



Indigenous Heritage Law Reform:

Possible reforms to the legislative arrangements for protecting traditional areas and objects

Re. envisaged Bill to revise ATSIHP Act

(Aboriginal and Torres Strait Islander Heritage Protection Act, 1984)

Museums Australia submission

based on Australian Government discussion paper (August 2009)

6 November 2009

Principal Recommendation

Museums Australia's principal recommendation arising through this submission is as follows:

That the Commonwealth, in concert with S/T governments, convene a gathering of recognised Indigenous leaders to achieve the following:

- 1.** Identify key impediments to effective Indigenous heritage protection, encompassing both administrative and cultural considerations that have constrained best outcomes to date;
- 2.** Scope and frame improved approaches to the current situation that would help overcome past obstacles and better promote implementation of a cohesive national approach to Indigenous heritage protection;
- 3.** Determine how desired improvements (in mainstream cultural terms) may be better accommodated in terms that are recognised by, and more readily engaging and realistically attuned to, Indigenous communities themselves – enabling them to play their necessary part in protection of their heritage and implementation of any legislative provisions designed to achieve such protection.

1. Introduction

Museums Australia (MA) strongly supports the right of Indigenous people to identify and conserve their own heritage, as set out in our national policy: ***Continuing Cultures, Ongoing Responsibilities (CCOR): Principles and guidelines for Australian museums working with Aboriginal and Torres Strait Islander cultural heritage*** (2003); this is a co-culturally consulted and revised (2nd) edition of a policy that has been in place since 1993 – in its first edition entitled **Previous Possessions, New Obligations (PPNO)**.

(See **Attachment 1** for the **Principles** underlying the CCOR Indigenous policy; the full policy document can be downloaded from the Museums Australia website, under Policies, at: www.museumsaustralia.org.au)

Accordingly, Museums Australia endorses the stated intentions of the proposed Commonwealth reforms to the **ATSIHP Act** of 1984; namely:

To ensure that Indigenous Australians will have the best opportunity to protect their heritage (traditional areas and objects), and to cut duplication and red tape by establishing a nationally consistent approach to protecting Indigenous heritage based on best practice standards.

It is understood, and supported, that the proposed changes are intended to provide a greater level of certainty regarding the administrative, as well as legislative, arrangements governing the management and protection of Indigenous cultural heritage.

However Museums Australia argues in this submission that the second of the two stated intentions is somewhat at odds with the first. While the intention *to cut duplication and red tape* is a positive and sensible proposition, it is grounded in the presumption that Indigenous communities have equal capacity to source appropriate representation, and that all share the mainstream capability to meet administrative requirements. This is clearly not the case.

Sadly, it is often those communities most fractured and most struggling with the impacts of colonisation whose heritage is most at risk. And yet it is these same communities who will be required by the proposed legislative changes to respond in a timely, accurate, and authoritative manner to requests for information about (sometimes internally contested items) of their heritage.

Museums Australia therefore argues in this submission that, in order to achieve the stated intentions of the legislative and administrative reforms proposed, consideration needs to be given to how best to align the interests of Indigenous communities with a realistic understanding expectations of their capacity to support the administrative arrangements seen to be required.

An innovative mechanism is therefore needed to resolve the present impasse in achieving Indigenous heritage protection, as detailed above.

Museums Australia's key Recommendation – stated on the opening page of this submission – has been devised to address some critical issues, from the museums sector's vantage-point, that currently inhibit Indigenous heritage protection, as described in this paper.

1.1 Museums Australia (organisational/sectoral context for this submission)

Museums Australia is the national organisation for the museums sector. Members encompass individuals (including volunteers), national and state institutions, as well as local and community-run museums across remote, rural and regional Australia

The international (International Council of Museums/ICOM) definition of *museums* includes galleries, historic sites, keeping places, botanic gardens and zoos – that is, public sector institutions, large and small, dedicated to the conservation, collecting and interpretation of cultural heritage in its broadest aspects.

The museums sector includes places and their collections, and encompasses the conservation, continuation and communication of Australia's historic, natural and Indigenous heritage – both tangible and intangible.

2. Museums sector Indigenous heritage protection: protocols and principles

Museums and galleries, particularly the national and large state institutions, have been consultatively developing and utilising a recognised set of principles and protocols to engage with Indigenous people in the protection of their heritage since the early 1990s.

The cumulative experience of the museums sector – based on almost two decades' experience of cumulative, concerted effort to consult and build long-term relationships with Indigenous communities – is that highly positive and tangible benefits can be achieved through non-legislative approaches. The building of networks of engagement – creating a broad range of contacts reaching out to Indigenous communities across the country – and the nurturing of trust long-term through demonstrably improved partnership and co-cultural management arrangements, have resulted in directly beneficial outcomes for the work of museums in the cause of helping to protect and better interpret Indigenous heritage nationally. These efforts have proved to be immensely positive and complementary to any government legislative endeavours during the same period.

The museums/galleries sector believes that such sustained endeavours have played an important role in achieving better outcomes nationally for Indigenous people and communities. They have been positive in a number of important ways:

- restoring intellectual authority to Indigenous people in the interpretation and control of their heritage
- raising the profile of Indigenous culture and society in the wider Australian community (and amplifying its unique importance internationally)
- assisting Indigenous people directly in improving their own capacities in managing and protecting their own heritage.

Museum policies and protocols (often supported by specific policies and advisory groups within specific institutions) have developed separately from any legislative

provisions. However they have nonetheless proved immensely fruitful in providing a framework within which trust has developed and reasoned processes been agreed and advanced.

This general improvement in both agreed principles and practice has ensured that more informed decisions can be made regarding the identification, management and protection of Indigenous cultural heritage, encompassing all the phenomena (including live performance and customary ritual) in which Indigenous heritage is embodied.

Such improved conditions have ensured furthermore that more informed actions can be taken, in effective partnership with the appropriate Indigenous communities and persons, in relation to the important questions and sanctions as to who may speak for what aspects of Indigenous heritage – restoring or maintaining appropriate respect for elders and their indisputable authority and agency in securing underpinning values and problem-solving in all matters involving Indigenous heritage.

Museums have perceived the necessity – and taken the time and effort entailed – in building long-term, durable relationships and establishing a range of contact-networks with Indigenous people. These efforts have crucially recognised and striven to accommodate Indigenous time-frames when decision making has been required. Progressively, over some years, the outcomes have provided positive, cumulative and strengthening in the cause of supporting Indigenous peoples and communities' powerful desire to regain and exercise control in the management and sustainability of their cultural heritage.

3. Difficulties hampering legislative efforts in Indigenous heritage protection

Museums Australia realises that extended and flexible time-frames are not the norm in most development and planning procedures involving governments, and – as stated in the Discussion Paper – extended time-frames for decision making clearly prove to be a major impediment to procedural efficiency under the present ATSIHP arrangements.

MA recognises that the Australian federal system of government determines that responsibility for Indigenous heritage is shared across all three levels of government nationally. It is also clear that these responsibilities, in practice, are managed unevenly across state and territory jurisdictions.

While it is tempting to assume that general agreement to a sensible set of governmental provisions and guidelines designed to streamline administrative arrangements will result in their improved implementation, the day-to-day realities for many Indigenous communities are such that these expectations cannot be met readily. Nevertheless ongoing consultative processes to engage Indigenous people in the protection of their heritage will achieve desired results only if – and when – Indigenous people themselves feel empowered and supportive of such efforts.

Museums Australia suggests that substantive progress can be achieved only when the will of Indigenous communities, backed by Indigenous national leadership, is engaged affirmatively in support of improved legislative outcomes, enabling more streamlined and expeditious administration. In other words, improved legislation, in

our view, is only a part of any solution, and addresses only one side of the partnership necessary for advancement of protection in practice.

4. The need for a circuit-breaking approach

There needs to be a circuit-breaking improvement envisaged by government. This can only be accomplished by securing the engagement of national Indigenous leadership, backed by their concerted will to identify the means and affirmatively advocate cooperation from Indigenous communities for improved legislative outcomes.

RECOMMENDATION

MA's key recommendation is that the Commonwealth, in concert with S/T governments, convene a gathering of recognised Indigenous leaders to:

- Identify key impediments to effective Indigenous heritage protection, encompassing both administrative and cultural considerations that have constrained best outcomes to date;
- Scope and frame improved approaches to the current situation that would help overcome past obstacles and better promote implementation of a cohesive national approach to Indigenous heritage protection;
- Determine how desired improvements (in mainstream cultural terms) are better accommodated in terms recognised by, and more readily engaging and realistically attuned to, Indigenous communities themselves – enabling them to play their necessary part in protection of their heritage and implementation of any legislative provisions designed to achieve such protection.

This revised approach is crucial, in Museums Australia's view, because Indigenous communities are invariably the weaker party in any efforts to resolve long-standing and complex problems that have arisen regarding appropriate recognition and protection of Indigenous heritage.

In seeking to advance protection of Indigenous heritage, and in undertaking to engage Indigenous people in such protection legislatively, it must be understood that such efforts are always framed and undertaken within the logic of mainstream, 'western' cultural norms, which by their history and disposition do not work spontaneously in favour of Indigenous norms.

It must be recognised that the effects of colonisation have inevitably produced a torn fabric of Indigenous society, the results of which are that which Indigenous communities today are very differently capacitated (from one community to another) in terms of their readiness and ability to speak for and manage continuing aspects of their own heritage.

To presume that all Indigenous communities are equally capacitated to respond to legislative and administrative measures to protect their heritage would be to ignore

the unequal and long-term effects of the colonial process itself across Australia, and its continuing, often disabling impacts that persist today.

It is through this framework that Museums Australia stresses a recognition that Indigenous culture remains the weaker (that is, less resourced or capacitated) party – though it may be resurgently strong in its own identity and sense of continuity – in any desired compact of joint action. Furthermore, any administrative changes currently envisaged within the ATSIHP framework, however sensible and considered they may be, arise within social structures and arrangements often at variance with those of the Indigenous people and culture whose interests they are seeking to support.

MA suggests that current good-willed efforts to remediate any dysfunctional aspects of the Indigenous heritage protection system are still hampered by their being conceived within the values and structures of the stronger party – Australian mainstream society – with insufficient attention given to the less resourced party's capacity to cooperate with the administrative burdens imposed by a mainly legislative effort and focus.

Museums Australia proposes that in order to achieve the outcomes desired, much greater attention needs to be paid to the actual circumstances of Indigenous people, and the diverse and unequal capacities of their communities to respond to requirements for appropriate representation – noting the desired timeliness of response, and ready compliance with provision of information and advice required for a national Indigenous heritage protection system to work effectively.

An important example of present dysfunction occurs in the difficulties that arise in many cases around the need to establish the appropriate Indigenous community members to speak for particular aspects or items of Indigenous heritage, in order to determine their status or value as items for possible protective sanction.

Therefore while the Commonwealth proposals regarding the involvement of 'appropriate' Indigenous representation are sensibly formulated in principle, they are fraught with difficulty in practice when the principles stumble against the disabling realities of equitable implementation. Meanwhile many failures in implementation tend to impact most adversely on the weakest and most vulnerable of Indigenous communities or their members.

5. Commonwealth cultural policy initiatives

Regrettably there is a lack of a set of recognised Commonwealth protocols governing relations with Indigenous people in the care and protection of their heritage.

Although the Commonwealth (through the Australian Heritage Commission) did produce guidelines some years ago (in 2002) – *Ask First: a guide to respecting Indigenous heritage places and values* – this publication is not generally known or widely used by the broader public; neither has it been updated.

Meanwhile a multiplicity of Commonwealth programs and provisions impinge directly upon the protection and care of Indigenous heritage – with very little regular connection, comparison or means of rationalising how these numerous and diverse provisions impact upon the protection and affirmative management of Indigenous cultural heritage from the point of view of Indigenous communities themselves.

The present Discussion Paper references legislative provisions under both the **PMCH (Protection of Movable Cultural Heritage)** and the **EPBC (Environmental Protection and Biodiversity Conservation) Acts** that apply to the protection of Indigenous culture and heritage. Nevertheless it is unclear how it is envisaged that these existing provisions may be aligned with administrative arrangements proposed under the revisionary **ATSIHP (Aboriginal and Torres Strait Islander Heritage Protection) Bill**.

It is equally unclear whether, or how, the Commonwealth intends to align any new ATSIHP protocols or envisaged administrative support arrangements, with the diverse Aboriginal and Torres Strait Islander culture and heritage support programs currently administered by the Commonwealth.

Commonwealth provisions and programs currently include:

- ***Caring for Country* – Australian Government support for the National Reserve System**
- the many different **programs supporting Indigenous artists and art centres**, jointly encompassing the DEWHA and FaCSIA portfolios
- the **Return of Indigenous Cultural Property (RICP)** Program
- the Indigenous Cultural Portal under development through **DEWHA's Cultural Portal**.

6. National Cultural Policy consultation

Most recently, the Minister for Environment, Water, Heritage and the Arts, the Hon. Peter Garrett, has initiated a public consultation on the Government's proposed National Cultural Policy (in October 2009), a key theme of which is *Keeping Culture Strong*, with special reference to 'the need to provide specific support and focus to Indigenous culture'.

Museums Australia urges that there is a timely opportunity here for the Commonwealth to initiate a National Indigenous Cultural Summit: to develop agreed protocols, administrative guidelines and frameworks that can truly engage Indigenous people (which includes engagement in ways that are compelling in terms of their values) and properly enable them to be fully involved in the identification, advocacy and care of their cultural heritage.

Museums Australia has made Recommendations previously concerning Indigenous heritage, in its Submission (13 March 2009) to the **Commonwealth's Review of the PMCH (Protection of Movable Cultural Heritage) Act**. Recommendations that are relevant to re-state in the present submission are provided below.

MA Indigenous heritage-related Recommendations to the PMCH Review were as follows:

- a. That a clear set of protocols be developed in consultation with Indigenous representatives to ensure that appropriate Indigenous expertise and representatives are enabled to have direct cultural input and influence to secure adequate national measures for the protection of Indigenous heritage.*

- b. That steps be taken to ensure that the wider public is well informed about the value and sensitivity of Indigenous material culture and the need for appropriate consultation with Indigenous people, especially with regard to its high-order intangible heritage values.*
- c. That an explanatory pamphlet concerning Indigenous artworks and cultural objects – a 'plain English guide' to the management of Indigenous heritage (and ethical policies thereto) – be developed and made widely available for general public awareness and use.*
- d. That consideration be directed to other Commonwealth programs and legislation concerned with the identification and protection of Indigenous cultural heritage, to achieve more integrated outcomes for communities.*

[Museums Australia]

Statement of the Principles underlying Museums Australia's Indigenous policy, framing relations between Australian museums and Indigenous people – revised, 2nd version, ***Continuing Cultures, Ongoing Responsibilities (CCOR)*** adopted by Museums Australia National Council in 2003 (replacing the first Indigenous Policy produced by the Australian museums sector, ***Previous Possessions, New Obligations***, produced in 1993).

PRINCIPLES

Self determination

1. Aboriginal and Torres Strait Islander people have the right to self-determination, particularly in respect of cultural heritage matters.
2. Aboriginal and Torres Strait Islander people have the right to fulfilment of their own cultural aspirations.
3. Authority for the protection of secret and sacred items belongs to the traditional custodians or their descendants, according to traditional Aboriginal or Torres Strait Islander laws.
4. Gender, age and status issues impacting on Aboriginal and Torres Strait Islander cultural heritage, materials, stories and other information are to be determined by relevant Aboriginal and Torres Strait Islander people themselves and these determinations are to be respected by collecting institutions.

Management and Collections

5. Aboriginal and Torres Strait Islander people must be given the opportunity to have informed input into decisions affecting how museums store, conserve, research, display or in any other way use collections of their cultural heritage and how such collections and information are presented, whether for exhibition, publication or educational purposes.
6. The stories and information associated with Aboriginal and Torres Strait Islander cultural materials are of equal importance to the actual materials and must be treated with equal respect.

Access to collections and information

7. Aboriginal and Torres Strait Islander communities have a right to know what items and documents of their cultural heritage are held in museum collections.
8. Relevant Aboriginal and Torres Strait Islander people should determine who has access to Australian Indigenous items and information held in museum collections.

Assistance to Aboriginal and Torres Strait Islander communities

9. Aboriginal and Torres Strait Islander people are entitled to seek and to reasonably expect assistance from museums to enable them to develop skills and knowledge about all areas of museum activity including storage, handling, recording and display of cultural items, strategic planning, research and recording techniques and exhibition planning.

10. Aboriginal and Torres Strait Islander communities seeking assistance from museums with the care, display or other use of their cultural heritage retain full authority in decision making matters pertaining to that material.

Employment and training

11. Aboriginal and Torres Strait Islander people should be actively encouraged to seek employment within all areas of the museums and galleries sector.
12. Aboriginal and Torres Strait Islander peoples' cultural skills should be recognised along with other experience and qualifications in their efforts to seek employment or training in museums and consideration of these skills should be reflected in the levels of employment they attain.

Policy formulation

13. Aboriginal and Torres Strait Islander people should be involved in policy affecting their cultural heritage in all areas of museological practice and at all levels – from high level issues of governance through to daily practices such as collection management, interpretation and access.
14. All museums should strive for best practice with their Indigenous Australian collections and programs and should play a role in helping Aboriginal and Torres Strait Islander people to fulfil their aspirations in how they store and use their cultural material.

Cultural and intellectual property rights

15. Aboriginal and Torres Strait Islander people retain full rights to their cultural heritage both in respect to Australian intellectual property laws as well as relevant customary laws.

Reconciliation

16. Reconciliation for Australians is a fundamental principle underlying the activities of museums in the development of their relationships with Indigenous Australians and the manner in which they deal with Aboriginal and Torres Strait Islander cultural heritage.