Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005

Referral and conduct of the inquiry

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

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

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

The Bill

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

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

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

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

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

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

¹ Senator the Hon Kay Patterson, Second Reading speech, Senate Hansard, No 15, 2005, 12 October 2005, p. 3.
1.6 The Bill also proposes to make consequential amendments to the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*.

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

**Proposed amendments**

**Schedule 1 – Effect of declarations**

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

1.9 Schedule 1 amends the Act as follows:

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

- item 2 inserts a new subsection 18(2A) which provides that where emergency declarations are issued under subsection (1) seeking to protect or preserve areas or objects, those declarations will not prevent the export of objects where a certificate is in force under s.12 of the *Protection of Movable Cultural Heritage Act 1986*.

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5 Senator the Hon Kay Patterson, Second Reading speech, *Senate Hansard*, No 15, 2005, 12 October 2005, p. 3.
Cultural Heritage Act 1986. The certificate authorises a person to import Australian protected objects and subsequently to export them again; and

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

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

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

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

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

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

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

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

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

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

1.16 The Director continued:

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

Schedule 2 – Repeal of Part IIA

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

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

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

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

…wrote to the Australian Government…to explore how this obstacle could be removed to allow proposed new Victorian cultural heritage legislation to be put in place.\textsuperscript{12}

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

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

Under Part III [of the Aboriginal Land (Lake Condah and Framlingham Forest) Act] which deals with the management of Condah land, the Kerrup-Jmara Elders Aboriginal Corporation is responsible for compiling a register of sacred and significant sites on Condah land. Subsection 16(2) requires that the register be kept in a manner that would prevent the disclosure of its contents other than in accordance with the purposes of Part IIA of the \textit{Aboriginal and Torres Strait Islander Heritage Protection Act 1984} without the permission of the governing committee. The current Bill removes this exception. This amendment is consequential on the proposed repeal of Part IIA.

In relation to Framlingham Forest, the Kirrae Whurrong Aboriginal Corporation is required to compile a register of sacred or significant sites and a similar exception also applies in subsection 24(2). That exception is removed.\textsuperscript{14}

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

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

\textsuperscript{12} Senator the Hon Kay Patterson, Second Reading speech, \textit{Senate Hansard}, No 15, 2005, 12 October 2005, p. 3.

\textsuperscript{13} Department of Parliamentary Services, \textit{Bills Digest} No. 65, 30 November 2005, pp 6-7.

\textsuperscript{14} Department of Parliamentary Services, \textit{Bills Digest} No. 65, 30 November 2005, p. 7.
However, in his submission, the Hon Gavin Jennings MLC, Minister for Aboriginal Affairs (Victoria) advised that:

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

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

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

This was a concern that was raised in other submissions.\(^{17}\) Dr Sharman Stone, Federal Member for Murray, has observed that:

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

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

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

\(^{16}\) Minister for Aboriginal Affairs (Victoria), *Submission 1*, p. 1.

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

\(^{18}\) Dr Sharman Stone, *Submission 4*, p. 1.

\(^{19}\) Yorta Yorta Nation Aboriginal Corporation, *Submission 7*, p. 3.
Schedule 3 – Technical amendments relating to legislative instruments

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

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

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

1.31 The Land Council points out that:

While emergency declarations made under section 9 of the Heritage Protection Act may only have effect for a maximum period of 30 days, declarations made under sections 10 and 12 may have effect for any period of time determined by the Minister. Accordingly, in 1992, pursuant to section 10 of the Heritage Protection Act, the Minister for Aboriginal Affairs made a 10 year declaration to protect Junction Waterhole, near Alice Springs in the Northern Territory.

Therefore, one of the consequences of making Ministerial declarations "legislative instruments" is that there is the potential for declarations to cease to have effect after only 10 years, even if the Minister has determined that the declaration should be in effect for a longer period. Whether or not declarations will continue to have effect after 10 years will be at the Parliament's discretion.

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

20 Explanatory Memorandum, p. 1.
21 Central Land Council, Submission 5, p. 1.
22 Central Land Council, Submission 5, p. 2.
...provision be made in Schedule 3 of the Bill for the Legislative Instruments Regulations 2004 to be amended to include Ministerial declarations made under sections 10 and 12 of the Heritage Protection Act in the list of legislative instruments which are exempt from the sunsetting provisions.\textsuperscript{23}

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

**Other issues**

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

- the Act provides insufficient recognition or protection of those Aboriginal traditional or spiritual knowledge or beliefs which restrict disclosure which severely inhibits the protection of areas and objects of particular significance to Aboriginal people;

- the requirement for the appointment of a reporter and the full reporting procedure whenever an application is made under s 10 of the Act should be amended to provide that such an appointment is discretionary;

- the threshold test required for the making of declarations under sections 9 and 10 of the Act, currently the same, should be much lower when seeking a s.9 'emergency' declaration than that required for a s.10 'permanent' declaration.\textsuperscript{24}

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

1.36 The Committee recommends:

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

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\textsuperscript{23} Central Land Council, Submission 5, p. 2.

\textsuperscript{24} Mr Ernst Willheim, Submission 3.