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14 August 2020

The Honourable Warren Entsch MP
Chair
Joint Standing Committee on Northern Australia
Online Submission:
https://www.aph.gov.au/Parliamentary_Business/Committees/OnlineSubmission

Dear Mr Entsch

Submission to the inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

1 The Kimberley Land Council (**KLC**) thanks the Committee for the opportunity to make the following submission to the inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia.

The Kimberley Land Council

2 The KLC is a grass-roots community organisation established in 1978 for the purpose of getting ownership and control of land back for Traditional Owners. The KLC's mandate is driven by its 1,500 strong membership of Kimberley Aboriginal people, and delivered by its board of directors. The links between traditional authority for country, reinforced by the support of all Kimberley Aboriginal people working together, is reflected in the culturally representative structure of the KLC board. The inherent link between land, law and language is also represented in the sisterhood between the KLC, the Kimberley Aboriginal Law and Culture Centre (KALACC) and the Kimberley Language Resource Centre (KLRC). Land, law and language are the touchstones of life and culture for Kimberley Aboriginal people, and the KLC's mandate is to deliver recognition and protection of interests in land.

3 Since 1998 the KLC has also been the recognised native title representative body for the Kimberley region pursuant to consecutive legislative instruments made under s203AD of the *Native Title 1993* (Cth) (**NTA**). More than 95% of the Kimberley region is now subject to determinations of native title. Twenty-two prescribed bodies corporate have been established in the region to hold or manage the recognised native title rights, and Aboriginal people are the largest land-owning demographic in the region. The KLC also supports 16 Aboriginal ranger groups in the Kimberley region through the Kimberley Ranger Network, and facilitates economic development opportunities through activities such as carbon farming and fee-for-service land management, providing essential and culturally aligned remote area employment.

4 All of these activities are done to recognise, protect, respect, and pass on to future generations the cultural heritage of the thousands of generations which came before us.

5 In this context, the KLC makes the following submissions to the Committee in relation to the

terms of reference -

> *(f) the interaction, of state indigenous heritage regulations with Commonwealth laws;*
>
> *(g) the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;*
>
> *(h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;*

National Native Title Council Submission to the Inquiry

6 The KLC is a founding member of the National Native Title Council (**NNTC**) and fully supports it submission to the Committee on the inquiry.[1] More particularly, the KLC endorses and repeats the submission of the NNTC that legislative reform is required at a Commonwealth level based on the *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation* developed by the Heritage Chairs and Officials of Australia and New Zealand (**Best Practice Standards**), a copy of which is attached to the NNTC submission. The Best Practice Standards are designed by reference to the *minimum standards* set out in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), which the Australian Government endorsed in April 2009 and most recently confirmed its commitment to in its submission to the "United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) – study on free, prior and informed consent" (**EMRIP Submission**).[2] It is important to note in relation to these *minimum standards* that:

> "*The UNDRIP does not impose new international legal obligations on states. Rather, it restates existing international legal obligations but framed in the specific context of Indigenous peoples.*"[3]

7 For the avoidance of doubt, what the NNTC submits, and KLC supports, is that the Australian Government put in place a legislative scheme that provides the globally accepted, and Australian Government endorsed, minimum standards for protection of Indigenous people. The fact that this submission needs to be pleaded to the Committee should reinforce how woeful current protections available to Indigenous people in Australia are.

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[1] Submission 34.

[2] https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/FPIC/Australia.pdf. The submission states that:

> *"Australia reaffirms its support for the Declaration as the most comprehensive commitment by the international community to the realisation of the human rights of indigenous peoples. We continue our efforts to advance the interests and defend the rights of Aboriginal and Torres Strait Islander peoples in Australia and indigenous peoples around the world."*

Aboriginal and Torres Strait Islander peoples in Australia and indigenous peoples around the world.

[3] Submission 34, p17.

KLC Submission on Commonwealth Indigenous Heritage Law Reform 2009

8 In November 2009 the KLC made a submission to the (then) Commonwealth Department of the Environment, Water, Heritage and the Arts (**DEWHA**) in response to a discussion paper on possible reforms to the legislative arrangements for protecting areas and objects. The submission and proposed reforms focused on the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIPH Act**), a statute which had originally been enacted as a two year stop-gap measure pending the development and enactment of a permanent scheme for protection of Indigneous heritage. However, at the end of the two year period, the stop-gap measure became permanent and no further changes have been made to the legislation in the 36 years since it was enacted.

9 The KLC respectfully submits to the Committee its November 2009 submissions on the failings of the ATSIPH Act and the requirements for an effective Commonwealth regime for protection of Aboriginal heritage, in particular:

> *"[T]he ATSIHP Act should be repealed and replaced by a new legislative regime which:*
>
> *(a) is consistent with the minimum standards set forth in the United Nations Declaration on the Rights of Indigenous People ("**UN Declaration**"), which was endorsed by the Australian Government on 3 April 2009;*
>
> *(b) recognises the development and shortcomings of native title law in Australia;*
>
> *(c) puts in place a scheme which is appropriate for the current legal understanding of Indigenous cultural heritage interests; and*
>
> *(d) is sufficiently advanced and adaptable to remain relevant and effective for the next twenty five years."*

10 While the KLC's November 2009 submission is now 11 years old, the sad reality is that there has been no reform in the Aboriginal heritage protection laws at either the Commonwealth or Western Australian State level in the intervening period. The submissions made in 2009 remain relevant, and need only be updated with the experience of Aboriginal people since then, particularly in relation to the interaction between the NTA and heritage protection laws. These experiences are addressed in the following section of this submission.

11 A copy of the KLC's November 2009 submission is included as **Attachment 1** to this submission.

The interaction between the *Native Title Act* and Indigenous Heritage Protection Laws

12 The KLC's submission on the interaction between the NTA and Indigenous heritage protection laws will focus on the context and consequence of the "consent" of native title holders to activities that damage or destroy their cultural heritage.

13 The KLC notes that it has been publicly reported that the destruction of the caves at Juukan Gorge was done with the agreement, provided under a written contract, of the native title

holders. The contract is before the Committee as an attachment to the submission of the National Native Title Tribunal[4] (**NNTT**). Clause 8 of the contract provides the necessary consents to the activities carried out by Rio Tinto for that agreement to qualify as an Indigenous Land Use Agreement (**ILUA**) under the NTA.

14 The KLC makes no further comment specifically on the contract between Rio Tinto and the PKKP native title holders, other than to note that it is one of the 1,343 ILUAs currently registered on the Register of Indigenous Land Use Agreements.[5] Common to all of these ILUAs is that fact that they provide the contractual consent of native title holders to an activity that will impact their native title rights to country which, given the inextricable link between land and cultural heritage, is highly likely to also involve impacts on heritage.

15 "Consent" in the context of communal interests such as native title rights is complex. The KLC supports the components of the principle of free, prior and informed consent (**FPIC**) set out in the Australian Government's EMRIP Submission, although we note that the EMRIP Submission refers to these components in the context of "consultation".

> *"The Australian Government makes efforts to consult in line with the principles of FPIC. This consultation:*
>
> - *is free from force, intimidation, manipulation or coercion;*
> - *occurs prior to policy decisions wherever possible;*
> - *ensures accessible and comprehensive information is provided to help people make informed decisions; and*
> - *seeks consent wherever appropriate and practicable in the particular circumstances.*
>
> *Australia takes the approach that consultation should be proportionate to the potential impacts of the proposal. Its form will largely depend on the issues under consideration, who needs to be consulted, and the available time and resources.*
>
> *Australia recognises that consultation with Aboriginal and Torres Strait Islander peoples that is aimed at achieving consent on matters that significantly impact on Indigenous communities is valuable for effective legislation, policies and programs."*

16 The KLC notes the first component of "consent" in the EMRIP submission, which is that it:

> ***is free from force, intimidation, manipulation or coercion***

17 The KLC submits to the Committee that its should not be assumed that consent given under ILUAs which purport to provide the agreement of native title holders to acts done under the "right to negotiate" provisions of the NTA is freely given for the simple reason that, should the native title holders not agree and provide their consent, the proponent may make an application to the NNTT for the act to be done even without the agreement of

[4] Submission 14.
[5] http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx. Accessed 13 August 2020 at 10:40am.

native title holders. Since 1994, the NNTT has determined 163 future act determination applications (not including applications withdrawn, dismissed or resolved by consent). Of these 163 determinations, three have resulted in a determination that the act may not be done, while 160 have resulted in a determination that the act may be done or done subject to conditions. That is, if native title holders do not agree to an act being done and the matter proceeds to determination before the NNTT, there is a 98% chance that the NNTT will determine that the act can be done or done subject to conditions. The extremely high likelihood that proponents will obtain the necessary approvals even if they don't reach agreement with and obtain the consent of native title parties means that the playing field for agreement-making is never level and native title parties participate in the future act process knowing that if they don't reach agreement with a proponent there is an almost 100% chance the proponent will have its interest granted if it makes a future act determination application.

18 The KLC submits that the operation of the right to negotiate provisions effects a form of legislative force or coercion on native title parties when they negotiate agreements about activities which will impact their cultural heritage. While consent may appear to be given, it should not be assumed that it is freely given. For this reason, any inquiry into the adequacy of heritage protection laws should take into account the interaction between these laws and the NTA, in particular the future act provisions.

19 The inequity created by the future act provisions of the NTA is compounded by the chronic lack of resources available to native title holders to participate in negotiations with proponents. This issue and the legislative gaps in section 60AB of the NTA were raised by the KLC in November 2019 in a written submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the *Native Title Legislation Amendment Bill 2019*.

20 The KLC recognises that there are good agreements between native title holders and proponents that are negotiated in a spirit of mutual respect and understanding, and there are proponents who are genuinely committed to ensuring their activities are only done with the free, prior and informed consent of native title holders including in relation to heritage. However, the KLC submits that these agreements are made despite and not because of the NTA future act provisions, in particular the operation of the right to negotiate.

The example of Kimberley Granite Holdings Pty Ltd

21 Sadly, damage to and destruction of cultural heritage occurs far too frequently in the Kimberley region and opportunities to stop such destruction are limited, expensive, onerous on native title parties, and are available in the context of legislative schemes that presume mining and exploration, and other economic activities, should *always* be prioritised over cultural heritage. A recent and tragic example of this is the activities of Kimberley Granite Holdings Pty Ltd (**KGH**), which holds an exploration permit in the east Kimberley region over lands where native title rights have been recognised for the Malarngowem native title holders.

22 KGH's activities have caused enormous damage to very significant dreaming sites,

potentially impacted burial sites, and disturbed gender restricted places. The KLC is pursuing legal avenues for the native title holders in relation to these activities and will not make any further submissions on the matter so as not to potentially prejudice those possible actions.

23 However, the KLC wishes to make the Committee aware that on Friday 31 July 2020 the senior custodian for one of the impacted dreamings, Mr R Peters, passed away. Mr Peters' family are enormously distressed by the damage to the dreaming site and surrounding country caused by the activities of KGH and believe that a link exists between that damage and Mr Peters' passing.

24 For Aboriginal people, country and culture are not abstract or external, but instead are deeply personal and familial. When a community of native title holders is asked for their permission to damage or destroy sites and country, their consideration of that request involves deeply personal issues for the community and senior individuals within that community. Despite this, consent and approval is often given, subject to proper processes and protocols being followed. However, when consent or approval is never sought, or when it can be imposed from above by a government official or Minister[6] because that's what the Commonwealth and State legal systems provide, even against the wishes of the people for that country, the personal and communal harm can be significant and impact across generations. It is for this reason the KLC submits that the only authoritative decision makers for cultural heritage are the Indigenous people with rights and interests in that heritage, which is the case of almost the entire Kimberley region are the recognised native title holders. The KLC therefore advocates for legislative reform which enshrines this principle.

25 Thank you for the opportunity to make these submissions.

Yours sincerely

Tyronne Garstone
Deputy Chief Executive Officer
Kimberley Land Council

[6] In the case of KGH, the Minister for Aboriginal Affairs did not approve the relevant activities that damaged and destroyed sites. The KLC fully supports the Minister's decision, and notes for the information of the Committee that the decision is currently the subject of a review application made by KGH to the State Administrative Tribunal.

Attachment 1: KLC Submission on Commonwealth Indigenous Heritage Law Reform 2009

KIMBERLEY LAND COUNCIL

"30 years strong"

SUBMISSION IN RESPONSE

COMMONWEALTH INDIGENOUS HERITAGE LAW REFORM

Discussion paper: possible reforms to the legislative arrangements for protecting areas and objects

November 2009

Submission to the inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

14 August 2020

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Executive Summary

The KLC welcomes the Australian Government review of Commonwealth legislation relating to protection of Indigenous cultural heritage. The KLC has prepared a submission in response to the Australian Government's Indigenous heritage law reform as described in the discussion paper released by the Department of the Environment, Water, Heritage and the Arts ("**DEWHA**").

The KLC's submission is in two parts.

The first part of the KLC's submission, or its "primary submission", calls for a new approach and a new law. Given the well recognised shortcomings of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ("**ATSHIP Act**") and the momentous changes in the recognition of the legal rights of Indigenous people in Australia in the twenty five years since that ATSIHP Act was first enacted, the KLC's primary submission focuses on the need for repeal of the ATSIHP Act and its replaced by a new legislative regime which overall recognises the development and shortcomings of native title law in Australia, is sufficiently advanced to be more than a temporary solution, and is consistent with the minimum standards set forth in the United Nations Declaration on the Rights of Indigenous People, which the Australian Government endorsed in April 2009.

The second part of the KLC's submission, or its "secondary submission", provides comment on the proposals set out in the discussion paper released by DEWHA. This second submission is supplementary to the primary position of the KLC that the ATSIHP Act should be repealed and replaced.

The KLC's submissions are founded on its objectives as a community-based organisation of Kimberley Traditional Owners charged with the protection of traditional land and waters and the responsibility to advocate for, protect, enhance and gain formal recognition (legal, social and administrative) for the customs, laws and traditions of Kimberley Traditional Owners.

The KLC's submission is based strongly on the premise that a failure by the Australian Government to take the opportunity now presented to comprehensively overhaul the its approach to recognition and protection of the Indigenous cultural heritage will likely necessitate a further review of that legislation in the short to medium term.

Throughout this submission the term "Traditional Owner" is used to identify those persons who, under traditional laws and customs have the rights and obligation to speak for, and be heard when speaking for, country.

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Introduction

Kimberley Land Council

1 The Kimberley Land Council ("**KLC**") is the peak body representing Aboriginal people in the Kimberley. The KLC was formed in 1978 as a community-based organisation of Kimberley Traditional Owners to work for the protection of traditional land and waters., The KLC is charged with the responsibility to advocate for, protect, enhance and gain formal recognition (legal, social and administrative) for the customs, laws and traditions of Kimberley Traditional Owners.

2 Following the commencement of the *Native Title Act 1993* (Cth), the KLC was recognised as the Native Title Representative Body ("**NTRB**") for the Kimberley region of Western Australia. Since then native title has been determined over more than 45% of the Kimberley, a large proportion of which is exclusive possession native title. The KLC and Traditional Owners have also negotiated agreements which include a broad range of economic, social, cultural and community benefits, and have established a range of land and sea management programs. All of these developments have been based on the recognition of the rights and interests of Traditional Owners in their country.

3 The principle objectives of the KLC, as a community organisation, peak body, and NTRB, are:

- ***Getting country back;***
- ***Looking after country; and***
- ***Getting control of our future.***

4 The foundation for these objectives is recognition, respect and appropriate protection for the culture of Kimberley Traditional Owners, which ties us to country and creates the obligations to country which are the foundation for the oldest living cultures in the world.

5 This document is the KLC's submission in response to the Australian Government's Indigenous heritage law reform (the "**Review**") as described in the discussion paper released by the Department of the Environment, Water Heritage and the Arts. The KLC's submissions are founded in its objectives as described above.

KLC Submission on the Australian Government review of Indigenous cultural heritage protection laws

6 The KLC welcomes the Australian Government review of its legislation relating to protection of Indigenous cultural heritage, in particular the ATSIHP Act.. Given the well recognised shortcomings of the ATSHIP Act and the momentous changes in the legal rights of Indigenous people in Australia in the twenty five years since that Act was enacted, the KLC's

primary submission in response to the Review is that the ATSIHP Act should be repealed and replaced by a new legislative regime which:

(a) is consistent with the minimum standards set forth in the United Nations Declaration on the Rights of Indigenous People[1] ("**UN Declaration**"), which was endorsed by the Australian Government on 3 April 2009[2];

(b) recognises the development and shortcomings of native title law in Australia;

(c) puts in place a scheme which is appropriate for the current legal under*standing of Indigenou*s cultural heritage interests; and

(d) is sufficiently advanced and adaptable to remain relevant and effective for the next twenty five years.

7 A failure to take the opportunity now presented to comprehensively overhaul the Australian Government's approach to recognition and protection of Indigenous cultural heritage by instead tinkering the around the edges of a fundamentally flawed statute will not stand Indigenous Australians, successive Australian Governments, or non-Indigenous entities who rely on certainty created by an appropriate statutory regime in good stead in the future, and would likely necessitate a further review of the legislation in the medium term. The KLC's principle submission to the Review is that it is in the interests of all parties whose rights or interests might be affected by the legislation to take the opportunity now presented to *get it right*.

8 The KLC submission also includes comment on the amendments proposed in the Indigenous Law Reform Discussion Paper ("**Discussion Paper**"). However, these secondary submissions should not be taken as an endorsement of the approach proposed (that the ATSIHP Act should be amended rather than repealed and replaced), and do not derogate from KLC's primary submission to that effect.

[1] United Nations Declaration on the Rights of Indigenous People adopted by the General Assembly on 13 September 2007. See http://www.un.org/esa/socdev/unpfii/en/drip.html

[2] Jenny Macklin MP *Statement on the United Nations Declaration on the Rights of Indigenous People* 3 April 2009. See http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

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Australian Government Indigenous Heritage Protection Legislation

Aboriginal and Torres Strait Island Heritage (Interim Protection) Act 1984

9 The current Commonwealth legislation relating to protection of Indigenous cultural heritage originally came into effect in 1984 via the *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984* (Cth) ("***Interim Protection Act***"). The *Interim Protection Act*:

(a) was intended to operate as an interim measure only and included a "sunset clause" which had the effect of repealing the Act two years after it was commenced[3];

(b) protected only those objects or places that met the statutory definition of "significant Aboriginal area" or "significant Aboriginal place"[4]; and

(c) operated only as an act of "last resort" where it was demonstrated that there was no "effective protection" under an applicable State or Territory regime[5].

10 The *Interim Protection Act* was designed to enable the Australian Government Minister to respond and act on requests to protect important Indigenous areas and objects in cases where it appeared that applicable State or Territory measures were insufficient to provide effective protection from threat. Under the Act the Minister was granted power to make special orders to protect traditional areas and objects of 'particular significance' from threat.

11 Two years after the *Interim Protection Act* came into operation it was amended so that:

(a) the words "(Interim Protection)" in the title were replaced by the word "Protection" and its named therefore became the *Aboriginal and Torres Strait Islander Heritage Protection Act*; and

(b) the "sunset clause" was repealed.

12 Thus, what was originally intended to be an interim arrangement became, via a name change and repeal of a single provision, the permanent Australian government legislative response to Indigenous heritage protection.

The Evatt Review

13 In October 1995 the Minister for Aboriginal and Torres Strait Islander Affairs appointed the Honourable Elizabeth Evatt to conduct a comprehensive independent review of the ATSIHP Act. The recommendations and outcomes of the review *were released in June 1996 in the*

[3] *Interim Protection Act* s33

[4] *Interim Protection Act* ss 3 (definitions of "Significant Aboriginal area" and "Significant Aboriginal object"), 4 (purposes of the Act"), 9 (emergency declarations) and 10 (other declarations).

[5] *Interim Protection Act* s13

*Review of the Aboriginal and Torres Strait Island Heritage Protection Act 1996 ("**Evatt Review**")*[6]*. The findings of the Evatt Review included the following.*

(a) While the act is intended to operate as a 'last resort', communication processes between Commonwealth and the States/Territories were poor, with the amount of consultation that should ideally occur before a determination is made under the Act unclear.

(b) No formal process was in place for making an application, and further issues with reporting processes were making declarations easy to overturn or set aside.

(c) In addition to the issues with the administrative process, the Act's processes exposed Indigenous people's beliefs to intense scrutiny.

(d) The Act was seen by developers as an impediment to a project moving forward, making this the most significant threat to Indigenous heritage and culture.

(e) Indigenous people were disillusioned by the Act as it does not prioritise the protection of their confidential information or spiritual beliefs during the declaration process and further fails to include Indigenous people meaningfully in decision making about their cultural heritage.

14 The recommendations of the Evatt Report included:

(a) guaranteed access rights to sites of recognised significance for those recognised as being allowed to do so under customary law;

(b) effective interaction with state and territory laws;

(c) the establishment of independent Indigenous cultural heritage bodies;

(d) the establishment of an Aboriginal Cultural Heritage Agency and Indigenous cultural heritage bodies controlled by Aboriginal members representative of Aboriginal communities with responsibility for site evaluation and administration;

(e) the inclusion of protection of all aspects of Indigenous heritage, including intellectual property;

(f) decisions on a site should be an issue for Indigenous people to determine based on information provided by relevant Indigenous communities or individuals and any anthropological information should only be provided with their consent;

(g) any Ministerial decision should be based on the recommendations of the Agency; and

[6] *Review Of The Aboriginal And Torres Strait Islander Heritage Protection Act 1984 Report By Hon Elizabeth Evatt AC 21 June 1996*, available at http://www.austlii.edu.au/au/other/IndigLRes/1996/1/index.html

(h) the Federal Government should meet its previous commitment with regard to consultation with Aboriginal and Torres Strait Islander communities on a broad range of amendments to the Act, prior to it being moved.

15 Following receipt of the Evatt Report, the Senate referred the matter to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund ("**Joint Committee**") to deliberate and report on "*the urgent need for amendments*" to the ATSIHP Act consistent with the recommendations in the Evatt Report and to avoid or minimise further situations "*in which the spiritual and cultural beliefs of the Aboriginal and Torres Strait Islander people are not able to be properly considered under existing legislative arrangements*"[7].

16 The Joint Committee published its report on the matter in April 1998[8]. A minority report was also issued by the Australian Greens and Australian Labor Party Senators as an addendum to the Committee's report[9] ("**Minority Report**"). The inquiry of the Joint Committee was conducted in the aftermath of the bitter debates regarding the Hindmarsh Island Bridge development and the amendments to the *Native Title* Act. The Minority Report strongly rejected the principle findings of the Joint Committee Report and noted that:

> *It is neither possible, nor desirable, to approach a review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 without considering the political, social and legislative context of the review.*
>
> *The committee has approached its task at the same time as the parliament engages in a lengthy and divisive debate on amendment to the Native Title Act 1993, the Northern Territory Government is reviewing the Aboriginal Land Rights (Northern Territory) Act 1976, and community debate continues on the issues raised by the Hindmarsh Island Bridge Act.*
>
> *The signatories to this dissenting report see the majority recommendations as substantially weakening protection for Indigenous heritage, and reflecting insensitivity to the laws, culture and beliefs of Australia's Indigenous peoples. It is unacceptable to propose procedures and substantive provisions to supposedly protect Aboriginal cultural heritage when those provisions and mechanisms are inconsistent with or even hostile to Indigenous laws and customs.*
>
> *In concert with the extinguishment of native title and the erosion of Indigenous rights central to the Native Title Amendment Bill, the majority recommendations represent a retrograde step in reconciliation between Indigenous and non Indigenous Australians.*
>
> *Furthermore, the recommendations of the majority are inconsistent with the motion passed by the Senate when it referred review of the Act to the Committee. The Senate acknowledged:*

[7] Senate Journal No. 94 – 26 March 1997, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=;db=;group=;holdingType=;id=;orderBy=;page=0;query=evatt%20SearchCategory_Phrase%3A%22senate%22%20Decade%3A%221990s%22%20Year%3A%221997%22%20Month%3A%2203%22%20Day%3A%2226%22;querytype=Day%3A26;rec=0;resCount=Default

[8] *Eleventh Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, available at http://www.aph.gov.au/senate/committee/ntlf_ctte/completed_inquiries/1996-99/report_11/report/contents.htm

[9] *Fourth Minority Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, available at http://www.aph.gov.au/senate/committee/ntlf_ctte/completed_inquiries/1996-99/report_11/report/d01.htm

> *The urgent need for amendments to the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, consistent with the report of the Review of that Act by Justice Elizabeth Evatt, in order to avoid or minimise the repetition of any further incidents, such as the Hindmarsh Island Bridge situation, in which the cultural and spiritual beliefs of the Aboriginal and Torres Strait Islander people are not able to be properly considered under the existing legislative arrangements.*
>
> *The recommendations of the majority ignore the most significant of Justice Evatt's recommendations and have the nett effect of reducing legislative and administrative protection and respect for "the cultural and spiritual beliefs of the Aboriginal and Torres Strait Islander people".*
>
> *In short, the recommendations represent an abrogation of the responsibility granted into [sic] the Commonwealth in the 1967 referendum to legislate for the benefit of our Indigenous peoples.*

17 The Minority Report proposed a series of recommendations, in particular in relation to the need for a consistent national standard of heritage protection, and the establishment of an independent advisory council and agency to ensure separation of administration of the legislation from political processes. The Minority Report also included the following recommendations.

> *That procedures and other measures for Indigenous heritage protection set out in this Act should at all times be sensitive to, and not inconsistent with, Indigenous laws and customs (Recommendation 8).*
>
> *That any provision for the Minister to intervene "in the national interest" must be so framed as to clearly define the protection of Indigenous cultural heritage as being within the meaning of "the national interest" (Recommendation 9).*

ATSIHP Act – current operation and effect

18 The ATSIHP Act is an ineffective protective mechanism of last resort. This claim is supported by statistics on the operation of the Act, with almost 95% of valid applications rejected since 1984 and almost half of the long term declarations made being overturned by the Federal Court. The majority of applications fail because the places or objects the subject of the application do not meet the statutory definition of a "significant Aboriginal place" or "significant Aboriginal object" on the grounds that they are not of "particular significance" in accordance with Aboriginal tradition.

19 That an application for protection can only succeed if a non-Indigenous decision maker determines whether or not a threatened place or object is of "*particular significance*" to the relevant Traditional Owners, notwithstanding the fact that it is the Traditional Owners themselves who are best, if not singularly, placed to make that decision, is one of the most damning aspects of the ATSIHP Act.

20 Because the ATSIHP Act is an "act of last resort" it is of limited practical assistance to Indigenous people. It assumes a subordinate role to State and Territory regimes, thereby significantly confining its scope of operation both in terms of constitutional arrangements and political relations between the States and the Commonwealth. It also depends on positive action at a political level to protect places or objects of significance to Indigenous people,

often in opposition to development pressures. Furthermore, if the persons concerned with the protection of a place or object are not aware of an action which might threaten that object or place, for example through the notification procedures under the NTA or the referral mechanism under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**"EPBC Act")** , then they cannot be in a position to determine whether or not an application for a declaration under the ATSIHP Act is necessary or appropriate.

Indigenous heritage law reform: August 2009

Discussion Paper: Possible reforms to the legislative arrangements for protecting traditional areas and objections

21 Fifteen years following the initial review of the ATSIHP Act, which itself occurred eleven years after the "interim protection" legislation was introduced, the Australian Government has released its Discussion Paper on Indigenous heritage law reform. The KLC welcomes this Review and looks forward to recommendations from the Review which take into account the findings of the Evatt Report, as well as the Minority Report.

22 The Discussion Paper sets out a number of suggested amendments, each of which are addressed in the KLC's secondary submission. However, it should be noted that the Discussion Paper appears to assume that the ATSIHP Act, and therefore considerations for its review and amendment, sit within a suite of other legislation which also afford some measure of protection to Indigenous cultural heritage, including the EPBC Act and the NTA. Unfortunately, neither the NTA nor the EPBC Act offers any such protection.

23 While the NTA permits the making of agreements (Indigenous Land Use Agreements, or ILUAs) which can include measures to protect Indigenous cultural heritage, Traditional Owners are only able to negotiate ILUAs with proponents if:

(a) they have a registered native title claim or a determination of native title which recognises rights and interests in the affected area;

(b) the relevant "future act" which the proponent wants to undertake, and which may threaten objects or places of significance, falls within the very small category of acts which afford rights other than mere procedural rights; and

(c) the relevant State or Territory government does not compulsorily acquire the affected native title rights and interests for the benefit of the proponent.

24 The measure of protection afforded to Indigenous cultural heritage under the EPBC Act is even more limited. While the EPBC Act provides that places may be included on the "National Heritage List" for Indigenous values of outstanding significance to the nation, listing cannot occur unless a rigorous assessment of the values of that place determines that, in comparison to all other similar places in Australia, it alone is of sufficient significance to be included on the National Heritage List. A compulsory comparative analysis of Indigenous heritage, culture and traditions such as that required for inclusion on the National Heritage List is not an appropriate or adequate mechanism for protection of the cultural heritage of all Indigenous Australians.

25 This Review must be conducted in light of a full and honest assessment of what, if any, protection exists for Indigenous cultural heritage outside the ATSIHP Act. If there is no such

protection offered anywhere else, the need for an entirely new approach becomes even more obvious and urgent.

KLC's Primary Submission: Call for a new approach and a new law

Legal status and recognition of Indigenous People

26 The ATSIHP Act was enacted (in its original form[10]) at a time when the interests of Traditional Owners in managing and protecting their cultural heritage were barely recognised in any jurisdiction in Australia. The approach adopted in most States and Territories, as well as under the ATSIHP Act, was to place the management of cultural heritage in a non-Indigenous decision maker, usually the Minister administering the relevant statute, and required that cultural heritage objects and places be managed in the interests of the "community" without any regard to the actual cultural, spiritual and proprietary interests of Traditional Owners in those places or objections.

27 In the twenty five years since the enactment of the ATSIHP Act the legal recognition of the rights and interests of Indigenous people in Australia has been significantly advanced, most notably through the recognition by the common law of native title rights, subsequently dealt with through the legislative regime of the *Native Title Act 1993* (Cth) ("**NTA**") and, more recently, the endorsement by the Australian Government of the United Nations Declaration on the Rights of Indigenous People.

28 The significant developments in the legal, social and administrative recognition of the rights of Indigenous people in the past twenty five years, as well as the ongoing appreciation of the shortcomings of the NTA, requires that the Australian Government's legislative regime for the protection of Indigenous cultural heritage take into account these significant developments, as well as their known shortcomings.

Native Title Act

29 While the common law recognition of native title rights and interests was a significant advancement in the recognition and protection of the rights of Indigenous people in Australia, the NTA operates by reference to common law concepts of property rights and assumes (through the operation of the future act process) that the proprietary and other interests of Indigenous people in their traditional laws and waters must be able to be dealt with in a way that does not prevent use by third parties.

30 The NTA operates by:

(a) making valid rights or interests created in land or waters before the commencement of the NTA, and extinguishing native title rights and interests which are not consistent with those rights or interests;

(b) setting the process for protection of still existing native title rights against the creation of further competing rights and interests (i.e. the "future act" process), which can

[10] *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984* (Cth)

range from the right to negotiate, to the right to be notified and, at the lowest level, no rights whatsoever where it is determined that the grant of an interest will have a "low impact" on native title rights;

(c) limiting the concept of native title to something which is similar to, or consistent with, common law concepts of proprietary interests in land, thereby excluding any interest that is not related to the land such as protection against misuse of images or spiritual knowledge; and

(d) limits on the definition of the persons or groups who are entitled to have native title interests recognised.

31 The NTA as currently enacted is not consistent with Australia's obligations under the *Convention on the Elimination of Racial Discrimination* ("**CERD**") and was, following the amendments made to the NTA in 1998, the cause of significant criticism of Australia by the United Nations Committee on the Elimination of Racial Discrimination[11], in particular because the 1998 amendments significantly shifted the legislative balance away from recognition of native title rights to protection and validation of non-native title rights.

> *While the original Native Title Act recognizes and seeks to protect Indigenous title, provisions that extinguish or impair the exercise of Indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of Indigenous and non-Indigenous title holders, the amended Act appears to create legal certainty for Governments and third parties at the expense of Indigenous title.*[12]

32 The Committee repeated these concerns in its most recent report on Australia in 2005[13], recommending that the Australian Government:

(a) "*refrain from adopting measures that withdraw existing guarantees of Indigenous rights*";

(b) "*reopen discussions with Indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all*"; and

(c) having regard to the number of native title claims which have not been successful because of the high standard of proof required to demonstrate "connection", "*review the requirement of such a high standard of proof [of connection], bearing in mind the nature of the relationship of Indigenous peoples to their land*".

[11] Committee on the Elimination of Racial Discrimination, *Decision 2 (55) on Australia : Australia. 16/08/99. A/54/18,para.23(2).* Office of the High Commissioner for Human Rights, Geneva, 16 August 1999.

[12] Committee on the Elimination of Racial Discrimination, *Decision 2 (54) on Australia : Australia. 18/03/99. A/54/18,para.21(2),* Office of the High Commissioner for Human Rights, Geneva, 18 March 1999.

[13] Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination AUSTRALIA,* (Sixty-sixth session 21 February-11 March 2005), Office of the High Commissioner for Human Rights, Geneva, 14 April 2005.

33 The NTA has recently been amended to facilitate a more efficient and timely process for recognition of native title rights and interests, and also to address to some extent the high burden of proof in relation to connection[14]. However, these amendments have not dealt with the "delicate balance" that was abandoned "at the expense of Indigenous title" by the 1998 amendments and which remain part of the NTA to date.

34 The significant shortcomings of the NTA should be the subject of a separate comprehensive review. However, they are noted in this submission on the Review of the ATSIHP Act because:

(a) attempts to ensure consistency between native title and heritage protection legislation must not result in the significant shortcomings of the NTA being imported into the ATSIHP Act or any replacement legislation; and

(b) the significant gaps in the protection and recognition afforded by the NTA confirm that a comprehensive change, rather than amendments to the existing regime, is required to fill the gaps in the approach to protection of Indigenous cultural heritage.

Intellectual Property and Protection of Movable Cultural Heritage

35 The lack of any legal protection for Indigenous intellectual property, in a form consistent with traditional property rights and obligations, is just one example of additional gaps that exist between the NTA, the ATSIHP Act, and legislation dealing with specific forms of property rights such as intellectual property. A new legislative approach to cultural heritage protection, and cultural property, should be undertaken by the Australian Government to fill these gaps.

36 Significant gaps also exist in relation to movable cultural heritage because the *Protection of Movable Cultural Heritage Act 1986* (Cth) only applies to the export of cultural heritage from Australia. The concerns, identified in the Discussion Paper, regarding inconsistent standards across the States and Territories for protection of cultural heritage, also apply to the protection of movable cultural heritage. Commonwealth government legislation should provide for:

(a) movement within and between States and Territories;

(b) movement from Australia (export); and

(c) dealings with movable cultural heritage over the internet or through other electronic means, including to capture online sale and trade through sites such as Ebay.

37 Misuse or misappropriation of Indigenous cultural heritage, particularly when motivated by profit and facilitated by misrepresentation of the interests or status of Traditional Owners, should also be addressed in Commonwealth legislation. A significant and widespread example of this type of misuse for profit is the misrepresentation of cultural heritage, such as

[14] *Native Title Amendment Act 2007; Native Title Amendment Act 2009.*

rock art, by commercial tourist operators as belonging to "unknown former inhabitants" even in the face of judicial determinations, formal notification and popular publications, such as books authored by Traditional Owners.

United Nations Declaration on the Rights of Indigenous People

38 The United Nations Declaration on the Rights of Indigenous People ("**UN Declaration**") was adopted by the United Nations General Assembly on 13 September 2007. Australia was one of only four nations to vote against its adoption. However, on 3 April 2009 the Australian Government formally endorsement the UN Declaration[15], and in the statement by the Minister for Families, Housing, Community Services and Indigenous Affairs special note was made of Article 10 of the UN Declaration, which provides in part that:

> *Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.*

39 The UN Declaration identifies a number of rights of Indigenous people and obligations of States which are a minimum standard[16]. Articles 31, 38 and 40 of the UN Declaration are of particular relevance to measures to protect cultural heritage and provide as follows.

> ***Article 31***
>
> *1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
>
> *2. In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*
>
> ***Article 38***
>
> *States in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.*
>
> ***Article 40***
>
> *Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous peoples concerned and international human rights.*

40 Articles 31, 38 and 40 confirm that cultural heritage is a matter of specific concern under the UN Declaration. However, there are numerous other principles in the UN Declaration which

[15] Jenny Macklin MP *Statement on the United Nations Declaration on the Rights of Indigenous People* 3 April 2009. See http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

[16] Article 43 provides that the rights recognised in the Declaration "constitute the minimum standards for the survival, dignity and well-being of the Indigenous people of the world".

also deal with the broad right of Indigenous people to have the content, form and manifestations of their culture appropriately protected. These other principles include:

(a) freedom from discrimination, in particular that based on Indigenous origin or identity (Art. 2);

(b) the right to maintain and strengthen distinct social and cultural institutions (Art 5);

(c) the right not to be subjected to destruction of Indigenous culture (Art 8);

(d) the right to practice and revitalise cultural traditions and customs, including the right to maintain, protect and develop the past, present and future manifestations of their culture, and States have the corresponding obligation to provide redress through effective mechanisms developed in consultation with Indigenous people with respect to cultural, religious and spiritual property taken without free, prior or informed consent or in violation of the laws, traditions and customs of those Indigenous people (Art 11);

(e) the right to manifest, practice, develop and teach spiritual and religious traditions, customs and ceremonies, the right to maintain, protect, and have access in privacy to religious and cultural sites, and to use and control of ceremonial objects, and the right to the repatriation of human remains (Art 12);

(f) the right to participate in decision-making in matters which would affect their rights, and States have the corresponding obligation to consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (Arts 18 and 19); and

(g) the right to maintain and strengthen their distinctive spiritual relationship with their traditional lands, including waters and coastal seas, and States have the corresponding obligation to give legal protection and recognition to those lands with due respect to the applicable customs, traditions and land tenure systems (Arts 25 and 26).

41 The UN Declaration has obvious significance to any review of the Australian Government legislation relating to management and protection of Indigenous cultural heritage. Not only does the UN Declaration contain specific provisions dealing with protection of culture, it also represents the most recent development in the manner in which protection and recognition of Indigenous rights, including rights in relation to cultural heritage, should occur. Any substantive Indigenous heritage law reform process must take the UN Declaration into account in order to be credible, effective and enduring.

Conclusion

42 The primary submission of the KLC in relation to Indigenous heritage law reform is that the ATSIHP Act represents an outdated and inappropriate mechanism for protection of Indigenous cultural heritage. Significant developments in the recognition of the rights of Indigenous people have occurred since the ATSIHP Act was enacted, in particular the UN Declaration and the common law recognition of native title rights. The period since the enactment of the NTA has also demonstrated that native title law has significant shortcomings and should not be viewed as part of the system of heritage protection or inadvertently incorporated into that system. The most appropriate response to the current legislation dealing with Indigenous cultural heritage is:

(a) the ATSIHP Act, which vests sole power for the protection and management of Indigenous cultural heritage in a non-Indigenous person (the Minister), is based on outmoded concepts of cultural heritage protection and should be repealed; and

(b) a new legislative regime which is consistent with the UN Declaration and has regard to the shortcomings of the NTA must be developed in consultation with Indigenous people across Australia.

KLC's Secondary Submission: Reforms proposed in the Discussion Paper

The proposed reforms

43 The KLC's secondary submission to the Review makes comment on the amendments proposed in the Indigenous Law Reform Discussion Paper ("**Discussion Paper**"). However, these secondary submissions should not be taken as an endorsement of the approach proposed (that the ATSIHP Act should be amended rather than repealed and replaced), and do not derogate from KLC's primary submission to that effect.

44 The KLC's responses to each of the amendments proposed in the Discussion Paper are set out below.

Proposed amendments – Part 1: Clarifying responsibilities

PROPOSAL 1: CLARIFYING THE PURPOSES OF THE LEGISLATION

45 Proposal 1 is to define the purposes of the legislation by reference to a number of principles, each of which is set out and addressed below.

> ***Recognise the importance of particular areas and objects for Indigenous Australians to maintain their traditional laws and customs.***
>
> ***Acknowledge that Indigenous Australians are the primary source of knowledge of their traditional laws and customs and have responsibilities to protect their traditional areas and objects.***

46 The KLC supports the proposal to increase understanding among those applying legislation by the use of best practice guidelines, subject to:

(a) the development of those guidelines in consultation with Traditional Owners; and

(b) the inclusion of processes, supported by the guidelines, that provide for culturally appropriate consultation or negotiation processes.

47 The guidelines may also need to be developed to take into account culturally-based regional variation.

> ***Encourage developers and Indigenous Australians to agree at the earliest available opportunity on practical ways to protect traditional areas and objects.***

48 The KLC generally supports this proposal. However, this proposal can only have practical effect if:

(a) developers are aware of the parties who should be consulted; or

(b) affected Traditional Owners are givern proper notice of developments that may have impacts on cultural heritage.

Ensure that all governments consider the potential impacts of their decisions on traditional areas and objects in full, including by specifying standards for the state and territory laws that protect Indigenous heritage.

49 This proposal is supported, subject to adequate consultation with Traditional Owners on the development of standards and the recognition in those standards that impacts on cultural heritage can have consequential impacts on the community, familial, social and economic life of the affected community.

50 The amendments must also ensure that "standards" are treated as a minimum, and States and Territories may develop a higher standard without providing grounds for those standards, or any steps taken in reliance on those standards, being appealed or set aside. Further comment is made on this issue in the response to Proposal 4 below.

PROPOSAL 2: MAKING TERMINOLOGY CONSISTENT WITH THE PURPOSES

Proposed new definitions to avoid ambiguity arising from use of 'particular significance'

'Traditional area' means an area that meets both of the following criteria:

- ***The area has a use or function under traditional laws and customs, or is a subject of a narrative that is part of traditional laws and customs.***
- ***The area is protected or regulated under traditional laws and customs.***
- ***A traditional area includes any traditional objects that are located in the area under traditional laws and customs.***

'Traditional object' means an object that meets both of the following criteria:

- ***The object has a use or function under traditional laws and customs, or is a subject of a narrative that is part of traditional laws and customs.***
- ***The object is protected or regulated under traditional laws and customs.***

'Traditional laws and customs of an Aboriginal or Torres Strait Islander group (including a kinship group)' includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

In addition the current definition of 'Aboriginal' could be updated to 'Indigenous' to encompass both 'Aboriginal' and 'Torres Strait Islander' without changing the effect of the definition. The proposed definition is:

> ***'Indigenous person' means a person of the Aboriginal race of Australia or a descendant of an Indigenous inhabitant of the Torres Strait Islands.***
>
> ***Would the proposed definitions leave out any areas and objects that are covered by the current legislation or cover any areas and objects that are covered by the current legislation?***

51 The proposed new definition of "traditional laws and customs" in the ATSIHP Act is consistent with the definition of that term in the *Evidence Act 1995*. KLC supports this proposal, and harmonisation of laws generally.

52 In relation to the proposed new definition of "traditional areas", it is noted that the Evatt Review recommended that the definition of "traditional areas" be extended to apply to significant historical and archaeological grounds. This has not be addressed in the new definition proposed in the Discussion Paper. The new definition of "traditional areas" is not supported because of this omission.

PROPOSAL 3: PROMOTING EFFECTIVE LAWS THROUGH ACCREDITATION

> ***The opportunity to gain accreditation could be an incentive for each State and Territory to make sure its laws are effective, provided it is clear that by gaining accreditation a state or territory could stop the Australian Government from overriding its decisions.***

53 The KLC supports an accreditation process which requires that State and Territory legislation meets standards set by Commonwealth legislation. However, the Discussion Paper does not propose that the ATSIHP Act be amended so that:

(a) it is no longer an Act of last resort; or

(b) it operates to protect Indigenous cultural heritage generally and without the need for an application requesting that the Minister intervene and protect a threatened area or object.

54 It is not clear how the mechanism of "accreditation" will provide any impetus for States or Territories to make their cultural heritage protection measures consistent with Australian Government standards unless the ATSIHP Act applies to all actions which may detrimentally affect Indigenous cultural heritage. For example, the EPBC Act provides for an "accreditation" mechanism which encourages States and Territories to adopt impact assessment measures that are consistent with the standards set in the EPBC Act by providing a single, streamlined assessment process, managed by the relevant State or Territory. However, if the EPBC Act did not apply to impact assessments in the States or Territories unless an interested party demonstrated that it should (in a manner analogous to the current process under the ATSIHP Act), then the incentive to seek "accreditation" would be significantly reduced.

55 The Discussion Paper does not identify how an accreditation process under the ATSIHP Act would work without effective incentives for States and Territories to participate.

> ***Do you think that periodic reviews would help make accreditation work effectively, especially if the Minister can add to the standards for accreditation?***
>
> ***If the Minister is satisfied that a state or territory is not complying with the standards the Minister could revoke accreditation. For example the Minister could revoke accreditation if the accredited state or territory government changes its laws in a way that affects compliance with the standards.***
>
> ***In addition accreditation could cease automatically if the relevant state or territory enacts a law that exempts an area or activity from the normal assessment and approval processes that were the basis for the Minister's original decision to accredit the state or territory.***

56 The KLC supports this proposal subject to:

(a) appropriate consultation during the review of accreditation to ensure the views of affected Indigenous people are taken into account; and

(b) in relation to the review periods, provision is made for early review or appointment of an independent reviewer if the practices of the accredited State or Territory are not providing a satisfactory level of performance.

PROPOSAL 4: SPECIFYING STANDARDS FOR EFFECTIVE PROTECTION

> ***Would these standards if adopted help to improve the ways that Indigenous traditional areas or objects are protected in your state or territory?***
>
> ***Protecting all traditional areas and objects: The laws must provide comprehensive protection for traditional areas or objects by providing that adverse impacts on traditional areas and objects including traditional areas and objects that have not been identified or recorded by the state or territory must be avoided.***
>
> ***Enabling activities to proceed: The laws must provide that despite the requirements to protect traditional areas and objects a proponent who acts in accordance with an approval ... is not liable to be prosecuted.***

57 Whether or not the standards would improve protection of traditional objects and places depends on:

(a) the manner in which the standards are developed;

(b) the substantive content of the standards;

(c) the procedural rights of Traditional Owners provided for in the standards; and

(d) the processes for review and amendment of the standards.

58 The most effective way to encourage and achieve best outcomes for protection of the traditional areas and objects is to ensure that early identification, and appropriate protection and management arrangements, occurs at the planning stage of any development.

> ***Ability to impose conditions: The laws must enable conditions to be attached to an approval to avoid or minimise an adverse impact on a traditional area or object when granting an approval.***

59 The KLC supports this proposal subject to Traditional Owner participation in the development of culturally appropriate conditions, and effective remedies for breach of conditions which include:

(a) compensation;

(b) other equitable remedies (where available); and

(c) appropriate cost penalties.

PROPOSAL 5: ENSURING THAT, IF LEGALLY RECOGNISED TRADITIONAL CUSTODIANS EXIST, ONLY THEY CAN SEEK COMMONWEALTH PROTECTION

60 The KLC does not support proposal 5.

> ***If legally recognised traditional custodians exist, only they can seek Commonwealth heritage protection on their lands. Overall, what do you think about this proposal?***

61 The objective behind this proposal appears to be harmonisation of native title and cultural heritage protection laws. While this objective is supported in principle, regard must also be had to the limitations of the NTA and relevant jurisprudence, including:

(a) the NTA does not effectively permit the recognition of regional relationships that must be observed in accordance with traditional Law and custom; and

(b) certain lands and waters, such as those subject to previous exclusive possession acts, may not be included in claims or determinations of native title.

62 The proposal also fails to:

(a) address whether or not applications for protection under the ATSIHP Act could be made in relation to land or waters where native title does not exist because of extinguishing acts such as creation of national parks or freehold interests; or

(b) take into account whether or not determined native title rights will fix the scope of rights that can be recognised in a declaration under the ATSIHP Act. For example, would a different level of protection be afforded to areas of exclusive and non-exclusive native title rights?

63 Overall, the proposal is wholly inconsistent with the stated aims of the reform, which are to ensure that Indigenous Australians have the best opportunities to protect their heritage.

Does it make sense to rely on existing legal processes like native title processes to identify traditional custodians?

64 The NTA deals specifically and exclusively with the process of recognition of native title rights and interests by the common law. The purpose of the ATSIHP Act is "to preserve and protect places, areas and objects of particular significance to Aboriginals". While both statutes deal with the interests of Indigenous people, the purpose, scope and effect of each is very different. The KLC does not support this proposal as it effectively subsumes existing flaws in the NTA, some of which are identified above, into the ATSIHP Act framework.

65 The Discussion Paper also suggests that:

> *"where land is held as freehold title by an Aboriginal land trust or similar organisation for the benefit of traditional custodians, only persons acting on behalf of those organisations should be entitled to apply for Commonwealth protection of traditional areas or objects on the land."*

66 The KLC strongly rejects this proposal. The reference to "Aboriginal land trust or similar organisation" captures government entities such as the Indigenous Land Corporation ("**ILC**") and the Western Australian Aboriginal Lands Trust. It is completely inappropriate for access to protection under the ATSIHP Act to be removed from the reach of Traditional Owners whose traditional country happens to be held by a government entity such as the ILC, and for the sole power and authority to access those protections to be vested in that government entity. This proposal would create a new standard in inequality and unfairness.

Should Indigenous persons who are not native title parties be able to apply for Commonwealth heritage protection over areas where native title rights and interests have already been recognised?

67 The KLC recommends a tiered approach which takes into account, in order of priority, the interests of:

(a) affected native title holders and claimants; and

(b) other Indigenous people who have recognised rights or obligations under relevant traditional Law and custom.

68 The proposal must also take into account the following.

(a) Declarations, and the ability to seek such, must not be prejudiced or affected by determinations that native title does not exist, in whole or in part, due to extinguishment.

(b) The financial burden placed on Registered Native Title Bodies Corporation / Prescribed Bodies Corporate ("**PBCs**") if they are solely or primarily responsible under the ATSIHP Act for seeking, negotiating and ensuring compliance with declarations.

(c) The ability for NTRBs to apply for a declaration on behalf of affected Traditional Owners.

PROPOSAL 6: ENSURING THAT COMMONWEALTH PROTECTION WOULD NOT PREVENT AN ACT AUTHORISED UNDER A REGISTERED INDIGENOUS LAND USE AGREEMENT (ILUA)

Should future acts permitted under a registered ILUA be excluded from coverage under Indigenous cultural heritage legislation? Overall, what do you think about this proposal?

69 The KLC supports this proposal subject to the comment set out below.

Is it fair to stop applications to protect traditional areas and objects from an activity if the activity is allowed under a registered ILUA?

70 Access to Commonwealth heritage protection should only be excluded where:

(a) specifically agreed to under an ILUA; and

(b) the ILUA includes heritage protection measures which, at a minimum, meet the standard of the guidelines referred to in Proposal 1.

PROPOSAL 7: REMOVING DUPLICATION OF STATE AND TERRITORY PROTECTION FOR INDIGENOUS REMAINS

Overall, what do you think about this proposal?

71 The KLC supports this proposal subject to the development of an accreditation standard for reporting of, and consultation regarding, appropriate treatment of Indigenous remains.

PROPOSAL 8: ADDRESSING GAPS IN STATE AND TERRITORY LAWS TO ENSURE RESPECTFUL TREATMENT OF INDIGENOUS SECRET SACRED OBJECTS AND REMAINS

Overall, what do you think about this proposal?

72 The KLC generally agrees with this proposal for a consistent national approach to the protection for, and prohibition against public displays of, Indigenous personal remains and 'secret sacred objects'.

Are there other situations where it might be necessary to prohibit or allow display?

73 Traditional Owners who are authorised, in accordance with traditional law and custom, to deal with an object or place in a particular manner must be excluded from the operation of any prohibitions.

Proposed amendments – Part 2: Improving procedures

74 Generally the KLC rejects the proposals 9-12. The *Evatt Report* included recommendations for the establishment of an independent agency to:

(a) consider significance separately from site protection (the Aboriginal Cultural Heritage Agency);

(b) administer the ATSIHP Act in all matters leading to any exercise of discretion by the Minister in relation to determining the 'significance' of an area or object; and

(c) make decisions, removed from the political process, that should be binding on the Minister.

75 The proposals detailed below do not address the *Evatt Report's* recommendations in this regard and appear to be dealt with by referrals and delegation rather than establishing the recommended independent agency.

PROPOSAL 9: SPECIFYING THE INFORMATION NEEDED FOR APPLICANTS FOR PROTECTION

Require that applications for protection are made on a prescribed form and checked by a delegated departmental officer before they are accepted by the Minister. Overall, what do you think about this proposal?

76 A prescriptive approach is not appropriate. Many applications made on an urgent basis will come from applicants with English as a second, third or fourth language. Applicants who are located in remote areas, where access to legal or other assistance is limited, may also be significantly disadvantaged by a narrow, inflexible approach, particularly in relation to emergency applications. Compliance requirements for what constitutes a "valid application" should not be so onerous that the application process acts as a bar.

77 The proposed amendments must make provision following lodgement of the initial application and review by a delegated departmental offices for further information to be provided within a reasonable time. This further information should be limited and must not impose onerous disclosure requirements (including for the provision of culturally restricted information) at the initial application stage (if at all).

78 The application process must also be clear and simple given the issues in relation to access to legal or other assistance. Any request for further information, or correspondence in relation

to unsuccessful applications must contain reasons for its request or rejection (as the case may be).

PROPOSAL 10: Using conferences to consider how best to deal with the issues

> ***Include procedures in the legislation to ensure that the people who would be affected by a decision to protect heritage can comment on the claims in the application. The department could call a conference of the parties to plan how to handle an application. Overall, what do you think about this proposal?***

79 The KLC supports this process.

80 Where a consultation process is necessary, the consultation process must be kept simple. Over-complication of the administration of the consultation process; or addition of multiple parties, may discourage Indigenous Australians from appropriate protection under Commonwealth measures.

81 In addition to this, and as previously referred to, appropriate resourcing must be provided to ensure real and equal participation and, if appropriate, access to legal, anthropological and archaeological advice.

PROPOSAL 11: PROTECTING SENSITIVE INFORMATION

82 The KLC rejects the adversarial approach taken in the Discussion Paper for the following reasons.

(a) Wxposing anyone's subjective beliefs to what in effect will be public scrutiny to an adversarial process is needless; and

(b) such exposure and confrontation may act as a deterrent in the first instance to applications for declarations under the ATSIHP Act.

83 There may be a need from time to time to inform other interested parties in relation to key aspects of any given application. However, beyond this limited notification there is no need to expose sensitive information to an essentially adversarial, confronting determination process. It is also essential that the requirements of confidentiality and protection of any intellectual property rights in traditional or cultural information are dealt with in the legislation itself.

PROPOSAL 12: CLARIFYING REASONS FOR PROVIDING AND REVOKING INTERIM PROTECTION

> ***Overall, what do you think about this proposal?***

84 Generally the approach taken in the proposals for emergency and interim protections orders is supported by the KLC. However, the timeframes proposed have not taken into account practical considerations such as constraints related to culture, language, or remoteness.

Considering proposal 9, is 48 hours sufficient time to lodge an application for protection?

85 Forty-eight hours in not sufficient time. Two weeks is an appropriate time period, subject to appropriate mechanisms for affected Traditional Owners to be notified of any proposals which might affect their cultural heritage.

86 Adoption of an appropriate timeframe would also ensure that there is not needless time wasting applying for extensions under emergency or interim protection orders.

Would the Minister need to consider other factors before deciding whether to provide or revoke temporary protection?

87 In addition to those issues raised above, where the Secretary is to consider other factors in relation to any emergency or interim application, any threshold should be limited to what appears on the face of the application itself.

PROPOSAL 13: CLARIFYING THE REASONS FOR PROVIDING AND REVOKING LONGER-TERM PROTECTION

Overall, what do you think about this proposal?

88 As noted in relation to Proposal 9 above, providing reasons is essential for administration of the process and to ensure that the proposed amendments are not an immediate deterrent to applicants.

Is it important to have a person who is independent from the Minister assess the facts?

89 There should be a clear separation between the administration of the ATSIHP Act and political processes. Establishment of the independent body proposed in the Evatt Report that could also address any grants or revocations of longer term protection would assist in removing the process from an adversarial system and would be more consistent with the principals of procedural fairness.

Proposed amendments – Part 3: Making sure that protection works

PROPOSAL 14: UPDATING THE PENALTIES AND IMPROVING THE ENFORCEMENT POWERS

90 This proposal is generally supported. However, it should be noted that penalty provisions will only be effective if:

(a) appropriate resources are available for compliance monitoring; and

(b) precedents are set for prosecutions for breach of the ATSIHP Act and real penalties are imposed for offences.

91 Compliance monitoring and enforcement powers should also be available, through appropriate delegations, to regional authorities and organisations. For example, the Kimberley region has a growing Ranger Initiative that employs Traditional Owners to look after country while equipping them with TAFE qualifications in conservation and land management. A similar program for Indigenous people to receive training to become inspectors (for an Aboriginal Cultural Heritage Agency) would also aide in the understanding of the application process and provide a way that people can get out on country and thereby monitor compliance.

PROPOSAL 15: REVIEWING THE EFFECTIVENESS OF THE LEGISLATION AT REGULAR INTERVALS

> ***Should the Minister appoint an independent person to review the effectiveness of the legislation after 7 years and then every 10 years? What would be the best intervals for reviewing the legislation?***

92 The KLC supports the concept of an independent review and ongoing reviews. The review periods should be:

(a) an independent review of the Act after three years; and

(b) ongoing reviews every five years.

93 As noted in relation to Proposal 3 above, provision should also be made in the ATSIHP Act for triggering of early reviews (or appointment of an independent reviewer) if a claim is made by an interested person that the practices of the accredited State or Territory are not providing a satisfactory level of performance. Early review processes must also be considered in relation to changes in circumstances and other practices.

Conclusion

94 The KLC welcomes the opportunity to comment on the Review.

95 The primary submission of the KLC in relation to Indigenous heritage law reform is that an opportunity presently exists to develop a new approach to Indigenous cultural heritage protection which is informed:

(a) by the experiences under the ATSIHP Act over the past twenty-five years;

(b) the strengths and weaknesses of native title law; and

(c) the most recent development in Australia in relation to recognition and protection of the rights of Indigenous people – namely, the endorsement of the United Nations Declaration on the Rights of Indigenous People.

96 The development of a new approach to Indigenous cultural heritage protection, which has regard to these matters, would be more enduring than merely amending the existing, flawed legislation, and is more likely to survive beyond the short term.

97 The KLC recommends that the opportunity provided by this juncture in history be taken to rewritten the current approach to Indigenous cultural heritage protection to ensure that it places at its centre the protection of the unique cultures of Indigenous Australians, in the interests firstly of the holders of those cultures and, secondly, of all Australians.