the Federal Court considered the decision-making process the Minister was required to undertake before making a decision which would clearly have political implications. Particular issues were whether the Minister was entitled to consult Cabinet, and the extent of the obligation to make inquiries of the State (see Chapter 10).

3. The case involved differing views among Aboriginal groups. The Federal Court at first instance, Wilcox J, was of the view that it was not necessary for the purposes of the Act to determine who was the proper custodian (see Chapter 10).

Marandoo, Pilbara, 1992[13]

Application under s 9, February 1992

Application was made on behalf of the Karijini Aboriginal Corporation on 5 February 1992 for a declaration under s 9 to protect more than 100 Aboriginal sites from damage which would be caused by an iron ore mine due to be operated by Hamersley. The mining lease covered a large area (200 sq kms) which had been excised from the Karijini National Park. Conditions had been imposed on the mining company in relation to the protection of Aboriginal sites, but these were considered inadequate by the applicants. Damage was said to have occurred already within the mining area and in the access corridors.

Background: surveys in the 1970s

In the 1970s, surveys had been done of parts of the area and consent had been given under the State legislation to destroy Marandoo cave. Hamersley claimed that the site clearances which had been obtained in 1977 remained valid; they also claimed that they had consulted with elders of the Karijini. The applicants, on the other hand, claimed that the Aboriginal group which had been consulted by Hamersley were not recognised by the Karijini Aboriginal Corporation.

[13] This summary includes material from the *Western Australian Museum Annual Report 1991-1992*.

Further surveys in 1991

As a result of Aboriginal concerns about the project, the State Government asked for surveys of the temporary reserve and the access corridor to be carried out in 1991. The surveys reported four areas of significance to traditional owners. Two were under threat from the project; two others were excised from the mining lease and reincorporated in Karijini National Park.

Application to ACMC 1991 -1992

In November 1991 Hamersley and the WA Minister for Mines asked the ACMC for consent under s 18 of the State Act to use not only the land in the mining area (temporary reserve), but also new access corridors. The ACMC advised that the two areas mentioned as significant should be protected and that more survey work was needed to deal with the application. Under pressure from the Minister to reach a decision, ACMC sent out a survey team on 18 January 1992 to report to their meeting on 29 January. One hundred and five sites were documented.

ACMC recommended that consent should not be given to use the land; if consent were to be given, eight conditions should apply, and a full scale salvage programme carried out by an accredited archaeologist, funded by Hamersley. The Minister did not accept the recommendation, but gave consent to the project under s 18 (3), subject to the conditions specified by ACMC. These were to avoid a rock art site, to protect a burial site, to avoid a significant area and to move and record several sites.

Special legislation, the Aboriginal Heritage (Marandoo) Bill was passed on 7 February 1992 to give exemption to the mining project, and to ensure that no legal action could be taken under the Act to block the project.

Publicity concerning the applications to the Commonwealth

According to media reports, the Commonwealth Minister announced, after receiving the application for a declaration, that it would not significantly delay the $500 million project, and that the matter would be resolved quickly. The applicants are reported to have wanted the Karijini Aboriginal Heritage Council to have power delegated to act on matters of cultural heritage; they wanted recognition as traditional owners, not as custodians, and they wanted professional archaeologists to do the salvage work. They were critical of Hamersley Iron's employment record in respect of Aboriginal people

Outcome: application declined 14 February 1992

The application was declined on 14 February 1992 on the ground that the threat to the sites was anticipated, not immediate. It was Commonwealth policy to expedite large projects. Assurances were sought from the company that it would take appropriate action to protect identified sites.

Observations

1. This case is one of the few mining cases to come under the Act. Most WA applications relate to urban developments. The history of the matter suggests that the Act is not likely to be used in situations where a major multi-million project, strongly supported by State and Commonwealth Governments, is at stake. Government backing for a project of this kind appears to make it difficult for Aboriginal people to be heard. The WA legislation was expressly amended to exempt the project.

2. The mining interests considered that the intervention of a different group of Aboriginal people had disrupted their relationship with the local group with whom they had dealt before.

3. It has been suggested that while the salvage programme was carried out, little effort was made to protect the sites.

Helena Valley, Perth, 1993 - 1994

Application, ss 9, 10 and 18, April 1993

The application was made orally on 16 April 1993 under ss 9, 10 and 18 by Mr. Robert Bropho, Fringe Dwellers of the Swan Valley Inc and six others. The application related to a proposed housing development by Cedar Woods Ltd. in Helena Valley which affected an area said to be significant to Aboriginal people.

An authorised officer declined the s 18 application. No declaration was made under s 9 or s 10.

State action

The State had been protecting an extensive (registered) Aboriginal site along the Helena Valley with a 30m buffer zone. Acting under the Aboriginal Heritage Act 1972 (WA), the State Government had consented to the development subject to conditions recommended by the ACMC.

The applicants concerns related to the area adjacent to the registered site. A part of that area was located within the housing development. The State Government view was that the applicants had failed to put their concerns during the planning process. State legislation had limited scope to include adjacent areas - such as isolated trees - which the applicants regarded as being significant, where protection of these other areas had not been specifically sought by Aboriginal spokespersons during the assessment process. The applicant had not taken part in the consultations, partly on the ground that they did not wish to reveal cultural information to the State authorities.

s 10 reporter October 1993 - February 1994

Six months after the application was made under the Commonwealth Act, Mr Giff Jones was appointed on 15 October 1993 to prepare a report

Broome Crocodile Farm, Broome, 1993[16]

Summary

Sections 9 and 10 applications were made to protect a significant area of Crown land which was leased for use as a crocodile park extension. The State Government had consented to the development if an excision was made from the lease to accommodate the Aboriginal concerns in regard to the recognised site, which included an intitiates' track. The applicants, however, viewed the area as a cultural whole. Two s 9 declarations were made and a mediator/reporter was appointed. After attempts at mediation, a s 10 report was prepared. The Minister made a declaration under s 10 in 1994.

That declaration was overturned in early 1995 by the Federal Court - largely on grounds of absence of procedural fairness to parties other than the applicants. An appeal by the Minister was dismissed in May 1996. There were native title claims to the land which led to separate litigation.

Application, 1992 - 1993

The application was made by the Kimberley Land Council on behalf of the Yawuru people in Broome. Written representations were made in 1992. Section 9 and 10 applications were made in April 1993, and repeated on 31 January 1994.

The application concerned land which the Western Australian Government was intending to lease to Mr and Mrs Douglas for the purposes of a crocodile park. The applicants claimed that the proposed works constituted a threat of injury and desecration to a significant Aboriginal area, including an initiates' track and camping area.

State consent to development 1992

After Douglas applied for consent to the development under s 18 of the State Aboriginal Heritage Act a report was prepared by R. O'Connor in early 1992. In February-March 1992 the ACMC recommended, and the Minister gave consent to, the development of the crocodile park on condition that the Chairman of the Yawuru Aboriginal Corporation was in agreement. Unconditional consent was given in July 1992.

The area and its signficance

An anthropological report was prepared by David Mardiros in 1992 for the Kimberley Land Council. It stated that the camping and meeting grounds for the initiates continued to have cultural importance, that a track for initiates and novices passed through the area, and that the larger area had demonstrated associations with the practice of Aboriginal law. This report was the basis for the ACMC determining, in January 1993, that the area was a significant area within the meaning of the State Act, and for recommending that consent not be given under s 18 for use of the land. The State Minister gave consent in July 1993 subject to an excision from

[16] Sources include: The Hon FM Chaney, *The Particular Significance to Aboriginals of Land Near Broome to be leased for the purpose of a crocodile park; Report to the Minister for Aboriginal Affairs under s 10 (40 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 1994. *Douglas v Tickner* (Carr J, 7.2.95)

site and acknowledged that differing views could exist among Aboriginal people, even where there is a well-established traditional association with a site. The reporter concluded that the land is an area of significance to Aboriginal people and that it is under threat of injury or desecration. The reporter accepted the existence of a dreaming mythology in relation to the area and also the existence of current significance to the cultural and spiritual life of Aboriginal people in regard to the initiates track and the camping ground.[17]

On 6 April 1994 the Commonwealth Minister made a declaration under s 10 to protect the site.

Legal challenge to the declarations, 1994- 1996

Mr and Mrs Douglas and the State Government challenged the section 9 and 10 declarations in the Federal Court.

The Court set aside the Minister's decisions in February 1995 on the grounds, inter alia, that the Minister had not applied procedural fairness when making his decision of 3 February 1994.[18] The State had objected to the speed of the consultations which followed the 31 January 1994 application. Carr J took the view that the Minister"s consultations with the affected parties did not sufficiently bring to their attention new information on the significance of the area received by the Minister, or by the reporter, following the completion of the State procedures. The urgency of the situation was held to be outweighed by the duty to provide the adversely affected party with an opportunity to persuade the Minister that the site was not under 'serious and immediate threat'. The Court also held that, with few exceptions, material on each side should be disclosed to the other side.

The Full Bench of the Federal Court dismissed an appeal by the Minister in May 1996.

Observations

1. The reporter noted that there can be differing Aboriginal views on significance, even where there is a clear traditional association with a particular mythology (see Chapter 8).

2. In this and other cases the Federal Court laid down demanding requirements under the Act to promote procedural fairness. The effect of these and the timing strictures imposed on the reporter, who had barely six weeks to complete the report, are discussed more fully in Chapter 10, where it is concluded that their combined effect is impractical in many situations.

[17] pp 51 - 53.
[18] Carr J, 7 Feb. 1995

3. The reporter drew attention to the confidentiality of information relating to the men's initiation site, information which was restricted on gender grounds (see Chapter 4).

4. In regard to development in and around Broome, the Rubibi agreement, which involves co-operation and consultation between the local planning authority and the Aboriginal communities, may help to minimise further problems.[19]

[19] See Annex VIII, Western Australia, for more information.

SOUTH AUSTRALIA

Data

Applications have been made under the Act in respect of eight areas in South Australia:

Mount Barker, Adelaide Hills, 1984[20]	s 9
Roxby Downs, 1984	s 10
Horse Peninsula Fish Traps, 1989	s 9
Coorlay Lagoon, 1989	ss 9 and 10
Hindmarsh Island (Kumarangk), 1993	ss 9 and 10
Iron Princess, Whyalla, 1993[21]	ss 9 and 10
Moana Beach, Adelaide, 1993[22]	s 10
Finiss Springs, 1994	ss 9 and 10

The breakdown is:

s 9 application	2
s 10 application	2
ss 9 and 10	4

Areas and sites

Half the sites were rural or remote. The kinds of sites included burial sites, dreaming sites, mythical sites, men's sites and women's sites, springs, fish traps.

The studies

Coorlay Lagoon, central area of SA, 1989 - 1991
Hindmarsh Island (Kumarangk), 1993

Coorlay Lagoon, Central area of SA, 1989 - 1991

Sections 9 and 10 applications, May 1989

On 3 May 1989 oral application was made for declarations under ss 9 and 10 on behalf of an Elder of the Kokatha People's Committee, Port Augusta. A written application was made on 15 May.

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[20] See *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984: A review*, DAA, AGPS 1986, for fact sheet on Mount Barker, p 35.

[21] Chapter 9 has further information on the mediation process in this case.

[22] Chapter 9 has further information on the mediation process in this case; see also Hon JH Wootten AC QC, *Significant Aboriginal Sites in Area of Iron Princess Mine, Iron Knob, South Australia, Report to the Minister for Aboriginal Affairs under s 10 (4) of the ATSIHP Act 1984*, 1993.

The area

The Lagoon was said to be part of the Red Ochre Dreaming trail belonging to the Kokatha people. The applicant claimed that it was being desecrated by the removal of stones, the building of roads, the use of the lake for recreational purposes and by an exploratory drilling programme being carried out at the northern end by Western Mining Corporation. The applicant sought a 10 kilometre buffer zone around the Lagoon.

State action

The State's anthropologist had completed a report in 1987, recording archaeological sites on the margins of the lagoon and mythological sites on rocky outcrops on the bed of the lagoon. As a result of this study the area was recognised by the State as significant, involving ancestral dreaming tracks and travelling routes. The State Government at first thought that the area was exempt from its heritage legislation; this turned out not to be the case.

Competing claims

Western Mining had consulted with the Kuyani Association, which also claimed rights over the land. There were differences between the Aboriginal communities arising from overlapping boundaries.

Consultations 1989 - 1991

The Commonwealth Minister did not appoint a mediator or s 10 reporter after receiving the application. Officers visited the Lagoon and consulted with the applicants and with representatives of the State and Western Mining. The State agency agreed to continue with research and consultations on the area, particularly the Dreaming Track claimed to be significant by the Kokatha People's Committee.

Consultations took place on the measures which the State would take to protect Aboriginal areas within the mining lease. Some of the proposals put forward by the applicant were not accepted by the State, such as the provision of a vehicle for use in monitoring access to the site. The issue of protection remained unresolved for some time because of reluctance by the State and Western Mining to take positive steps before the question relating to custodianship was settled. By mid-1991 some protective measures had been put in place.

Application declined May 1991

The Minister declined the application on 6 May 1991, on the basis that Western Mining had agreed to co-operate with any measures taken by the State, including a restriction of its drilling program and limitations on access by its employees to the Lagoon.

Outcome

A submission to the Review has suggested that further damage continued to occur to the site after the withdrawal of the Commonwealth as a result of exploration, road construction and recreational activities.[23]

Observations

1. This matter was dealt with by the Commonwealth Minister in the absence of a s 10 report and without a formal mediation process. Under current rulings by the Federal Court, the Minister should, in most cases, commission a s 10 report before declining the application. Ultimately the matter was left to the State Government to deal with.

2. The applicants remained concerned that further damage continued to occur to the site during the period of consideration, and after the Commonwealth had withdrawn. The application did not result in any actual protection.

Hindmarsh Island (Kumarangk), 1993 [24]

Note: This case is continuing.

Summary

Applications were made under sections 9 and 10 by the Lower Murray Aboriginal Heritage Committee to protect sites on Hindmarsh Island (Kumarangk) from a threat posed by a proposed bridge between Goolwa and Hindmarsh Island. State planning processes recognised that there were occupation sites on the Island.

A study carried out for the State Government by an anthropologist during early 1994 identified new and sensitive cultural information. Further applications were made for s 9 declarations in April 1994.

The Minister made two successive s 9 declarations. Prof Cheryl Saunders was appointed to prepare a s 10 (4) report. Information about the spiritual importance of the site was revealed to her by Ngarrindjeri Aboriginal women. The Minister made a s 10 declaration in July 1994 to ban construction of the bridge for 25 years.

The Federal Court overturned the Minister's declaration in 1995 - partly on the basis that the Minister had not personally examined sensitive material provided to the reporter on behalf of the Aboriginal women, and partly for reasons of procedural fairness. The Full Bench of the Federal Court dismissed the Minister's appeal in December 1995.

New applications were made by the Aboriginal women. A second section 10 reporter was appointed and a new inquiry commenced. Completion of the s 10 report is postponed (June

[23] Neale Draper, Sub 59.

[24] See also Professor Cheryl Saunders AO, *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Significant Aboriginal Area in the vicinity of Goolwa and Hindmarsh (Kumarangk) Island, Pursuant to section 10 (4) of the Aboriginal and Torres Strait Islander Act 1984*, July 1994; decisions of the Federal Court: *Chapman v Tickner* (O'Loughlin J, 15.2.1995); *Tickner v Chapman and others* ,Full Court, Black CJ, Burchett and Kiefel JJ, 7 December 1995.

1996) pending the outcome of High Court proceedings relating to the appointment of the s 10 reporter.

There has been extensive litigation at State and Federal level. This summary makes its focus the action taken under the Commonwealth Act.

The first application: December 1993

Written application under sections 9 and 10 was made by the Aboriginal Legal Rights Movement Inc (ALRM) on behalf of the Lower Murray Aboriginal Heritage Committee (which includes Ngarrindjeri people) on 22 December 1993. The application had been preceded by community representations in October 1993.

The area and its significance

The applicants were concerned that approval had been given for the construction of the proposed Hindmarsh Island (Kumarangk) Bridge without adequate consultations, that the surveys of Aboriginal sites had been incomplete and that preliminary work for the bridge construction was affecting an Aboriginal burial site. They were concerned that the construction of the bridge and the increased use of Kumarangk would result in continuing damage to the sites.

The initial December 1993 application referred, in the main, to two major camp sites adjacent to the bridge approaches, and to sites on Hindmarsh Island (Kumarangk) as a whole which were said to be significant to Aboriginal people.

State action concerning the site

The State government had taken measures to mitigate damage to the areas mentioned during the stages of approving work on the construction of the bridge approaches. The general approach of the State was that the identified areas had already been severely modified by developments at Goolwa and that skeletal material, if discovered, could be salvaged.

In 1994 the State Aboriginal Heritage Branch carried out a further survey in conjunction with the Lower Murray Heritage committee. The resulting Draper Report of April 1994, revealed that there was some anthropological evidence of women's sites within the channel between Goolwa and Hindmarsh Island (Kumarangk).

Approval of the bridge

The South Australian Government had initially required the bridge to be built as a condition of its planning approval for a marina which was to be built on the Island by Binalong. The State Government later became contractually bound to construct the bridge itself. On 3 May 1994 the State Minister authorised the construction of the bridge in accordance with section 23 of the Aboriginal heritage Act 1988 (SA).

Declaration under s 9, May - June 1994

An application to the Commonwealth Minister for a declaration under s 9 was made on behalf of the applicants on 7 April 1994. The application claimed that significant Aboriginal areas were under serious and immediate threat. It referred to a significant Aboriginal area at Goolwa/Hindmarsh Island, including the area of the bridge alignment and the channel between. On 20 April ALRM wrote to the Minister to disclose information of a confidential nature concerning the cultural and spiritual significance to the Ngarrindjeri people of Hindmarsh Island, the Lakes and Coorong area.

The Commonwealth Minister made two successive s 9 declarations on 12 May and 9 June 1994.

The description of the area in the application and in the public notice became an issue in the later litigation, as did the fact that the concerns of the Aboriginal women were raised at a late stage after the development approval process was complete.

Section 10 report, May - July 1994

Professor Cheryl Saunders was appointed on 23 May 1994 to prepare a report in accordance with s 10 (4). She had discussions with interested parties and received over 400 representations about the matter. The report comments on the bitter divisions in the community in Goolwa and the surrounding area about the proposed bridge.

Material provided to the reporter, including sensitive information made available by the anthropologist who assisted the applicants, served to confirm the significance of the area. The reporter concluded, p 35, that it was open to the Minister to conclude that the area has particular significance for Aboriginal people. She relied in particular on the supreme spiritual and cultural significance of Hindmarsh and Mundoo Islands and the water surrounding them for the Ngarrindjeri people, within the knowledge of Ngarrindjeri women, which concerns the life force itself. The report of the anthropologist Dr Deane Fergie was attached as confidential Appendices to a representation of ALRM (acting for the applicants). This material was submitted with the report as requied by the Act. The reporter indicated that these confidential appendices should not be read by men, p 28.

The report was received by the Commonwealth Minister on 5 July 1994. The Minister made a s 10 declaration on 9 July 1994, the effect of which was to prevent the construction of the bridge for 25 years.

Federal Court overturns decision

The developers challenged the Minister's decision in the Federal Court. The Minister's decision was overturned by the Court in February 1995.[25] The Minister's appeal was dismissed by the Full Court in December 1995.[26]

The Full Court held that the public notice of the s 10 inquiry was defective in that it did not give the public the information about the purpose of the application that the Act requires. It did not adequately identify the area for which protection was sought and did not identify the apprehended injury or desecration sufficiently for the purposes of the Act. Another ground on which the Minister's decision was defective was that the Minister failed to consider personally all the representations made to the reporter, including the material in the envelopes which the reporter had indicated should not be read by men.

Further applications, February 1995

Following the Federal Court judgment of February 1995, which remitted the decision back to the Minister, further applications were made to the Minister for declarations under ss 9 and 10 on 15 February 1995. No action was taken in respecte of these applications until December when the Full Court upheld the judgment of February. A s 10 reporter was then appointed in December 1995. The outcome of this process is uncertain, due to pending legal challenges.

The bridge project was halted from the time of the initial s 9 declaration on 12 May 1994.

Observations

1. This case is one of a small group of cases which have led to Court decisions requiring particular procedures to be followed under s 10 of the Act. These are discussed in detail in Chapter 10.

2. In addition to the matters mentioned above there has been a Royal Commission in South Australia to inquire into whether there was a fabrication of the beliefs which were said to make the site significant. The Commissioner concluded that there was a fabrication of the whole of the 'women's business' and that the purpose of the fabrication was to obtain a declaration under s 10 to prevent the construction of the bridge.[27] In the context of that Commission, the South Australia Minister approved the giving of evidence in matters which should, in accordance with Aboriginal tradition, be regarded as confidential (see Chapter 6).

[25] *Chapman v Tickner and others* , O'Loughlin J, 15 February 1995, (1995) 55 FCR 316.
[26] *Tickner v Chapman and others* ,Full Court, Black CJ, Burchett and Kiefel JJ, 7 December 1995.
[27] *Report of the Hindmarsh Island Bridge Royal Commission*, December 1995, p 299.

3. There has been extensive litigation in respect of the matter. In addition to the matters mentioned, the Federal Court issued an injunction against protesters, and the developers have a pending claim for damages against the Minister and the s 10 reporter.

4. The time frame for obtaining the initial s 10 report was very short for a full scale inquiry into competing claims concerning significance (see Chapter 8).

5. The reporter commented on the lack of an anthropologist to assist her for the purposes of preparing the report, p 8. The need for such assistance was noted. (see Chapter 11)

6. The reporter commented on the fact that women had seldom been involved in the consultative process, p 32. This had been acknowledged by the State agency.

7. The case also shows up the lack of provision in the Act to deal with information which should be treated as confidential, or as limited to persons of one gender in accordance with Aboriginal tradition. Requiring this information to be disclosed as a condition of protection may discourage Aboriginal people from using the Act (see Chapters 4 and 8).

NORTHERN TERRITORY

Data

Applications have been made under the Act in respect of six areas in the Northern Territory:

Undemow Waterhole, Walhallow Station	1984	s 9
Kunjarra (Devil's Pebbles)	1989	s 10
Mount Samuel	1989	s 10
Coronation Hill, Alligator River[28]	1989	s 10
Junction Waterhole (Niltye/Tnyere-Akerte)Alice Springs	1991	ss 9 and 10
Crawford Ranges, Central Australia	1994	s 10

The breakdown is:

s 9 application	1
s 10 application	4
s 9 and s 10	1

Declarations under ss 9 and 10 were made in respect of Junction Waterhole (Niltye/Tnyere-Akerte). No other declarations have been made in respect of the Northern Territory.

Areas and sites

Most of these sites were in remote or rural settings. The kinds of sites included dreaming sites, mythical sites, men's sites and women's sites.

Junction Waterhole (Niltye/Tnyere-Akerte) Alice Springs, 1991 - 1992[29]

Applications, February 1991

A written application asking for declarations under ss 9 and 10 was made to the Minister on 1 February 1991, by the Central Land Council (CLC) on behalf of the Arrernte people to protect a significant site threatened by the proposed construction of a dam on the Todd River.

The applicant claimed that:

> Construction of the dam will mean the loss of a large number of red river gums considered sacred, the subsequent filling of the dam will lead to the permanent inundation of the site Tnyere-Akerte and the future operation of the dam will put at risk further sacred trees at the base of the dam wall.

[28] See Hon Justice DG Stewart, *Reort to the Minister for Aboriginal Affairs on the Kakadu Conservation Zone*, May 1991.

[29] See H. Wootten, *Significant Aboriginal Sites in Area of Proposed Junction Waterhole Dam, Alice Springs, Report to the Minister for Aboriginal Affairs under s 10(4)*, May 1992.

The area and its significance

The significance of the areas which would be affected by the proposed dam was recognised under the Territory's own legislation. The s 10 reporter described it as follows (para 7.1.3):

> The whole area derives a continuous importance from the passage through it of two dreaming tracks which converge and interact in this area. One is of great importance to women, involving the story of the Two Women (Arrweketye Atherre) whose journey starts far to the south west in Pitjantjatjara country. The other is of special significance to men and involves the journey of a group of Uncircumcised Boys (Kwekatye) from the area of Port Augusta through to the northern coast of Australia.

Proposals for the construction of a dam had been under discussion for several years, and alternative proposals had been put forward at different times by the Northern Territory Power and Water Authority (PAWA). The Northern Territory Aboriginal Areas Protection Authority (AAPA) had, in 1989, given a certificate to construct a flood mitigation dam in the area on the condition that the site not be permanently flooded. However, the matter remained controversial. Although Aboriginal custodians had been consulted, the applicant claimed that they had been misled during the initial consultations concerning the threat of damage, and that they had been led to believe that the proposed dam would not be a permanent feature.

Considerable documentary material had been prepared about the site by a number of anthropologists containing confidential and sensitive information. Many representations were made by Central Australian Aboriginal people direct to the Minister, largely in support of the need for a declaration.

Declaration under s 9 March 1991

Negotiations and discussions about the dam continued after the original application was made. The custodians discovered in early March 1991 that earthmoving work had begun at the site. That information was passed to the Commonwealth Minister. After attempts to get agreement by the Northern Territory Government to halt work, the Minister made a declaration under s 9 on 16 March 1991 to prevent further work for 30 days. Two mediators were appointed during mid-1991, Ms Joan Domicelj and Mr Bob Ware. They were unable to resolve the matter.

Action by the Territory Government

The Northern Territory Government redesigned the dam project and PAWA made a fresh application to the AAPA, which formally refused an authority certificate on 3 October 1991. However, the NT Minister effectively overruled the AAPA and issued a certificate authorising the work on 3 April 1992. Consultations at government level continued throughout the whole period the matter was under consideration. There were on-site meetings by Ministers.

Further application and s 9 declarations March 1992

A further application under s 10 was made to the Commonwealth Minister on 11 November 1991. The Minister made successive s 9 declarations on 19 March 1992 and 15 April 1992. A s 10 reporter, the Hon Hal Wootten was formally appointed on 8 April 1992.

Section 10 report April 1992

Many representations were made from differing points of view, some concerning the need for the dam as flood mitigation, and some stressing the conservation of the site and its significance to Aboriginal people. The Territory Government provided a substantial submission. The s 10 report was presented to the Minister on 30 April 1992.

The report gave details of the long history of the matter, and of the two sites which would be affected, including the women's site. It stressed the importance of consulting all appropriate Aboriginal groups, including women custodians as well as men, and of ensuring that they are fully informed about the proposals and their effect. In the present case the consultation process carried out by the NT Government was said to have been divisive and incomplete. The report mentioned that at one stage the AAPA and the CLC were excluded from the negotiation process (para 5.9.2). The politicisation of the issues concerning the dam itself and its purpose (ie was it for flood mitigation, or for leisure activities) had overshadowed questions relating to the Aboriginal sites and the interests of the two groups affected. The issue of significance, according to the report, was whether the sites were important to Aboriginal people in terms of the norms and values of their traditional culture and beliefs. The Northern Territory law recognised this significance but did not give effective protection.

s 10 declaration May 1992

The Minister made a declaration on 15 May 1992 to halt construction activity in the area of the proposed dam for twenty years. The Northern Territory Government sought, unsuccessfully, to gain compensation from the Commonwealth. No litigation followed the declaration.

Observations

1. This is the only area in Australia protected by a declaration under the Act.

2. The history of the matter illustrates the importance and the problems of consultation with Aboriginal people, and the difficulties which arise for Aboriginal people when they have to reveal confidential information in order to gain the protection of the Act.

TASMANIA

Data

Applications have been made under the Act in respect of two areas in Tasmania: Oyster Cove, Hobart, 1985 (cemetery of historic and spiritual significance), ss 9 and 10, and Maxwell River Cave, South-West Tasmania, 1986 (a rock art site), s 10. No declarations have been made in respect of areas.

VICTORIA

Data

One application has been made, for a s 9 declaration in respect of Hattah Lakes, Kulkyne National Park, Robinvale, 1984.[30] Since 1987, applications for protection of Aboriginal areas in Victoria have to be made under Part IIA of the Act; the powers of the Commonwealth Minister under Part IIA are delegated to the Victorian Minister Responsible for Aboriginal Affairs.

[30] See *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984: A review*, DAA, AGPS 1986, for fact sheet, p 32.

PART B
ABORIGINAL OBJECTS: OVERVIEW OF DATA

Applications in respect of objects

Applications have been made in respect of eleven objects or groups of objects. The cases and their outcomes are as follows:

Case	State	Year	s18 declaration	mediator	s 12 declaration
Aboriginal Remains	Tas	1984			
Sotheby's Auction No 1	NSW	1986	x		x
Aboriginal Remains, Tasman Peninsula	Tas	1986			
Pickles Auction No 1	NSW	1986			
Pickles Auction No 2	NSW	1986			x
Murray Black Collection	Vic	1987			
Lawson's Auction	NSW	1987			
Leyland Bros. Roadhouse	NSW	1991			
Strehlow Collection (4 applications in all)	SA	1992		x	x
Cast of Truganini Death Mask	Tas	1993		x	
Sotheby's Auction No 2	NSW	1995			

OBJECTS: CASE SUMMARIES

Summaries of the following cases can be found in Chapter 12:

Pickles Auction No 2, 1986
Murray Black Collection, 1987
Strehlow Collection, 1992

Pickles Auction No 1, 1986

This application was refused.

Lawson's Auction, Port Macquarie, 1987

An application was made under s 12 concerning the proposed auction of objects. It was believed that the exhibition of the objects, contrary to

tradition, could cause danger.[31] The application was declined. The objects were withdrawn from auction. A private sale took place.

Leyland Brothers Roadhouse, Newcastle 1991

An application was made in respect of a planned auction of sacred objects. The application was declined, the objects were withdrawn from the auction and later disposed of. They were not returned to the traditional owners.

Cast of Truganini Death Mask, 1993

An application was made under s 12 in respect of the proposed sale of one of several plaster copies of the death mask. A mediator was appointed under s 13. No declaration was made, and the matter is unresolved.

Sotheby's Auction No 2, Sydney 1995

Objects from Victoria, which could not be sold under Victorian law, were transferred by Sotheby's to NSW. An application under s 12 was declined. The Commonwealth and State governments provided funds to purchase the objects for return to Aboriginal communities.

Sotheby's Auction No 1, Sydney 1985

Application, 19 June

An application was made by the Central Land Council and the NSW Aboriginal Land Council on 19 June 1986 under ss 18 and 12, to prevent the public auction of certain Aboriginal objects. The applicants claimed that the public display and auction of the objects, which belonged within Aboriginal tradition to a class of sacred/secret objects, constituted injury or desecration.

Inspection and advice at short notice

Arrangements were made at short notice for the senior anthropologist/curator at the Australian Museum to inspect all objects which were to be auctioned, and to identify and advise on their significance and the question of desecration.

S 18 declaration 20 June

An authorised officer made a declaration under s 18 covering 76 lots in the catalogue. It was served on the auctioneer about two hours before the auction, on 20 June. The 76 lots were withdrawn from the auction.

S 12 declaration 21 June

A s 12 declaration was made on 21 June 1986. The Minister did not consult the State Government as in New South Wales there is no power to prevent the auction of significant Aboriginal objects.

[31] As to the effects of the use and display of Aboriginal objects see Chapter 12.

Private sale

Private negotiations were entered into by the NSW Aboriginal Land Council with the auctioneer, and a private sale was effected on 29 July. The Land Council arranged for the disposal of the objects to a number of other land councils, particularly in the Northern Territory. Funding for the acquisition came from the State Government, through its financial support for the NSW Aboriginal Land Council under State legislation.

Strong representations followed, opposing Commonwealth intervention in the right to sell Aboriginal objects.

Observations

This case demonstrates the need for emergency powers as under s 18. It also points to a gap in the legal protection of Aboriginal objects under NSW law and to the need for uniform legislation on the sale and display of Aboriginal objects. (see Chapter 12)

Aboriginal Remains, Tasman Peninsula, 1986

Application

The Tasmanian Aboriginal Centre made a written application to the Commonwealth Minister on 15 April 1986 under s 12 to protect Aboriginal remains from desecration by being subjected to scientific examination.

Grounds for the application

In February 1986 a human maxilla of prehistoric Aboriginal origin had been uncovered on the Tasman Peninsula. The State Minister had made a public statement that it would be retained and examined by a physical anthropologist. It was claimed by the applicant that action taken by the National Parks and Wildlife Service, which had responsibility under State legislation for Aboriginal 'relics', was creating a threat to the objects. (Such relics were, under the Tasmanian legislation, the property of the Crown.)

State action

The State processes involved consultations with an Aboriginal Relics Advisory Council, which included Aboriginal members. In August 1986 the Council met and recommended to the Minister that the human remains be returned to representatives of the local Aboriginal community.

The State Government in response to consultations by the Commonwealth Minister indicated that it would be developing, in consultation with the Aboriginal community, a policy on the disposal of Aboriginal human remains. It also stated that no physical examination would be undertaken because of the low scientific value of the remains.

Application declined, 23 September

The Commonwealth Minister declined the application on 23 September 1986 on the basis that the threat had been removed.

Observations

The State response indicated some shift away from the long-standing approach of retaining Aboriginal human remains - primarily for scientific purposes - and toward considering positively the issue of return to the Aboriginal community.

STATE AND TERRITORY LAWS

ON ABORIGINAL CULTURAL HERITAGE

INTRODUCTION

The following summary of State and Territory laws has been prepared as part of the background research for the Review. It includes the main legislative provisions dealing with Aboriginal cultural heritage and information about practice, where that is available. It has not been possible to undertake a comprehensive critical analysis of the relevant laws within the framework of the Review. Consultations suggest that there is considerable discontent with some of the laws. Chapters 2 and 5 discuss these issues further.

A study limited to the relevant legislative provisions, while revealing something about the basic approach of a particular State or Territory to the question of protection of heritage, could be misleading if considered without regard to the practice prevailing in the relevant administration. In some cases provisions which appear to give considerable recognition to Aboriginal heritage issues are not fully implemented due to lack of resources or because Ministerial powers are used in a particular way. In other cases, an unpromising legal framework has been adapted in practice to ensure a certain level of involvement by Aboriginal people in the protection of their heritage. Wherever possible, attention is paid to the practice, the way in which decisions are made, and the resources that are available for research and consultation.

Order of treatment

PART A

NORTHERN TERRITORY[1]

BACKGROUND AND OBJECTIVES OF LEGISLATION

The Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth) lays down the governing principles for Northern Territory legislation on Aboriginal cultural heritage. Those principles are based on recognition of the spiritual affiliation of Aboriginal people to certain sites. For example, the Land Rights Act itself provides for the protection of sacred sites, that is sites of spiritual importance to Aboriginal people, regardless of whether those sites are on land which is held under Aboriginal title or could be claimed as such, s 69. That Act also defines traditional Aboriginal owners of land in terms of their spiritual affiliations to a site on the land.

The Land Rights Act provides for the Legislative Assembly of the Northern Territory to make laws relating to the protection of sacred sites in the Northern Territory, s 73 (1). Those laws must provide for access by Aboriginal people to such sites and must ensure that the wishes of Aboriginal people concerning the extent of protection of sacred sites is taken into account.

The first specific legislation was the *Aboriginal Sacred Sites Ordinance 1978*, which was replaced by the *Aboriginal Sacred Sites Act* (No.2) *1978* . That Act was repealed and replaced by the *Northern Territory Aboriginal Sacred Sites Act 1989*. The Act is directed to the reconciling of Aboriginal interests in sacred sites and their protection with the interests of development. As stated in the Act, its purposes are:

> to effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement, by establishing a procedure for the protection and registration of sacred sites, providing for entry onto sacred sites and the conditions to which such entry is subject, establishing a procedure for the avoidance of sacred sites in the development and use of land and establishing an Authority for the purposes of the Act and a procedure for the review of decisions of the Authority by the Minister, and for related purposes.

The Act is administered by the Aboriginal Areas Protection Authority (AAPA) which has a predominantly Aboriginal membership (see below).

WHAT IS PROTECTED: DEFINING SACRED SITES

The definition of sacred site in the *Northern Territory Aboriginal Sacred Sites Act 1989* makes it clear that it is the significance of a site *to Aboriginal people themselves* which is the determining factor. In effect, it adopts the definition of sacred sites in the Land Rights Act, s 3:

> a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.

Aboriginal tradition is defined in the Land Rights Act, s 3, as

[1] The Review acknowledges the assistance of the Chief Executive Officer of the AAPA in making suggestions about this summary.

> the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.

IDENTIFYING, ASSESSING AND REGISTERING SITES; ROLE OF THE AAPA

The role and functions of the AAPA

The Northern Territory Sacred Sites Act 1989 establishes the Aboriginal Areas Protection Authority. The Authority is constituted by five male and five female Aboriginal custodians of sites in the Northern Territory together with two other government appointees, s 6. The Aboriginal members are nominated by the Land Councils, which play an important role in the protection of sacred sites and in making the legislation effective.[2] The Chair and Deputy Chair of the Authority must be Aboriginal people nominated by the Authority, and must be of opposite sexes.

The AAPA has regulatory and advisory functions, including powers to determine the location and extent of sacred sites and the identity of their custodians. The focus of its work is the protection of sacred sites. It does not give authority certificates that would result in damage or desecration of a site contrary to the wishes of the traditional custodians of sites.

> Its functions are part of the scheme of site avoidance and protection embodied in the Act and do not extend to adjudicating between these values and others which may from time to time conflict with the preservation of sacred sites.[3]

The AAPA employs its own staff. It is, in most of its major functions, independent of Ministerial control, s 5(5).[4] It is informed through its own contacts with Aboriginal people and through its own resources which include several anthropologists. The Authority has connections to traditional custodians and elders through the Land Councils, though it remains independent of these bodies. It is also independent of developers in that it commissions its own expert reports.[5]

The Chief Executive Officer and the Staff of the Authority execute the functions and policy of the Authority and manage the day to day operations. These include consultations with custodians of sites for Site Registration (s 27), applications for Authority certificates (s 20-22) and the exercise of other powers involved in site protection, s 42. The Authority has offices in Darwin and in Alice Springs.

Site registration

One of the functions of the AAPA is to establish and maintain the Register of Sacred Sites, s 10 (d). A custodian of a sacred site may apply to the Authority for the site to be registered, s 27 (1). The procedure for registration of a site includes consultation with the Aboriginal custodian of the site, notice to the owners of the land and consideration of any representations made by the owner. The owner can ask for a meeting with the Aboriginal custodians to discuss the issues, ss 27-29. The Authority must make findings about any detrimental effect of the existence of a sacred site on the owner's proprietary interest in the land. If, after evaluating the material, the Authority is satisfied that the site is a sacred site, its findings are placed in the Register.

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[2] Land Councils are established under the Aboriginal Land Rights (NT) Act 1976. Their functions include assisting Aboriginals in taking measures to assist in the protection of sacred sites on land (whether or not Aboriginal land) in the area of the Land Council, s 23 (1).

[3] Aboriginal Areas Protection Authority (NT) Submission 49, p 20.

[4] AAPA, sub 49, p 21.

[5] Ministerial Council on Aboriginal and Torres Strait Islander Affairs, Working Party Report on Item 4.1, *Aboriginal Heritage: Interaction between States, Territories and Commonwealth*, 1995, p 71

Registration has the effect of increasing the level of protection of the site, not least because the owner of the land must be informed of the process.

The Register is available for public inspection except to the extent that such availability would disclose sensitive commercial information or matters required by Aboriginal tradition to be kept secret, s 10 (g).

Aboriginal custodians may decide whether the benefits of increased protection afforded to sites entered on the Register of Sacred Sites outweighs any detriment in having certain information about these sites available on the public Register established under s10 (d). The Authority also keeps records of sacred sites that have been brought to the attention of the Authority by custodians. These records are separate from the Register and details of these records are not available to the public unless specifically authorised by the Aboriginal custodians concerned. In the majority of cases, this information has been provided to the Authority by custodians as the basis (and justification) for conditions on proposed works or use of land imposed by Authority Certificates (s.22).

In round figures, the Authority has entered 1,100 sites in the Register and has records of a further 7,000 sacred sites. Approximately 5,000 sacred sites are located on land where the underlying title is not held by Aboriginal interests.

Sacred sites that have been brought to official attention as a consequence of the operation of the Sacred Sites Act are recorded by the Northern Territory Registrar General's Office as an 'administrative interest' on Land Titles. Persons conducting title searches are thereby informed of the existence of any sacred sites located within a particular parcel of land and advised to contact the Aboriginal Areas Protection Authority for further information.
'The central principle underpinning the process of registration is that the process may only be initiated by Aboriginal custodians themselves. Notwithstanding the fact that registration requires that information about a sacred site be placed on a public Register, demand to have sites registered has been consistently strong with the result that there is a backlog of such applications before the Authority at any one time. The Authority prioritises work on this backlog by concentrating on sites that are located on land where the underlying Title is not held by Aboriginal people and / or where there are grounds for believing the site may be under threat.[6]

PROTECTION THROUGH CRIMINAL SANCTIONS

The NTASS Act 1989 creates a number of offences, the effect of which is to give blanket protection to sacred sites. It is an offence to enter or remain on a sacred site or to carry out work on a sacred site without authority, ss 33, 34.[7] It is also an offence to desecrate a sacred site 35. Penalties can be up to $40,000 in the case of corporate offenders.

A defence is available where it is proved that the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site, s 36. This defence is restricted in respect of sites which are on Aboriginal land (eg inalienable freehold administered by Land Councils), s 36. *Registration* is prima facie evidence that an area is a sacred site, s 45.

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6 Discussions, AAPA.

7 The Land Rights Act makes it an offence to enter and remain on land that is a sacred site, s 69 (1).

The *Crown* is bound by the Act, s 4. The AAPA is has the exclusive function of bringing prosecutions under the Act, s 39.

There have been seven successful prosecutions under the Act, three for illegal entry under s 33, three for carrying out works contrary to s 34, one for desecrating a grave site, s 35, and one for contravention of site avoidance conditions.[8]

The rights of owners

Section 44 of the Act preserves the proprietary rights of land owners to:

> enter and remain on that land and do anything thereon for the normal enjoyment of the owner's proprietary interest in the land, s 44(1)

This provision does not exempt landowners from responsibility for action which may desecrate or damage a sacred site. It was interpreted in the *Tapp* case to impose restrictions on landowners carrying out new work which may damage or further damage a site without applying for an Authority Certificate.[9]

> It seems probable that section 44 means that landowners may continue their normal use of land even if it is a sacred site but may not use the land in other ways which would further affect the site adversely.

CONFIDENTIAL INFORMATION

Secret information is protected from disclosure by the Authority or by persons involved in procedures under the Act. The Authority retains control of all material gathered in its inquiries, ss 10 (g), 38, 48. The Register of Sacred Sites does not include information that is required to be kept secret.

As a result of a case brought by the Authority over the disclosure of information required by Aboriginal tradition to be kept secret in the Waramunggu Land Claim, the Federal Court rules that such information held by the Authority is protected by a public interest immunity.[10]

MANAGEMENT AND ACCESS ISSUES

The Act preserves the right of Aboriginal persons to have access to sacred sites in accordance with Aboriginal tradition and to have entry pursuant to such access, s 46.[11] The Act makes it an offence to obstruct access by traditional Aboriginals to a sacred site, s 47(4). Section 47 enables a person, with appropriate permission, and on giving reasonable notice to the owner to cross any land to get to a sacred site, for traditional purposes or other purposes under the Act, the Land Rights Act or the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. The AAPA can grant permission to enter and to remain on a sacred site or to access other land for the purposes of the Act, ss 43, 47.

Ritchie has described the rights as follows:[12]

> Under the laws in force in the Northern Territory Aboriginal custodians have statutory rights which amount to a significant legally recognised interest in areas which fall within the definition of a 'sacred site' as discussed above. Those rights include the right of access to such sacred sites in accordance with Aboriginal tradition, regardless of the underlying land tenure (s46). Custodians also have the right to authorise other people (both Aboriginal and non-Aboriginal) to cross any land whether it be public or private land for the purposes of entering a sacred site. These rights of custodians are reinforced by a provision that makes it an offence to obstruct an Aboriginal

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[8] Comments from AAPA Exec Director, 10 May 1996. One conviction was under sections 33 and 34.

[9] *Police v Ben Tapp*, McGregor SM, 23.9.94, unreported, transcript p 151. AAPA sub 49, p 22.

[10] *Aboriginal Sacred Sites Protection Minister - v - Maurice* [1986] Vol 65 Australian Law Reports, p.247.

[11] See Aboriginal Land Rights (Northern Territory) Act 1976 s 73.1. NT legislation must be taken to provide for the right of Aborigines to have access to sacred sites in accordance with Aboriginal tradition and take into account the wishes of Aboriginal people in regard to protection.

[12] Ministerial Council on Aboriginal and Torres Strait Islander Affairs, Working Party Report on Item 4.1, *Aboriginal Heritage: Interaction between States, Territories and Commonwealth*, 1995, p 70.

custodian from exercising these rights (s 47(4)). Custodians also have the power to refuse permission for persons to enter or remain on a sacred site (s 43) and custodians may also determine the nature and extent of works (if any) that may be undertake on or in the vicinity of a sacred site (s 20).
This bundle of rights amounts to a caveatable interest and the existence of registered sacred sites are recorded in the Northern Territory Land Title Register.

COMPETING LAND USE: THE PLANNING PROCESS

Background

Development work cannot be carried out on a sacred site without an Authority Certificate. An objective of the legislation is to establish a procedure for the avoidance of sacred sites in the development and use of land. The existence and recognition of a sacred site does not necessarily preclude other land use. It has been observed that custodians' attitude to works continuing within sacred sites vary from case to case.

> In many cases this will not conflict with the needs of Aboriginal custodians even if some elements of a site have been damaged in the past.[13]

It is not mandatory to seek an Authority Certificate before carrying out works or using land in the Northern Territory. There are a number of reasons for this: Relatively minor works may damage or interfere with sacred sites. This means that in order for such a provision to be effective, Authority Certificates would need to be mandatory for comparatively minor projects. As it is essential that Aboriginal custodians be consulted before certificates are issued, this requirement would necessitate that they be involved in numerous applications for relatively minor works. Such a burden would not be acceptable.[14]

Although an Authority Certificate is not mandatory, the risks associated with proceeding without a Certificate in place are high. The prosecution of a mining company that had failed to follow the processes of the Act, and as a result had damaged a site reinforces this point. [15] As a matter of Government policy, all capital works undertaken by Northern Territory Government agencies may only proceed once an Authority Certificate is in place.

Mining and exploration licences contain a warning that the licence is "not an authorisation to enter, carry out work on, or use a sacred site as defined in the *NT. Aboriginal Sacred Sites Act*" and that such approvals may only be obtained from the Aboriginal Areas Protection Authority.

Application for Authority

A person proposing to carry out work on land where that work may pose a threat to a sacred site can apply for an authority certificate. The functions of the AAPA, set out in s 10 include:

> (a) to facilitate discussions between custodians of sacred sites and persons performing or proposing to perform work or use land comprised in or in the vicinity of a sacred site, with a view to their agreeing on an appropriate means of sites avoidance and protection of sacred sites.

In evaluating applications for an Authority Certificate, the AAPA is to consult the custodians of sacred sites on or in the vicinity of the land. The applicant can seek a conference with the custodians. s 20. Time limits are established for these procedures.

The Authority shall issue an Authority Certificate under s 22 where it is satisfied that

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13 AAPA sub 49, p 23.

14 Comments from AAPA Exec Director, 10 May 1996, referring to Bruce Rose "Land Management Issues: Attitudes and perceptions amongst Aboriginal people of Central Australia, CLC, Jan 1995.

15 In 1994, Cambridge Gulf Exploration was convicted of carrying out works on a sacred site; Comments from AAPA Exec Director, 10 May 1996.

(a) the work or use of land could proceed or be made without there being substantive risk of damage to or interference with a sacred site on or in the vicinity of the land; or
(b) an agreement has been reached between the custodians and the applicant.

Review by the Minister

Persons aggrieved by a decision of the AAPA to refuse an Authority Certificate to carry out work may apply to the Minister to review the decision, s 30. The Minister may ask the Authority to review the matter and report.[16] The Minister can issue a certificate, and in effect withdraw protection, only after receiving the report and recommendations from the Authority and considering them; the Minister may also have discussions with interested persons, s 30, 31.

At the end of the review process the Minister can uphold the decision of the Authority or issue the applicant for review with a Certificate to carry out work on a sacred site, with or without conditions, s 32. The Minister must give reasons for decision, s 32 (3). His decision and reasons are to be tabled in the Legislative Assembly. The Minister must, in exercising these functions, take into account the wishes of Aboriginal people as to the extent of protection of the sacred site, s 42.

The Minister's powers do not extend to authorising the desecration of a sacred site.

> The ability of the Minister to issue a Certificate pursuant to s 27 (sic) has the appearance that works could be authorised such as destroy or otherwise desecrate a sacred site. This is doubtful given the Crown (Northern Territory) is bound by its own Act and desecration is an offence.[17]

Legal limitations also flow from the operation of the Land Rights Act:

> Section 73(1)(a) of the *Land Rights Act* authorises the Northern Territory Legislative Assembly to make laws for the 'protection of, *and the prevention of the desecration* of sacred sites . . .' (emphasis added). 'Desecration' in ordinary English means to 'deprive of sacred character, outrage, profane.' Thus arguable, anything which outrages Aboriginal religious beliefs (such as work authorised under a Ministerial certificate contrary to the wishes of custodians) or deprives the area of sacred character (which would depend upon the terms of the relevant Aboriginal tradition) would be desecration and would therefore be forbidden by s 73 (1)(a).[18]

ENCOURAGING AGREEMENTS

An important objective of the Act is to secure agreement between custodians and developers. One of the functions of the AAPA is

> 10 (a): to facilitate discussions between custodians of sacred sites and persons performing or proposing to perform work on or use land comprised in or in the vicinity of a sacred site, with a view to their agreeing on an appropriate means of sites avoidance and protection of sacred sites.

This function is carried out within the process of dealing with applications for Authority Certificates, s 20.

MOVABLE CULTURAL PROPERTY, OBJECTS, REMAINS

Movable cultural property on a sacred site is protected by the NTSSA 1989. Outside sacred sites, the relevant legislation is the Heritage Conservation Act 1991.

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16 In practice, there have been two reviews requested by the Minister in the last seven years. AAPA, sub 49, p 22.

17 Submission to the Resource Assessment Commission Kakadu Inquiry, by Mr B Coulter, Northern Territory Government, No. KA90/074, Appendix G "Aboriginal Interests in the Conservation Zone", p 7, para 3.6, August 1990.

18 James Renwick, article in Darwin Community Legal Service Law Handbook, 1992, p 7. (Information provided by AAPA).

The Heritage Conservation Act 1991

This Act provides for the protection of places and objects of prehistoric, protohistoric, social aesthetic or scientific value. Aboriginal sacred sites and movable property located on those sites are excluded from the Act. Subject to that, the Act covers Aboriginal portable objects, including secret and ceremonial objects, log or bark coffins, human remains, portable rock or wood carvings or engravings or stone tools. It is an offence to desecrate or damage such objects without approval.

Under s 29 (2) of the Act The Minister must consult the AAPA before taking any action in regard to sacred Aboriginal archaeological objects. The AAPA must consult with traditional owners.

Human Remains

The Minister has appointed the Chief Executive Officer of the Authority as his delegate to perform the functions and exercise the powers conferred by s 29 of the *Heritage Conservation Act 1991* . The Chief Executive Officer must be notified of the discovery of an Aboriginal burial site or skeletal remains, and has power to make decisions about appropriate protection of an Aboriginal burial site. Delegations under the *Heritage Conservation Act* and under the *Conservation Commission Act* formalise arrangements developed with the Police and simplify requirements attached to Authority Certificates that developers inform the Authority if they discover skeletal material when excavating or carrying out works.

Some skeletal remains are held by the AAPA pending discussions which may reveal their source and the relevant Aboriginal people to take possession of them. Identifiable remains are returned to the relevant Aboriginal community which is prepared to take custody of them for the purpose of appropriate interment. Consultations for this purpose involve the Land Councils and the AAPA.[19]

INTERACTION ISSUES

In consultations with the Minister and other government representatives, concern was expressed about the lack of adequate consultation by the Federal Minister when applications under ATSIHPA were being considered. A political clash was inevitable when the Federal Government took a different view of the public interest from that which had been taken by the Northern Territory Government in approving a project.

CASES UNDER THE FEDERAL ACT

See Appendix VII, for a discussion of cases from the Northern Territory which have arisen under the ATSIHPAct 1984

[19] Ritchie, Ministerial Council on Aboriginal and Torres Strait Islander Affairs, Working Party Report on Item 4.1, *Aboriginal Heritage: Interaction between States, Territories and Commonwealth*, 1995, p 73.

SOUTH AUSTRALIA[20]

BACKGROUND AND GENERAL OBJECTIVES OF STATE LAW

The principal legislation in South Australia is the *Aboriginal Heritage Act 1988* ('the Act').[21] The objective of *the Act* is to provide for the protection and preservation of Aboriginal heritage. The legislation is now under review. A Bill will be introduced into Parliament in late 1996 to reform the current Act.[22]

Under *the Act*, criminal sanctions provide "blanket protection" to broadly defined classes of Aboriginal heritage which include sites, objects and remains. The existence of sanctions makes it necessary to seek Ministerial authority to proceed with development proposals which may threaten a site or other heritage and thus lead to a violation of the law.

Powers under *the Act* are vested in the Minister who has general responsibility to take such measures as are practicable for the protection and preservation of Aboriginal sites, objects and remains, s 5(1)(a). The Minister must, in carrying out these and other functions under *the Act*, consider any relevant recommendations of the Aboriginal Heritage Committee, s 5(2) (see below), but is not bound to do so. The Minister may delegate certain powers to traditional owners, s 6(2), but it is not clear how this power is used.

The Department of State Aboriginal Affairs administers the Act. The resources of the Department allocated to Aboriginal heritage include one archaeologist and about four other officers. It appears that the number of staff has been reduced over the last few years.[23]

The Act recognises the role of Aboriginal people and, in particular, the role of traditional owners in the identification and protection of their cultural heritage.[24] The Act has been held to be a special measure within the meaning of the Convention on the Elimination of All Forms of Racial Discrimination:[25]

> the Act and s 35 are directed towards the preservation of Aboriginal heritage and, by that means, the preservation of the distinctive Aboriginal culture....{this} is a measure which ensures to such indigenous people equal enjoyment or exercise of human rights and fundamental freedoms.

WHAT IS PROTECTED

The Act protects Aboriginal sites, Aboriginal objects and Aboriginal remains, s 3.

Aboriginal sites and *Aboriginal objects* are those

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[20] The Department of State Aboriginal Affairs was invited to comment on the draft. No editorial suggestions were made. The Minister's submission to the Review observed that a review of State legislation went beyond the terms of reference.

[21] The Act replaced earlier, relics-based law. It was amended in 1993.

[22] SAG, sub 65.

[23] The Evaluation Report indicates that 11 staff were employed in 1984-1985.

[24] Eg, under s 13(2) the Minister must accept the views of traditional owners on the question whether land or an object is of significance according to Aboriginal tradition. It is uncertain how these provisions operate in practice.

[25] *The Aboriginal Legal Rights Movement Inc v The State of South Australia and Iris Eliza Stevens* (No 2) 16 August 1995, Full Court of the Supreme Court, per Doyle CJ.

that are of significance according to Aboriginal tradition, or that are of significance to Aboriginal archaeology, anthropology or history.[26]

"*Aboriginal remains*" means the whole or part of the skeletal remains of an Aboriginal person but does not include remains that have been buried in accordance with the law of the State.

"*Aboriginal tradition*" is defined in s 3 as:

> 'traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation *and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation.*

This is one of the broadest definitions of Aboriginal cultural heritage in any of the state and territory laws. Only South Australia and the ACT expressly recognise that Aboriginal traditions may change over time.

PROTECTION THROUGH CRIMINAL SANCTIONS

Sites, objects and remains defined by *the Act* are protected by criminal sanctions. It is an offence to excavate land to uncover a site, object or remains, or to cause damage to sites or objects without the authority of the Minister, ss 21, 23. Other provisions prohibit the disclosure of confidential information (see below).

It is an offence for an owner or occupier of land (not traditional owners) to fail to report the discovery of an Aboriginal site or object or remains to the Minister, s 20. There is, however, no obligation on any other person, such as tourists, hikers or archaeologists, to do so.[27]

The Minister may give directions to prohibit or restrict access to a site, object or remains or the surrounding area. s 24. Before giving directions notice must be given to the owner, the Committee, Aboriginal organisations and other interested parties, s 24. Failure to comply with the Minister's directions is an offence, s 26.

Prosecutions may only be initiated by a person authorised by the Minister (or, in relation to certain Aboriginal lands, by or with the approval of the traditional owners or those in whom that land is vested), s 45 (1). Traditional owners may require the Minister to authorise a person to commence a prosecution and the Minister must give 'proper consideration' to such a request, s 45 (3).

A site or object will be conclusively presumed to be an Aboriginal site or object if it is entered in the Register, s 11. If registration has been refused, that is also conclusive. If registration has not been sought, presumably it would be a matter of proof.

Penalties under ss 20, 23 and 26 are $10,000 or six months for an individual, and $50,000 for a body corporate. An Aboriginal object may be forfeited where the owner has committed an offence in relation to it, s 33.

The Act binds the Crown, s 4.

It would not be an offence for Aboriginal people to do anything in relation to Aboriginal sites, objects or remains in accordance with Aboriginal tradition, s 37.

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[26] Objects and areas, or objects and areas of a class may be excluded from the ambit of the definition by regulation.

[27] Compare National Parks and Wildlife Act (NSW) s 91, which makes it an offence for any person aware of a relic not to report it.

No information is available on the extent to which these sanctions have been applied or are effective.

IDENTIFICATION, ASSESSMENT AND REGISTRATION OF SITES

a) *The Register*

There is a Register of Aboriginal Sites and Objects which contains entries describing "sites or objects determined by the Minister to be Aboriginal sites or objects", s 9(2). Information on the Register is confidential (see below). There are 4,000 entries on the Register, most of which relate to sites.[28] However, the Register is not an exhaustive list of sites. It appears that little registration occurs outside the process of dealing with applications for development.

In addition to the central Register there is provision in *the Act* for assistance to be given to Aboriginal organisations to keep local archives. No information is available as to whether any such local archives have been established, though there have been expressions of concern about the protection of confidential information under *the Act*.

b) *Determining whether a site or object is an Aboriginal site or object*

The Minister has power under *the Act* to determine whether a site or object is an Aboriginal site or object and is to be protected under *the Act* or to be included in the Register. The Minister must take reasonable steps to consult with the Aboriginal Heritage Committee, and with Aboriginal organisations, traditional owners or other Aboriginal persons who in the opinion of the Minister have a particular interest in the matter, s 13.

The Minister must accept the views of the traditional owners (if there are such owners) of the site or object, on the question of whether the site or object is of significance according to 'Aboriginal tradition', s 13 (3). The Minister must consider any relevant recommendations of the Committee in carrying out functions under *the Act*.

THE ABORIGINAL HERITAGE COMMITTEE

a) *Membership*

The Act provides for an advisory Aboriginal Heritage Committee consisting of "Aboriginal persons appointed, as far as is practicable, from all parts of the State by the Minister to represent the interests of Aboriginal people throughout the State in the protection and preservation of the Aboriginal heritage", s 7. The Committee has a full time Chair. Its resources include an archaeologist and the departmental staff.

The Review was informed that the Committee has recently been reconstituted by members representing 17 regional committees broadly representing each of the 17 tribal groups in the State. Each of these is asked to nominate members for the State Committee, but there is no statutory basis for this. The Minister is not bound by the nominations and can, in effect, 'veto' a nominee.[29] There is no provision for gender

[28] *A Plain English Introduction to Legislation Protecting Aboriginal and Torres Strait Islander Heritage in Australia*, ATSIC, 1996, p 27

[29] Consultation in South Australia with Patpa Warra Yunti Regional Council.

balance as in the Northern Territory. Nor are there established criteria for nomination or selection.

Each regional Committee is asked to make suggestions about heritage issues in their area. The regional Committees are informed about plans, and work with the Parks and Wildlife people. In consultations it was suggested that the regional Committees have an interest in strengthening their role, which at present has no legislative support, by ensuring that they have adequate resources to engage in consultations with developers and access to training and technical support.

b) *functions of the Committee*

The Committee's functions are basically advisory; it can act on its own initiative or at the request of the Minister, s 8. The Minister must consult the Committee on certain issues, eg, before determining that a site or object is covered by *the Act* or authorising damage to a site. The Minister must consider any relevant recommendations of the Committee in carrying out functions under *the Act*, but is not bound to accept them, s 5(2).

In practice, the Review was informed that the Committee's views as to whether a site or object is an Aboriginal site or object within the meaning of *the Act* would be accepted by the Minister.

c) *Reform proposals*

Consideration is now being given to those parts of *the Act* providing for the constitution of the Committee and for its links with local heritage committees. These would provide a legal structure for the changes in practice which have been introduced. Consideration is also being given to the involvement of local government in Aboriginal heritage protection.[30]

d) *Role of traditional owners*

'Traditional owner' is defined by *the Act* as an Aboriginal person who in accordance with Aboriginal tradition, has social, economic or spiritual affiliations with, and responsibilities for, the site or object, s 3.

The Minister must accept the views of traditional owners on the question whether particular land or an object is of significance according to Aboriginal tradition, s 13 (2).

'Traditional owners' can request that certain powers of the Minister under s 21, 23, and 35 be delegated to them. The Minister is required to comply but can attach any conditions to this as she/he deems appropriate, s 6(2) (3).

There are no established links between traditional owners and the Aboriginal Heritage Committee or the regional committees. They do not have a recognised role in nominating members.

Particular Aboriginal groups in whom land is vested, such as Anangu Pitjantjatjara (AP)[31] exercise control over development on their lands through recognised policies. They also have authority to prosecute offences under the *Aboriginal Heritage Protection Act*, s 45.

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[30] SA Discussions.

[31] AP is incorporated under the Pitjantjatjara Land Rights Act 1981. The likelihood of having to use the Commonwealth Act is minimal. Pitjantjatjara Council Inc SA Submission 28.

CONFIDENTIALITY OF INFORMATION

a) *Offence to divulge information*

It is an offence to divulge information about an Aboriginal site, object or remains or about Aboriginal tradition, in contravention of Aboriginal tradition without authority, s 35(1). The Minister may give authority to divulge information s 35 (2).

This provision, s 35, has been held to be a special measure which ensures to indigenous people equal enjoyment of human rights and fundamental freedoms. "The protection is not absolute, but qualified, but it remains as a whole a provision which is directed to the better enjoyment by the Aboriginal race of their culture."[32]

> In *ALRM v State of SA and Stevens*[33]it was held that authorisations given by the Minister were invalid for want of adequate consultations between the Minister and the Aboriginal people concerned as required by s 13. While the Minister was not bound to accept advice received in the process of consultation the process may have enabled others to make suggestions as to the width of the proposed authorisations and the extent to which limitations should be placed upon the persons to whom the information would be disclosed (such as limitations in terms of gender).[34]

The Minister later carried out a consultation process and authorised disclosure of information, despite the fact that most of those consulted did not agree to that disclosure.

b) *Location of a site not to be disclosed*

The Minister must not disclose the exact location of a site or object if, in the Minister's opinion, the disclosure is likely to be detrimental to the protection of preservation of the site or object or to be in contravention of Aboriginal tradition, s 12(5).

c) *Confidentiality of Register*

The confidentiality of information entered in the central or local archives about sites or objects must be maintained unless the traditional owners approve disclosure or unless it is disclosed by the Minister in response to an application under s 12, s 10. The traditional owners and the Committee can stipulate conditions for the disclosure of information, s 10(3).

The operation of these provisions depends on the recognition of traditional owners. If they are not clearly recognised they may have difficulty in obtaining access to information on the register about their own sites.

d) *gender issues*

Women's sites or issues are not covered by any special provisions concerning confidentiality; the general provisions would apply.

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[32] *The Aboriginal Legal Rights Movement Inc v The State of South Australia and Iris Eliza Stevens* (No 2) 16 August 1995, Full Court of the Supreme Court, per Doyle CJ.

[33] Supreme Court of SA, Full Court, unreported, 28 August 1995. *Aboriginal Law Bulletin*, vol 3 no 76, October 1995 p 23.

[34] The Review was informed in discussions that there were extensive consultations after the decision, overwhelmingly against disclosure, but the deputy Minister decided to authorise disclosure.

OWNERSHIP, MANAGEMENT AND ACCESS ISSUES

a) *Access to sites*

The Minister may authorise an Aboriginal person to enter any land (including private land) for the purpose of gaining access to an Aboriginal site, object or remains, s 36. Notice must be given to the owner and occupier who have a right to make representations and be informed of any conditions.

The Act preserves any rights which Aboriginal people may have to do anything in relation to Aboriginal sites, objects or remains in accordance with Aboriginal tradition, s 37.

The *Pastoral Lands Management Act* provides for the Pastoral Board to allow access rights to sites, s 43. Aboriginal people are not represented on the Board.

Land rights legislation also gives traditional owners the right to control entry to their lands.

b) *Acquisition*

The Minister may acquire land for the purposes of protecting or preserving an Aboriginal site, object or remains, s 30. Land that has been acquired or come into the possession of the Minister may be placed in the custody of an Aboriginal person or organisation or otherwise dealt with, s 34.

c) *Inspectors*

Inspectors authorised under the Act may enter land property etc. to inspect Aboriginal sites or objects. They are also allowed to make urgent actions to protect sites by issuing directions, ss 15-18. They are not required to be Aboriginal.[35] Traditional owners of an object or site have the right to object to an inspector. Submissions suggest that in practice there is only one inspector at present, though previously several officers of the Department and of the National Parks and Wildlife Services had been appointed as inspectors.[36] If this is the case, it would be difficult for the Department to respond in any situation of emergency.

COMPETING LAND USES: THE PLANNING PROCESS

The question whether a site or object falls within the definition of *the Act* frequently comes up for consideration when a development proposal may threaten that site or object. An application can be made to the Minister (eg by a landowner or developer) to ascertain if there is a site or object entered on the Register for an area, s 12. The Minister must then make a determination as to whether an entry should be made on the Register about a site or object.

Where there is an Aboriginal site or object which has been or should be entered on the Register, work cannot proceed without an authorisation under *the Act*. The Minister cannot make a determination or give an authorisation[37] unless he has taken reasonable steps to consult with the Committee, any Aboriginal organisation, traditional owners or other Aboriginal person that in the opinion of the Minister have a particular interest

[35] Linda Westphalen (et al) on behalf of the Native Title Supporters Coalition, Submission 38.

[36] ALRM, submission of 28 May 1996.

[37] For example, an authorisation to damage a site or object under s 23.

in the matter, s 13 (1) (d), (e) and (f).[38] The Minister does not have to explain why he has not followed the recommendations of the Committee or of any expert opinion. The validity of the Minister's actions may be challenged in the Supreme Court.

In practice, a developer approaches the Department of State Aboriginal Affairs, DOSAA, which refers them to the Aboriginal Heritage Committee which then refers them to the local Heritage Committee. If there is an issue concerning a site or object, it is the responsibility of the developer, and not the Government, to engage an expert to investigate Aboriginal heritage issues before the question of authorisation to damage or destroy the site is considered. The Minister may require the applicant to provide information or to engage an "expert acceptable to the Minister to do so", s 12 (6). Time lines are laid down for these steps, s 12.

> An average of 30-40 applications per week are received by the Department, mainly as a result of referrals and legal obligations through other State Acts such as planning and mining Acts.
> Of the 30-40 per week applications, the majority come through other agencies, such as the Department of Mines and Energy and the State Planning Authority and applications rely on the advice of the Department in relation to consultation processes that need to be carried out.[39]

The role of the local Committees is of considerable importance under the current practice, though they have no statutory powers or functions.

There are certain restrictions on information that can be made available to developers about the location of sites, s 12 (5) (see above).[40]

The Minister's powers to give authority to damage or to excavate etc, ss 21, 23 must, if requested, be delegated to traditional owners, subject to conditions specified by the Minister, s 6. No information is available as to whether there have been any such delegations.

HERITAGE AGREEMENTS

Under the 1993 amendments to *the Act*, Heritage Agreements can be made between the Minister and the owner of land on which an Aboriginal site or object exists. Any traditional owners or their representatives must be given an opportunity to become parties to the agreement, s 37A. Such an agreement attaches to the land and is binding on the current owner and occupier.[41] A conservation plan for a site could provide for the involvement of Aboriginal people in management, and could provide for access, s 37B.

EMERGENCY PROTECTION

Where urgent action is necessary to protect a site, object or remains, the Minster may give directions restricting access to the site or area or restricting activities in relation to it, s 24 (5). If this is done before the determination concerning the site or object, the

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[38] In the *Hindmarsh Island* case the Minister authorised interference with Aboriginal sites to the extent necessary, under s 23 after a consultation process.

[39] Ministerial Council on Aboriginal and Torres Strait Islander Affairs, Working Party Report on Item 4.1, *Aboriginal Heritage: Interaction between States, Territories and Commonwealth*, 1995, p 5-6.

[40] This could support the practice or work clearance as against site identification. See Ministerial Council on Aboriginal and Torres Strait Islander Affairs, Working Party Report on Item 4.1, *Aboriginal Heritage: Interaction between States, Territories and Commonwealth*, 1995, p 32.

[41] There is one agreement at present; it concerns Granite Island, SA discussions, Govt.

Minister must give an opportunity to make representations and then proceed to make the determination, s 24 (6) (7).

CULTURAL PROPERTY, OBJECTS, REMAINS

The Minister has power to authorise the sale and disposal of Aboriginal objects, s 29, and may acquire Aboriginal objects or records by purchase or compulsory purchase, s 31. The Minister may require the compulsory surrender of an Aboriginal object or record for the purpose of a determination, s 32.

An Aboriginal object or record that has been acquired or come into the possession of the Minister, other than by surrender under s 32, may be placed in the custody of an Aboriginal person or organisation, s 34.

OTHER LEGISLATION

The *Heritage Act 1993* (SA) protects non-Aboriginal places of aesthetic, historic, archaeological scientific or social significance. Damage to a place on the State Heritage Register may attract penalties under that Act or the *Development Act 1993*.

The Pitjantjatjara Land Rights Act 1981 and the Maralinga Tjarutja Land Rights Act 1984 provide for protection of sites on Aboriginal land.

INTERACTION ISSUES

The interaction between the State legislation and the Commonwealth Act has been the subject of considerable attention as a result of the Hindmarsh Bridge matter. The Minister explained the approach of the South Australian Government to interaction issues in this way:

> The South Australian legislation has a different purpose from the Federal legislation, which has the potential to create conflict in administrative actions to preserve and recognise Aboriginal heritage. The federal legislation is seen as an appeal mechanism to override State responsibilities. It is paramount for all parties to bring certainty to the decision making process. there is a need for Aboriginal people, State and Federal Governments and the planning processes to work together to make sure significant Aboriginal heritage is retained and the community interests as a whole are fulfilled.
>
> Current Commonwealth and State Aboriginal heritage protection legislation seem to act as a disincentive to Aboriginal participants o fully engage in State planning processes and tend to encourage members of the Aboriginal community to have Aboriginal heritage dealt with separately and subsequently under Aboriginal heritage processes. Such an approach is costly both for developers and for the credibility of Aboriginal heritage claims. It also tends to draw Aboriginal heritage into political and Commonwealth/State conflicts.
>
> I appreciate that the simplest response to the complexities of Commonwealth/State relations would be for one of the jurisdictions to vacate the field. I assure you that the South Australian Government is not tempted to abdicate its responsibilities.
>
> The key policy and planning processes impacting on Aboriginal heritage are very diverse, especially in terms of history, culture and identity. This diversity determines that uniform national or state Aboriginal heritage legislation is not likely to be the most effective way of pursuing Aboriginal heritage protection objectives.
>
> While South Australia does not seek that the Commonwealth withdraw from the field, co-operative relationships need to be developed which reflect the fact

that State and Territories are best placed to take the primary responsibility for Aboriginal heritage.
To the extent that the Commonwealth Constitution gives the Commonwealth responsibilities in relation to Aboriginal heritage, it should strive to position itself so that its Aboriginal heritage processes do not undermine the State processes or discourage parties from using the State processes.[42]

Other concerns raised on behalf of the SA Government in regard to this Review included the following:

The Federal Act presents an opportunity to 'second guess' the South Australian law. The Federal Minister may, in that regard have information which had not been made available to the State Minister.

The Commonwealth should contribute to the cost of the State processes which enable Aboriginal participation.

REFERRALS TO COMMONWEALTH ACT

See Appendix VII

[42] SAG, sub 65.

WESTERN AUSTRALIA[43]

BACKGROUND AND PURPOSES OF LEGISLATION

Aboriginal Heritage Act 1972

The main legislation in Western Australia is the Aboriginal Heritage Act 1972. As with legislation in other States it was partly a response to the increasing likelihood that development would result in damage to Aboriginal sites.[44] However, it goes beyond the primarily archaeological or relics approach of some States in that it refers to places and objects which are currently used by Aboriginal people. The purpose of the Act is "to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto." (Long title).

> Senior has recommended that the long title be re-drafted to make it clear that the Act is intended to benefit Aboriginal people: 'An Act to provide for the protection and preservation of the Aboriginal heritage by and on behalf of Aboriginal people and the community generally and to recognise and give effect to the rights and responsibilities which Aboriginal people have in relation to their heritage and for related purposes".[45]

There has been considerable litigation in relation to the Act. It was amended in 1980, after the *Noonkanbah case*. It was further amended by the Aboriginal Heritage Amendment Act 1995 (No 24 of 1995) in force on 1 July 1995.

Reform proposals

A comprehensive review of the Act by Clive Senior 'the *Senior Review*' was completed in 1995. He observed:

> There is a general recognition from all sides that the Act is not working satisfactorily. In recent years it has been a source of much conflict involving Aboriginal people, developers and government itself, often in prolonged and bitterly contested litigation. Procedural uncertainty must bear a large part of the responsibility for these disputes and in particular the uncertainty as to how Aboriginal sites are to be avoided and, if they cannot be avoided, what mechanisms should be used to resolve disputes.[46]

The WA Government accepts the need for change:

> the Act was originally intended to deal with matters concerning the illegal export of Aboriginal artefacts and other matters of cultural significance. Significantly, the powers of the Act have now been extended to include other problematic issues for which it was not originally intended, and has thus produced confusion and uncertainty within the community as to the role of the Commonwealth legislation vis a vis State heritage legislation.[47]

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[43] The Review acknowledges the suggestions made by Clive Senior, Minter Ellison Northmore Hale, and Craig Somerville, Director Heritage and Culture, Aboriginal Affairs Department, WA, on the draft of this summary.

[44] *Senior Review* outlines the history of the legislation, p 14.

[45] *Senior Review*, p 51.

[46] *Senior Review* p ix.

[47] Western Australian Government Submission 34.

WHAT IS PROTECTED

places and sites

The Act has broad coverage of places and sites, including any sacred, ritual or ceremonial site which is of importance and special significance to persons of Aboriginal descent. Under s 5, the Act applies to:

> (a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
> (b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
> (c) any place which, in the opinion of the Trustees, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographic interest and should be preserved because of its importance and significance to the cultural heritage of the State;
> (d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

The Act covers all Aboriginal sites, whether or not they have been registered or recorded.

objects

The Act also extends to objects, "which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for . . . any purpose connected with the traditional cultural life of the Aboriginal people past or present." s 6.

OFFENCES RELATING TO SITES AND OBJECTS

The Act creates various offences in relation to sites and objects. It is an offence to excavate, destroy, damage or alter a site without the consent of Minister, s 17. This applies whether or not the site is on public or private land, and whether or not the site is registered. It is also an offence to damage, destroy or remove an object on an Aboriginal site or to deal with it in a manner not sanctioned by relevant custom, s 17 (b). Under section 16, the Registrar, on advice of the ACMC, has limited power to authorise the entry upon and excavation of an Aboriginal site and the examination or removal of any thing on or under the site in such manner and subject to such conditions as the ACMC may advise.

There are further offences in relation to objects which have been declared as Aboriginal cultural material. The offences include selling, removing from the State or damaging the object without authority, s 43 (1). However, persons of Aboriginal descent may deal with objects in a manner sanctioned by Aboriginal custom.

It is a defence to any offence under the Act to prove that the defendant did not know and could not reasonably be expected to know that the place or object to which the charge relates was a place or object to which this Act applies, s 62.

The penalties are relatively low, $500 for a first offence and $2,000 for a later offence.

The Act is not expressed to bind the Crown, but the High Court held that the Crown should comply with aspects of the Act.[48]

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48 *Bropho v WA* (1990) 171 CLR 1; 64 ALJR 374. For a discussion of the effect of *Bropho v WA, No 1* 1989, see *Senior Review* p 211-212.

reform proposals

Senior observed that there have been scarcely any prosecutions, let alone successful prosecutions under the Act, pp xvi, 196. Among the reasons for this are weaknesses in the law, evidentiary problems. He recommended that the sanctions be strengthened in various ways, including extending the period for prosecution, *abolishing the need for the Minister's consent*, excluding the defence where an area was the subject of a special declaration of protection, and increasing the penalties, pp 84, 198-203. The courts should be given power to impose a moratorium on use and development of an area for up to 10 years following a conviction, p 205. He also recommended that the Act bind the Crown, so that all government instrumentalities and employees have to follow the same procedures as private developers, p 211-214. There would be an exemption in cases of emergency threatening the health and safety of the public, p 214.[49]

ASSESSING SITES: THE ACMC

Administration of the Act

The Aboriginal Heritage Amendment Act 1995 transferred responsibility for the Act from the Trustees of the Museum to the Minister for Aboriginal Affairs, s 11A.[50] The Minister must have regard to the recommendations of the Aboriginal Cultural Materials Committee and the Registrar but, unless otherwise stated, is not bound to give effect to those recommendations. The Minister may delegate any powers and duties to an officer of the Department, s 13.

The Aboriginal Cultural Materials Committee

The Aboriginal Cultural Materials Committee is established under s 28. One member of the Committee shall be a person recognised as having specialised experience in the field of Anthropology as related to the Aboriginal inhabitants of Australia, s 28 (3), but there is no legislative requirement that any members of the Committee be of Aboriginal descent or that there be any links with Aboriginal community organisations.[51] The ACMC in fact has Aboriginal representatives from seven regions of Western Australia, together with qualified archaeologists and anthropologists. Three- quarters of its members are Aboriginal. The Registrar of Aboriginal sites (who is a Departmental officer) administers the operations of the Committee.

Functions, assessment recommendations etc

The ACMC is said to have "expertise to deal with heritage matters, and can call on qualified consultants to investigate and mediate situations dealing with problematic issues."[52] The functions of the ACMC include evaluating places and objects, recording and preserving traditional Aboriginal lore associated with such places and objects, making recommendations and giving advice as specified, s 39. The importance of places is to be evaluated with regard, inter alia, to associated sacred beliefs and ritual or ceremonial usage, s 39. It is accepted by government that it is the Committee which should decide whether there is an Aboriginal site.[53]

reform proposals

Senior has recommended that a new body be established, along the lines of the Northern Territory AAPA:

> The body responsible for the administration of the Act should be the AHPA [Aboriginal Heritage Protection Authority] Its membership would be comprised of at least 10 part time Aboriginal male and female representatives of regional Western Australia with particular expertise in Aboriginal

[49] It had been suggested on behalf of the WA Government that the fact that the Crown is bound could cause problems in regard to emergency work [Interaction 52].

[50] This move is seen by some to have undermined the effectiveness of the Act and the independence of the Committee.

[51] Bropho objected to the constitution of the ACMC as non-Aboriginal, and did not put submissions to it. The court found that he had thereby lost his right to so (Full Court). One issue was whether an Aboriginal had standing to challenge a breach of the Act. Steven Churches "Aboriginal Heritage in the Wild West: Robert Bropho and the Swan Brewery Site" *Aboriginal Law Bulletin* vol 2 no 56 June 1992 p 9.

[52] Western Australian Government ,Sub 34.

[53] Perth discussions, Govt.

heritage. Appointments would be made by the Minister from panels of persons nominated from the regions. P 193, rec 58.

He also recommends the establishment of Regional Heritage Offices to maintain contact with local Aboriginal people, and staffed by suitably qualified local male and female Aboriginal people, pp 193-194.

REGISTRATION OF SITES

There is a Register of Sites for all protected areas and cultural material, ss 10, 38. In practice all sites notified are recorded on a temporary register until evaluated. But this evaluation usually occurs only when there is an application to disturb a site. As a consequence, thousands of sites on the register have not been evaluated. There are 14,500 sites recorded under the Act. It does not appear that registration gives additional legal protection for a site, but it may do so in practice.

Sites of outstanding importance

The Committee may recommend to the Minister that a site is of outstanding importance and that it should be declared a protected area. After notification of the owner and other interested parties, and after considering representations, the Minister may declare a site a protected area (can be public or private land) (s 19). There can be a temporarily protected area (s 20). A right to compensation may arise if the owner is prejudicially affected, s 22. The declaration enables conditions to be imposed on entry and use of land. There is no specific requirement to consult traditional custodians before a declaration is made, nor are they given any specific role in the process or in the management of areas, Senior 78.

There are 75 protected areas.

Reform proposals

Considering whether registration of site could be a condition of protection, Senior acknowledges, p 95, the impossibility of registering all sites. There would, in any event, be insufficient resources to evaluate sites outside the section 18 process. He recommends a central registration system, with on-line regional access. He proposes that more information be held on the register about custodians, and that access to the register and to information about custodians be limited, pp 95 -106.

Senior also recommends that all declarations of protected areas, etc, should allow for the involvement of Aboriginal people:

> in initiating declarations;
> in deciding whether or not to make declarations;
> concerning the management of or any investigations relating to the area after a declaration is made;
> by vesting protected areas in the appropriate Aboriginal organisations where these exist, to the intent that nothing should be done in an area contrary to any wishes of the traditional custodians. Senior p 84.

MANAGEMENT AND ACCESS ISSUES: TRADITIONAL USE

The Act recognises traditional Aboriginal use in regard to cultural sites and objects:

> Section 7 of the Act provides that, in relation to a person of Aboriginal descent who usually lives subject to Aboriginal customary law, the Act shall not be construed
> to take away any traditional rights or interests in relation to any place or object to which the Act applies so far as the right is exercised in a manner compatible with Aboriginal tradition;
> to require any disclosure or action contrary to Aboriginal customary law or tradition.
> However, persons may not exercise rights or interests in a manner which the Minister believes to be detrimental to the purposes of the Act, s 7(2).

The Minister may, after consultation with the Committee make places or objects under the Minister's custody or control available for traditional use, s 8. Where the Committee is satisfied that a representative body of persons of Aboriginal descent has an interest in a place or object, the Minister has discretion to delegate the exercise of powers and the performance of duties in relation to any place or object to the traditional custodians, s 9 (1).

Management and protection

There is a system of honorary wardens who have prescribed powers under the Act, s 50. They can enter premises to examine a site or place an object, for purposes under the Act. Doubts have been expressed about the effectiveness of this system.

Access

s 106(2) of the Land Act 1933 gives Aboriginal people the right at all times to enter upon any unenclosed and unimproved parts of pastoral leases 'to seek their sustenance in their accustomed manner', and does not extend to enabling access for cultural or spiritual purposes.. The question of access was raised in many submissions, and it appears to be accepted that it is a problem. Part of the difficulty is the extent of pastoral leases which are fenced and have locked gates.

Reform proposals

Senior has recommended that, without prejudice to the statutory right, access to Crown land be given to custodians for the purpose of visiting significant Aboriginal areas, Aboriginal remains or Aboriginal objects for the exercise of their cultural or spiritual activities in accordance with Aboriginal tradition. Crown land would include national parks and pastoral leases, etc. [54]There would be an authorisation procedure, including consultation with those affected. Access to sites on private land would be only by agreement with the private land owners and occupiers which should be encouraged, rec 10.

Senior also recommended that Aboriginal people be trained and appointed as inspectors on a local basis to improve site protection and early detection of offences, p xvi 211.

CONFIDENTIAL INFORMATION

With the limited exception that Aboriginal persons are not required to disclose information contrary to any prohibition of Aboriginal customary law, the Act makes no provision for the protection of confidential information provided by Aboriginal people for the purposes of the Act. In practice an Access Policy has been prepared by the Department to protect information on the Register which was given in confidence. It is not legally binding.

Senior points out that

> By way of contrast, s 56 of the Act makes it an offence to disclose trade secrets, or information relating to mining or prospecting operations, that have been obtained under the Act.[55]

Concern was expressed in consultations that information was not protected and could be used to disadvantage Aboriginal people.

reform proposals

Senior recommends non-disclosure provisions in respect of information provided to the authorities, and that in certain circumstances the Minister not be entitled to have secret or sacred information, pp 115 - 118.

IDENTIFYING TRADITIONAL OWNERS

At present custodians may be identified by the use of the Tindale material, despite the considerable doubts expressed about its reliability. The Government has a huge data base of knowledge from the 1820s.[56]

Senior has recommended that there be a definition of custodian or traditional custodian, that information about these be included in the register, with their consent, and that they have unimpeded access to the register. Provisions are recommended to preserve privacy. [57]

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[54] *Senior Report*, p 75, recommendations 7, 8, 9.

[55] Senior p 109.

[56] Perth discussions, government.

[57] *Senior Report*, pp 69-71.

COMPETING LAND USE: RIGHTS OF NEGOTIATION

consent to develop

Where the 'owner' of land *which might* contain an Aboriginal site wants to use the land for a purpose that may affect any such site by giving rise to an offence under s 17 if done without authority, a notice must be given to the ACMC, s 18. Applications to excavate for the purpose of research, salvage, mitigation or management are made under s 16. Consent is required, whether or not the site is registered under the Act and regardless of ownership of the land.

In practice, applications are first assessed by the Heritage Management Branch of the Aboriginal Affairs Department, which provides advice to the Aboriginal Cultural Material Committee (ACMC). The Department will inform the developer whether there is a registered site. Even if there is not a registered site, the developer/applicant may be required to carry out an Aboriginal heritage survey. This may be done by direct consultation with relevant Aboriginal people, by making use of the professional staff of a Land Council (anthropologist, archaeologist), or by employing a consultant directly. *[source ?? WA sub?]* The resulting report is assessed by the Department's archaeologist or anthropologist, and then submitted to the ACMC.

The ACMC forms an opinion as to whether there is any Aboriginal site on the land, evaluates the importance and significance of any such site. It may call for more information if the report is inadequate. It then submits the notice to the Minister with a recommendation as to whether or not the Minister should consent to the use of the land, s 18 (2). Consent may be recommended on certain conditions.

Guidelines have been prepared by the Department "to help development proponents understand the process for Aboriginal heritage protection under the Aboriginal Heritage Act, and to assist the passage of development proposals through this process."[58] *There is no similar publication for Aboriginal people.* About 60% of applications are from public authorities or government agencies, 30% from mining companies and 10% concern real estate developments.

Minister's decision

The Minister is responsible for the final decision whether to give consent to land being used in a way which may cause damage to a site, s 18. The Minister must consider the recommendations of the ACMC, and also take into account "the general interests of the community."[59]

In practice, the Minister has refused consent in only *one* case in the last three years.[60] In that period, 111 notices under s 18 were considered by the ACMC. Consent was recommended in 50, conditional consent in 51 cases, and in 10 cases refusal was recommended. Of these 10, the Minister has given 7 conditional consents, and 2 are pending.

The developer and landowner can appeal the Minister's decisions but Aboriginal people may not appeal. The WA government acknowledges that the absence of a specified mechanism of appeal from the decision of the Minister is a problem of the Act.[61]

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58 *Guidelines for Aboriginal Heritage Assessment in Western Australia*, Jan 1994.
59 Western Australian Government ,Submission 34.
60 *Interaction* p 51.
61 Western Australian Government, Submission 34.

time limits

No set times apply under the State law. The process is said to take between 8 and 14 weeks from submission of the notice to the Ministerial decision.

Reform proposals

Problems identified with the legislation and procedures are these:

There is no provision for consultation with Aboriginal people before recommendations or decisions, though this may happen in practice. Consultation may be required to comply with principles of natural justice.

The *Guidelines for Aboriginal Heritage Assessment* are not legally binding.

The ACMC does not appear to have sufficient resources to conduct its own independent inquiries about sites, and depends on reports commissioned buy developers, in many cases.

Senior has recommended a new process, the aim of which is to promote early and widespread consultation with the relevant Aboriginal people (defined at p 90). Under this procedure applications would be referred to the appropriate Regional Heritage Office which would be responsible to notify the relevant Aboriginal people. A process of negotiation would occur and if no agreement were reached, there would be a report back to the AHPA.[62] A detailed procedure is outlined for the consultation process.

Under Senior's recommendations government agencies would be bound to follow the same procedure. He also would require Decision Making Authorities to refer proposals to the AHPA where there could be damage to a site.[63]

Under Senior's proposals, the new Authority would decide in the first instance whether to give consent to the development, following which there would be an appeal to the Minister. There would be no appeal from the Minister. The Minister would have to give reasons, and his decision would be subject to disapproval by Parliament, p 145.

ENCOURAGING AGREEMENTS

In practice some mining and mineral companies engage in discussions with Land Councils on a work clearance model. But this is not universal, . Apparently, if a mining company or a developer reaches agreement with the local Aboriginal community, the development would, in practice, proceed without seeking consent under the Act.

Under the WA Mining Act, minerals belong to the government. The question whether royalties or other compensation can be paid to Aboriginal people in respect of mining activities on Aboriginal land depends on the interaction between Western Australian legislation and the Native Title Act 1993.[64]

Senior makes proposals to encourage agreements. Ss 12(2), 27 are little used. Cf 21K Federal Act. He recommends work clearance rather than site clearance approvals, p 160.

Broome agreement

An important agreement was finalised in May 1996 at Broome between the Rubibi group and the Shire of Broome to integrate Aboriginal interests in town planning. The agreement was negotiated through the Native Title Tribunal. It recognises the rights and responsibilities of the shire and the Rubibi Aboriginal Land, Heritage and Development Company representing the traditional owners of the Broome area.[65]

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62 *Senior Report*, pp 131-134, recs 34 - 36.

63 *Senior Report*, p 178. Decision Making Authorities, such as local authorities, the Department of Land Administration and the Department of Minerals, have specific obligations under the Environmental Protection Act 1986 to refer proposals which may have a significant effect on the environment to the Agency established under that Act.

64 Mining Amendment Act 1985 (WA), s 123 (1), which appears to prevent the payment of compensation, would be overridden by valid Commonwealth legislation.

65 SMH, 2 May 1996. See also Sue Jackson *When History Meets the New Native Title Era at the Negotiating Table; A case study in reconciling land use in Broome Western Australia*, A Discussion Paper, NARU, Darwin, 1996, Chaney. s 10 Report on Broome Crocodile Farm.

EMERGENCY PROTECTION

Senior recommends that the WA legislation include an emergency procedure along the lines of the Commonwealth Act; such a procedure might prevent some cases being referred to the Commonwealth Minister.[66]

CULTURAL OBJECTS, REMAINS ETC

see above

THE HERITAGE OF WESTERN AUSTRALIA ACT 1990

The Heritage of Western Australia Act 1990 does not refer to Aboriginal cultural heritage though it could have some application to places of cultural significance.[67] Senior recommended that this Act not apply to areas covered by the Aboriginal Heritage Act, so that there would be no overlap.

INTERACTION ISSUES

In a submission to the Review, the Western Australian Government expressed the view that issues concerning the maintenance, conservation or protection of Aboriginal heritage should be dealt with in the first instance at the State level and that there should be an established mechanism for cooperation between State and Commonwealth agencies when matters are referred under the Commonwealth Act after completion of State processes. It observed that the Commonwealth Act has, in the past, been used by parties dissatisfied with decisions or recommendations made under the State legislation, as a *de facto* appeal.[68] The submission makes proposals to clarify the relationship between the Commonwealth and State/Territory legislation. The Aboriginal Affairs Department and Aboriginal Affairs Minister endorse the Broad Guidelines for Aboriginal Heritage Legislation [No 6], as presented by the Ministerial Council on Aboriginal and Torres Strait Islander Affairs, Working party on Aboriginal Heritage Interaction between States, Territories and Commonwealth.[69]

Applications to the Federal Minister in recent years have generally related to conditional consents issued by the State Minister, contrary to the advice of the ACMC.[70]

> As the Committee's role is to assess the heritage value of a place and to make its recommendations on those grounds alone, it is to be expected that the Minister's decision which takes into account the wider interests of the community will sometimes differ. However, it should be noted that less than 10% of the Committee's recommendations are that consent be refused and that in most cases so far decided the Minister has overridden that recommendation.

Concern was expressed in consultations that the WA Government is sometimes asked to respond to the Commonwealth at short notice in respect of applications for declarations under sections 9 and 10, and that while it has provided all relevant material to the Commonwealth about a case, the Commonwealth may proceed in reliance on material which had not been available to the State authority.[71]

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66 *Senior Report*, p xvi and 79-81,

67 An agreement was made under the Act about the Old Swan Brewery site, Menham, s 10 Report on the OSB, p 55.

68 Western Australian Government Submission 34.

69 Western Australian Government Submission 34.

70 *Interaction*, p 51.

71 Perth discussions, government.

Commonwealth involvement may be called for in respect of boundary issues, such as where a site overlaps two states, eg Telecom cable. F.[72]

Applications under the Commonwealth Act

See Annex VII and, in particular, the Swan Brewery case which illustrates aspects of WA and Commonwealth law.

72 Perth discussions, government.

PART B

NEW SOUTH WALES[73]

Background and general objectives

The main legislation in New South Wales is the *National Parks and Wildlife Act 1974* as amended ('the Act'). *The Act* is not specific to Aboriginal heritage, and in so far as it does deal with Aboriginal heritage, it has an archaeological focus on the protection of Aboriginal 'relics'. The interests of or benefit to Aboriginal people of cultural heritage protection is not stated as an object, nor does the legislation give a role to Aboriginal people in the management and protection of their heritage, except as provided for in the 1992 amendments which established the Aboriginal Cultural Heritage (Interim) Advisory Committee (see below).

Under s 85 of the Act the Director-General of the National Parks and Wildlife Service (NPWS) is the authority for the protection of relics and Aboriginal places, as defined, ss 83-89. The NPWS has several units dealing with Aboriginal heritage in Head Office and throughout the State.

reform proposals

Reform of NSW laws is under consideration. A Report of a Ministerial Task Force in 1989[74] proposed as the preferred option, new, separate, legislation for the protection and management of Aboriginal heritage and culture. Under the proposals, the role of Aboriginal people in the protection and management of their heritage would be recognised. An Aboriginal Culture and Heritage Working Group has been established to further develop the proposals with a view to preparing a scheme for government consideration, including the transfer of responsibility for the management of Aboriginal heritage from the NPWS to Aboriginal control under separate legislation. A discussion paper is in preparation which is expected to propose new and separate Aboriginal heritage legislation and an independent Aboriginal Heritage Commission.[75]

The Act protects relics and certain places and areas

relics

The Act is directed to the protection of relics and the places or areas where they are found. Relics are defined as any object, deposit or material evidence relating to indigenous and non-European habitation of NSW before or after European settlement. Relics include human remains, s 5.

Relics are deemed to be owned by the Crown unless privately owned before 1967. The Director-General is responsible for their care and protection, s 85. Relics are protected whether or not recorded.

declared places

The Act extends to Aboriginal places declared under *the Act*:

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[73] The Review acknowledges the assistance of Mr Gavin Andrews of the Environmental Policy Division, NPWS and the NSW Aboriginal Land Council in making comments on the draft of this summary.

[74] *Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture* 1989, (Chair, W. Jonas)

[75] NSW Govt submission to House of Reps Standing Committee on ATSI Affairs Inquiry into Culture and Heritage, p 4

> A place that in the opinion of the Minister is or was of special significance with respect to Aboriginal culture can be declared by the Minister, by order to be an Aboriginal place for the purposes of the Act, s 84.

Areas declared as Aboriginal places which are not on unoccupied Crown land remain in the possession of the land owner or occupier.

Places or areas significant to Aboriginal people according to Aboriginal tradition are not protected as such, though they may in fact be the subject of a declaration.

dedicated Aboriginal areas.

Unoccupied Crown lands may be dedicated as an Aboriginal area in order to protect Aboriginal places or relics which are there, s 62.

protected archaeological areas

Lands on which a relic or Aboriginal place is situated can be declared "a protected archaeological area." This enables restrictions to be imposed on entry to the area. The consent of the owner is required, ss 65 - 66.

reform proposals

The Ministerial Task force recommended, pp 31, 33, that the principle of new legislation should be the protection of all Aboriginal sites considered significant by local Aboriginal communities and all Aboriginal heritage items. The term 'relics' was considered offensive and alienating:[76]

> They see it as implying something which is left behind when something has dies or ceased to exist, in this case, Aboriginal culture. They argue, correctly, that Aboriginal culture is not dead, that it has continued and continues to evolve, and that many places gain their heritage value because they are part of this evolving culture. p 29.

Criminal sanctions

'Relics', as defined, are protected by laws creating these offences:

- knowingly destroying or damaging a relic or an Aboriginal place (ie a place declared a such), without consent, s 90;
- failure to notify the Director-General within a reasonable time of the finding of relics, s 91;
- excavating, disturbing or removing etc relics other than with the authority of the Director-General, s 86.

The penalties for an offence under s 90 are $5,000 for an individual and $20,000 for a corporation. There have been few prosecutions or convictions.

The Act binds the Crown, s 3.

Prosecutions under the Act are rare; it is suggested that this is partly because of the high standard of proof required.[77]

reform proposals

The Ministerial Task Force proposed that there be general offences in respect of damage etc done to any Aboriginal sites or places of heritage importance, or any Aboriginal heritage items, without a permit, pp 34-35. This would extend protection to a wider range of places by definition.

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[76] pp 29, 30

[77] NSW Land Council, comments.

Identifying, assessing and recording sites

Notification

Persons finding relics are required to notify the Director-General. In practice notifications may come from Officers of the NPWS, from Council officers, from developers or the general public.

Assessment process and consultation

The assessment of a site on which relics are found could involve the preparation of a report by a qualified archaeologist An assessment is made by the NPWS on the basis of the report and any other investigations, and if so decided, the site is listed on the Site Register. Assessment usually refers to environmental impact assessment, which includes Aboriginal heritage as a component.

There is no obligation on the Minister or Director-General to consult with the Aboriginal community to determine whether a place is of special significance before recording sites or making a declaration. In practice, the NPWS considers that the Register of sites and the work and infrastructure associated with assessing and recording sites make opportunities for genuine attempts to consult with and involve Aboriginal people.[78] Local Land Councils are often the bodies consulted, along with other Aboriginal groups, such as Elders corporations.

> In practice the Minister will consult with the land owner or other interested persons (eg leaseholders), the local Aboriginal community, those government departments who may have an interest in the land use and the applicant, if not one of those. An assessment is carried out reporting on the historical, archaeological and anthropological aspects which would indicate whether or not the land area is a place of special significance to Aboriginal culture.[79]

> Consultative mechanisms utilised by the Service include direct consultation by Service field staff with local community members and organisations, including local aboriginal land councils, workshops and advisory committees. Training at a local community level is also provided when resources permit.[80]

The NPWS drew attention to the difficulties they encounter in finding the right people to consult, sometimes because the tribal connections with areas have been disrupted, and there may be more than one group with an interest in an area.

Register of sites (relics and places)

Relics notified to the Director-General, and declared Aboriginal places are recorded in a register of sites, regardless of the tenure of the land on which they exist. All declared Aboriginal places are published in the Gazette. Nine places have been so declared.[81] Registration does not confer any additional protection.

reform proposals

> The Ministerial Task Force called for legislation to require a state register and regional registers of Aboriginal sites, heritage items and places important to Aboriginal people. It emphasised the importance of involving local communities in the assessment process, p 30.

The Aboriginal Cultural Heritage (Interim) Committee

The Act provides for an Aboriginal Cultural Heritage (Interim) Advisory Committee, to consist of eight members. Five are to be Aboriginal persons nominated by the NSW

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[78] Submission to House of Reps Standing Committee, p 4.

[79] *Interaction* 59.

[80] Submission to House of Reps Standing Committee, p 3.

[81] *Plain English Guide*, p 22.

Land Council.[82] There are no provisions for gender balance on the Committee. Its functions are to advise the Minister or the Director-General on any matter relating to the preservation, control of excavation, removal and custody of relics on Aboriginal places.

The Committee was established in 1992. It is not clear what role it is playing pending the introduction of new legislation. On the request of the Committee, only those consent to destroy applications that are considered contentious are referred to the Committee for its advice.

Reform proposals

> The Ministerial Task Force recommended that an Aboriginal Heritage and Culture Commission be established with wide responsibilities for the promotion, protection and management of Aboriginal heritage and culture, including the acquisition, holding and administration of land and heritage items for protection and management of Aboriginal heritage and culture. It would be an independent statutory body with elected members.[83]

Confidential information

There are no legal provisions to protect confidential information which has been disclosed by Aboriginal people or recorded, nor to deal with issues specific to women in any special way. In practice, the NPWS accepts the need to protect against the disclosure of information that might result in cultural destruction.

reform proposals

> The Ministerial Task Force recommends that access to restricted information held on the register should not be available without written authority from the relevant community and that it should be only given for defined purposes, p 37.

Management and access issues

sites and areas

The legislation makes no provision for Aboriginal access, management or control over sites. In practice some steps have been taken towards the greater involvement by Aboriginal people in the management of significant lands in national parks.[84] Aboriginal Sites Officers are employed in some areas.

> The NSW government is considering vesting ownership of culturally significant national parks, nature reserves and historic sites in local Aboriginal councils, in trust for the traditional owners of the area in which the park area or reserve exists. Progress has been impeded by the Native Title legislation.[85]

Following the recent advice of the Crown Solicitor the impact of native title on the proposed Aboriginal ownership Bill has been clarified. The Government is committed to the introduction of the Bill at the first opportunity.

relics

'Relics', as defined, are the property of the Crown. The Director-General has authority to return the care control and management, but not the *ownership*, of relics to the community.

Reform proposals

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[82] Ss 27, 28 and Schedule 9. One is to be selected from among three nominees of the Nature Conservation Council of NSW, one is to be an officer of the Service, and one an appointee of the Minister.

[83] pp 42, 43.

[84] NPWS 2.

[85] Submission to House of Reps Standing Committee, p 4.

> The Ministerial Task force recommends that the principles upon which new legislation should be based include the following:[86]
>
> acknowledgment of Aboriginal ownership of Aboriginal Heritage and culture in NSW;
> local Aboriginal involvement in protection and management of heritage and culture in NSW;
> access to Aboriginal sites by Aboriginal people;
> hunting fishing and gathering rights.

The proposed Aboriginal Ownership Bill includes an amendment to allow the Director-General the ability to transfer the ownership of relics.

Competing land uses: the planning process

Applications for consent to destroy or damage relics

The protection of relics by criminal sanctions makes it necessary to seek the consent of the Director-General to do work or carry out a development which may damage or destroy any relics, s 90.

In practice, persons seeking to change land use may approach the NPWS or they may be asked by the local council to prepare a report on the impact of the development on Aboriginal relics. This could be part of the EIA process. The report would usually be prepared by a professional archaeologist, and would not necessarily refer to any anthropological information or to the interests of local Aboriginal people.

> While liaison with local Aboriginal community is not compulsory, most archaeologists make efforts to inform local people of their work. Nevertheless, the process is far from a true collaboration.[87]

The developer must make an application to the Director-General for consent to destroy, if the development is likely to affect relics.

Consultation with Aboriginal people not required by law

The Director-General is not required by law to consult Aboriginal people before granting consent to destroy. Aboriginal people have no legal right to be consulted on these issues. The Committee referred to above does not have a statutory role in deciding whether consent should be given. In practice Aboriginal people may have an opportunity to be consulted and to participate in the Environmental Impact Assessment processes required under the relevant legislation, *NSW Environmental Protection and Assessment Act*.[88]

> The Director-General will consult with the local community by seeking advice from the relevant regional Aboriginal land Council and in investigations carried out by the NPWS field service staff with their community contacts.

Consent, if given, may be subject to conditions or restrictions. The Director-General can also issue a permit for the purposes mentioned in s 86, (eg disturbing a relic by excavating) with conditions, s 87.

Appeal to Minister

If consent is refused by the Director-General, there is an appeal to the Minister by the party seeking consent, s 90 (3). There is no right of appeal for the Aboriginal community which may be affected. The Minister's decision is final.

Reform proposals

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86 p 4, 30, 36; Return to ownership was also contemplated in the Submission to House of Reps Standing Committee, p 4.

87 Organ 5.

88 Submission to House of Reps Standing Committee, p 1.

The Ministerial Task Force recommended that there must be consultation with the local Aboriginal community before any destruction of cultural heritage.

Emergency protection

In regard to emergency protection, there is no specific procedure. However, in some situations, used could be made of sections 91A-91I of the Act which provide for the Minister to make interim protection orders in respect of an area of land for up to 12 months, on the recommendation of the Director-General, if the area has natural, scientific or cultural significance . Proceedings could be taken in the Land and Environment Court to restrain a breach of *the Act*, s 176A. In the Ballina case the Jali Local Aboriginal Land Council commenced proceedings to challenge the validity of the local council's consent to develop.[89]

Under the *Heritage Act 1977* application can be made for protection orders. This procedure could be used to protect Aboriginal heritage which may not receive protection under the *NPW Act* because, eg, there is insufficient archaeological evidence.[90]

Cultural property, skeletal remains etc

ownership and custody

'Relics', as defined, are the property of the Crown. *The Act* provides for relics to be removed to the custody and control of the Australian Museum Trust, s 88. The Australian Museum has a policy of consultation and return of cultural property to traditional owners. There have been discussions between the Museum and the NPW Service concerning the placing of relics into the care and control of Aboriginal people.[91] However, under the current legislation ownership cannot be transferred.

Skeletal remains

The Australian Museum has returned more than one-third of the human skeletal remains in its collection to Aboriginal communities.[92]

return of cultural heritage

The NSW Government is considering the proposals of the Australian Aboriginal Affairs Council for a national policy on Aboriginal cultural property.[93] In recent years the NPWS has developed procedures which reflect community wishes in relation to the recovery and reburial of remains.

reform proposals

The Ministerial Task Force recommends the protection and reburial of skeletal remains.

Other relevant legislation

Environmental Planning and Assessment Act 1979 (NSW)

89 *Jali Local Aboriginal Land Council v Council of the Shire of Ballina*, Land and Environment Court Proceedings No 40069/91. The case was settled by mutual undertakings on 20.9.91. There has also been proceedings under the Commonwealth Act.

90 Interaction 9.

91 Submission to House of Reps Standing Committee, p 5.

92 Submission to House of Reps Standing Committee, p 5.

93 Submission to House of Reps Standing Committee, p 6.

Under this Act the environment is broadly defined to cover cultural and social significance. Parts III and IV Local and Regional Environment Plans and must take account of heritage of all kinds as part of the environment to be protected. Heritage must also be part of the environmental assessment; this may entail archaeological surveys. Environmental Impact Statements, which must accompany applications for certain kinds of development, whether public or private,[94] must take into account the effect of development activity on the cultural and heritage significance of the land, and the environmental impact on a community; these factors could be relevant for Aboriginal communities in regard to important heritage sites.[95] However, Aboriginal heritage is not expressly mentioned as a factor to be considered in preparing the EIS.

This Act could, possibly be a source for protection of Aboriginal cultural heritage, though, as in the Jali case mentioned above, it would be necessary to have recourse to the Court to obtain a remedy.

Heritage Act 1977

This Act could possibly be relevant to the protection of Aboriginal cultural heritage, though it does not refer specifically to Aboriginal cultural significance as a relevant factor.

Australian Museum Trust Act 1975

The Australian Museum plays a significant role in that the legislation provides for it to have custody of certain objects and skeletal remains which are part of Aboriginal cultural heritage.

National Trust of Australia (NSW) Act 1990 (NSW)

Aboriginal Land Rights Act 1983

The Aboriginal Land Rights Act 1983 (NSW), may have some relevance to the protection of Aboriginal cultural heritage. The Preamble refers to the cultural significance of land. The Act and Regulations provide a role for Local Aboriginal Land Councils in co-ordinating cultural heritage protection within their geographical area, subject to the wishes of traditional owners.

Interaction issues

Need for a consistent national approach

The NSW Government accepts the need for consistency across Australia as to how heritage should be co-ordinated, regardless of its nature.[96] The NSW Government submission favours a co-operative regime, not an overriding or inconsistent regulation.

> The Review should ensure that consistent procedures for the identification, assessment and management of Aboriginal heritage are established through close consultation between the Commonwealth, States and Territories. The desired result should be complementarity between Commonwealth and State processes to avoid duplication, gaps and confusion. Sub p 4.

Commonwealth to have final role

The NSW Government accepts that the Commonwealth should have primary responsibility for the preservation of Aboriginal heritage sites, but only after State processes have failed, sub p 3.

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[94] Parts IV and V.

[95] Section 90 and Environmental Planning and Assessment Regulations 1980, reg 56.

[96] NSW Govt, sub 55, p 4.

Accrediting State processes

The Federal Minister should be able to recognise administratively the adequacy of state legislation and remove the Commonwealth from the process in those jurisdictions. This would provide certainty for development and avoid delay.[97] State processes could be accredited:

> Consideration should be given to accrediting the State processes (in a similar manner to that contemplated under the Intergovernmental Agreement on the Environment) where State legislative mechanisms are capable of meeting Commonwealth requirements and obligations imposed under the Act. This may involve the development of State and Federal heritage agreements, or may require the development of a national agreement on Aboriginal heritage management principles similar to those currently being [developed by] MCATSIA.

Interaction practice

When an application is made to the Commonwealth, the Commonwealth Minister advises the State Minister for Environment and requests a copy of all its information. The NPWS has no further involvement. Interaction is limited to the mandatory consultations which the Commonwealth Minister must undertake with State counterparts on receipt of an application.[98]

The State Minister should have access to and an opportunity to consider the material submitted to the Commonwealth Minister:

> The Commonwealth Act should also allow an opportunity for the appropriate State or Territory Minister to be asked to consider directly the material which the Federal Minister is considering. . . This should be a requisite to any further action by the Federal Minister under the Commonwealth Act. Sub p 3.

Applicants under the Commonwealth Act should not be required to set out the circumstances evidencing the inability of state legislation to adequately protect the area or item.[99]

Lack of certainty in interaction

The NSW Land Council suggests that the way applications are referred back to the NPWS under s 13(2) could jeopardise the effectiveness of the Commonwealth Act. [Note: there is a lack of any clear point at which people have to be involved, or at which their right to be consulted or to take further action comes to an end] The Minister should not compel an applicant to seek remedies at state level before considering the application.[100]

Mediation in the Commonwealth process

There is a need for a mediation focus at Commonwealth level.[101]

Exemption of Commonwealth places

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97 NSW Govt, sub 55, p 3.
98 NSW Govt, sub 55, p 2.
99 NSW Govt, sub 55, p 4.
100 Submission 43, p 7.
101 NPWS 2.

Commonwealth places should not be exempt from State and Territory legislation and regulation.[102]

Applications under the Commonwealth legislation

See Annex VII Case Studies.

102 NSW Govt, sub 55, p 3.

QUEENSLAND[103]

History, Background and General Objectives

The first legislation in Queensland, the *Aboriginal Relics Preservation Act 1967-76* had a relics based, archaeological approach. That Act was repealed and replaced by the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 ('the Cultural Record Act').*[104] *The Cultural Record Act* is not specific to Aboriginal cultural heritage, but subsumes Aboriginal heritage within its definitions. It makes few references to Aboriginal people.

Consideration has been given to new legislation. However, no report or discussion paper has been published. The government has not prepared an analysis of its laws against the Guidelines of the Working Party.

Relevant legislation

Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987

The *Cultural Record Act 1987* applies to land and to heritage objects, including remains. Aboriginal heritage and European heritage are both covered by the definitions of Landscapes Queensland and Queensland Estate (see below). The Department of Environment ('DoE' - formerly the Department of Environment and Heritage) administers the Act.

Queensland Museum Act 1970

The Board of Trustees of the Museum may acquire keep or dispose of objects, which could include cultural property of Aboriginal people.

Aboriginal Land Act 1991

Native Title (Queensland) Act 1993

Queensland Heritage Act 1992 ('the Heritage Act')

This Act provides for the protection of 'cultural heritage' in the form of places or objects of aesthetic, architectural, historical, scientific, social or technological significance to the present generation or past or future generations. The Queensland Heritage Council maintains a Heritage Register under the Act. Areas of archaeological significance can be declared protected areas by the Governor in Council. A permit is required to carry out any harmful activity in the area. The Act applies to private land. Its application to indigenous heritage is excluded.[105]

Nature Conservation Act 1992[106]

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[103] The Review acknowledges the assistance of the Queensland Government in providing comments on the draft of this summary.

[104] An area declared under the repealed Act as an Aboriginal site shall be deemed to have been declared under s 17 of the Act as a Designated Landscape Area for the purposes of the Acts 6(2).

[105] s 61: This Act does not apply to - (a) a place that is of cultural heritage significance solely through its association with Aboriginal tradition or Island custom; or (b) a place situated on Aboriginal or Torres Strait Islander land unless the place is of cultural heritage significance because of its association with Aboriginal tradition or Island custom and with European or other culture, in which case this Act applies to the place if the trustees of the land consent.

[106] This Act repealed the National Parks and Wildlife Act 1975. That Act protected forest products, which include: Aboriginal remains, artefacts or handicrafts of Aboriginal origin.

The protection of cultural heritage in National Parks is now primarily dealt with under the *Nature Conservation Act 1992*. The Act provides for the recognition of the interests of Aborigines and Torres Strait Islanders in protected areas and native wildlife, and for the cooperative involvement of Aborigines and Torres Strait Islanders in the conservation of nature, s 5 (f). The Act provides for the protection of cultural resources and values in the management of National Parks, s 17 (1). Protection of cultural heritage is achieved by the declaration of restricted access areas, and by the administration of permits, including permits to take, use, keep or interfere with cultural resources. Provision is made for consultation with land holders and interested groups and persons, including Aborigines and Torres Strait Islanders, in the administration of the Act, s 6.

Local Government (Planning and Environment) Act 1990

This Act establishes Queensland's planning processes. Other relevant legislation include Mineral Resources Act 1989 and the State Development and Public Works Organisation Act 1971. A new Planning, Environment and Development Assessment Bill (PEDA) will, in due course, replace the Local Government (Planning and Environment) Act.

Wet Tropics World Heritage Protection and Management Act 1993

This Act provides for the implementation of Australia's obligations under the World Heritage Convention in relation to the Wet Tropics Area. The Wet Tropics Management Authority must as far as practicable have regard to the Aboriginal tradition of Aboriginal people particularly concerned with the land in the Wet Tropics Area and liaise and cooperate with those Aboriginal people, s 10(5).

How Aboriginal heritage is defined

The Cultural Record Act 1987 defines Landscapes and the Queensland Estate:

> "Landscapes Queensland" means areas or features within Queensland that
> (a) have been or are being used altered or affected in some way by humans; and
> (b) are of significance to humans for any anthropological, cultural, historic, prehistoric or societal reason
> and includes any item of the Queensland Estate found therein, s 5.
>
> "Queensland Estate" means evidence of human occupation of the areas comprising Queensland at any time that is at least 30 years in the past but does not include anything
> (a) made or constructed as a facsimile; or
> (b) made or constructed at or after the commencement of this Act for the purpose of sale; or
> (c) that is not of prehistoric or historic significance.

In principle the Act is broad enough to extend to "areas of particular significance in accordance with Aboriginal tradition". But it is not clear when 'the use' of sacred or religious places, such as rocks, waterholes, trees and mountains makes them of significance under the Act. Aboriginal people have no formal role in deciding whether areas of significance to them are covered by the Act.

Criminal sanctions

Queensland legislation does not create specific offences in respect of Aboriginal heritage, as such. However, the general offence provisions would apply to protect those aspects of Aboriginal heritage which fall within the statutory definitions

mentioned above. The *Cultural Record Act* confers protection on items falling within the definition of Queensland Estate and Landscapes Queensland.

It is an offence to destroy or interfere with a notice or boundary mark or to trespass on Designated Landscape Areas, without authority, ss 23, 24.[107] It is an offence to be in possession of or to damage an item of the Queensland Estate without authority, s 56, even if it is not registered.[108] The owner is exempt from these provisions in respect of unregistered items. It is a defence to prove that the defendant did not suspect and could not be reasonably expected to suspect that the thing to which the charge relates was an item of the Queensland Estate. The Review has no information about the enforcement of these sanctions.

The Minister may authorise surveys or excavations on a designated Landscape Area or in respect of Landscapes Queensland or the Queensland Estate, s 27.

The Act does not expressly bind the Crown; the Review was informed that the Government acts in accordance with the Act.

The *Nature Conservation Act* makes it an offence to disturb cultural resources on protected areas. The *Forestry Act* also provides protection of forest products (which include cultural materials) on forestry lands.

Assessing, declaring and registering sites

An area may be declared 'a Designated Landscape Area' (by the Governor in Council) if it is necessary or desirable to restrict entry in order to preserve Landscapes Queensland or Queensland Estate, s 17. If the area is on private land, the consent of the occupier, and if the occupier is not the owner, the consent of the owner must be obtained to the declaration, s 18. Owners can prevent a declaration being made, and also request termination of the declaration.

When an area is declared to be a Designated Landscape Area, the area may be assigned to a protector, to prevent entry of unauthorised persons, and to protect all items of the Queensland Estate in the area, s 21.

Aboriginal people do not have a specific statutory role in deciding whether a site or area is a site of significance according to Aboriginal tradition. No cultural sites have been registered in the Queensland National Estate.

The Nature Conservation Act creates a power to compulsorily declare a nature reserve over land. This power would be used only exceptionally, as the main purpose of the Act is to deal with the management of protected areas such as national parks and the protection of wildlife. Areas of interest to indigenous people could be protected by declaring an area a restricted access area. [There are associated offences]. Such a declaration could in fact restrict access by Aboriginal people unless they were exempted from its effect. This has occurred with a restricted access area in Cape Melville National Park.

Register

107 The penalties are 40 and 20 penalty points respectively. Penalty units are at present $75.

108 Offences against s 56 carry 100 penalty units; under s 62, offences by a body corporate carry 1000 penalty units (currently $75).

A register is kept of areas declared by the executive as 'designated Landscape Areas', s 20. At present there are approximately ten Designated Landscape Areas in DoE records. [109]

The Act also provides for a register to be kept of items of the Queensland Estate approved by the Governor in Council as items of great significance to Queensland's history and as items which should be preserved, s 41. Regulations have not yet been made in respect of the register. At present an inventory (not statutory) is maintained by the Cultural Heritage Branch.

The owner or occupier of an item of the Queensland Estate must consent to the inclusion of the item in the register, s 42. The owner of an item can have it removed from the register if it is intended to do an act which may damage or destroy it, s 44, 56 (2)(a)(iii). This will result in either the removal of the item from the register or the approval of the act in accordance with certain standards and guidelines as set by the Minister, s 44. The Minister may refer a proposal to the relevant advisory committee, if there is one.

Under the *Queensland Heritage Act* the Queensland Heritage Council maintains a Heritage Register; it could include areas of archaeological significance, and it extends to private land.

Confidential information

There appear to be no general provisions dealing with confidential information. When a progress report is made to the Minister by a researcher who has been carrying out a survey etc with permission under the Act, information or knowledge acquired as part of the research or survey concerning any anthropological or archaeological matter that is of a sacred or secret nature in the understanding of indigenous people may not be disclosed, s 31.

Site clearance procedures for development on land may in practice minimise the amount of confidential information required to be revealed by Aboriginal custodians by adopting work clearance rather than site identification in some situations. The Queensland Govt. has developed a 'work area clearance' process to accommodate a particular project's needs and the indigenous cultural heritage interests likely to be affected by the project. The law makes no provision to encourage this approach.

Administration and management

The Cultural Heritage Branch within the Department of Environment has the responsibility for administering the *Cultural Record Act* and the *Heritage Act.*

There is provision for Advisory Committees to advise the Minister on matters relating to the preservation of Landscapes Queensland or the Queensland Estate, ss 12, 13. Other provisions indicate the circumstances in which such Committees could be consulted, ss 39, 44. There is no statutory requirement for any Aboriginal person to be appointed as a Landscapes Queensland Protector, s 9; as a Landscapes Queensland Adviser, s 10; nor to be a member of any Advisory Committee, s 12; or of any Regional Landscapes Queensland Committees established under s 14 of the Act. An Aboriginal Heritage Advisory Committee was in fact constituted in 1987; it met on approximately three occasions, the last meeting being in 1988. It has no mandatory statutory functions.

[109] Information from Queensland Government. These records are currently being checked.

While there is no express provision requiring consultation with Aboriginal people, the *Cultural Record Act* requires the Minister, when determining whether an application for a permit should be granted, to consider whether sufficient consultation has been undertaken with all persons who might be affected by the performance of the work to which the application relates, s 27 (4) (d). It is a matter for the Minister to consider in each case whether Aboriginal people should be consulted, and , if so, which groups or individuals.

An Aboriginal Ranger Service was established under the former law; there were also honorary wardens who supported the Rangers. These Rangers do not operate under the *Cultural Record Act*.. However, Aboriginal officers are presently employed by the DoE and work in Aboriginal and Torres Strait Islander cultural heritage management in the Department's regional offices. Under this scheme, officers are required to complete studies in cultural heritage management whilst employed by the Department.

Under the *Nature Conservation Act* and the *Wet Tropics Act*, Aboriginal people must be consulted in the administration of the Acts and the preparation of management plans. These Acts make provision for an Aboriginal Advisory Committee, and an Aboriginal representative has been appointed to the Board of Directors of the Wet Tropics Management Authority.

Ownership and access issues

The traditional rights and customs of indigenous people are to be unaffected by the *Cultural Record Act*, s 32.

> 32. No provision of this Act shall be construed to prejudice -
> (a) rights of ownership had by a traditional group of indigenous people or by a member of such a group in a part of the Queensland Estate that is used or held for traditional purposes; or
> (b) free access to and enjoyment and use of a part of the Queensland Estate, where such access, enjoyment or use is sanctioned by traditional custom relating to that part, by person who usually lives subject to the traditional custom of a group of indigenous people.

The effect of this provision depends on the meaning given to 'traditional.' It is seen by some as divisive in making a distinction between traditional and non-traditional Aboriginal people.[110]

Subject to section 32, the *Cultural Record Act* provides that, apart from certain burial remains, all parts of the Queensland Estate that constitute evidence of occupation of any part of Queensland by indigenous persons, or whose owner is unidentified are the *property of the Crown*, s 33. The Minister has power to remove items of the Queensland Estate to the Queensland Museum, s 37 (a). [see later as to remains]

Under s 26, the Crown may acquire land for the purpose of preservation of Landscape Queensland or the Queensland Estate.

The *Nature Conservation Act 1992* deals with the management of protected areas, which may include areas of interest to indigenous people. There is power to compulsorily declare a nature reserve over land. This could involve restricted access, requirements for permits etc. The protection of Aboriginal heritage is not the main object of the Act though it could be used to protect cultural heritage in certain circumstances by declaring a nature refuge (see above). The provisions of section 93 of the Act, which authorise Aboriginal people to take use or keep protected wildlife (unless a

[110] **Fourmile, d 64, p9.**

conservation plan prohibits this) under their tradition or custom, have not yet been proclaimed.

National Parks which are Aboriginal land provide for joint management between the Department of Environment and Aboriginal people. Fifteen national parks have been gazetted as available for claim under the *Aboriginal Land Act 1991*.

Cape York Agreement

The Cape York Agreement, February 1996, was negotiated with a view to registration as a Regional Agreement under s 21 of the Native Title Act (Cth). The parties to the agreement are the Cape York Land Council, the Cattlemen's Union of Australia, the Australian Conservation Foundation, the Wilderness Society and the Peninsula Regional Council of ATSIC. Among its many provisions, the agreement provides for access by traditional owners to pastoral properties for traditional purposes, including:

access to sites of significance;
access for ceremonies under traditional law;
protection and conservation of cultural heritage.

The Queensland Government has not yet ratified the Cape York Agreement.

Competing land use: the development and planning process

There is no legislative requirement for consultation with traditional owners or custodians in the planning and development process, though this may happen in practice, as a matter of discretion. The Queensland Government has stated that it recognises that it is important to encourage negotiation between affected parties and developers at an early stage in the development of a project. The 'work clearance' process developed by departments in co-operation with Aboriginal communities is said to have enabled a particular project's needs to be accommodated with the cultural heritage interests of the indigenous people likely to be affected. Experience in using the process has indicated that it is generally successful, nevertheless, recent experience with the process has demonstrated that the process may be complicated as a result of disagreement between different Aboriginal people within the subject area.[111]

Planning and environment processes

Under the *State Development and Public Works Organisation Act 1971*, the Coordinator-General coordinates departments to ensure that in any development proper account is taken of the environmental effects, s 29. Policies and administrative arrangements have been adopted to give effect to this provision.[112]Development proposals are considered in consultation with interested organisations. Impact assessment studies are usually required.

Any requirement for a developer to investigate Aboriginal or Islander heritage interests usually comes through the provision for Environmental Impact Assessment or Studies. The DoE would be consulted on the terms of reference for an environmental impact statement. Those terms might include a survey of items and places of cultural significance if it is known that there might be such items or places, including Aboriginal archaeological and historic sites. There would usually be a requirement to consult affected groups. The developer would be responsible for selecting the consultant; this might be an archaeologist. The Minister approves the consultant 'undertaking a cultural heritage assessment as part of an Environmental Impact Statement through the issue of a permit to the consultant'.

111 Queensland government, comments provided on 29 May 1996.

112 *Impact Assessment in Queensland - Policies and Administrative Arrangements*..

An Environmental Management Plan may require measures to safeguard archaeological remains of cultural heritage significance.

The preservation of Landscapes Queensland or the Queensland Estate is a function of local government, s 45 Cultural Record Act. Under the *Local Government (Planning and Environment) Act 1990,* (the P&EAct) opportunities are provided for persons to make submissions to the Local Governments in respect of a proposed planning scheme. After the approval of the Governor in Council has been sought for a new planning scheme, public notice must be given of this fact; the scheme and supporting documents must be kept open for 60 days, s 2.14 (1). According to the Government, Aboriginal organisations are increasingly having input into local government planning schemes. Every submission made in accordance with requirements must be considered. The onus is, however, on Aboriginal people to raise their concerns about a project.

Other legislation

By way of contrast, under *the Heritage Act*, the onus is on the developer to seek permission to develop in registered areas.

In relation to National Parks, gazetted as claimable under the provisions of the *Aboriginal Land Act 1991* there is a requirement for Aboriginal involvement in planning decisions.

Under the *Mineral Resources Act* there is a code of conduct which covers contact between the miners and the traditional custodians.[113]

The gas pipeline case,

To show their commitment to consultation with Aboriginal groups, the Queensland Government referred to the construction of a gas pipeline in South East Queensland by Tenneco, under licence from the Queensland Government. As part of the planning process, extensive consultations were undertaken with representatives of Aboriginal groups. All the relevant Aboriginal clans or groups with members living in the area of the pipeline route agreed to the Goolburri Aboriginal Corporation Land Council, acting as their representative for the purpose of dealing with both the State of Queensland and Tenneco Energy.

When one of the groups, the Gungarri, sought an injunction to prohibit further work on the pipeline within the area of their native title claim, Drummond J, in the Federal Court, after considering the evidence put forward found as follows: [114]

> I accept that the pipeline route through the claimed area was planned in conjunction with the Gunggaris to avoid harm to areas of cultural and other significance to the Gunggaris and that the route selected was accepted by them as one which protected their cultural and heritage interests.

There was no evidence that there were any cultural sites within the pipeline corridor of any significance to the Gunggaris. Nor was there evidence sufficient to suggest that completion of the partly built pipeline would harm, in any significant way, the interests of the Gunggaris if they were able, in due course, to establish that they were in truth the native title owners of the whole or any part of the claimed lands.

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[113] Discussions, 9. It was observed that regional agreements with miners have an archaeological focus.

[114] *Smith (on behalf of the Gunggari People v Tenneco Energy Qd, the State of Queensland and Goolburri Aboriginal Corporation Land Council*, QG 60 of 1996 FED No. 363/96, Drummond J, Federal Court, 3 May 1996, unreported, para 45.

emergency protection

Temporary protection can be provided under the *Cultural Record Act* by declaring a temporary Designated Landscape Area. The Governor in Council can make such a declaration if satisfied that it may become necessary or desirable, and expedient to declare the area to be a Designated Landscape Area and that it is necessary to prevent or regulate the entry of persons into the area in the meantime, s 19 (1). Such a declaration lasts for a maximum of three months. No consents are required. The provisions of sections 21, 23, 24 and 27, mentioned above, apply to control and protect the area. There is no provision for urgent court action to prevent damage.

The *Heritage Act*, provides for emergency stop orders.

Cultural property, objects and remains

The *Cultural Record Act* extends to indigenous burial remains (other than those buried by non-indigenous law). Provision is made for indigenous ownership of certain burial remains, even if they are on private land. The Act requires that a person who has in their control Queensland Estate that consists of indigenous burial remains shall submit them to the Minister for examination and classification, s 35 (1). If a person uncovers any indigenous burial remains he shall notify the Minister or a Landscapes Queensland protector of the occurrence, s 35 (2). If the Minister is satisfied that there exists familial or traditional links between burial remains and a traditional group of indigenous people, or any indigenous person, the burial remains are the property of the traditional group or person, if certain procedural steps have been complied with, s 34. These steps include consultation with officers appointed under the Act and any relevant committee.

The *Queensland Museum Act* does not make provision for consultation with indigenous people in regard to cultural property which may be in the possession of the Museum, though consultation does in fact occur informally. The Queensland Museum Repatriation Plan facilitates the return from the Museum's collections of : human remains, burial goods, secret and sacred ritual items, stolen items and other items that appropriately belong to Aboriginal and Torres Strait Islander Communities. The plan commenced in October 1995 and will continue until December 1998. Documentation of the collection, community consultation and repatriation are monitored by the Museum's Aboriginal and Torres Strait Islander Committee. Several items have already been returned with the full participation of the community including ceremonial processes within the Museum. The Museum is negotiating with communities for the loan of items to house in keeping places or community endorsed mainstream organisations.[115]

Interaction issues

The submission of the Queensland Government,[116] observed that the main issue is the need to improve communication and coordination between the Commonwealth and States/Territories particularly at officer level. Other points made in the submission relevant to interaction were these:

- the need to limit confusion caused by the involvement of the Federal Minister in development which has previously received approval at the State level;
- the development of administrative processes to address matters such as prompt notification to the States and Territories of receipt of an application for protection under the Commonwealth Act and to reinforce the use of mediation to resolve issues including the preparation of guidelines for mediation processes;

[115] Information provided in Government comments.
[116] sub 69.

the identification/nomination of a single reference point within Queensland for matters involving the protection of Aboriginal and Torres Strait Islander heritage.

It was suggested that applicants often approach both federal and State Government to ensure that they communicate with each other.[117] In some cases it is required that issues are referred to the Queensland advisory Committee before they can go to Commonwealth Government. This is a long-drawn out and usually unhelpful.[118]

Cases under the Commonwealth Act

Many submissions expressed concern about the current Queensland law. Among the points of concern was the fact that the legislation is not specifically directed towards the protection of Aboriginal heritage, and that consultation about development is often not initiated as a requirement but is left to Aboriginal people to take up. Another concern was the apparent emphasis in practice on archaeological concerns rather than on cultural significance to Aboriginal people. The high number of applications from Queensland under the Commonwealth Act reflects a high level of concern about the lack of legal protection of Aboriginal heritage.

Appendix VII includes summaries of several Queensland cases arising under the Commonwealth Act.

117 ATSIC admin Cairns.
118 Cribb 23, p 2.

TASMANIA

Background and general objectives of relevant laws

Tasmanian legislation follows the NSW 'relics' model and has an archaeological focus. It gives almost no recognition to the role of Aboriginal people in the protection of their cultural heritage. Some changes have been made in practice to involve Aboriginal people and to consult the Tasmanian Aboriginal Land Council on heritage issues. Further changes are contemplated.

A Review Committee has been considering the current legislation with a view to replacing the *Relics Act* with A new Cultural Heritage Act, based on the concept of Tasmanian Aboriginal control of Tasmanian Aboriginal heritage.[119] A discussion paper is due for publication in mid-1996.

The discussion paper will consider some important issues:[120]

- What is heritage, its connection with spirituality? Should it extend to artworks, artefacts, folklore?
- How should the Act be administered, eg through an Aboriginal Heritage Council?
- Who owns heritage? Who can own it?
- Who can own contemporary manifestations of culture, eg artworks, artefacts?
- Consider how the profits of tourism are allocated.
- Question of access by Aboriginal people, and by others.

Any proposed changes will be put to the broader Aboriginal community for comment.[121]

Relevant legislation

The principal Acts in Tasmania are:

The Aboriginal Relics Act 1975 which applies to relics created before 1876.

The National Parks and Wildlife Act 1970

The Director of National Parks and Wildlife is responsible for Aboriginal heritage under both Acts.

Other relevant legislation includes:

Museums (Aboriginal Remains) Act 1984

Land Use Planning and Approvals Act 1993

This legislation is part of a comprehensive resource management and planning system, under which provision could be made to protect certain aspects of Aboriginal heritage such as sites or areas, by controlling use and development proposals in the planning process. The State Policies and Projects Act 1993 also offers possibilities for the

119 Tas Government, submission 64.

120 Tas Discussions, Govt.

121 Tas Government, sub 64; Ministerial Council on Aboriginal and Torres Strait Islander Affairs, Working Party Report on Item 4.1, *Aboriginal Heritage: Interaction between States, Territories and Commonwealth*, 1995 p 10.

development of State Policy on Aboriginal heritage.[122] This legislation does not affect portable heritage items.

Aboriginal Lands Act 1995

This legislation transfers to Aboriginal ownership 12 crown land sites which have historical, cultural, social and economic significance to the Aboriginal community.[123] The land is vested in perpetuity in the Aboriginal Land Council of Tasmania, established under the Act.

Living Marine Resources Management Act 1995

This Act recognises the right of Aboriginal people to continue customary fishing and gathering, ss 10, 60(2)(1).

What is protected: relics and sites

Tasmanian legislation applies to relics and to sites or areas where they are found. It has little application to contemporary Aboriginal culture or to areas which are of particular significance in accordance with Aboriginal tradition, unless those areas are the site of relics as defined.

Relics

The *Aboriginal Relics Act* applies to relics created before 1876. Section 2 (3) defines relics to include:

> (a) any artefact, painting, carving, engraving, arrangement of stones, midden, or other object made or created by any of the original inhabitants or the descendants of any such inhabitants;
> (b) any object site or place that bears signs of the activities of any such original inhabitants or their descendants;
> (c) the remains of the body of such an original inhabitant [or descendant] who died before 1876 that are not interred in [a lawful burial ground or marked grave], s 2(3).
> (4) No object made or created after the year 1876 shall for the purposes of this Act be treated as a relic . . .

Protected sites or objects

The Minister can declare that an area of land which contains relics is to be *a protected site*, s 7. A specified relic on that site becomes *a protected object*. Permission of the landowner and occupier is required for the declaration, except in the case of Crown land.

Conservation areas

Under the *National Parks and Wildlife Act* , land can be declared a conservation area to preserve features of historical, archaeological or scientific interest, and to preserve or protect any Aboriginal relic on that land, s 13. The consent of the owner of private land is required. Relics, as defined by s 3 (1) of this Act, are not restricted to pre-1876 relics but include "any artefact, painting, carving, midden, or other object made or created by any of the aboriginal inhabitants of any of the islands contained within the State, or any object, site, or place that bears signs of the activities of any such inhabitants."

122 Tas Government, submission 64.
123 Tas Government, submission 64.

Criminal sanctions

Blanket protection extends to the protection of relics.

Damaging relics

Under the *Aboriginal Relics Act*, it is an offence to destroy, damage, interfere with or remove a relic, to copy, to sell or offer a relic for sale, take it out of the State or cause an excavation to search for a relic, etc, without a permit from the Minister, s 14. Persons having a relic or knowing of a relic must inform the Director, s 10.

Damaging protected object

It is an offence to destroy, damage, conceal, expose, excavate or interfere with a protected object or to interfere with fencing or work carried out at a protected site without a permit granted by the Director, s 9. A protected object may not be removed from a protected site without a permit from the Minister.

It is a defence to any offence concerning a relic (eg under ss 9 or 14) that the defendant did not know or could not reasonably be expected to know that it was a relic, s 21.

The Act is not stated to bind the Crown.

The penalties for offences against sections 9 and 14 are $1,000 or 6 months, s 20.[124] The penalty under s 14 for the owner of a relic can include forfeiture of the relic, which then becomes the property of the Crown. It was observed in consultations that there had been only one prosecution in the last 20 years.

Disturbing objects on reserve land

Under the National Parks and Wildlife Act and Regulations it is an offence, without the authority of the Director to remove or disturb any relic or any object of archaeological, historical or scientific interest in any reserved land. However, the right to carry out Aboriginal cultural activities consistent with the legislation is preserved.

Register of sites

There is no legal provision for registration, however The Parks and Wildlife Service keeps a register of sites which have been identified as a result of archaeological work and surveys. The register is on paper; it may in due course be transferred to an electronic form. Approximately 8,000 sites have been recorded. Anyone can ask for registration. In practice information about sites comes from survey and other work. The Parks and Wildlife Service has three Aboriginal Heritage Officers.

Forestry Tas have their own recording system for areas which are under their control. They have an Aboriginal Heritage Officer.[125]

Confidential information

There are no legal provisions concerning the protection of confidential information or to limit the information that has to be revealed. In practice, there is no public access to the Register of sites. Access is restricted and will be given only with the approval of the Tasmanian Aboriginal Land Council.[126] Information on the Tasmanian Aboriginal Site Index is exempt from Freedom of Information legislation.

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124 as amended.

125 Karen Brown TALC, discussions.

126 Tas Government, submission 64.

Ownership, management and access issues: role of Aboriginal people

Crown Ownership

Relics found or abandoned on Crown land are the property of the Crown, s 11. The Minister can acquire relics for the Crown by serving a notice on the owner requiring delivery. An Aboriginal person can apply to quash the notice if he or his ancestors have had possession of the relic for more than 50 years, s 12.

Relics vested in the Crown become available for scientific investigation, as the Director considers necessary or desirable, having regard to the recommendations made by the Aboriginal Relics Advisory Council, s 13.

Land may be acquired under the *National Parks and Wildlife Act* for the purposes of that Act including reservation as Aboriginal and Historic Sites (see above).

Aboriginal Relics Advisory Council

The *Relics Act* provides for a five-member Aboriginal Relics Advisory Council; one member is to be from a list submitted by a body representing persons of Aboriginal descent. The Council has not operated for some years. "The Aboriginal Community felt disempowered with this membership and believed it was designed to protect other interests rather than Aboriginal interest." [127] The Aboriginal representatives withdrew. There is no provision for Aboriginal membership of the Parks and Wildlife Advisory Council, s 10.[128] Since 1992, the Tasmanian Aboriginal Land Council (TALC) has advised the Parks and Wildlife Service in regard to heritage matters.

Management

The Director of PWS is responsible for the management of protected sites and objects, s 8. This could involve preservation and restoration work, fencing, etc. or the removal of the object or remains if necessary for its protection, s 8.

There is little or no provision for Aboriginal management and control over sites, landscapes or resources, or over site assessment. As mentioned, in practice, the Tasmanian Aboriginal Land Council may be consulted by PWS.

Wardens and heritage officers

Officers of the PWS or other persons may be appointed as wardens under the *Aboriginal Relics Act*, s 15. Honorary wardens may also be appointed, s 16. Wardens have certain powers to ask for identification, s 17. Authorised officers, acting as wardens can seize objects and arrest persons in some cases, 18. There is no requirement that wardens be Aboriginal people.

The Tasmanian Aboriginal Land Council undertook a program for the training of Aboriginal heritage officers, funded by DEET. The officers were trained on the job, and were employed by TALC. With Commonwealth assistance the Aboriginal Heritage Unit in the PWS now employs three Aboriginal Heritage Officers who carry

[127] Ministerial Council on Aboriginal and Torres Strait Islander Affairs, Working Party Report on Item 4.1, *Aboriginal Heritage: Interaction between States, Territories and Commonwealth*, 1995, p 10.

[128] There is provision for persons interested in historic structures or engaged in the study of history or anthropology in its relation to the peoples who inhabit, or inhabited, the islands contained within the State, s 10 (3)(i).

out assessment work.[129] These officers are involved in the rediscovery of sites, which are then put on an Index of Aboriginal Sites Index (by PWS).[130]

Access

There are no provisions in the Act dealing with a right of access to sites by Aboriginal people. However,

> Nothing in the Act precludes Aboriginal cultural activities on Aboriginal land. These activities are allowed provided they are consistent with the general provisions of the *NPW Act 1970* and do not adversely affect any animals or plants within the area.[131]

"Aboriginal cultural activity" is defined to include the activity of hunting, fishing or gathering undertaken by an Aboriginal person for his or her personal use based on Aboriginal custom of Tasmania as passed down to that Aboriginal person, s 49A (2).

Planning process; competing land use

Under the *Land Use and Planning Act 1993*, local councils are "responsible for including consideration of cultural heritage in the preparation and administration of planning schemes".[132] The criminal sanctions mentioned above make it necessary to seek consent if it is known that proposed development will affect a relic. However, these provisions are not necessarily effective without an automatic clearance or consent procedure.

There are no legal requirements to carry out consultations concerning Aboriginal heritage in the planning and development process. Current practice is that information is sought from PWS about protected items in a development area. This will reveal what is registered, but nothing else.

If it is known that a proposed land use may affect an Aboriginal site or if survey work or research is to be done, an application is made to the Department of Environment and Land Management for a permit under section 9 or 14 of the Aboriginal Relics Act. The matter would be referred to the Tasmanian Aboriginal Land Council for a recommendation.[133] The Department then advises the Minister who makes the final decision on the protection or destruction of Aboriginal sites.[134]

The policy is to protect 'heritage' of all kinds. To advance this policy a condition of planning permission could be to require an archaeological survey to be done in order to discover whether there are sites or relics not yet known and recorded.[135]

Current law does not protect cultural sites, ie. sites which are significant to Aboriginal people according to Aboriginal tradition. There appears to be potential to develop State planning policy to ensure a wider consultation process with Aboriginal community about the impact of development proposals on these broader aspects of cultural heritage. Such a procedure could be built into the legal requirements.

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129 Karen Brown TALC ,discussions.

130 Tas Discussions.

131 s 49A, National Parks and Wildlife Act (inserted by Aboriginal Lands Act 1995).

132 Ministerial Council on Aboriginal and Torres Strait Islander Affairs, Working Party Report on Item 4.1, *Aboriginal Heritage: Interaction between States, Territories and Commonwealth*, 1995 10.

133 Tas Discussions, Govt.

134 Ministerial Council on Aboriginal and Torres Strait Islander Affairs, Working Party Report on Item 4.1, *Aboriginal Heritage: Interaction between States, Territories and Commonwealth*, 1995 10.

135 Tas Discussions, Govt.

Emergency protection

The legislation does not provide for emergency protection.

Cultural property, objects, remains

Tasmanian legislation does not deal with the return of Aboriginal heritage, except in regard to remains.

The *Museums (Aboriginal Remains) Act 1984* declares all Aboriginal remains in possession of the Museums to be property of the Crown. The Minister can require the Museum trustees to deliver remains to the elders of the Tasmanian Aboriginal community. They may then cremate them (by virtue of exemption from laws which would prohibit this).

According to the government, most problems concerning human remains have been resolved. However, litigation had to be undertaken by TALC in the case of *Sainty v Allen*[136] to secure the return of non-skeletal material taken from the Tasmanian World Heritage Area under authority of a permit which had expired.

Recovery of material from overseas

Tasmania has been active in recovering materials from overseas. See Chapter 12.

Interaction issues

The submission from the Tasmanian Government makes the following observations:

> Notwithstanding the powers given to the Commonwealth under the Constitution, any new Federal Aboriginal heritage legislation should recognise the high level of protection afforded Aboriginal heritage under existing and planned Tasmanian legislation and avoid intervening unnecessarily in the State land use and planning system. Overlap of Commonwealth and State responsibilities in this area is not in the interests of efficient administration or proper decision-making on planning and land use issues.
> Should the new Commonwealth legislation contain powers to intervene in decisions covered by the State's resource management system, it is in my view essential that mechanisms be put in place at the outset, through full consultation with the States, to clearly establish the responsibilities of the two levels of government.[137]

some concerns

Concern was expressed in consultations about the need for more resources to research and protect Aboriginal heritage in Tasmania. Another issue was the need for legal standards to ensure that developers are required to consult Aboriginal communities. Most of the concerns raised are covered by the Chapters dealing with Interaction and Standards for State and Territory laws.

Tasmanian Applications under Commonwealth Act

See Appendix VII

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136 Kate Auty, "Aboriginal Cultural Heritage: Tasmania and La Trobe University" (1995) Aboriginal Law Bulletin, vol 3, no 76, p 20.
137 Tas Government, sub 64.

PART C

VICTORIA[138]

Background and general objectives

The protection of Aboriginal cultural heritage in Victoria is dealt with under a unique legislative structure. This includes a Victorian Act, the *Archaeological and Aboriginal Relics Preservation Act 1972*, ('the Relics Act'), and the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984, Part IIA : Victorian Aboriginal Cultural Heritage* ('Part IIA').

The Archaeological and Aboriginal Relics Preservation Act 1972 (Vic)

The *Relics Act* adopts an archaeological approach to the protection of relics, and is comparable with relics based legislation in other parts of Australia. It establishes administrative procedures for archaeological investigation.

Part IIA: Victorian Aboriginal Cultural Heritage (Cth)

Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is specific to Victoria, and was passed by the Commonwealth in 1987 in response to a request from the Victorian Government.[139] It defines heritage broadly and gives local Aboriginal communities an extensive role in the protection of heritage. It provides blanket protection to 'Aboriginal places' and Aboriginal objects' as defined. The principles on which the Act is based were was developed by the Koori Heritage Working Group after extensive consultation with Aboriginal people.[140] Its guiding principles are based on: Aboriginal ownership and control of heritage; and a definition of heritage which reflects the aspirations of Aboriginal people rather than scientific interests.[141] Part IIA recognises the role of Aboriginal people in the protection of their cultural heritage, though it may not have delivered fully the intentions of its authors.

The preamble to the amending Act which added Part IIA to the Commonwealth Act (and which does not appear in the reprint of the 1984 Act) is as follows:

> Whereas it is expedient to make provision for the preservation of the Aboriginal cultural heritage in Victoria:
> And whereas the Government of Victoria acknowledges:
> (a) the occupation of Victoria by the Aboriginal people before the arrival of Europeans;
> (b) the importance to the Aboriginal people and to the wider community of the Aboriginal cultural and heritage;
> (c) that the Aboriginal people of Victoria are the rightful owners of their heritage and should be given responsibility for its future control and management;
> (d) the need to make provision for the preservation of objects and places of religious, historical or cultural significance to the Aboriginal people;
> (e) the need to accord appropriate status to Aboriginal elders and communities in their role of protecting the continuity of the culture and heritage of the Aboriginal people;
> And Whereas the Government of Victoria has requested the Parliament of the Commonwealth to enact an Act in terms of this Act:
> And whereas the *Commonwealth does not acknowledge the matters acknowledged by the Government of Victoria, but has agreed to the enactment of such an Act:*

In some respects *Part IIA* has superseded the *Relics Act*. According to the Victorian government the inter-relationship between the Victorian and Commonwealth legislation

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138 The Review acknowledges the assistance of AAV and MNTU VALS in providing comments on the draft of this summary.

139 The amending Act is the Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987; HR Debates 25 March 1987, 1512. See Atkinson 51 ff.

140 A Discussion Paper was published in 1985, and was the catalyst for further work on draft legislation.

141 See the Preamble, below.

is complex and uncertain in effect. This may explain the fact that the Commonwealth legislation has not been used extensively.

Interaction issues

Some problems were raised in discussions and in the submission of the Victorian Government about the differences in approach between the Victorian legislation and Part IIA and about the uncertainty concerning the legal effects of their inter-relationship.[142] Because of the fundamental differences in approach of the Victorian legislation and Part IIA, the Victorian government has adopted a range of procedures to deal with the day to day administration of Aboriginal cultural heritage. The procedures are based on these principles:

> (a) Commonwealth legislation takes precedence over State in any area where the operation of the two Acts may be in conflict.
> (b) The matters acknowledged in the preamble to the 1987 amending Act accurately represent the views and aspirations of Victoria's Aboriginal people in relation to the protection of their cultural heritage.
> (c) Actions taken in relation to Aboriginal heritage administration should be in keeping with current Victorian government policy.[143]

There is continuing uncertainty as to the effect of s 7 (1A) of the Commonwealth Act. It is considered that this provision is an obstacle to reform of the Victorian legislation and to the enactment of legislation to amend or replace the *Archaeological and Aboriginal Relics Preservation Act 1972*. [144]

Administration

The powers and responsibilities of the Federal Minister under Part IIA are delegated to the Victorian Minister Responsible for Aboriginal Affairs. Both Acts are administered by Aboriginal Affairs Victoria, AAV.

Changes contemplated

Further legislation is contemplated by the Victorian Government to deal with the impact of planning and development on Aboriginal cultural heritage.

> The Victorian Government will undertake a review of all Victorian and Commonwealth legislation affecting the protection and management of Victoria's Aboriginal cultural heritage. The review will identify relevant legislation and planning processes impacting on heritage management and develop a cultural heritage management strategy for consideration by the Minister responsible for Aboriginal Affairs. In developing this strategy Victoria will not limit itself to simply reviewing legislation, but look at issues associated with the creation of a greater public awareness and understanding of the importance of cultural heritage resources and their relationship to the social, cultural and economic aspirations of Victoria's Aboriginal communities.[145]

What is protected

Part IIA: Aboriginal places, objects and folklore

142 Vic Govt, sub 68.
143 Vic Govt, sub 68.
144 Submission 68. Other issues are mentioned in Chapter 13.
145 Statement of Victorian Government to Ministerial Council, October 1995.

Part IIA covers *Aboriginal places and objects* in Victoria that are of particular significance to Aboriginals in accordance with Aboriginal tradition. *'Objects* include Aboriginal skeletal remains.

Part IIA also applies to *Aboriginal 'folklore'*, which means traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

'Aboriginal cultural property' includes Aboriginal places, Aboriginal objects and Aboriginal folklore.

Relics Act

The *Archaeological and Aboriginal Relics Preservation Act 1972 (Vic)* defines *'Archaeological relic'* and *'relic'* to include:

> a relic pertaining to the past occupation by the Aboriginal people of any part of Australia, whether or not the relic existed prior to the occupation of that part of Australia by people of European descent. . . and includes any Aboriginal deposit, carving, drawing, skeletal remains . . .

Remains interred in a cemetery after 1834 are excluded from the definition.

Criminal sanctions

Part IIA: Aboriginal places and objects

Part IIA prohibits damage or injury to broadly defined classes of Aboriginal places and objects, regardless of whether they have been registered or made the subject of a declaration. It is an offence to wilfully deface, damage, otherwise interfere with or do any act likely to endanger an Aboriginal object or Aboriginal place, s 21U. Consent can be sought from a local aboriginal community, to do an act which would otherwise be an offence. This provision does not prevent an Aboriginal person from entering on or interfering with an Aboriginal object in accordance with Aboriginal tradition, s 21U (2)

It is also an offence under Part IIA to contravene a declaration of preservation or protection made under the Act, s 21H (see below). The declaration is prima facie evidence that the place or object comes within *the Act*. In regard to these offences, if there is evidence that the defendant neither knew nor had reasonable grounds to know that the object or place was an Aboriginal object or place or was the subject of a declaration, the prosecution must prove that the defendant knew or ought reasonably to have know that fact.

The penalty for the offences mentioned is $10,000 or five years for a natural person and $50,000 for a body corporate. They are indictable offences.

Part IIA binds the Crown in right of the Commonwealth and of Victoria, s 6.

In certain circumstances a warrant can be obtained to enter, search and seize in order to protect Aboriginal objects, s 21S.

Relics Act

The *Relics Act* provides blanket protection by way of criminal sanctions for sites, artefacts and other relics. This protection applies to all relics, regardless of whether

they have been declared or registered. It is an offence to damage or endanger a relic, or to excavate land to uncover a relic without the consent of the Minister, s 21, 22. The discovery of relics must be reported, s 23.

The penalty for the offences is $1,000 or 3 months, s 28.

The Crown is not bound by *the Act.*

Enforcement

Information provided by AAV indicates that the enforcement provisions of the *Relics Act* have mainly been applied in respect of the illegal buying and selling of Aboriginal relics, s 26A. There have been approximately six prosecutions for such cases, dating back to 1976, and one case is currently listed for hearing in the courts. In addition, there has been one prosecution for damaging relics, s.21; one prosecution for entering an archaeological area without a permit, s.17; and one prosecution for possession of Aboriginal skeletal remains, s 26B.

Action was also taken under the *Relics Act* in 1980 by the Gunditjmara Aboriginal community, to protect sites and places endangered by construction of an aluminium smelter at Point Danger, Portland.[146] Other relevant litigation, initiated by Mr. Jim Berg of the Koorie Heritage Trust, is mentioned below.

In addition to actual litigation, the existence of sanctions and penalties within the Relics Act for "wilfully or negligently" damaging relics, s 21U, has been of considerable assistance in ensuring that Aboriginal cultural heritage is taken into account in the course of environmental assessment and statutory planning processes.[147]

Identifying assessing and registering sites

Part IIA: Declaration of preservation of places and objects

Under Part IIA a local Aboriginal community (as defined) can decide on its own motion or on application that a *place* or *object* is an Aboriginal place or object, and that it is appropriate, having regard to the importance of maintaining the relationship between Aboriginals and that place or object, that a declaration of preservation should be made. If such a decision is made, the community can advise the Minister that it considers that a *declaration of preservation* should be made, s 21E. Emergency and temporary declarations can also be made.[148]

The Minister must notify persons affected and give an opportunity to be heard. After hearing objections, the Minister can, if satisfied that it is reasonable and appropriate to do so, make a declaration of preservation.

> if the Minister considers that, in all the circumstances of the case, it is reasonable and appropriate that a declaration be made for the preservation of the place or object - make the declaration in writing and, in the declaration, specify the terms of the declaration and the manner of preservation to be adopted in relation to the place or object, including prohibition of access to or interference with, the place or object; or
> refuse to make the declaration.

146 *Onus v Alcoa Aust Ltd* (1981) 149 CLR 27 (55 ALJR) The High Court recognised the standing of Aboriginal people to enforce the Victorian Act.

147 Information provided by AAV.

148 See below.

The Minister's decision to make or not to make a declaration can be the subject of review by an arbitrator at the request of the community or of a person likely to be affected.

Legal protection follows when there has been a declaration in respect of the object or place, s 21H, 21Y. A Register is kept of declarations, s 21V. A declaration relating to a place does not affect any legal obligation relating to the protection or conservation of land, unless inconsistent with the declaration, s 21J.

Relics Act

a) **designating archaeological areas**

Land can be declared an archaeological area where it is necessary to reserve the land for the preservation of relics, s 15. Consent of the owner, or if it is Crown land, etc, the relevant Minister, must be sought first. Permission is required to enter such an area.

b) **recording archaeological sites**

The AAV has a section, the Heritage Services Branch, which studies and records sites and places. There is a central register and computerised maps showing all the registered archaeological sites are provided to the local Aboriginal communities. Other maps show areas not yet surveyed. Eighteen thousand archaeological sites have been recorded. Work is also being done by AAV to locate and document Aboriginal historic places and sites, which are significant in terms of Aboriginal post-contact heritage. [149].

The *Relics Act* establishes administrative procedures for archaeological investigations. Permits are necessary to enter archaeological areas or to excavate.

Confidential information

Part IIA provides that the Register of places in respect of which declarations have been made is not to be open for inspection except as prescribed, s 21V. An application has to be made to the Minister.

The *Relics Act* does not make provision for confidentiality of information, nor for dealing with specific gender issues, such as women's sites. In practice, AAV does not give out information about sites except in accordance with stringent Site Registry access guidelines.

Ownership, access and management issues

Part IIA of Commonwealth Act

a) **Ownership**

The Minister may compulsorily acquire any Aboriginal cultural property which is of such significance that it is irreplaceable and where no other arrangements can be made to ensure its continuing preservation and maintenance. The property so acquired is vested in the local Aboriginal community, s 21L.

b) **Access**

[149] Discussions, AAV.

A temporary declaration or a declaration of preservation under Part IIA may include provision prohibiting access to the place or object.

A local Aboriginal community can give authority to enter on land to place a notice about a place or object which has been the subject of a declaration, s 21G. This would most probably be done by a community-based Cultural Officer. It is an offence to damage or interfere with a notice.

c) **Role of local Aboriginal communities**

Under part IIA Victoria is divided into 'community areas' and in each area a 'local Aboriginal community' is recognised as having responsibility for the Aboriginal heritage in that area.[150] Local Aboriginal communities are organisations established for the purposes of Part IIA. They have extensive functions under that Part. They can seek declarations, enter into Aboriginal Cultural Heritage Agreements, appoint wardens, receive remains, negotiate for the return of remains, etc. They can request an arbitrator to review a decision of the Minister to refuse a declaration. However, some of these bodies do not operate due, in part, to lack of funding.[151]

The Act provides for a general meeting of representatives of each local Aboriginal community, s 21W. It is understood that this has not yet occurred on a State-wide basis, and that no such general meeting has yet been requested.

The Aboriginal communities are used by the Government as referral bodies for certain purposes.

d) **Inspectors, keepers and wardens**

After consultation with a local Aboriginal community, the Minister may appoint a person as an inspector for the purposes of Part IIA, s 21R. Inspectors, (who may also be cultural officers) can make emergency declarations to protect sites, have power to enter and search in certain situations. Honorary keepers or wardens may also be appointed by local Aboriginal communities, s 21T.

e) **Cultural officers and site officers**

Under the Cultural Officer Program of AAV, Cultural Officers are attached to local Aboriginal organisations to perform a range of duties. These include protecting Aboriginal sites, providing information on Aboriginal cultural heritage and representing the local Aboriginal community on all Aboriginal heritage matters.[152] There are 25 Aboriginal cultural officers. They are selected and employed by Aboriginal community organisations, using funds provided through AAV. Most are also inspectors under Part IIA.

Relics Act

a) **Ownership**

Relics within an archaeological area are the property of and are under the protection of the Crown, s 20. The Museum of Victoria is the official place of lodgment.

There is provision for the acquisition by purchase of relics or the land on which there are immovable relics, etc, s 26.

b) **Access**

150 The boundaries were established for the communities, it took two years: Discussions, Brooks, Atkinson. There is continuing conflict in relation to certain boundaries under the scheme.

151 Comments by MNTU VALS.

152 Health and Community Services Annual Report 1994-1995, p 182.

Aboriginal people have no rights of access to sites over and above any other person, nor any right to be consulted on issues arising under the Act.

c) **Management and control**

The Victorian Act makes provision for an Archaeological Relics Advisory Committee of 12 members, three of whom are to be Aboriginals, nominated by the Minister, s 5. The functions of the Committee are to advise the Minister on the preservation of archaeological relics, s 7. The Committee ceased in 1987, and the government now liaises with the local Aboriginal communities established under Part IIA of the Commonwealth Act.

There is provision for honorary inspectors and wardens, s 9. They have power in certain situations to make inquiries, ask for identification and ask persons to leave an archaeological area. Aboriginal people could be, but need not be, appointed as inspectors. Some inspectors are in fact members of local Aboriginal communities.

AAV employs five regional site officers to monitor the management requirements of significant Aboriginal places and archaeological sites.

The Victorian Government accepts that the Commonwealth Act gives greater recognition to the role of Aboriginal people in heritage matters:

> The main strength of the Commonwealth Act is the recognition that it gives to Aboriginal people as the principal custodians and decision-makers concerning Aboriginal heritage. The Victorian Act is less adequate in this regard. [153]

Competing land uses: the planning process

Legal framework

Under both Acts consent must be sought for any action, such as a development, which could give rise to an offence under the legislation by causing damage to an Aboriginal object or place, or to a relic.

Part IIA

Under Part IIA, which makes it an offence to damage an Aboriginal place or object, an application can be made for consent to do an act which would otherwise be an offence, s 21U (3). Consent can also be sought for excavation or scientific research. The application is made to the local Aboriginal community which has 30 days to respond. If it does not either grant consent or refuse consent within 30 days the applicant can seek consent from the Minister. The Minister must seek recommendations from any person or body that should consider the matter, and must consider any recommendations made; the Minister can give consent if of the opinion that, in all the circumstances, consent should be granted.

Relics Act

Under the *Relics Act*, the Minister can give consent to damage a relic. He must, within 90 days, seek a recommendation from the Advisory Committee (in practice, the local Aboriginal community) and publish a notice in the paper to call for submissions, s 21 (2)-(7). The Minister must consider whether the relic is of special significance and, in that regard consider the recommendation of any Aboriginal person submitted to him. There is no statutory provision requiring Aboriginal people to give consent.

153 Statement of Victorian Government to Ministerial Council, October 1995.

Practice

It is not compulsory under Victorian law for developers to approach the Department to get clearance in respect of Aboriginal heritage, and AAV could not handle the workload if this occurred.[154] In practice, applications to the Minister for authority to damage, disturb or destroy an Aboriginal site would be referred to the local Aboriginal community established under Part IIA of the Commonwealth Act. The practice and procedures which have been adopted are considered to go some way to overcoming the problems of overlapping laws and gaps in the system.

> The Government concedes that the Victorian Act does not make adequate provision for the inclusion of Aboriginal site protection in the planning process. However, the administrative procedures, particularly the keeping of a central register of known sites and an archive of archaeological survey reports, provide a basis for effective input of cultural heritage information into the planning and environmental impact assessment process.
>
> The two areas where there is a shortfall are incentives for private land holders to assist Aboriginal heritage protection and the explicit inclusion of Aboriginal heritage protection in the planning process. These are important issues because both deal with private land where long term protection of Aboriginal heritage values is most problematic and where conflict may occur. However, other Victorian legislation does address these issues.
>
> As to planning, the *Planning and Environment Act 1987* sets out objectives of planning in Victoria. Aboriginal places and archaeological sites meet the criteria for conservation and enhancement through the planning process. A few municipalities have commissioned Aboriginal heritage studies. Aboriginal heritage values can be included in the environmental impact assessment process at the discretion of the Minister.[155]

Where Aboriginal heritage may be affected, AAV advises the proponents of developments to engage an archaeological consultant to carry out a survey and assess likely impacts. Aboriginal communities would participate, and advise the consultant of the community's views, eg. on site significance and appropriate management actions.[156] The practice described is not supported by any formal legal structure for negotiation or mediation with Aboriginal people in the planning process.

Mining

Under the *Mineral Resources Development Act 1990,* applications for exploration and mining licenses are to be provided to Aboriginal communities and to the AAV. No mining is to occur within 100 metres of a registered Aboriginal site.[157] This system depends to some extent on a comprehensive data base concerning Aboriginal heritage, whereas the records are not complete. A map is being developed which can be given to miners or developers. It indicates distribution of sites, but does not suggest that if there are no sites shown there are none there. If inquiries are made by a mining company or developer, AAV may suggest that if the area has not been surveyed the mining company then does its own survey for Aboriginal heritage before it begins work. But there is no automatic clearance process.

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154 Discussions, AAV.

155 Statement of Victorian Government to Ministerial Council, October 1995. The EIA process is under the *Environmental Effects Act 1978.*

156 Comments and discussions, AAV.

157 Statement of Victorian Government to Ministerial Council, October 1995.

Agreements

Part IIA

The Commonwealth Act provides for a local Aboriginal community to enter into an Aboriginal Cultural Heritage Agreement with a person who owns or possesses any *Aboriginal cultural property* (includes folklore), s 21K. Agreements may be about preservation, maintenance, exhibition, sale or use of the property and the rights, needs and wishes of the person and of the Aboriginal and general communities. Agreements relating to land can include a provision that they be recorded in the Registry of Titles.

Cultural Heritage agreements have been considered on several occasions, but legal problems have prevented finalisation in each case. One problem is lack of enforcement provisions to deal with breaches of Agreement. [158]

Relics Act

The Victorian Act does not contain provision for agreements with private land holders or others.

> The Victorian Government observes that private land holders could enter into conservation covenants under the *Victorian Conservation Trust Act 1972*, and that this could provide long term protection for Aboriginal cultural heritage on the property. There would be financial incentives. However, the local Aboriginal community would not participate. They suggest that financial incentives for cultural heritage agreements be provided under the Commonwealth Act, to encourage its use.[159]
>
> It is also suggested that there should be incentives for land holders to carry out site protection works in co-operation with local Aboriginal communities.

Emergency and threat protection

Part IIA of Commonwealth Act

Emergency and other protective orders can be sought under Part IIA of the Commonwealth Act. Local Aboriginal communities have a specific function in seeking protection of this kind. These processes must be used before an application is made to the Commonwealth Minister for a declaration, s 8A. This is one reason why no applications have been made to the Federal Minister since Part IIA came into force.

a) **Emergency declarations**

An emergency declaration can be made by an inspector appointed under Part IIA, or by the Minister where they have reasonable grounds for believing that an Aboriginal *place* or *object* is under threat of injury or desecration of such a nature that it could not properly be protected unless an emergency declaration is made. They may act on their own motion or on application by a local Aboriginal community, or by any person, s 21C. A Local Aboriginal community may also apply to a magistrate for an emergency declaration.

The emergency declaration lasts only for 30 days, or a period fixed by Minister up to 44 days. There is provision for notice to be given to persons likely to be affected. It is an offence to contravene an emergency declaration in respect of the object or place (see above).

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158 Comment provided by AAV.

159 Statement of Victorian Government to Ministerial Council, October 1995.

There have been 8 emergency declarations under s 21C in respect of five individual Aboriginal places .[160] One of these was later subject to a temporary declaration under s 21D.'

b) **Temporary declarations**

If a local Aboriginal community decides, on its own motion or on application, that a *place* or *object* is an Aboriginal place or Aboriginal object, and that it is under threat of injury or desecration, it can advise the Minister that a temporary declaration of preservation should be made, s 21D. The Minister must notify persons affected and give an opportunity to be heard.

After hearing objections, the Minister shall,

> if the Minister considers that, in all the circumstances of the case, it is reasonable and appropriate that a temporary declaration be made for the preservation of the place or object - make the declaration in writing and, in the declaration, specify the terms of the declaration and the manner of preservation to be adopted in relation to the place or object, including prohibition of access to or interference with, the place or object; or
> refuse to make the declaration.

The declaration can remain in force for 60 days or be extended up to 120 days. Notification has to be given of the declaration or its revocation. There has been one temporary declaration.[161]

Persons affected by the making, refusal or revocation of a declaration may ask for an arbitrator to be appointed to review the Minister's decision, s 21D (6)(7).

It is an offence to contravene a declaration in respect of the object or place (see above).

Relics Act

There are no equivalent provisions in the Victorian Act. It may be possible to take Court action to enforce *the Act.*

Cultural property, objects and artefacts

Objects

a) **Part IIA protects objects and folklore**

Emergency and other declarations can be made under Part IIA in respect of Aboriginal objects which are under threat. This does not expressly apply to the sale or removal of an object from Victoria unless that may create a risk of damage or desecration.

Aboriginal Heritage Agreements can be made in respect of any Aboriginal cultural property, which includes objects and folklore. Cultural property can be compulsorily acquired in certain cases, s 21L.

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160 *A Plain English Introduction to Legislation Protecting Aboriginal and Torres Strait Islander Heritage in Australia,* ATSIC, 1996, p 23. Multiple emergency declarations were made in respect of Bucks Sand ridge in the Barmah Forest.

161 *A Plain English Introduction to Legislation Protecting Aboriginal and Torres Strait Islander Heritage in Australia,* ATSIC, 1996, p 23; comments from AAV, above..

b) **Relics Act prohibits buying ,selling etc**

It is an offence to buy or sell a relic of any kind without consent, ss 26A, 27. It is also an offence to buy or sell a portable relic, s 27. Persons in possession of portable relics are bound to safeguard them and to give notice to the Secretary, s 27a, 27B. The Director of AAV issues permits for the sale and purchase of relics.

It could be doubtful in some cases whether certain objects covered by the Victorian Act also fall within the definition of the Commonwealth Act

Interaction issues relating to objects

There are problems concerning the overlap and gaps between Victorian and Commonwealth law, and between Victorian law and laws of other States in regard to the protection of objects and relics.

> Both Acts provide for significant Aboriginal objects, and make some provision for return of these to Aboriginal communities. However, these provisions could be improved in both Acts.[162]
>
> Effective implementation of the legislation in this area is hampered because laws in other States and Territories do not control the buying and selling of Aboriginal relics as tightly as Victorian legislation. We have raise this issue for discussion at a national forum of cultural heritage administrators, with a view to achieving more uniform controls on the sale of culturally significant materials.[163]

Many artefacts offered for sale in Victoria are said to come from other parts of Australia. Some examples are given. There were four cases in which relics were advertised for sale. In one case investigations led to 80 artefacts being withdrawn from a major sale of Aboriginal artworks. The Review was also informed that the objects in question had been removed from Victoria and offered for sale in another State. The Federal Minister arranged for the purchase of the material under s 21L. The artefacts were returned to Victoria, where it is intended that they will be returned to relevant local Aboriginal communities which have appropriately secure storage and display facilities.[164]

Remains

a) **Part IIA**

Provisions relating to the protection of 'objects also apply to 'remains' which are included in the definition of 'object'. There are also specific provisions relating to remains.

Persons discovering Aboriginal remains in Victoria must report the discovery to the Minister. The Minister shall then consult with the local Aboriginal community with a view to determining the proper action to be taken in relation to the remains, s 21P.

Where Aboriginal remains are delivered to the Minister, he shall return them to a local Aboriginal community which is entitled willing to accept them, or deliver them to the Museum of Victoria. The local Aboriginal community is not prevented from dealing with the remains in accordance with Aboriginal tradition, s 21Q.

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162 Statement of Victorian Government to Ministerial Council, October 1995.

163 Health and Community Services Annual Report 1994-1995, p 187.

164 Comments provided by AAV. Further discussion in Chapter 12. Cases are discussed in Annex VII.

If a local Aboriginal community believes that any Aboriginal remains held by an institution came from its area, the community may request the Minister to negotiate with the institution for the return of the remains to the community, s 21X.

b) **Relics Act**

The definition of relics includes remains other than those relating to cemetery burials after 1834. They are therefore covered by the provisions mentioned above. I n addition it is an offence to possess, display or have under control any Aboriginal skeletal remains without consent, s 26B.

There have been active efforts to secure the return of remains which were held by museums and universities in Victoria to the Aboriginal communities. Some significant litigation occurred in this regard, initiated by Jim Berg of the Koori Heritage Trust.[165]

While most remains have been returned, it was mentioned in consultations that AAV still holds some skeletal remains at the request of the relevant Aboriginal communities, pending return for reburial. AAV also works in co-operation with the Victorian Police Coroner's Office and Aboriginal communities to investigate, document and protect Aboriginal skeletal remains which are found during the course of land disturbance, or in areas subject to natural erosion.[166]

Problems of interaction

There have been no applications under the Commonwealth Act from Victoria since the enactment of Part IIA. Some problems arising from the unique combination of laws in Victoria is mentioned in the introduction to this summary and in Chapter 13 of the Report.

The Victorian Government recommends a uniform approach to the protection of significant Aboriginal objects from unlawful sale and that there by a system for controlling the purchase and sale of Aboriginal objects other than those specifically made for the purpose of sale.[167] This is considered in Chapter 12.

Applications under Commonwealth Act

There have been no applications under the Commonwealth Act since the 1987 amendments to that Act took effect.

165 MNTU VALS submission p 13, the two cases which have advanced the protection of skeletal remains and the preservation of Aboriginal cultural material in Victoria have been victories within the framework of the Victorian Act.

166 Comments from AAV.

167 Statement of Victorian Government to Ministerial Council on the Sale of Aboriginal relics from Victoria and other jurisdictions, October 1995.

AUSTRALIAN CAPITAL TERRITORY[168]

Background and general objectives

Aboriginal cultural heritage in the ACT is covered by legislation of general application which includes specific provisions covering Aboriginal cultural heritage. There is provision for Aboriginal to be consulted.

The *Land (Planning and Environment) Act 1991 (ACT)* [The Land Act], Part III, Division 5, deals with Aboriginal Heritage. It provides for the protection of Aboriginal places and objects associated with those places.

The *Heritage Objects Act 1991* applies to certain 'Aboriginal objects' which are not or are no longer associated with an Aboriginal place.

The heritage aspects of the ACT legislation apply only to Territory Land. They are administered by the Bureau of Arts and Heritage in the Department of Business, the Arts, Sports and Tourism.

Aboriginal heritage places on National Land are the responsibility of the Australian Heritage Commission under the Australian Heritage Commission Act 1976 (Cth).

What is protected

The relevant legislation adopts a broad definition of Aboriginal places and objects which could extend to contemporary as well as traditional Aboriginal cultural heritage.

Aboriginal place

'*Aboriginal place*' is defined in the Land Act to mean a place which is of significance in 'Aboriginal tradition'.

'*Aboriginal tradition* means "the traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and include traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation", s 52.

Aboriginal objects

'*Aboriginal object*' is defined by the Land Act to mean

> a natural or manufactured object, which is of significance in Aboriginal tradition, or
>
> human remains which have not been buried in accordance with State or Territory laws and which are of significance in Aboriginal tradition, s 52.

The Land Act applies to Aboriginal objects which are located on an Aboriginal place and which are intrinsic to its heritage significance, s 54 (1)(b).

The Heritage Objects Act defines 'Aboriginal objects', in the same way as the Land Act. Its intention is to cover objects which are not part of a place.

Protection through criminal sanctions

It is an offence to disturb damage or destroy an unregistered Aboriginal place (unless its earlier registration has been cancelled), Land Act, s 70. It is an offence to carry out

168 The Review acknowledges the assistance of the ACT Bureau of Arts and Heritage, and of Robyne Bancroft in providing comments on the draft of this summary.

certain controlled activities, ie activities which affect heritage conservation, on a registered heritage place without approval, s 225.

The penalty is, in the case of s 70, 50 penalty units for an individual or 250 units for a corporation.[169] In the case of s 225 the penalty is $20,000.

Damage or destruction of unregistered Aboriginal objects or activity inconsistent with an interim Heritage Objects Register carries similar penalties.[170]

The Crown is bound by the legislation.

Assessing and registering sites

Aboriginal places and objects are registered on general Heritage Registers. There is provision for them to be specifically identified.

Heritage places register

The Land (Planning and Environment) Act 1991 establishes an interim and a permanent Heritage Places Register. Any person may apply for an Aboriginal place to be entered on the register.

There is an obligation to report the discovery of an unregistered Aboriginal place to the Minister, s 67. Penalties are prescribed.

Upon report or discovery of a site an Aboriginal Sites Officer and a qualified person (such as an archaeologist) from the Department would examine the site. The Heritage Council must report to the Minister on the significance of the place or object after consultation with the owner, occupier and any relevant Aboriginal organisation, s 68. The Minister would then decide whether or not to put the place on an interim register, s 69. Interested persons may then appeal to an Appeals Board, s 86.

When the above processes are complete, steps are taken to include the place in the permanent register which forms part of the ACT Plan; thereafter it is subject to s.8 of the Land Act. Entry on the Heritage Register is subject to final approval by the ACT Legislative Assembly.

The Register must specify places that are Aboriginal places, s 54 (1)(a). Three Aboriginal places are on the ACT Heritage Places Register.[171]

Heritage objects register

There is a separate Heritage Objects Register. One collection is recorded.

Heritage Council

The Heritage Council has 11 members including 9 appointed by the Minister, s 97. The Minister should endeavour to ensure that various disciplines and areas of expertise are represented on the Council; the specified areas include Aboriginal tradition, s 99. At present there is no member with expertise 'in Aboriginal tradition' as provided for in the Act.[172]

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169 Penalty units are at present $100.

170 Heritage Objects Act 1991, s 39

171 *A Plain English Introduction to Legislation Protecting Aboriginal and Torres Strait Islander Heritage in Australia*, ATSIC, 1996, p 32.

172 The Review was informed that the Minister is attempting to find a person who is acceptable to the various Ngunawal and Ngunnawal corporations.

Land in the ACT remains the property of the Commonwealth Government.

Planning and development process

> Registered sites are included in the Territory Plan. Section 8 of the Land Act prevents the Territory, the Executive, a Minister or Territory Authority from doing any act inconsistent with the Plan."
>
> The heritage protection provisions are fully integrated with planning provisions in the ACT. The entry of an Aboriginal place in the ACT Heritage Places Register requires a variation to the Territory Plan, the ACT's planning instrument. Consequently, land use decisions are directly affected or influenced by heritage listings.
>
> There are defined time frames for the approval process for heritage controlled activities.[176]

Development approval, Ministerial approval and compliance with the heritage provisions of the Land Act are required for any development. There is a public notification procedure and an appeal process. The Minister and the Authority, in relation to development and external design and siting respectively, are required to consult with relevant Aboriginal organisations when a proposed development may affect an Aboriginal place, s 231.

Under the Heritage Objects Act, the Minister must notify the Heritage Council and any relevant Aboriginal organisations in respect of an application to conduct controlled activities in relation to a heritage object, s 25.

Incentives to agreement

There are no legislative incentives to land holders to enter into agreements with Aboriginal people concerning heritage.

The Land Act provides for compensation to persons in respect of loss or damage arising out of obligations which were incurred prior to the Registration of a place, s 76-80.

Emergency protection

Emergency protection is provided by the Registrar of the Appeals Board, s 256, or the Executive, s 256 (4D). This implication here is that an order made by the Executive is effective immediately, whereas an order by the Registrar may be delayed up to 7 days. An injunction can be sought to prevent a breach of such orders, s 261.

The Land Act provides for stop orders in respect of unregistered Aboriginal places pending consideration by the Heritage Council, s 71.

The Heritage Objects Act, s 40 provides for orders to be made for the protection of unregistered Aboriginal objects.

Cultural property, objects, remains, etc

Remains are included in the definition of "objects". The legislation does not provide expressly for the return of significant Aboriginal objects or remains to Aboriginal people.

Under the Heritage Objects Act the Minister must keep Aboriginal objects owned by the Territory in an authorised repository, s 48. The Minister must first consult with and

[176] Paper by ACT for Standing Committee of Officials, August 1995.

consider the views of the Heritage Council and each relevant Aboriginal organisation, s 48.

Applications under Commonwealth Act

There have been none.