

445 Dryburgh St
North Melbourne Vic 3051

Tuesday, 10 November 2009

Indigenous Heritage Law Reform,
Heritage Division,
Department of the Environment, Water, Heritage and the Arts,
GPO Box 787
Canberra ACT 2601

Re: Proposed reforms to the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSHPA)

I am writing on behalf of the Public Affairs Commission of the Anglican Church of Australia. I apologise for late submission of this comment but hope that it will be of use nevertheless.

The Commission only seeks to address some key matters of principle in relation to any reforms of the Commonwealth Indigenous heritage scheme.

Strong Commonwealth protection required

Despite the existence of legislation in most States and Territories in Australia which give some protection for places and objects significant under Indigenous traditions and culture, these are varied and not particularly effective. Even where the legislation makes it an offence to damage such places and objects, there is in all cases, power given to government bodies to consent to such damage where that body deems it appropriate. Furthermore, the enforcement of legislation by way of prosecutions for damage, even where consents have not been given, is also rare and subject to limitations in funding for investigation and prosecution and other discretionary factors. As a result, even where the State or Territory legislation may appear to be appropriate, effective protection is often lacking. There are still all-too-common stories of destruction of Indigenous sacred places and objects, especially where governments regularly give priority to economic development ahead of Indigenous cultural and spiritual values. The constant prioritization of the economy over spirituality is obviously a matter of great concern to all people of faith.

The UN Human Rights Committee in 2000 raised questions about Australia's compliance with the standards set out in the International Covenant for Civil and Political Rights which had been ratified by Australia in 1980. Article 27 of the ICCPR, provided that ethnic and cultural minorities should have the right to protect their culture and practice their own religion. The Human Rights Committee expressed concern that protection of sites of religious or cultural significance for minorities was not always a major factor in determining land use in Australia.

It is essential that the Commonwealth government should take a leading role in protecting Indigenous heritage or, at very least, continue to provide protection as a last resort. This responsibility should not be relinquished to States or Territories just because they have legislation that may on its face be satisfactory and accredited as there are always dangers that such governments will continue to favour short term economic gains that may result in irreparable damage to Indigenous heritage, cultures and communities. The involvement of the Commonwealth should also not be limited to situations where the heritage in question qualifies as being of national or world significance as it is often hard for heritage places or objects to attain such standards given their very specific meanings to the local Indigenous groups. The Commonwealth was given constitutional powers in the 1967 referendum relation to Indigenous matters due to the recognition of its important role. Support was recently given to the Declaration on the Rights of Indigenous Peoples and there will be ongoing International obligations to fulfill which will require the Commonwealth's government's active role in providing protection for heritage.

Some key elements of protection required

There are many reforms required to ATSIHPA, some of which have been identified by Justice Evatt in her 1996 report. There will no doubt be many submissions which concentrate on the details of specific reforms. The Commission will just highlight some key points:

- The legislation needs to have the purpose of protecting heritage for the benefit of the relevant Indigenous people whose heritage it is. These interests and values should be given priority in decisions as to the manner and type of protection. For instance, the Indigenous values should outweigh desires for maintaining a "museum collection" for the general public.
- The need to ensure that there is a wide coverage of the types of places and objects that will be protected. There are many different types of Indigenous heritage and it is essential that definitions used should be wide enough to cover them all.
- What is to be protected must include what is of significance to Indigenous peoples today. All religions and cultures adapt and change and it is vital that protection does not require Indigenous heritage to be frozen in time or in location.
- Indigenous should not be required to act against their religious beliefs as to restrictions in disclosure of information in order to obtain protection of their places and objects of significance. This should be the case despite normal assumptions of natural justice for people whose property or financial interests may be affected.

Yours sincerely,

Professor John Langmore
Chair, Anglican National Public Affairs Commission