ARTICLES

Changes proposed to the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 and their impact on project developments

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Impact assessment procedures in most jurisdictions require the effect of the development proposal on both European and Aboriginal cultural heritage to be considered. Most conflict over European heritage occurs as a result of proposals to remove or substantially alter buildings in urban areas which are heritage listed. Projects proposed for rural and isolated areas, particularly mining developments, often have to address Aboriginal cultural heritage concerns. If these proposals do not properly account for and manage Aboriginal cultural heritage issues, they may be subject to protracted delays and possibly litigation.

At present, the legislative regimes for cultural heritage are characterised by a broad assessment of archaeological significance at the State level, and a more inclusive definition of significance at the Commonwealth level. The *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) currently provides a regime of last resort, for Aboriginal people concerned about the impact of, and possible desecration by, project development on their sites and places of cultural heritage significance.

The Act involves a process of application to the Commonwealth Aboriginal Affairs Minister for protection. Significant difficulties have arisen with the application of the Act, the most notable with regard to the Hindmarsh Island Bridge development. The shortcomings of the current legislation are: the use of ministerial discretion in making protection orders, the inability of the Minister to consider the effect of orders on non-indigenous interests, the requirement that the Minister make an assessment on the significance of a place when considering an order, and inadequate coordination with State processes. Only one long term protection declaration has to date withstood judicial review.

Given these difficulties, Senator Herron announced a review of the Act on 17 December 1996, and nationwide consultation commenced. This followed extensive consultation surrounding Justice Elizabeth Evatt's comprehensive review of the Act in 1995-96.[2] The Evatt review and the extent of its implementation have resulted in a vigorous policy debate on the legislation. Indigenous stakeholders and their supporters believe the Evatt review was already a compromise between development and Aboriginal concerns, and are wary of State and Territory governments being given more control. The Commonwealth Government was not persuaded by these arguments, and last year the *Aboriginal and Torres Strait Island Heritage Protection Bill* 1998 was introduced.

The Bill includes the following changes to the existing Act:

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[2] A useful summary of this process can be found in the 11th report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, April 1998.

The accreditation of State/Territory heritage protection processes by the Commonwealth Minister. Minimum standards will be applied in order for accreditation to be achieved. The 'carrot' for States/Territories to seek accreditation is that Commonwealth involvement in heritage processes may be sought earlier where a State/Territory regime remains unaccredited.

The separation of decisions about significance from decisions about land use. Aboriginal people will be the primary source of information when assessing significance.

Indigenous information will be subject to confidentiality.

Mediation will be the primary vehicle for resolving conflicts between Aboriginal people and developers.

Time limits will be set on mediation processes.

- 'Blanket' protection of indigenous areas, objects and sites will be included in the standards established for accreditation of States/Territory processes.

These proposals represent a retreat by the Commonwealth on cultural heritage protection, with States and Territories to be given a greater role. Although ATSIC was content that ministerial discretion should determine disputes over heritage, in his evidence to the Senate Legal and Constitutional Legislation Committee on 19 February 1999 (at p8), Mr John Eldridge of ATSIC summed up the situation:

> It is a case where the political weighing of the detriment to the developer versus the detriment to the indigenous applicants was different at the State or Territory level from the political weighing of those respective detriments at the Commonwealth level.

The Association of Mining and Exploration Companies and Minerals Council of Australia, expressed concerns to the Committee about the definition of significance, and for the capacity of the current legislation 'to stall, stymie, [and] delay development' (Mrs Tamara Stevens, AMEC, p 29). Both the Association and Council were generally supportive of the Commonwealth's proposal to hand the matter back to States and Territories as part of their responsibility for land administration.

From the perspective of impact assessment processes, although the new proposals will help to manage the risks of cost and delay potentially arising from cultural heritage assessment, they do not obviate the need for proper management of these issues. They establish only minimum standards to ensure the involvement of Aboriginal people in the assessment of development proposals. As Mr Shane Yun, Executive Director of the Kimberley Land Council, pointed out to the Committee, 'the fundamental principle' in avoiding disputes over heritage is 'inclusiveness of involving Aboriginal people in the planning process'. (p44).[3]

There has been some assessment of the definition of 'sacred site' by the Courts. In Western Australia, in *Noonkanbah Pastoral Co Pty Ltd v Amax Iron Ore Corporation*[4] the term was 'declared to include all land within a specific radius of an identified point, on the basis of the evidence of Aboriginal people regarding the traditional significance of that land, rather than on any non-Aboriginal records of relics or archaeological evidence'. Such a definition should be borne in mind when managing cultural heritage processes in impact assessment.

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[3] See also J Fulcher '*Cultural Heritage: Law and Practice*' in Australia Mining and Petroleum Law Association Yearbook 1998 pp556-568.
D Gately and J Fulcher '*Native Title and Cultural Heritage: The Blurring of the Issues*' APPEA Journal 1998 Pt2 pp156-9.

[4] Unreported, Supreme Court of Western Australia, Brinsden J 27 June 1979.

'Blanket' protection, as pointed out by Senator McGouran in the Second Reading Speech on the Bill 'puts the onus on a developer to ensure that no heritage sites are at risk before work goes ahead'. This may create difficulties for a developer when managing cultural heritage processes, as indigenous interests are concerned only for the protection of heritage, not for the time and costs of the developer in taking account of those concerns. The Bill proposes mediation processes in addition to State processes which are likely to include extensive mediation, consultation and negotiation. Dispute resolution processes at the Commonwealth level should include early resort to the Courts with adequate funding arrangements for parties, so that early determination of the dispute can be made.

Time limits on mediation processes are essential at the Commonwealth and State levels. These are provided in the Commonwealth's proposals, but should make allowance for the amount of time at State level in impact assessment processes where heritage matters have been considered. 'Good faith' ought also to be a precept adopted for the conduct of all parties in cultural heritage negotiations. Such provisions have been applied in the native title context and impact assessment negotiations would benefit from their application to heritage issues. Too often, cultural heritage management regimes can become caught up in broader indigenous community politics. Concentration on the issue of avoidance of cultural heritage sites, places, objects and areas is overlapped with disputes about matters beyond the developer's concern or control. 'Good faith' negotiation would help to focus on the protection of sites; this is after all the ultimate purpose of the policy debate on the legislative proposal, and of negotiation during the application of specific impact assessment procedures.