

## CHAPTER 7

### INDIGENOUS HERITAGE

*There are few issues of greater importance to indigenous people than the protection of indigenous cultural heritage. Significant intangible heritage, areas and objects form an irreplaceable cultural and physical link between the past and present for the vast majority of indigenous people.*<sup>1</sup>

#### **Introduction**

7.1 An important element of the bills is the provision of legislative measures to protect indigenous cultural heritage. The inclusion of indigenous heritage in the wider heritage protection regime raises some complex issues, however. The first is how the proposed legislation will relate to existing laws. The second relates to indigenous culture and the role the Commonwealth should play in national heritage protection.

#### **Relationship of the Bills to other Commonwealth legislation**

7.2 An obvious starting point for consideration of indigenous issues within these bills is the relationship the proposed laws will have with the existing Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) and its proposed replacement, the *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998*.<sup>2</sup>

7.3 The ATSIHP Act states as its purpose:

[T]he preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.<sup>3</sup>

7.4 Similarly, the ATSIHP Bill aims to:

... establish procedures relating to:

(a) the preservation and protection from injury or desecration of certain significant indigenous areas, and of certain significant indigenous objects, that are situated in Australia or Australian waters; and

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1 ATSIHP, Submission 25, p 8.

2 The Bill was passed by the House of Representatives on 11/2/99 and by the Senate on 26/11/99 with amendments. The House of Representatives did not agree to all the Senate amendments, and this was reported back to the Senate on 9/12/99.

3 Section 4 Purposes of Act

(b) the accreditation of the laws in force in States and self-governing territories as accredited heritage protection regimes in respect of a particular matter or matters.<sup>4</sup>

7.5 Mr Bruce Leaver, of Environment Australia, explained that the ATSIHP Act (and the Bill):

Is a development control act engaging heritage protection in the face of development proposals. These bills propose the identification and protection of heritage as values in its own right outside the pressure of development proposals. There is one linkage between the two acts [sic], and that is an obligation of the proposed Australian Heritage Council to seek the advice of the director of indigenous heritage established under the ASTIHP Act regarding listings, but beyond that these bills regards indigenous heritage as part of the natural social and cultural heritage of Australia and deal with it accordingly.<sup>5</sup>

7.6 Nevertheless, the Committee is concerned that there is no clear discussion in either the legislation itself or the accompanying materials about the intended relationship between the two regimes.<sup>6</sup> This is unacceptable given the complexity and sensitivity of indigenous heritage protection, and the amount of negotiation, consultation, review and inquiry that has been invested into the ATSIHP legislation, including the:

- Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 by the Hon Elizabeth Evatt AO (the Evatt Report)
- Joint Parliamentary Committee on Native Title and the Aboriginal Torres Strait Islander Land Fund 11<sup>th</sup> and 12<sup>th</sup> Reports
- Senate Legal and Constitutional Legislation Committee report into the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998.

7.7 The Evatt Report in particular, is regarded as providing an influential blueprint for establishing a heritage protection regime.<sup>7</sup> In particular it is worth noting that one of the main recommendations of the report was the establishment of a national indigenous heritage body that would be staffed and managed by Indigenous people in recognition of the fact that they are the custodians of their cultures. This was a point reiterated by the Chairman of ATSIC, Mr Geoff Clark, in his presentations to the Committee.<sup>8</sup>

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4 Section 4 Main object of Act

5 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p .

6 Note the shared concerns of the Victorian government: Submission 31, p 4.

7 National Heritage Convention Key Outcomes, p. 45

8 Mr Clark, *Proof Committee Hansard*, Canberra, 7 March 2001, p 103.

7.8 The Committee concludes that while no evidence has been received that suggests any direct conflict between the two regimes, the importance and complexity of the subject matter dictates that every measure is taken to clarify this relationship and how the regimes will interact to provide the necessary level of protection of indigenous heritage. The Committee considers that the relationships between the two regimes should be clarified before the Senate considers the bills. ATSIC and other relevant indigenous organisations should be invited to provide the Committee with their views on the Government's response so that the Committee can develop a fully informed position on the issues.

### **Recommendation 7.1**

The Committee recommends that the Government provide full details about the relationship between indigenous heritage protection in the proposed EPBC regime and the ATSHIP Act prior to the Senate's consideration of the bills. Indigenous people should be given the opportunity to comment on the Government's response.

### **Recommendation 7.2**

The Committee recommends that the Government provide a full response to the recommendations contained in the Evatt Report.

## **Appropriateness of the proposed measures**

7.9 Evidence has also argued that the proposed legislative framework for heritage protection centred around the concept of places of National Environmental Significance, is fundamentally unsuited to its task, due to the characteristics of indigenous heritage. This is explained by Professor John Mulvaney:

each linguistic or 'tribal' grouping reveres its own fundamental creation/Dreaming places and interconnecting pathways ('Songlines')[.] Europeans, for example, rate Uluru as the supreme Aboriginal place (witness the National Museum's 'Uluru Line'). Yet its significance for Aboriginal people was limited to the people of that region, and it was not more important to them than many less impressive places. Indigenous elders in totally diverse regions (Cape York, Kimberley, Arnhem Land) would list many places which, to them, are as 'national' as Uluru.<sup>9</sup>

7.10 Accordingly, there is a danger that site selection will be dominated by eurocentric values and notions of what makes a place important. Ms Sullivan reinforces this point:

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9 Professor Mulvaney, Submission 3, p 2. See also Australian Council of Professional Historians Association, Submission 30, p 4.

[T]here are very real problems in limiting the protection of indigenous heritage places outside the Commonwealth jurisdiction to those which are deemed to have national significance. Many very significant Indigenous sites do not have such significance, or, if they were deemed to do so, Indigenous people do not want them to be treated in this way – that is, turned into national icons.<sup>10</sup>

7.11 ATSIIC agree, noting that the traditional European notion of culture and heritage, centered around monuments and ‘leading’ civilisations, is too narrow:

ATSIIC shares this view that a Eurocentric domination of any listing will be absolutely discriminatory to the very basis of Australia’s Indigenous heritage and its people.<sup>11</sup>

7.12 A similar concern is raised by the Tasmanian government:

The Tasmanian government believes that there are significant deficiencies in the Bill as it relates to the provision of Indigenous Heritage protection. Indigenous heritage has been incorporated into a document that was originally written for built heritage. The language and methods of European built heritage conservation are not necessarily appropriate for Indigenous Heritage.<sup>12</sup>

7.13 At the same time, ATSIIC asserts that the bills are flawed in their inadequate provision for protecting ‘intangible’ heritage, and are instead completely focused on tangible sites, places and objects.<sup>13</sup> Intangible heritage includes cultural heritage not capable of physical embodiment such as singing of songs, stories, spiritual attachments, intellectual and cultural property.<sup>14</sup>

7.14 A second issue that arises in consideration of the appropriateness of the proposed measures is that of adequate protection of indigenous sites. Mr Preston Thomas, an ATSIIC Commissioner, explained that many indigenous people are reluctant to use listing provisions for fear that information about the site’s location and significance will be publicly available.<sup>15</sup> Such a release of information may be culturally inappropriate and may also lead directly to the damaging of those sites by unauthorised visitors. Mr Geoff Clark, the Chairman of ATSIIC, gave an example of such disclosure involving the release over the internet of cultural site information by a visiting researcher. He went on to explain that:

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10 Ms Sullivan, Submission 14, p 7.

11 ATSIIC, Submission 25, p 12.

12 Tasmanian government, Submission 28, p 5.

13 ATSIIC, Submission 25, p 12.

14 EDO, Submission 21, p 9.

15 Mr Preston Thomas, *Proof Committee Hansard*, Canberra, 7 March 2001, p 100. Also Mr Clark

This bill has reached a critical stage where it needs to include all Aboriginal sites. It needs to take into consideration how Aboriginal stories are held in terms of their sacredness, in terms of who should know, whether you are male, female or a young person, et cetera.<sup>16</sup>

7.15 According to Mr Bruce Leaver of Environment Australia, the Department has been aware of these issues in drafting these bills,<sup>17</sup> but makes two points. First, notwithstanding the conceptual problems associated with listing criteria requiring indigenous sites of 'national' significance, there has been interest by indigenous people in listing:

many historical sites particularly associated with the first European contact, battle sites, massacre sites and so on which would be very worthily listed as a place of national heritage significance ...<sup>18</sup>

7.16 Second, Mr Leaver claims that a sensitive approach will be taken to the listing process that will ensure that key indigenous heritage sites will be protected with appropriate controls over confidentiality:

it should be made absolutely clear that in these bills indigenous places will be available for inclusion on the national and Commonwealth lists subject to the views that have affected indigenous communities and the confidentiality provisions of the bills. The issue of dealing with the concept of 'national', as I have mentioned, applying to an individual community site will have to be dealt with on a site by site basis and I expect, like its predecessor, the Australian Heritage Council will take a constructive, consultative and sensitive approach to the listing of indigenous places.<sup>19</sup>

7.17 While acknowledging the best intentions of departmental officials, the Committee is not convinced that this will necessarily be the case. Although the bills do provide for confidential listings, the fact remains that departmental officials will be bound by the requirements of the law, which will still require demonstrated 'national' or 'Commonwealth' heritage values in order to list a place on either of these proposed lists.

7.18 The Committee also considers that greater consideration should be given to the protection of intangible heritage.

7.19 Witnesses have suggested several solutions. Ms Sullivan proposes that the bills should be amended to:

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16 Mr Geoff Clark, *Proof Committee Hansard*, Canberra, 7 March 2001, p 99.

17 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 121.

18 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 121.

19 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 121.

allow the Minister, in consultation with relevant Aboriginal groups, as well as the Australian Heritage Council, to declare or List an Aboriginal cultural heritage place to be a Commonwealth Heritage Place.<sup>20</sup>

7.20 This would require either that the place be situated on Commonwealth land, or that the definition of the Commonwealth list is amended.

7.21 The Committee has also heard evidence that during the consultation period for the proposed new regime that indigenous communities and other groups were advised that all indigenous sites currently on the RNE would be automatically listed on the Commonwealth list as ‘matters of constitutional interest’.<sup>21</sup> The Committee sees considerable merit in this approach, but is also mindful that significant changes of this nature need to be fully canvassed with indigenous communities and other options should also be discussed given the current problems that are identified with the listing process by indigenous people, some of which have been highlighted above.

7.22 The importance of comprehensive consultation is further reiterated by ATSIC who argue that it is the key to resolving these issues properly:

These are complicated issues that this bill does not address because it has not had sufficient, we believe, consultation with Aboriginal people in understanding those issues or, if those issues are understood, they have been ignored.<sup>22</sup>

7.23 The Committee appreciates that there are problems with attempting to apply the definition of ‘national’ significance to many of the indigenous heritage sites. As the bills stand, sites of indigenous heritage significance will be listed on much the same grounds as historic or natural sites of ‘national’ significance, rather than reflecting any particular significance to indigenous Australians.

7.24 The Government argues that this is in accordance with the general objective of the bills and that it is not the intention of the bills to provide the principal mechanism for indigenous heritage protection. The Government says, however, that the bills do serve to provide an overarching protection to those few items of heritage that have a national significance. In this sense, ‘national’ is explicitly intended to refer to the significance of a place to all Australians, rather than indigenous Australians specifically. Indigenous sites that may be placed on the National list, may be thought of as being of ‘national’ significance by non-indigenous people, but they will probably not be regarded as being of ‘national’ significance by indigenous people, particularly given the large number of Aboriginal nations in Australia. There is therefore a real problem if the National List is not ‘owned’ by all Australians and if Aboriginal people feel in any way that the broader community is appropriating their heritage. This would be a counter-productive outcome since it would send a very

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20 Ms Sullivan, Submission 14, p 7.

21 ACF, Submission 16, p 8.

22 Mr Geoff Clark, *Proof Committee Hansard*, Canberra, 7 March 2001, p 99.

negative message to Aboriginal people about how the broader community values their heritage.

7.25 In considering these issues, the Committee is of the view that the concept of a national list is a culturally discrete concept that should not be imposed upon indigenous heritage if it is something that Aboriginal people feel is inappropriate and which may actually cause significant harm and offence.

7.26 The Committee fully understands and supports the need to protect indigenous heritage based on its significance to indigenous Australians, and considers that the bill does not adequately achieve that. The Committee concludes that listing all indigenous sites on the Commonwealth list, may be a possible means of resolving concerns over the placement of indigenous sites on the National List, but that this approach requires further consultation with indigenous peoples.

7.27 The Committee further concludes that given the problems with the placement of sites on the National List, that this is another good reason for the retention of the RNE, in which all indigenous sites can be listed. The Committee is also mindful of the fact that the given the significance of indigenous heritage to the Australian community as a whole, that it would be of great concern not to have indigenous sites represented on some kind of national register of Australia's collective heritage.

7.28 The Committee notes, however, that the RNE is not a comprehensive listing of indigenous sites given the concerns that some Aboriginal people have with listing processes. The Committee agrees with ATSIC, therefore, that further dialogue with Aboriginal people is needed to determine an effective long-term solution for the protection of heritage of significance to Aboriginal people.

**Recommendation 7.3**

The Committee recommends that the Government investigate with indigenous people the appropriateness of placing all indigenous sites currently on the RNE onto the Commonwealth List.

**Recommendation 7.4**

The Committee also recommends that the Government engage in further consultations with indigenous people about the best means to ensure the long term protection of heritage of significance to Aboriginal people.

## International and national obligations

7.29 ATSIIC also drew the Committee's attention to a number of relevant principles of international law that should inform debate on the protection of indigenous heritage.<sup>23</sup> These include the:

- Draft Declaration on the Rights of Indigenous People<sup>24</sup>
- Convention on the Elimination of Racial Discrimination (CERD)
- International Covenant on Civil and Political Rights (ICCPR)<sup>25</sup>
- International Convention on Economic Social and Cultural Rights (ICESCR)
- International Labour Organisation (ILO) Convention 169 concerning Indigenous and Tribal peoples in independent countries, provide relevant principles.<sup>26</sup>

7.30 In raising these matters, ATSIIC comments that:

the standards set out by the draft declaration, especially the rights of self-determination, are regarded as a necessary minimum to safeguard the cultural diversity represented by indigenous people.<sup>27</sup>

7.31 The Committee concludes that these international instruments are sources of important general principles that should be taken into consideration in developing heritage protection laws for indigenous peoples.

### **Recommendation 7.5**

The Committee recommends that the Government take appropriate steps to ensure that Australia's indigenous heritage protection laws reflect the principles and rights embodied in international legal instruments.

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23 ATSIIC, Submission 25, p 10 - 11. Mr Geoff Clarke, *Proof Committee Hansard*, Canberra, 7 March 2001, p 99-100.

24 Articles 4, 12, 13,14, 25, 26, 27, 28 and 29.

25 Articles 1.1 and 27.

26 Preamble, paragraph 7

27 Mr Preston Thomas, *Proof Committee Hansard*, Canberra, 7 March 2001, p 100.