



UNIVERSITY OF
TECHNOLOGY SYDNEY



Submission for the Proposal on Indigenous Heritage Law Reform

Prepared for the Heritage Division of the Department of Environment, Water,
Heritage and the Arts

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Jumbunna Indigenous House of Learning

6 November 2009

Contents

Executive Summary	3
List of Recommendations	4
Introduction	8
Part 1 – Creation of the accreditation system and the uniform standards.	9
1. The Revised objectives and purposes	9
2. Making terminology consistent with the purposes.....	10
3. The accreditation system	10
4. State and Territory accredited standards.....	11
5. Ensuring that only legally recognised traditional custodians have the right to make an application for Commonwealth protection.....	13
6. Indigenous Land Use Agreement immunity.....	14
7. Reporting Indigenous remains.....	14
8. Protection of Indigenous remains.....	15
Part 2 – Amendments to the Commonwealth structure with non-accreditation.....	16
9. Use of applications to make claims	16
10. Use of conferences	17
11. Cultural information sensitivity.	19
12. Interim Protection	19
13. Means of providing long term protection.....	21
Part 3 – Penalties and Means of Review	23
14. Updating penalties	23
15. Reviewing the legislation	24
Annexures.....	25

Executive Summary

On August 2009, the Minister for Environment, Water, Heritage and the Arts, Mr Peter Garrett AM MP released for public opinion a number of proposals for the improved protection of Indigenous cultural heritage. The two main objectives the proposal wished to achieve were to 'cut the red' tape between the Federal and State jurisdiction and to give Indigenous Australians a better opportunity to protect their heritage. After all, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) was originally created to last for two years, but is now inadequate in recognising Indigenous culture and creates a conflict between different jurisdictions and different races.

The Jumbunna Indigenous House of Learning (IHL) submits that these proposals are an improvement to the current system of protection. In particular, the broadened definition as to traditional land, the revised test for heritage protection and the protection of traditional knowledge as confidential knowledge creates a more culturally sensitive and feasible means for Australia's traditional owners to claim protection.

Aside from a number of minor amendments we have submitted, there are two main themes within this submission's recommendations for change to this proposal.

Firstly, an impartial Indigenous heritage body must be established for the protection of Indigenous heritage. The purpose of the body must be to collect and retain culturally sensitive information about traditional areas or objects; consult with the traditional owners and other interested parties; and have the discretion as to making declarations of protection with the Minister's endorsement. This body would therefore be the most appropriate body, compared to the inability of previous Ministers to recognise the connection our traditional owners have with our land and our sacred objects.

Secondly, as of 3 April 2009, the Federal government has formally endorsed the United Nations Declaration on the Rights of Indigenous Peoples. Indigenous heritage protection is jurisdictionally defined through the broadly interpreted races power of the Australian Constitution. The Federal government must now rely on their constitutional powers of external affairs to enact legislation to mirror the articles in the Declaration. This is because a significant portion of the Declaration makes provision for the protection of Cultural heritage. To rely upon the race powers of the Australian Constitution will invite prejudicial conduct against our Indigenous people.

List of Recommendations

1. The Revised objectives and purposes

- 1.1. The revised purposes of the legislation reflect Articles 3, 4, 5, 8, 11, 12, 15, 18, 19, 22, 25, 26, 27, 28, 31, 32, 39 and 40 of the United Nations Declaration on the rights of Indigenous Peoples (Annexure 1);
- 1.2. The revised purposes must include the purpose to educate non-Indigenous peoples as to the significance of Indigenous cultural heritage.

2. Making terminology consistent with the purposes

- 2.1. Jumbunna IHL supports the changes to the definition of 'traditional area' and 'traditional object' as under the *Evidence Act 1995*.
- 2.2. The definition as to 'traditional area' must expressly include the natural resources within the area.

3. The accreditation system

- 3.1. The system of accreditation should be implemented to give certainty to decision making.
- 3.2. States implementing the standards of accreditation must either enact a blanket system body of protection all over the state either through the establishment of a state department or by enacting the standards of protection within each department dealing with Indigenous cultural heritage.

4. State and Territory accredited standards

- 4.1. Recommendations under parts 7, 9, 10, 12, 13, 14, 15, 16 and 17 of this submission should be implemented within the state accredited standards.
- 4.2. Standards 1 and 4 of the state accredited standards are essential to improve relations between the development proponents and the traditional owners.
- 4.3. Jurisdiction of an impartial Indigenous heritage body should be integrated within the jurisdiction of state and territories accredited.

5. Ensuring that only legally recognised traditional custodians have the right to make an application for Commonwealth protection

- 5.1. The new legislation must allow claims from Indigenous persons with a cultural interest in the land, concurrently with any claims made by any legally recognised traditional custodian.

6. Indigenous Land Use Agreement immunity

- 6.1. No recommendations made.

7. Reporting Indigenous remains

- 7.1. Uniform standards for reporting Indigenous remains should be in accordance with guideline 3.4.5 of the Queensland State Coroner's Guidelines of 2003.

8. Protection of Indigenous remains

- 8.1. Jumbunna IHL supports the penalisation of displaying sacred items or Indigenous remains.
- 8.2. A database of cultural heritage be established under an impartial Indigenous heritage body to allow reconnections with their traditional owners or descendants, in the case of Indigenous remains.

9. Use of applications to make claims

- 9.1. Applicants should be able to present their evidence about their cultural connection to the area or object to a culturally appropriate officer, appointed by the Minister and handled only by that officer.
- 9.2. Jumbunna IHL supports the inclusion of application boxes that the information cannot be displayed, due to cultural secrecy.
- 9.3. Relevant government bodies and proponents should also give to the traditional owners or applicants a signed statement that they will conduct themselves in good faith.
- 9.4. Failure to adhere to the good faith principle should be actionable and render any Minister's declaration void or voidable.

10. Use of conferences to best deal with the issues

- 10.1. Jumbunna IHL supports the greater emphasis on dispute resolution, other than litigation. However, existing Alternative Dispute Resolution is culturally inadequate.
- 10.2. Conferencing method should follow the method of co-facilitation, outlined by Dr Loretta Kelly and Professor Larissa Behrendt, annexed to this submission (Annexure 2)

11. Cultural information sensitivity

- 11.1. Jumbunna IHL supports the proposal to protect traditional knowledge as confidential information.
- 11.2. Information collected should only be handled by Indigenous staff or staff with extensive Indigenous backgrounds.
- 11.3. Staff entitled to hold and view culturally sensitive information should also be of the appropriate gender and age to view the material.

12. Interim Protection

- 12.1. Jumbunna IHL supports the amended test for provision of interim protection, being the 'reasonable grounds' test.
- 12.2. The Federal system should implement the accredited standard of early identification of Indigenous heritage. This system can be implemented and monitored by an impartial Indigenous heritage body.
- 12.3. The power to make emergency and temporary orders for protection should only be given by an impartial Indigenous heritage body, recommended in Chapter 11 of the Evatt Report.
- 12.4. The applicant's 48 hour time period for emergency protection must be increased to 96 hours.

13. Means of providing long term protection

- 13.1. That an independent Indigenous heritage body be established for the purposes of making cultural heritage assessments binding upon the Minister.

- 13.2. Jumbunna IHL supports the changed tests for cultural heritage; however the means of assessment should still be in lieu of Recommendations 8.1 to 8.9 of the Evatt Report.
- 13.3. Changes in Indigenous culture and traditions, related to the area or object, due to previous forced assimilation policies, should not be viewed as a detriment to the assessment of cultural significance.
- 13.4. The proposed provisions for revocation of protection must be replaced in favour of Article 22 and 23 of the United Nations Economic and Social Council's review of the draft principles and guidelines on the heritage of Indigenous peoples (Annexure 3).

14. Updating penalties

- 14.1. Section 23(4) of the ATSIHPA be repealed and replaced with Division 9 of the Commonwealth Criminal Code.
- 14.2. The class of persons able to apply for injunctive relief be expanded to those directly affected by the decision.
- 14.3. The new legislation make provisions for compensation and repair to damaged cultural areas or objects.
- 14.4. The new legislation implement Article 20 of the United Nations Economic and Social Council's review of the draft principles and guidelines on the heritage of Indigenous peoples, making it illegal for businesses to provide incentives to individual traditional owners against the community.

15. Reviewing the legislation

- 15.1. The time period for review is amended to five years, instead of seven.

Introduction

- 1.1. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (hereafter 'ATSIHPA') has drawn criticism in how it protects the cultural sites and objects of Indigenous Australians.
- 1.2. The Evatt report in 1996¹ perfectly reflects these criticisms. In her report she noted a number of failures by the Federal government, including the failure to keep traditional knowledge confidential, the battles between the Federal and State governments over jurisdictional uncertainty and the absence of any impartial Indigenous body to make ultimate determinations. This last failure has been of exceptional note, since the abolishment of the Aboriginal and Torres Strait Islander Commission in 2005. The report made a number of recommendations to alleviate the issues as to Indigenous heritage protection. Coming close to 2010, Jumbunna IHL still have yet to see the implementation of these recommendations.
- 1.3. The failings of the current Federal provisions are perfectly encapsulated within the Hindmarsh dispute in the late 1990s. This created a perfect example as to how the current provisions failed to amend the ties between the Traditional owners, local communities, commercial entities and government authorities. Feelings of resent and distrust now reside within the minds of the Hindmarsh disputants, because of the lack of contemporariness of the current Federal provisions.
- 1.4. It is commendable that the Rudd government has now formally endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in April 2009. Because of this, there is now a stronger imperative for them to ensure that the proposed new submissions reflect the UNDRIP, in particular because the majority of the articles within the declaration deal with the protection of cultural heritage, including our knowledge and traditions.
- 1.5. Upon learning of this proposal, Jumbunna IHL acknowledge this as a positive step towards living up to the UNDRIP and making the traditional owners an integral player within the framework of cultural heritage protection. However, the Rudd government must not be too afraid to leave the current system entirely and create a new one from scratch, which will include having more faith in the traditional owners of our lands.

¹ Hon Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Commonwealth of Australia, 1996

Part 1 – Creation of the accreditation system and the uniform standards.

1. The Revised objectives and purposes

- 1.1. Jumbunna IHL welcomes the reformed purposes of the proposed legislation. This is particularly so with the recognition of Indigenous people as the primary source of their traditional laws and customs and that they have the responsibility to protect those areas and objects.
- 1.2. Australia has now formally endorsed the UNDRIP, as of 3 April 2009. As such, the government should also include a number of references as to some of their articles of importance to the protection of cultural heritage². In particular, reference has been made to:
 - the right of Indigenous people to freely participate in these decision-making bodies, specially chosen by themselves in accordance with their own procedures³;
 - The requirement of government to consult and cooperate *in good faith* with the Indigenous peoples concerned⁴.
- 1.3. Furthermore, the Evatt report recommended the education of non-Indigenous persons as to the importance of Indigenous heritage, within their local and greater residence⁵. This is the same within the UNDRIP⁶. The purpose of this is to reduce the ignorant damage done to culturally significant sites and induce a greater understanding between parties to a dispute⁷.

Recommendations:

- 1.4. The revised purposes of the legislation reflect Articles 3, 4, 5, 8, 11, 12, 15, 18, 19, 22, 25, 26, 27, 28, 31, 32, 39 and 40 of the United Nations Declaration on the rights of Indigenous Peoples (Annexure 1);

² Articles 3, 4, 5, 8, 11, 12, 15, 18, 19, 22, 25, 26, 27, 28, 31, 32, 39 and 40 of the United Nations Declaration on the rights of Indigenous Peoples (Annexure 1).

³ Article 18 and 27 of the United Nations Declaration on the rights of Indigenous Peoples (Annexure 1).

⁴ Article 19 of the United Nations Declaration on the rights of Indigenous Peoples (Annexure 1).

⁵ Recommendation 3.1 of the Evatt Report 1996 at n1.

⁶ Article 15 of the United Nations Declaration on the Rights of Indigenous Peoples (Annexure 1).

⁷ Recommendation 3.1 of the Evatt Report 1996 at n1. See also Article 15 of the United Nations Declaration on the Rights of Indigenous Peoples (Annexure 1).

- 1.5. The revised purposes must include the purpose to educate non-Indigenous peoples as to the significance of Indigenous cultural heritage.

2. Making terminology consistent with the purposes

- 2.1. The previous definitions of “traditional area” and “traditional object” under the ATSIHPA required a stronger standard of proof to prove that the area or object is ‘particularly significant’⁸.
- 2.2. The current definition, therefore, has created the assumption that traditional objects are relegated to only sites or objects of traditionally divine value. The new definitions allow for a broader and more encompassing ambit of protection.
- 2.3. The only needed requirement Jumbunna IHL can draw from this proposal is to expressly include the natural resources of the traditional land. The purpose of this inclusion is that it would safeguard the cultural right to use the area as hunting or gathering grounds, according to their cultural tradition. Traditional owners have been denied access to their natural resources or their natural resources have been significantly diminished, due to the influence of commercial entities, private use of the land or water and government intervention.

Recommendations

- 2.4. Jumbunna IHL supports the changes to the definition of ‘traditional area’ and ‘traditional object’ as under the *Evidence Act 1995*.
- 2.5. The definition as to ‘traditional area’ must expressly include the natural resources within the area.

3. The accreditation system

- 3.1. One of the main criticisms of the ATSIHPA has been the requirement for the Federal Minister to consult with the State equivalent. This requirement has resulted in both sides of the dispute experience very long delays, followed by increased legal costs and hostility between the parties.
- 3.2. A system of accreditation would make the process of heritage protection faster and more certain. This would be more beneficial for the proponents,

⁸ Section 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

the government and the traditional owners as recommended in the Evatt Report⁹.

- 3.3. This accreditation system still does not deal with the jurisdictional problems within the state departments. In NSW alone, there is only the *National Parks and Wildlife Act*, which expressly deals with cultural heritage, while the *Aboriginal Land Rights Act* only deals with management plans that include provisions for protection of cultural property. Should there be an accredited system, there must be a stand-alone system of protection encompassing all of the state or territory. Alternatively, all state or territory government departments must amend their legislation to implement the standards of protection as under Proposal 4 of the discussion paper.
- 3.4. The one remaining issue with this accreditation system is the means of review, which will be dealt with at the end of this submission.

Recommendations

- 3.5. The system of accreditation should be implemented to give certainty to decision making.
- 3.6. States implementing the standards of accreditation must either enact a blanket system body of protection all over the state either through the establishment of a state department or by enacting the standards of protection within each department dealing with Indigenous cultural heritage.

4. State and Territory accredited standards

- 4.1. Because a number of these standards reflect the current Federal proposals, they will not be dealt with under this part. This means our recommendations as to Proposals 7, 8, 10, 11, 12, 13 and 14 should also be implemented within the state and territory accredited standards.
- 4.2. The laws of cultural heritage protection have not, in the past, given a stronger burden on the proponents of development. As such, it is usually the case of closing the gate after the horse has bolted. At this time, the Traditional owners are distressed, resentful, distrusting and overall aggrieved from the loss or damage done to the areas or objects that give definition to their tradition and culture.
- 4.3. Our interpretation of Standard 1 is that it will create a positive duty upon the proponents to actively seek out the traditional owners, before any activity is carried out. The situation is less adversarial and both parties

⁹ Recommendation 3.2 of the Evatt Report 1996 at n1

would be more willing to undertake negotiations. Standard 4 assists with this, allowing the government to require the proponent to make an application for protection.

- 4.4. By imposing the above duty upon the proponents, any mistake as to the cultural status and significance of the area or object would still be considered as criminally culpable.
- 4.5. The proposed standards are a great improvement over the current provisions in NSW and under the Commonwealth means of protection. This is especially so in regards to the proponents being required to actively seek out the traditional owners and consult with them, rather than to be wilfully blind to them.
- 4.6. The largest problem with these standards is the lack of a culturally integrative system. The provisions for secrecy of traditional knowledge for the purpose of these matters are an important step. However, the means of assessment as to the cultural connections and spiritual significance as to Indigenous areas and objects should purely be an Indigenous matter.
- 4.7. Therefore, the jurisdiction of a nation-wide or state-wide impartial Indigenous heritage body must be established, as recommended in the Evatt Report¹⁰. This body would be responsible for registering areas and objects considered traditional and providing reports and declarations of protection as to the cultural significance of the area or object. The staff of the body must be comprised of Indigenous persons, or at least Indigenous senior and executive members and other members who have a background in anthropology, sociology, law and/or Indigenous culture. This provides an independent and specialised means of information and review of areas for assessment.

Recommendations

- 4.8. Recommendations under parts 7, 9, 10, 12, 13, 14, 15, 16 and 17 of this submission should be implemented within the state accredited standards.
- 4.9. Standards 1 and 4 of the state accredited standards are essential to improve relations between the development proponents and the traditional owners.
- 4.10. Jurisdiction of an impartial Indigenous heritage body should be integrated within the jurisdiction of state and territories accredited.

¹⁰ Recommendation 11 of the Evatt Report 1996 at n1

5. Ensuring that only legally recognised traditional custodians have the right to make an application for Commonwealth protection

- 5.1. Legally recognised traditional custodians i.e. Native Title Representative Bodies (NTRB) might be appropriate bodies to claim protection. These bodies may provide a certainty as to who are the traditional owners of the land and also provide more resources.
- 5.2. The difficulty with this proposal though, is the failure to recognise traditional land owners with cultural connection to traditional area, but who could not satisfy the extremely stringent standards for native title. The process of recognising native title can exclude those groups with colonially distorted ties to their land, even if native title recognise other groups with ties in the same area. It therefore adds fuel to the fire, which is the adversarial conflicts brought about by the Native Title process and this creates a slower and more hostile process of recognising the appropriate claimant.
- 5.3. Furthermore, there are still traditional owners of the land that have chosen not to apply for legal recognition under the *Native Title Act*. This has been because they have either found stressful process of establishing an NTRB discouraging, or they have found a suitable alternative in the form of a land claim under the *Aboriginal Land Rights Act*, or another form of land rights protection.
- 5.4. The NSW Aboriginal Land Council has the responsibility to plan, develop and implement community, land and business plans, which require the consultation with persons who have cultural association with the land¹¹. Furthermore, these business plans must have details as to the cultural heritage of the land and must have strategies implemented to protect it¹².
- 5.5. However, there is a gap of difference as to the nature of Aboriginal land councils and NTRBs. Because of this, these two groups have been at odds with each other as to the management and jurisdiction of the area.

Recommendations

- 5.6. The new legislation must allow claims from Indigenous persons with a cultural interest in the land, concurrently with any claims made by any legally recognised traditional custodian.

¹¹ S137A of the *Aboriginal Land Rights Act* 1983 (NSW)

¹² Section 137B Ibid.

6. Indigenous Land Use Agreement immunity

- 6.1. There are no direct recommendations made, regarding this proposal.
- 6.2. The creation of an Indigenous Land Use Agreement (ILUA) has been met with both open arms and closed fists. They can create undue pressure upon the traditional owners, have very high costs in negotiation, have terms prejudicial upon the traditional owners and are next to impossible to amend or repeal. On the other hand, they give the traditional owners the power to negotiate as partners and there have been agreements with a positive impact on various communities.
- 6.3. As such, the ILUA provisions under the *Native Title Act* are considered as a more separate issue, deserving of a more special inquiry.

7. Reporting Indigenous remains

- 7.1. The accredited standards should include the requirement for state and territory governments to report Indigenous remains and to consult with Indigenous peoples when deciding what to do about the discovery and what to do with the remains. Some jurisdictions, including New South Wales, do not have any policies, guidelines or legislation and regulations that deal with the reporting the remains of Indigenous people.
- 7.2. For the discovery of Indigenous deceased persons, it is recommended that standard 5 of the proposed accredited state standards include provisions that reflect guideline 3.4.5 of the Queensland State Coroner's Guidelines 2003:
 - *If the deceased is an Aborigine or a Torres Strait Islander, contact should be made with the local Indigenous legal service to arrange for a community member to accompany police to advise of the death. Such people will be better equipped to understand the more complicated family structures that exist among some Indigenous people and information they give about the coronial system may be better received or more effectively communicated to other Indigenous people than that supplied by the police.*

Recommendation

- 7.3. Uniform standards for reporting Indigenous remains should be in accordance with guideline 3.4.5 of the Queensland State Coroner's Guidelines of 2003.

8. Protection of Indigenous remains

- 8.1. The proposed new laws do provide a stronger means of preventing offence to Indigenous Australians. This is particularly so in the event of museums displaying the personal remains of Indigenous ancestors as objects of scientific marvel.
- 8.2. What needs to be implemented to protect these sacred objects or remains is the creation of a database that records the description of the remains or objects and where they were located, being the approximate distance from a town centre or suburb centre. This allows for any Indigenous person from the area to discover these objects or remains. It should be mandated that objects and remains be stored with cultural sensitivity and that no pictures be displayed in the database. This is to maintain cultural sensitivity and prevent intellectual property theft.

Recommendations

- 8.3. Jumbunna IHL supports the penalisation of displaying sacred items or Indigenous remains.
- 8.4. A database of cultural heritage be established under an impartial Indigenous heritage body to allow reconnections with their traditional owners or descendants, in the case of Indigenous remains.

Part 2 – Amendments to the Commonwealth structure with non-accreditation

9. Use of applications to make claims

- 9.1. The difficulty with this proposal is that it still does not redress the numbers of applicants whom are illiterate and have no support. This is especially so in remote communities, where the most unspoilt heritage lies. Furthermore, requiring more information goes against the recommendation of the provision of minimal information in the application process, according to the Evatt Report¹³.
- 9.2. There is also the added issue that the applicants would not feel confident about divulging their traditional culture in an application, especially if that information were to be in the hands of someone not culturally qualified to view it. The added provision to indicate cultural sensitivity is a good way to handle confidential information; however some traditional owners may feel they have to include this information, to improve their chances of protection.
- 9.3. To improve the amount of information provided and to maintain cultural sensitivity it is recommended that a field officer be appointed to record the oral evidence of the applicant and write to text, as recommended in the Evatt Report¹⁴. The field officer will be of Indigenous background and must be of the appropriate gender to record the information to maintain cultural sensitivity. The benefit of this is that the applicant will be more confident to divulge the most relevant information to the most appropriate person for the best protection.
- 9.4. Good faith in these talks is most important, but it is also important to require both the proponent and the Minister, including all agents, to participate in the resolution process in good faith. There have been far too many outcries by applicants as to these above parties acting in bad faith, for example not replying to communications or failing to attend conferences¹⁵. It is recommended that the government and the proponents also give to the traditional owners or applicants a signed statement to proceed with the application process in good faith. The failure to proceed in good faith should then be actionable against the denial of protection.

¹³ Recommendation 4.2 of the Evatt Report 1996 at n1

¹⁴ Recommendation 10.23 and 10.24 of the Evatt report 1996 at n1

¹⁵ L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond*, Federation Press 2008 at p81

- 9.5. Finally, it is against the UNDRIP to require the applicants to demonstrate financial hardship, before they can receive assistance. Under Article 39 of the UNDRIP, Indigenous people have the right to have access to financial and technical assistance from Nation-states and international cooperation for the enjoyment of rights under the UNDRIP. Furthermore, there are different degrees of assistance that the government can provide, making the test for hardship more flexible according to the hardship suffered and help needed.

Recommendations

- 9.6. Applicants should be able to present their evidence about their cultural connection to the area or object to a culturally appropriate officer, appointed by the Minister and handled only by that officer.
- 9.7. Jumbunna IHL supports the inclusion of application boxes that the information cannot be displayed, due to cultural secrecy.
- 9.8. Relevant government bodies and proponents should also give to the traditional owners or applicants a signed statement that they will conduct themselves in good faith.
- 9.9. Failure to adhere to the good faith principle should be actionable and render any Minister's declaration void or voidable.

10. Use of conferences

- 10.1. Jumbunna IHL does support the use of conferences to resolve the issues pertaining to heritage protection as soon as possible.
- 10.2. The use of conferences has been seen as ideal over the use of litigation or arbitration. Litigation is not only a slow and costly process, but it also creates an atmosphere of mistrust and conflict during and well afterwards. The same can be said for mediation, under non-Indigenous principles and procedures. These processes are too westernised and too formal, creating those same feelings of distrust and hatred between different groups, both Indigenous and non-Indigenous¹⁶.
- 10.3. What is instead proposed is a new model of *co-facilitation*, as developed by Dr Loretta Kelly and Professor Larissa Behrendt in their book '*Resolving Indigenous Disputes*',¹⁷ a copy of which is annexed to this paper (Annexure 2). Key aspects of this new model include:

¹⁶ L Behrendt and L Kelly, n15 at p82-83

¹⁷ L Behrendt and L Kelly, n15 at p114-137

- The appointment of both Indigenous and non-Indigenous facilitators in each meeting, with knowledge in both Indigenous culture and Alternative Dispute Resolution (ADR) and the Indigenous facilitator must have a greater amount of control over the proceedings;
- The role of the facilitators would be to manage only the process of conflict resolution, without having any input into the content of the resolution, whatsoever;
- There must be an added emphasis on the pre-facilitation and post-facilitation procedures, to determine the groups affected by the proponent, elect representatives of each group and to build trust and rapport between each group;
- There must be an equal number of representatives on each opposing side, with the allowance of representative reserves (in case one falls sick, prevalent with Indigenous Elders) and lawyers present, who have no say in the resolution;
- The facilitation process must be done on the land where the conference concerns a traditional area, to give the proponents a greater understanding as to the significance of the land; and
- Resolutions created from the facilitated meetings are to be considered draft resolutions, where each group representative can discuss the resolution with other members, legal counsel and the facilitators themselves in private sessions.

10.4. The effect of this process is to create a mutually beneficial relationship between the different groups affected. This can then lead to more consistent outcomes because of the Indigenous and non-Indigenous groups trust with the system. Because of this level of trust, there is a greater opportunity for both parties to not violate the outcome they agreed to and not feel cheated in the process.

Recommendations

- 10.5. Jumbunna IHL supports the greater emphasis on dispute resolution, other than litigation. However, existing Alternative Dispute Resolution is culturally inadequate.
- 10.6. Conferencing method should follow the method of co-facilitation, outlined by Dr Loretta Kelly and Professor Larissa Behrendt, annexed to this submission (Annexure 2)

11. Cultural information sensitivity.

- 11.1. Many traditional owners have refused to apply for cultural protection until a threat became imminent. They refuse to apply because of the requirement to disclose their sacred knowledge to persons who would be unsuitable to receive their knowledge.
- 11.2. Information should be only be recorded and registered by Indigenous people only, or managed in cooperation with relevant Indigenous staff¹⁸. This could be achieved by utilising field officers from an Indigenous cultural heritage body recommended in the Evatt report¹⁹. Staff entitled to hold and view culturally sensitive information should also be of the appropriate gender and age to view the material.

Recommendations

- 11.3. Jumbunna IHL supports the proposal to protect traditional knowledge as confidential information.
- 11.4. Information collected should only be handled by Indigenous staff or staff with extensive Indigenous backgrounds.
- 11.5. Staff entitled to hold and view culturally sensitive information should also be of the appropriate gender and age to view the material.

12. Interim Protection

- 12.1. Jumbunna IHL strongly supports the 'reasonable grounds to believe test', to improve the discretion of the officer making the emergency declaration. This includes the removal of the 'significant risk' test²⁰.
- 12.2. The reformed Commonwealth Legislation should implement the standard of early identification as under proposal 4:

The early identification of Indigenous heritage issues: The earlier heritage issues are identified, the easier it is to find ways to protect heritage through careful planning. To achieve the early identification of heritage issues, laws should place the onus on proponents to avoid or minimise their potential impacts on heritage while enabling them to

¹⁸ Y Yokota and S Council, "Review of the draft principles and guidelines on the heritage of Indigenous peoples", United Nations Economic and Social Council; Commission on Human Rights, twenty-third session 18-22 July 2005; E/CN.4/Sub.2/AC.4/2005/3 (Annexure 3); Article 25.

¹⁹ Recommendation 11 of the Evatt Report 1996 at n1

²⁰ Recommendation 10.10 of the Evatt Report 1996 at n1

identify heritage by meeting with the traditional custodians and accessing government registers, enable proponents to proceed when their heritage obligations are clarified, and set penalties that encourage compliance with these requirements

- 12.3. The adherence to this standard can be made possible through the registration of traditional areas and objects with an Indigenous heritage body outlined under the Evatt Report²¹.
- 12.4. The proposal to still give the Minister power over interim protection is not within the recommendations of the Evatt Report. The Evatt Report recommended that an Indigenous Heritage body is the most appropriate body to issue emergency and temporary protection²². By not doing so, it goes against Article 27 of the UNDRIP (Annexure 1).
- 12.5. The 48 hour time period given to applicants to complete the application should be extended to 96 hours, as recommended in the Evatt Report²³. This is especially important in the context that the applicants will need to include more information than the standard application as suggested by this proposal.

Recommendations

- 12.6. Jumbunna IHL supports the amended test for provision of interim protection, being the 'reasonable grounds' test.
- 12.7. The Federal system should implement the accredited standard of early identification of Indigenous heritage. This system can be implemented and monitored by an impartial Indigenous heritage body.
- 12.8. The power to make emergency and temporary orders for protection should only be given by an impartial Indigenous heritage body, recommended in Chapter 11 of the Evatt Report.
- 12.9. The applicant's 48 hour time period for emergency protection must be increased to 96 hours.

²¹ Chapter 11 of the Evatt Report 1996 at n1.

²² Recommendation 11.12 of the Evatt Report 1996 at n1.

²³ Recommendation 10.11 of the Evatt Report 1996 at n1.

13. Means of providing long term protection

- 13.1. Jumbunna IHL strongly supports the utilisation of an independent body to evaluate the impact of the proponent's activities on the applicants as to the traditional use of the particular object or area.
- 13.2. Site evaluation and legislative administration should be vested within an independent Indigenous cultural heritage body, as recommended in the Evatt report²⁴. This is the best approach, due to the many views from traditional owners that the investigating bodies may be biased or have little cultural knowledge or sensitivity.
- 13.3. The measurement of significance should be based on Recommendations 8.1 to 8.9 of the Evatt Report. This includes:
 - Assessments as to traditions and culture related to the area or object are assessed on a subjective, rather than objective basis. This means it must be based on the degree of intensity of belief and feeling of Indigenous people about that area or site and its significance²⁵;
 - Consultations with the Indigenous community or individuals and anthropological reports, provided with their consent, form the primary evidence of assessment²⁶; and
 - The opinion or conclusions of the Indigenous cultural heritage body as to the assessment of an area or object should be binding on the Minister²⁷.
- 13.4. The ability for the traditional owners to use their land or object for their tradition is a better indicator for assessment. In addition, the assessor must not see the changes in the cultural tradition as a detriment in assessment. Indigenous knowledge, culture and traditions are passed down from the elder to the younger by word of mouth. The impact of colonial settlement, including previous campaigns of assimilation as such, has significantly changed a number of those traditions. To view these changes as a detriment to assessment would reinforce the negative impact colonial settlement and assimilation has had to Indigenous culture.
- 13.5. Jumbunna IHL recommends against the revocation provisions in this proposal. Indigenous traditional culture is ongoing, much like all other

²⁴ Recommendation 6.3 of the Evatt Report 1996 at n1.

²⁵ Recommendation 8.1 of the Evatt Report 1996 at n1

²⁶ Recommendation 8.6 of the Evatt Report 1996 at n1

²⁷ Recommendation 8.7 of the Evatt Report 1996 at n1

culture. The removal of cultural protection will cause a number of problems within Indigenous communities. It is recommended that the provisions for revocation should mirror that of Articles 22 and 23 of the United Nations Economic and Social Council's review of the draft principles and guidelines on the heritage of Indigenous peoples (Annexure 3)²⁸:

- *22. Protection of elements of Indigenous peoples' cultural heritage should last at least as long as the element remains distinctively associated with the Indigenous peoples concerned and continues to be regarded by them as integral to their collective cultural identity.*
- *23. After the expiry of such protection, Indigenous peoples and/or cultural heritage shall not require any formalities.*

Recommendations

- 13.6. That an independent Indigenous heritage body be established for the purposes of making cultural heritage assessments binding upon the Minister.
- 13.7. Jumbunna IHL supports the changed tests for cultural heritage; however the means of assessment should still be in lieu of Recommendations 8.1 to 8.9 of the Evatt Report.
- 13.8. Changes in Indigenous culture and traditions, related to the area or object, due to previous forced assimilation policies, should not be viewed as a detriment to the assessment of cultural significance.
- 13.9. The proposed provisions for revocation of protection must be replaced in favour of Article 22 and 23 of the United Nations Economic and Social Council's review of the draft principles and guidelines on the heritage of Indigenous peoples (Annexure 3).

²⁸ Y Yokota and S Council, n17; Article 22 and 23.

Part 3 – Penalties and Means of Review

14. Updating penalties

- 14.1. Section 24(3) of the ATSIHPA resulted in very few prosecutions, due to the wilful blindness of some developers and private persons. Jumbunna IHL therefore supports the removal of Section 24(3) of the ATSIHPA and the replacement with the *Criminal Code Act 1995 (Cth)*. The purpose of this can make the mistake as to not knowing of the gazetted declaration a mistake of subordinate legislation under Section 9.4 of the Commonwealth Criminal Code. The effect of this is that, despite this mistake, the defendant is still criminally responsible and liable. This is conditional, of course, upon the classification of a gazetted order an instrument of a legislative character made directly or indirectly under the new Act. Furthermore, there is a potential loop hole under Section 9.4(2)(c)(ii), where if the order had not been made available to persons likely to be affected by the order, should they exercised due diligence. It is therefore essential to impose a positive duty on all proponents to consult with an impartial Indigenous heritage body, recommended by the Evatt Report, to determine if the area for developmental impact has any cultural interest.
- 14.2. Jumbunna IHL supports the extended class of persons who can apply for a Federal Court injunction. In the interests of natural justice, it is necessary for those directly affected by the actions of the proponent to take action against it. Those affected by the decision should expressly include the traditional owners of the land, listed on the protection order. However, should an emergency declaration be made or in the process be made then there should be the ability for the traditional owners and their representatives to apply for an interlocutory injunction for the purpose of contacting an officer to assess whether the area or object requires an emergency declaration.
- 14.3. Provisions for the remediation of traditional owners, in the event of damage to their cultural property, is a step forward to prevent or remedy the situation in times of damage to cultural property, as under Article 11 of the UNDRIP.
- 14.4. Finally, in the interests of justice and to prevent corruption, Jumbunna IHL propose the implementation of Article 20 of the United Nations Economic and Social Council's review of the draft principles and guidelines on the heritage of Indigenous peoples²⁹. The effect of this Article is that no business or industry shall offer any incentives to individuals claim ownership over the area or object. This is where such action would go against the collective nature of the community. Having such a provision prevents the proponents from unduly influencing one person to go against the community. Doing so has resulted in conflict and strife within each community claiming either native title or heritage protection.

²⁹ Y Yokota and S Council; n17; Article 20.

Recommendations

- 14.5. Section 23(4) of the ATSIHPA be repealed and replaced with Division 9 of the Commonwealth Criminal Code.
- 14.6. The class of persons able to apply for injunctive relief be expanded to those directly affected by the decision.
- 14.7. The new legislation make provisions for compensation and repair to damaged cultural areas or objects.
- 14.8. The new legislation implement Article 20 of the United Nations Economic and Social Council's review of the draft principles and guidelines on the heritage of Indigenous peoples, making it illegal for businesses to provide incentives to individual traditional owners against the community.

15. Reviewing the legislation

- 15.1. Jumbunna IHL proposes that the period of review of the proposed legislation take place after the first five years, due to the nature of change to the proposed structure being quite considerable.

Annexures

Annexure 1 – United Nations Declaration on the Rights of Indigenous Peoples,
March 2008

Annexure 2 – L Behrendt and L Kelly, *'Resolving Indigenous Disputes: Land Conflict
and Beyond'*, Federation Press 2008

Annexure 3 – Y Yokota and S Council, *"Review of the draft principles and
guidelines on the heritage of Indigenous peoples"*, United Nations
Economic and Social Council; Commission on Human Rights, twenty-
third session 18-22 July 2005; E/CN.4/Sub.2/AC.4/2005/3