

**ATSIC SUBMISSION TO THE
SENATE LEGAL AND CONSTITUTIONAL
(LEGISLATION) COMMITTEE
ON THE**

***ABORIGINAL AND TORRES STRAIT ISLANDER
HERITAGE PROTECTION BILL 1998***

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1. Introduction

1.1. Terms of Reference

No formal terms of reference have been developed in relation to the Committee's consideration of the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998.

However, the Selection of Bills Committee in its report to the Senate identified three areas of concern:

- amendments to bring the Bill into line with the Evatt Report; and
- clarification of the drafting of the minimum standards for accreditation;
- the need for further consultation with indigenous Australians, etc.

1.2. Overview

This submission aims to address all of these concerns, drawing on previous submissions by ATSIC to the Parliamentary Joint Committee on Native Title and the Indigenous Land Fund, the Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth.) by Justice Elizabeth Evatt, AC, and our experience in administering the Act.

The primary focus of this submission is on issues related to Commonwealth withdrawal and the minimum standards for accreditation. These issues are of primary concern to indigenous people and must be resolved before there can be any guarantee that the arrangements will adequately protect their heritage and heritage values.

Its major themes are:

- the proportionality of the Bill in response to the concerns identified in relation to the Act;
- the coherence and integrity of the heritage protection system created by the Bill;
- the scope and effectiveness of the minimum standards for accreditation; and
- the strength of indigenous consultation and involvement in the process.

2. Bringing the Bill into line with the Evatt Report

2.1. Introduction

From the outset, a major motivation behind the reform process has been a perceived abuse of the Commonwealth Act. Despite original intentions to reform State and Territory regimes, conflicts continued to arise in a number of States, resulting in an increasing burden on the Commonwealth Act and, inevitably, substantial and protracted litigation. Reform was considered necessary in order to reduce the burden on the Commonwealth Act and limit the apparent exposure of the Commonwealth Minister to judicial review.

2.1.1. *The Evatt Report*

In October 1995 the Commonwealth Government asked Justice Elizabeth Evatt AC to examine the terms and operation of the Act because there had been considerable litigation and adverse publicity in relation to a number of decisions made under the Act. The litigation largely related to issues of process under the Act.

In August 1996 Evatt presented her Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The review produced wide ranging recommendations relating to the nature and operation of the Commonwealth regime and its interaction with State and Territory regimes. Essentially the recommendations were aimed at:

- reforming the procedures under the Commonwealth heritage protection regime;
- strengthening Commonwealth, State and Territory regimes; and
- establishing a coherent model for the effective future operation of these regimes.

In relation to the Commonwealth, the recommendations were aimed at improving the decision making process and increasing the level of indigenous involvement in assessments of significance and decision making on protection.

In relation to the States and Territories, the recommendations were aimed at producing best practice among all regimes and maximising the opportunity for effective interaction with the Commonwealth legislation. Accordingly, she recommended the development of uniform best practice minimum standards for all heritage laws and a system for accreditation of State and Territory laws and processes to allow the Commonwealth Minister to adopt assessments of significance from those regimes.

The recommendations were based on a legislative and procedural model that placed the Act in an umbrella position, allowing the Commonwealth Government to monitor State and Territory regimes and ensure that they operated to effectively and adequately protect indigenous heritage. In accordance with the original intention behind the Act, the legislation was intended to operate on the same subject matter as State and Territory laws to allow the Commonwealth Minister to intervene where s/he considered that those laws had not operated effectively and adequately.

2.1.2. *The Bill*

According to the Government, the main objectives of the Bill are to:

- reform the procedures under the Commonwealth heritage protection regime;

- strengthen State and Territory regimes; and
- ‘reduce the potential for confusion between the roles of the Commonwealth and the States and Territories’¹

In relation to the Commonwealth, the provisions of the Bill are drafted to improve the quality of decision making without necessarily ensuring a greater involvement of indigenous people in assessment or decision making processes.

In relation to the States and Territories, the standards for accreditation are aimed at allowing maximum flexibility for States and Territories to devise laws ‘appropriate to their circumstances’. Accordingly, the standards are set at a minimum

The Bill is based on a model of autonomous State and Territory regimes and limited Commonwealth involvement in the field of indigenous heritage protection based on notions of ‘national interest’. It appears that the Bill is intended to operate on a subject matter quite distinct from State and Territory laws, leaving those regimes largely exempt from any direct monitoring or intervention.

2.2. Reform of the Commonwealth Act

Given the nature of the litigation, the most obvious reform strategy was to restructure the decision making process in order to shield the Commonwealth Minister from judicial review and protect applicants from a requirement to disclose culturally sensitive material.

Accordingly, Evatt recommended a separation of assessments of significance from decision making on protection in order to increase indigenous control over assessments and to prevent any direct consideration by the Minister of culturally sensitive material. She also recommended clarification of the consultation and reporting process to reduce or eliminate certain ambiguities highlighted in the litigation, especially in relation to procedural fairness and the requirement to disclosure of culturally sensitive material.

The Bill substantially implements these recommendations with the effect that assessments of significance are separated from decision making on protection and the requirement to disclose culturally sensitive material is closely regulated in the consultation process.

While the Minister may be protected from considering culturally sensitive material, there is no real requirement to give indigenous people control over assessments or a significant role in the decision making processes. The Director is merely required to ‘have regard to the principle that indigenous persons are the primary source of information about the significance of particular areas or objects in terms of indigenous traditions’.²

2.2.1. A Primary Source of Information

It is unclear what this provision adds to the assessment and consultation process. Given the focus on indigenous traditions, customs, observances and beliefs, it is obvious that indigenous people will be a primary source of information.

To some extent the provision may strengthen the position of indigenous people in determining issues of significance. It is consistent with the limitations on access to submissions from indigenous people and it may increase the weight given to those submissions. However, there is still a duty to afford affected people an opportunity to

respond to the issues raised in an application and an obligation to consider all relevant material.

At best, the provision means that, in relation to assessment of areas and objects, indigenous people are to be consulted first, with the proviso that archaeologists, anthropologists, etc. may be called upon to corroborate the existence of stories in historical texts, etc. At worst, the provision reflects a view that indigenous people cannot be trusted to identify areas and objects of significance without outside assistance.

What is required is that indigenous people effectively *determine* the significance of areas and objects. As Evatt recognised, significance is an issue ‘which should be seen as peculiarly within the competence of Aboriginal people to determine’.³ She recommended that assessments of significance and threat ‘should be *based on* information provided by and consultations with the relevant Aboriginal community, communities or individuals and on any anthropological reports or information provided with their consent’.⁴

Ultimately, the issue is the veracity of the applicants, rather than the ability of non-indigenous people to shed light on the significance of the area or object in question.

2.2.2. *Involvement in Policy Development and Decision Making*

In addition to flaws in the assessment process, there is the wider issue of indigenous involvement in decision making and policy formulation on heritage protection issues. The Bill makes no provision on these issues, despite this level of involvement being a requirement imposed by international law,⁵ and the subject of a major recommendation of Elizabeth Evatt.⁶ Given the significance of these issues, Evatt recommended the establishment of an Aboriginal Cultural Heritage Advisory Council to provide advice on the operation of the Act and relevant processes. The Council would serve a representative function, incorporating a range of indigenous people from different indigenous heritage bodies, representative bodies and the like. ATSIC considers that this recommendation provides an invaluable guarantee of indigenous involvement.

2.3. **Strengthening Commonwealth, State and Territory Laws**

Given the emphasis on the primary responsibility of States and Territories, a second obvious reform strategy was to strengthen State and Territory regimes.

In this respect, Evatt recommended the establishment of national standards ‘as the basis for uniform or model laws on Aboriginal cultural heritage protection’.⁷ These standards would prescribe the core requirements of acceptable heritage protection regimes covering matters such as: objectives of laws, definition of cultural heritage, administrative arrangements, site assessment, planning and development procedures, confidentiality issues, access to areas, effective enforcement and compensation. They would be applicable to State and Territory laws and, where relevant, the Commonwealth Act ‘bearing in mind that its objective is to provide a mechanism of last resort, not a comprehensive scheme to deal with all aspects of heritage protection’.⁸

In general, it is clear that the standards in the Bill do not attempt to encourage States and Territories to aim at best practice in heritage protection regimes. While some of the standards deal with issues requiring changes to State and Territory laws, many of the standards impose requirements already addressed in a number of regimes. In addition, a number of key standards proposed by Evatt are missing. Of greater significance is the fact

that the bulk of the standards are drafted so broadly as to allow a majority of existing State and Territory regimes to be accredited without significant improvements.

The standards are listed in s.26 of the Bill:

‘26 Standards for accreditation

- (a) that those laws provide for the protection of all areas and objects that are significant to indigenous persons in terms of their indigenous traditions and, if that protection is to be removed, for the requirements, in particular, of paragraphs (e), (f) and (g) to be met;
- (b) that those laws recognise that indigenous persons are the primary source of information about the significance of areas and objects referred to in paragraph (a);
- (c) that those laws provide for decisions in relation to the significance of areas or objects to be made in consultation with indigenous persons and separately from any decisions in relation to the protection of those areas or objects;
- (d) that those laws provide an option for persons to obtain advance approval of an activity in relation to an area taking into account indigenous heritage issues, and provide for the involvement of indigenous persons in that approval process;
- (e) that those laws promote negotiated outcomes between indigenous persons and others whose activities might threaten areas or objects significant to those indigenous persons;
- (f) that those laws provide protection for culturally sensitive information disclosed in the course of administering heritage protection legislation;
- (g) that those laws ensure that, subject to paragraph (f), interested parties are treated fairly and given an opportunity to put their views and obtain reasons for decisions on the removal or non-removal of protection referred to in paragraph (a);
- (h) that those laws provide effective deterrents to injury or desecration of areas referred to in paragraph (a) or injury, desecration or illegal removal of objects so referred to through appropriate offences and penalties;
- (i) that those laws provide for the reporting of findings of indigenous human remains.’

2.3.1. Standard (a):- traditional significance

This standard requires that State and Territory laws provide for the protection of areas and objects of traditional significance. While it is appropriate that State and Territory regimes cover traditional significance, the standard is incomplete. First, there is no requirement to recognise the contemporary nature of traditions and the fact that they may change over time. Evatt recommended that the definitions should include traditions which have evolved from past traditions.⁹ A Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA) Working Party recommended definitions incorporating *all* aspects of contemporary indigenous traditions.¹⁰ Second, there is no requirement to protect areas and objects of historical or archaeological significance, despite the fact that they are already incorporated into a number of State and Territory regimes. Both the Working Party and Evatt recommended that the definitions ‘extend expressly to historic and archaeological sites’.¹¹

2.3.2. *Standard (a):- blanket protection*

This standard also requires State and Territory laws to provide automatic or presumptive protection for all areas and objects falling within the statutory definition. An enormous amount of attention has been focused on this issue of ‘blanket protection’ on the assumption that such a requirement is the key to the successful operation of State and Territory laws. It has been the subject of recommendations by Justice Evatt and the Parliamentary Joint Committee on Native Title and the Indigenous Land Fund. Indeed, it represented a major bone of contention among members of that Committee and a significant area of divergence between the Committee’s 11th and 12th Reports.

First, it should be noted that blanket protection only applies once an area or object has been damaged and is of no real benefit to indigenous people except as a general deterrent.

Second, it should be noted that blanket protection already operates in a number of States and Territories but has been unable to prevent the sort of conflicts that find their way into the Commonwealth regime. It is worth noting that the conflict surrounding the Hindmarsh Island Bridge, a paradigm case, arose in a blanket protection regime.

Third, it should be noted that, in a number of ‘model’ regimes, blanket protection operates independently of any registration or listing system. The effect is that questions of significance and threat are left to the proponents of the threats themselves. The problem is compounded by the fact that any offences created under blanket protection regimes are subject to substantial defences based on actual or constructive knowledge and mistake of fact. Generally, a defendant need only demonstrate that it was unreasonable to expect him or her to have known of the significance of the area or object in question. In this way the regimes rely heavily on the knowledge of the proponents, or the ‘reasonable man’, significantly reducing their effectiveness. This is a critical issue in State and Territory regimes and an area which ought to be addressed in the accreditation standards.¹²

Ideally, blanket protection would impose ‘a “duty of care” on all those whose actions may threaten damage or desecration to a site or area to make reasonable inquiries’.¹³ This would rely on an approach to the defences which emphasised reasonableness rather than actual or constructive knowledge. While there is some judicial support for such an approach,¹⁴ there is a significant risk that blanket protection regimes will continue to operate as described without providing any guarantee to indigenous people. The standards [(a) and (f)] should require State and Territory laws to adopt this duty of care approach, codifying statutory offences and/or defences accordingly.

2.3.3. *Standards (b) & (c): indigenous control over assessments & involvement in decision making*

As in the Commonwealth regime (discussed below), this standard requires only that State and Territory laws recognise that indigenous people are the *primary source of information* about significance. As such, the standards are subject to the same criticisms discussed above.

More importantly, it should be noted that, while there may be uncertainty at the Commonwealth level, there is strong support from States and Territories for closer indigenous involvement in the assessment and decision making process. The position preferred above has been endorsed by the MCATSIA Working Party whose report has been supported by most of the State and Territory Governments. Their proposal was that

indigenous people be given ‘a high level of involvement in the administration of [legislation] and decisions affecting sites’ and that the body responsible for assessments ‘be independent and controlled by Aboriginal custodians’.¹⁵

2.3.4. Standard (d):- early consideration in planning processes

While the ‘duty of care’ approach (discussed above in section 2.3.2) will assist in strengthening blanket protection, problems are still likely to arise regarding proof of offences (including those relating to the reasonableness of inquiries, and the fact that protection arises after areas and objects have been damaged).

Clearly, something more is required to prompt consideration of heritage issues by proponents and prevent conflict from arising at the outset.

Two options are a registration or listing system and a set of work program clearance procedures in planning processes. These were both considered by Justice Evatt in her review of the Act. She supported work program clearance procedures on the basis that an effective registration system would need to be comprehensive and would therefore involve prohibitive time and resource costs and would place enormous and unnecessary pressure on custodians to reveal culturally sensitive information. By contrast, a set of work clearance procedures would target areas of conflict for early resolution without requiring disclosure of sensitive information.

The requirement to provide ‘an option’ for advance approval is not necessarily consistent with the establishment of ‘work clearance procedures’. There is a requirement for indigenous people to be ‘involved’ in the approval process, but there is nothing to suggest that this amounts to anything more than a requirement to be ‘consulted’. This standard effectively mandates provisions in State and Territory laws dealing with ‘developer applications’, which allow proponents to fast track heritage protection processes by relying on a time-limited statutory consultation process and a provision barring subsequent consideration of protection issues. The issue of ‘developer applications’ was canvassed by the Minister’s Office in the early stages of consultations over reforms to the Commonwealth Act and was rejected by the majority of respondents, particularly indigenous interests.

By contrast work clearance procedures focus on the early identification of heritage issues in routine land planning and development processes. They focus on the involvement of indigenous people in land planning and development processes through a coordinated network of government agencies and indigenous groups. As such, they rely on the experience of these parties rather than the foresight of developers and, as a result, are likely to identify a much wider range of heritage issues and prevent rather than pre-empt any potential heritage conflicts.

2.3.5. provision for emergency and interim protection

There is no requirement for State and Territory laws to provide for ‘on application’ emergency and interim protection. As such, remedies for crises at the State and Territory level will be limited to formal court processes, such as injunctions, etc. In the interests of efficiency and effectiveness, a protection regime requires these mechanisms.

2.4. Interaction of Commonwealth, State and Territory Laws

The third strategy was to improve the interaction of Commonwealth, State and Territory regimes to reduce the level of delay arising out of Commonwealth intervention. As indicated, a significant objective of the Bill was to ‘reduce the potential for confusion between the roles of the Commonwealth and the States and Territories’.¹⁶ The Explanatory Memorandum cites three possible options for doing this:

- (i) Blanket protection under a Commonwealth scheme;
- (ii) Complete Commonwealth withdrawal where State schemes meet prescribed uniform standards; and
- (iii) Commonwealth withdrawal where States meet certain minimum standards, except for matters of ‘national interest’.

Under option (iii), States and Territories would be accredited where their legislation meets a number of loosely prescribed standards. The Bill applies this option on the basis that the ‘standards provide a basis for improving State [and] Territory laws and withdrawal by the Commonwealth provides an incentive for States and Territories to seek accreditation’. According to the Government, while the standards represent a *minimum* ‘they will in no way prevent States and Territories from going further if they wish’.¹⁷

However, the Explanatory Memorandum completely ignores a fourth option, recommended by Evatt and strongly endorsed by the Indigenous community:

- (iv) *Partial* Commonwealth withdrawal where State schemes meet uniform national standards.

Under this option, States and Territories would be accredited where their legislation and administrative regimes meet uniform standards for *best practice* and the Commonwealth Act would continue to apply as a statute of last resort. In practice, the Commonwealth Minister could adopt reliable assessments and findings made at State or Territory level and applications would not be accepted by the Commonwealth for other than interim or emergency protection until the relevant State or Territory processes were completed. This would be sufficient incentive for States and Territories to meet the minimum standards, as the arrangements would not apply to unaccredited regimes.¹⁸

The benefit of accreditation under this option is twofold: first, it confers primary responsibility for Indigenous heritage protection on accredited State and Territory regimes, while retaining access to the Commonwealth regime where the State or Territory regime fails; second, it encourages States and Territories to move towards uniform minimum standards of best practice. The benefit to the States and Territories would be that, provided they comply with the standards, there would be no need for further delay in project approvals etc. and the question of Commonwealth intervention would be dealt with immediately on conclusion of the relevant State or Territory process, where it arises.

2.4.1. *The Role of the Commonwealth*

Clearly, the major difference between the approach taken by Justice Evatt and the approach favoured by the Government is the view taken of the Commonwealth’s role in the protection of indigenous heritage.

When the Act was passed, it was recognised that States and Territories had responsibility for land management and should have primary responsibility for heritage protection.

However, it was also recognised that lack of protection could arise either from an absence of effective legislation or an unwillingness to enforce its provisions.¹⁹ The Government perceived a need for its own legislation to prompt legislative reform at the State and Territory level and to permit the Commonwealth to supervise the operation of State and Territory regimes. The Act was presented as a last resort mechanism for indigenous people under the premise that States and Territories had primary responsibility, but that the threat of Commonwealth interference would achieve both of these objectives.

At the time, the Commonwealth Government publicly understood its role in two ways. First, the Government viewed heritage legislation in the context of national land rights. The Act was initially intended to form the first interim stage of a proposed national land rights scheme involving the Commonwealth Government as a principal stakeholder. Second, the Government considered that it had a responsibility under the Constitution to provide a safeguard against decisions by States and Territories.²⁰ While there has never been any formal ‘responsibility’ in the Constitution,²¹ there was a clear appreciation of the significance that Commonwealth legislation would serve in supervising State and Territory regimes.

Another foundation, no doubt in the legislators minds, can be found in international law. Various international instruments impose an obligation on the Commonwealth to protect and preserve the collective rights of indigenous people to enjoy their own culture, including the enactment of laws to protect significant cultural sites.²² Other instruments impose obligations to recognise the right of indigenous people to pursue their own cultural development,²³ and to ensure that cultural heritage is identified, protected, conserved and transmitted to future generations.²⁴ Doubtless, these obligations were considered to be best served by Commonwealth legislation enabling supervision of State and Territory heritage regimes. These ‘international obligations’ were emphasised by Justice Evatt in her review of the Act.

At all stages in the reform process, the Government has taken the view it has a limited role in heritage protection. Accordingly, it has emphasised the primary responsibility of the States and Territories and the desirability of the Commonwealth absenting itself from involvement in State or Territory decision making.²⁵ While it is clear that there needs to be greater cooperation between the Commonwealth and the States and Territories, there have been no statements regarding the ‘constitutional responsibility’ or ‘international obligations’ referred to above. The only indication has come from the use of ‘national interest’ which has not been defined in the Bill or explained in extrinsic materials.

This suggests a change in the perceived role of the Commonwealth from a focus on the heritage values of indigenous people and the concerns of the international community to a focus on the wider interests and concerns of the nation as a whole. That is, unless it is presumed that the protection of indigenous heritage is, in itself, a matter of national interest, there would appear to be an abandonment of the ‘constitutional responsibility’ and international obligations referred to above.

2.4.2. *National Interest*

In order to fulfil its ‘constitutional responsibility’ and its ‘international obligations’ the Commonwealth Government might reasonably be expected to *supervise* the operation of State and Territory regimes. However, with the withdrawal and the introduction of ‘national interest’ the Bill is framed to significantly reduce the supervisory capacity of the Commonwealth.

In relation to applications from an accredited State or Territory regime, the Commonwealth Minister is directed to consider the national interest before making any protection orders. In making an LPOs, the Minister *must* form the view that the making of such an order is in the national interest. Likewise in making EPOs and IPOs the Minister *must* take into account national interest and s/he is entitled to reject applications if they do not appear to involve any national interest considerations. Nowhere in the Bill is the phrase ‘national interest’ defined.

2.4.2.1. Judicial consideration

Overall, the phrase ‘national interest’ has been used by the Commonwealth in lieu of the more general public interest notion available to States and Territories. It has been used to override some significant right or interest of individuals,²⁶ or to provide some special benefit to a group over another,²⁷ or to restrict such a benefit in special circumstances.²⁸ It has also been called upon to rationalise some aspect of Federal-State relations either in the extension of legislative or executive power,²⁹ or more generally.³⁰ The greatest bulk of cases have been about international relations foreign affairs,³¹ immigration, and military security implications.³² Others have been about public confidence in the government.³³

Given this background, it is understandable that decisions based on these considerations are largely immune from judicial review. Where an opinion or discretion is based on national interest considerations, a person seeking judicial review would have to demonstrate ‘that the opinion were not genuinely entertained or that the opinion was wholly unreasonable’.³⁴ It may not be open to make a case based on a demonstration that the Minister failed to take into account relevant considerations or took into account irrelevant considerations, or that he or she applied a policy without regard to the merits of the case.³⁵ The reason is that ‘national interest’ may involve the widest considerations and ‘[w]hen such a breadth of considerations is involved only something amounting to lack of *bona fides* could justify curial intervention in decisions made in the exercise of the power’.³⁶

2.4.2.2. In context

This discussion demonstrates that the ‘national interest’ denotes a range of high policy considerations which are largely subjective and non-justiciable. Its relevance to indigenous affairs would seem to be its capacity to justify administrative decisions affecting the rights and interests of a particular section of the community. While the rights and interests of indigenous people are a matter of national concern, the most obvious application of the phrase has been to allow the Commonwealth Minister to *override* indigenous rights to negotiation under the *Aboriginal Land Rights (Northern Territory) Act 1976* and *Native Title Act 1993*. In a sense, the ‘national interest’ in protecting indigenous land rights is assumed: these rights can only be traversed where there is a clear national interest at stake.

In the litigation referred to above, the Federal Court noted that the Act operates on a fundamental premise ‘that there are particularly significant areas and objects which it is in the national interest to preserve’.³⁷ In one sense this comment is obvious. The existence of Commonwealth legislation dealing with indigenous heritage (an otherwise State and Territory domain) is evidence that this subject matter is of interest to the nation. But it is also a conclusion based on the scope, purpose and object of the Act and relevant extrinsic materials which demonstrate that, when the Act was passed, the Commonwealth accepted that it had a direct role in the protection of indigenous heritage.

There is no such premise in the Bill.

There are a number of alternative interpretations of ‘national interest’ ...

2.4.2.3. A balance of interests

The most obvious interpretation is that ‘national interest’ relates to the nature and effect of the decision to issue protection orders.

Any decision to protect an area or object will involve a process of balancing the rights and interests of all parties and, given the subject matter and the nature and effect of protection orders, this will inevitably involve political considerations. This conclusion is even more evident in the context of a Commonwealth Act applying to interfere with an area over which States and Territories have ‘primary responsibility’. It is largely for this reason that decisions to issue protection orders are the subject of an unfettered discretion. They, like decisions to grant land under the *Aboriginal Land Rights (Northern Territory) Act 1976*, involve questions which are ‘pregnant with political controversy’.³⁸

Clearly, decisions under the Commonwealth Act have the potential to affect Federal-State relations and consequently, the balancing process may involve broad considerations of ‘national interest’. In other words, before the Commonwealth Minister may interfere with State or Territory land management processes, s/he must be satisfied that the case for protection outweighs the right to autonomy of the relevant State or Territory Government.

This interpretation follows from the premise that States and Territories should have primary responsibility for heritage protection and that the Commonwealth Act is a last resort mechanism. It is consistent with the cases referred to above in which ‘national interest’ is used to emphasise the potential impact of decisions on Federal-State relations. It is also supported by comments made by the Federal Court when considering the nature of the decision making process. The Federal Court recognised that, in making declarations, the Minister is entitled to take into account ‘broad considerations of national interest’.³⁹

The interpretation also provides a sound justification for limiting the scope of judicial review. A court would have no role to play in assessing the appropriate balance of interests between the Commonwealth and the States and Territories.

The existence of a wide discretion to make declarations affecting the rights and interests of individuals (in spite of State and Territory laws) attests to the fact that the decision maker may take into account the widest possible policy considerations, including those relating to national interest. This has already been recognised by the Federal Court and, on this basis, the inclusion of ‘national interest’ in the Bill would appear to be superfluous or redundant.

2.4.2.4. A change in the balance

Clearly, the balancing process may involve broad considerations of ‘national interest’. But the balancing process in the Act is not restricted to a consideration of national issues. The Minister may take into account the widest possible considerations, fettered only by the duty to follow ‘due process’ discussed above.

By contrast, the discretion in the Bill to issue protection orders is conditioned on the Minister being satisfied that protection is or would be ‘*in the national interest*’. In this

way, the discretion is restricted to issues of national concern and there is nothing to focus the Minister on the issue of Federal-State relations. The implication is that the balancing exercise involves a weighing of national interest considerations on *both* sides, based on the circumstances of each case. The implication is that indigenous people must address notions of 'national interest' in order to make a *prima facie* case for protection under the Bill.

This conclusion is supported by the way that the phrase is used in the Bill. In order for an IPO application to be successful, the Minister must be satisfied that the application has *established* on its face that protection of the area or object is in the national interest.⁴⁰ Applications for LPOs are liable to be rejected if the Minister is satisfied that, *on the face of the application*, there is no indication that making an LPO would be in the national interest.⁴¹

In this way, the phrase effectively puts an onus on applicants to demonstrate national interest in every case and this creates some obvious difficulties.

Applicants will seldom be able to make a case for protection. In the cases referred to above, the phrase 'national interest' has been judicially construed as a limited or restricted concept, difficult to define and largely non-justiciable. As a minimum, the phrase denotes something that is of interest to Australians and it is not about what is beneficial to the community at large. Generally, to evoke 'national interest' a matter must be something of national concern that unchecked would undermine the welfare of the nation or, having been addressed, would contribute significantly to its well being.

There may be some complications in the context of judicial review. Ordinarily, matters of 'national interest' are solely the domain of Ministers and Cabinet. However, the implication that applicants bear the onus of demonstrating the 'national interest' in protection carries with it a suggestion that there will be a strong pressure to challenge adverse decisions made on the grounds of 'no evidence'. For example, on the basis of the language used in the Bill, if the Minister rejects an application, an applicant might be able to overturn the decision by demonstrating that there was at least *some* evidence or argument in the application that protection would be in the 'national interest' (in the sense understood by the court).⁴²

2.4.2.5. A change in subject matter

Clearly, there is a serious question regarding the nature of the balancing process, but in other respects the Act would appear to be unchanged: once satisfied that an area or object is 'of particular significance to indigenous people' and is 'under threat of injury or desecration', the Commonwealth Minister has a wide discretion to intervene. However, in addition to altering the balancing process and placing an onus on applicants, the phrase may effect a change in the subject matter of protection.

The suggestion that national interest is a matter which can be *established* by an application suggests it is a substantive issue and not merely a statement reflecting the nature of the decision making power. It is something that must be demonstrated in order to make a case under the Bill, not a policy consideration on which the Minister can rely in his or her reasons statement. It follows from the above discussion that, in making their case for protection, applicants will have to demonstrate that their heritage is of interest to all Australians, contains heritage values shared by the nation, or is of some special significance to the national identity. In other words, the implication is that, in order to

make a *prima facie* case for protection, applicants will have to demonstrate that the relevant area or object is not only of traditional significance, but of *national significance*.

This conclusion is supported by the commentary associated with the Bill. It is clear from the Second Reading Speech to the Act that the legislation was intended to allow the Commonwealth to supervise the States and Territories but was to be *used* as a last resort. Accordingly, it was drafted to operate on the same subject matter as State and Territory laws with the reservation that the Commonwealth was not attempting to ‘cover the field’. By contrast, the Second Reading Speech and Explanatory Memorandum to the Bill do not disclose an intention to allow supervision of State and Territory regimes, but to effect a ‘withdrawal’ by the Commonwealth from the field occupied by the States and Territories. There is a clear desire to ‘reduce duplication’, to ‘clarify the roles and responsibilities’ of governments and to *entrench* the ‘last resort’ status.

It seems clear that, with the use of ‘national interest’, the Government envisages a *sui generis* role for the Commonwealth, with its legislation operating on a different subject matter to State and Territory laws.

As a matter of principle, any focus on national significance is inconsistent with the Commonwealth’s ‘international obligations’ and the nature of indigenous heritage values. When the Act was passed it was unusual in that it focused on areas and objects of significance to indigenous people in accordance with their tradition. Consistent with the ‘international obligations’ referred to above, the Act focused on cultural diversity and sustaining the cultural heritage values of indigenous people, rather than the heritage or scientific values of the wider community. Consistent with the localised nature of these values,⁴³ it focused on the existing customs, traditions and beliefs of each applicant group rather than any generalised notion of traditional significance. By changing the subject matter to national significance, the focus of the Bill is drawn away from cultural diversity and localised beliefs to the heritage values of non-indigenous people. It may also be drawn towards values associated with science, the environment, tourism, etc.

As a matter of practice, the focus on national significance suggests further complications in the context of judicial review. The suggestion that the Minister can rely on applications in order to be satisfied of a substantive issue, suggests that decisions can be challenged on the basis of ‘jurisdictional fact’. For example, on the basis of the language used in the Bill, a developer might be able to overturn a decision to issue an Interim Protection Order by involving the court in an assessment of whether protection is in fact in the ‘national interest’ (in the sense defined by the court).⁴⁴

2.4.3. Accreditation

In order to fulfil its ‘constitutional responsibility’ and its ‘international obligations’, and in the absence of direct involvement in supervision, the Commonwealth Government would ordinarily be expected to at least *monitor* State and Territory regimes. However, through the process of accreditation, the Bill is framed to reduce the monitoring role of the Commonwealth.

Evatt recommended accreditation of State and Territory assessment *processes*, to allow the Commonwealth Minister to adopt assessments of significance made at the State or Territory level, thereby avoiding unnecessary duplication. By contrast the Bill provides for accreditation of State and Territory *laws* with the effect that, in the absence of direct involvement in supervision, the Commonwealth is unable to monitor the operation of State and Territory regimes.

An incidental issue is the process of accreditation. The Bill currently allows the Commonwealth Minister to accredit State and Territory laws without any requirement for consultation with any indigenous interests. The absence of any substantive consultation provisions sits uncomfortably within the general push in administrative law towards greater scrutiny of legislative decision making.⁴⁵ Indeed, it could be argued that the approach in the Bill is inconsistent with draft legislation introduced by the Government to achieve this result.⁴⁶

2.5. Conclusion

It is clear that the procedural reforms in the Bill are designed to reduce the potential for judicial review rather than to achieve any real improvement to the operation of the Commonwealth regime. It is also clear that the combination of accreditation and 'national interest' is intended to create distinct role for the Commonwealth rather than merely to reduce the potential for duplication and clarify the roles of the Commonwealth and the States and Territories.

Clearly, there was a need to address the procedural flaws in the existing legislation and in this respect the Bill is to be commended. But there was also a need to:

- improve the operation of the Commonwealth regime, in order to increase indigenous involvement and control in assessments and decision making. This was a major feature of the Evatt Report and an issue of concern to indigenous people; and
- strengthen the State and Territory regimes, in order to reduce the pressure on the Commonwealth Act.

Given the discussion above, it would seem that the Bill fails to achieve the objectives set out in the Evatt Report or indeed in the Explanatory Memorandum and Second Reading Speech:

- It cannot be argued that the reforms will increase indigenous involvement in the Commonwealth regime.
- It is doubtful whether the accreditation standards provide a basis for improving State and Territory laws. They are too narrow and too loosely expressed to achieve any real reform. The Bill suggests that States and Territories are free to go beyond the standards, but, given the history of conflicts arising in a number of States and Territories, it is doubtful whether this will ever happen.
- It is also doubtful whether Commonwealth withdrawal is a necessary incentive for States and Territories to seek accreditation. The focus of attention has been on unnecessary delay and uncertainty arising out of Commonwealth intervention. Yet, most of these issues could be resolved by the partial accreditation model discussed above, including the requirement to exhaust State and Territory remedies and the discretion to reject frivolous and vexatious applications.
- It is doubtful whether the phrase 'national interest' will allow the Commonwealth regime to operate efficiently and effectively. It is difficult to reconcile the implication that applicants bear the onus of establishing 'national interest' with the fact that, ordinarily, matters of 'national interest' involve subjective policy considerations which are solely the domain of Ministers and Cabinet. It is difficult to maintain a focus on localised indigenous heritage values when there is a clear intention to restrict the scope of the Bill to consideration of national issues. To the

extent that ‘national interest’ is an issue of substance, it is difficult to ignore the potential for court action challenging decisions regarding protection.

3. Consultation with Indigenous Interests

Over three years, the Act and the Bill have been the subject of periods of review and consultation with States and Territories, Commonwealth agencies, ATSIC and other indigenous interests. It is ATSIC’s opinion that throughout the consultation process regarding the Government’s proposed reforms, insufficient information has been provided and insufficient time has been given for responses. There has also been a clear failure to accommodate or address comments from one consultation round in subsequent consultations. This has inevitably led many indigenous people to conclude that the process was not open and transparent.

In ATSIC’s opinion, appropriate consultation with Indigenous people requires that detailed information be provided on the relevant proposals sufficient to allow an accurate picture of the intended reforms. It also requires a sufficient time-frame for clan groups, custodians and representatives of community organisations, Land Councils and ATSIC Regional Councils to discuss the issue and determine a local position on Indigenous issues including heritage protection.

However, the consultative process leading to the drafting of the Bill was inadequate from the perspective of indigenous interests in both these respects.

4. ATSIC’s Position on the Bill – Summary

4.1. Overview

This document sets out a summary of ATSIC’s position on the revised Bill.

The key issue of concern to the Commission is the retention in the current Bill of provisions limiting Commonwealth involvement in accredited State regimes to matters involving the “national interest”.

In ATSIC’s view, the Commonwealth has prime responsibility for the protection of Indigenous heritage, both under the Constitution and as a result of its status as signatory to various international covenants providing for such matters. It is inappropriate and unacceptable for the Commonwealth to abdicate this responsibility to the States and territories on the basis of loosely defined and incomplete “national standards” for accreditation.

The second reading speech for the current Bill notes that the government considered but rejected the recommendation of the JPC that the Bill define the protection of indigenous heritage to be in the national interest. The JPC recommendation would ensure that the Commonwealth Bill continued to provide a forum of last resort for applicants for protection of sites and objects of significance, where States failed to provide protection or to achieve a mediated resolution to threats of desecration. The second reading speech notes that “amending the Bill in this way would potentially involve the Commonwealth in all indigenous heritage protection cases.” This is both an indication that the Commonwealth has no confidence in its proposal for accreditation of State regimes as a vehicle for protecting indigenous heritage (if all cases end up with the Commonwealth, it would mean that no protection had been offered in response to threats that arise) and a distortion of the Commission's and the JOINT COMMITTEE's intent. There is no reason

why States which achieve accreditation cannot be accorded streamlined processes under the Commonwealth Bill, so that a quick decision, utilising the outcome of State processes, can be reached. On the assumption that at least some applications for protection would be accepted by accredited States, the Commonwealth Bill would provide a forum of last resort for review of State decisions to destroy, in which the prime issue would be to weigh the identified detriments against the proposed loss/desecration of indigenous heritage values.

As in the Junction Waterhole case in Alice Springs (the only existing operative Commonwealth protection declaration), the political pressures faced by State governments can distort their ability to adequately assess the potential impact of heritage loss against the benefits put by development proponents. In such cases, the Commonwealth can ensure that it meets its responsibilities under the Constitution and international covenants by considering the issues, and in so doing bring to bear an independent and impartial assessment of the relative merits and demerits of a decision to protect.

Under the current Bill, the Commonwealth would have no role in relation to accredited State/Territory regimes, unless the Minister is of the view that protection would be in the “national interest”.

The Second Reading Speech notes that there should be no need for recourse to the Commonwealth in an accredited regime, because the standards for accreditation will ensure that accredited regimes offer comprehensive and fair heritage protection processes. As noted above, the standards for accreditation proposed under the Bill are not sufficiently comprehensive or detailed to give any assurance that this will be the case. Indeed, the inadequacies of the proposed accreditation standards make it imperative – in the interests of indigenous heritage – that access to the Commonwealth Act is retained as a forum of last resort, irrespective of accreditation.

This change to the provisions of the current Bill is the highest priority change sought by the Commission.

4.2. The Bill

4.2.1. Background

A revised version of the Aboriginal and Torres Strait Islander Heritage protection Bill 1998 was introduced into the House of Representatives on 12 November 1998. The revised Bill has included a small number of the changes sought by ATSIC and the JOINT COMMITTEE report on the previous Bill and to this extent is an improvement on its predecessor.

However, the changes adopted in the Bill are those that present no challenge for the approach initially adopted by the government. While they are welcome, they fail to address the priority concern of the Commission that the Act continue to function as a forum of last resort.

The revised Bill addresses two recommendations of the Parliamentary Joint Committee on Native Title and the Indigenous Land Fund and a further recommendation in part. The two key recommendations by the Joint Committee are ignored:

- that the Bill define the protection of indigenous heritage *per se* to be in the “national interest”, to ensure that the Act continues to act as a forum of last resort; and
- that the Bill provide a more detailed and comprehensive national standard for accreditation of State regimes.

The report produced by Justice Evatt included a series of recommendations that have been widely supported by indigenous people – this was evident during consultations undertaken by ATSIC on the content of the proposed Bill. The 1996 Report by Evatt was also endorsed, at the National Heritage Convention held here in Canberra in August, and a resolution stating that the Government should adopt the recommendations of the Evatt Report in order to ensure the protection of indigenous heritage was adopted at the Convention. ATSIC takes the view that the Bill should follow the recommendations made in the 1996 Evatt Report more closely.

If the Bill was amended on the basis of the JPC recommendations, using the more specific content included in those made by Justice Evatt, then it would be far more acceptable to indigenous people and the standard of protection for indigenous heritage may be maintained at existing levels and, in the longer term, may initiate improvements in the heritage protection regimes in some States – in particular we draw your attention to heritage laws in both New South Wales and Queensland.

While there are many further changes that could be made to improve the Bill, the two priority changes needed from ATSIC’s perspective are still:

retention of Commonwealth legislation as a last resort mechanism where State and Territory heritage regimes have failed to provide effective protection for indigenous heritage; and

prescription of more detailed comprehensive minimum standards for the accreditation of State and Territory regimes.

4.2.2. *A Last Resort Mechanism*

Providing a last resort mechanism means that Commonwealth legislation would apply where State or Territory processes have been exhausted and failed to provide effective protection, regardless of whether the State or Territory heritage legislation is accredited.

- ✓ To achieve this requires the *removal* of the current provision limiting the intervention of the Commonwealth to cases of national interest.

The Joint Committee has recommended something slightly different – that protecting indigenous heritage *per se* is a matter of national interest and that this should be made explicit in the Bill. This would achieve the same end.

If nothing else changes, we would hope to see the Act amended to ensure that it continues to provide a forum of last resort, irrespective of whether State/Territory regimes are accredited.

4.2.3. *Standards for Accreditation*

The accreditation standards framework was developed with a view to providing uniformity across the country on key aspects of State and Territory indigenous heritage protection legislation.

The Joint Committee recognised that the loosely drafted standards in the Bill would not achieve this and recommended the inclusion of more detailed and comprehensive standards in the Bill. They did not, however, provide any guidance on their content or extent of the details that should be included in them.

The minimum standards outlined in the Evatt Report provide an acceptable foundation for developing those to be included in the Bill.

The revised Bill has been changed to include in the standards requirements that State schemes:

- ✓ provide blanket protection for all areas and objects which fall within this definition of indigenous heritage;
- ✓ separate decisions on significance from decisions on protection (equivalent to the Bill);

This change does not meet the Joint Committee's recommendation for more comprehensive and detailed standards. The previously identified deficiencies remain – ie State and Territory legislation should, amongst a range points made by Evatt, be able to:

- ✓ protect areas and objects which are significant to indigenous people in accordance with their contemporary traditions and include historic and archaeological sites;
- ✓ provide for indigenous participation in heritage protection through the establishment of independent, indigenous dominated State/Territory heritage bodies, or at the very least, Committees with responsibility for the evaluation of significance and who would be involved in the formulation of policy and the monitoring of legislation;
- ✓ ensure the integration of indigenous heritage issues with State and Territory planning and development processes at the local level;
- ✓ ensure that a benchmark is set for adequate penalties, and that limited defences apply;
- ✓ ensure the participation of indigenous people in monitoring the operation and breaches of State/Territory laws;
- ✓ include confidentiality provisions equivalent to those set out in s.59 of the Bill;
- ✓ provide for access to significant sites on Crown land and to land under the control of the Crown; and
- ✓ provide for interim and emergency protection of significant areas and objects.

In addition, the minimum standards should be focused on accrediting State and Territory *processes*. Experience has shown that threats to sites are as likely to arise from shortcomings in the administration of legislation as from the legislation itself.

4.2.4. *Accreditation*

The main purpose of accreditation is to reduce delay and costs and avoid duplication between Commonwealth and State and Territory jurisdictions.

The accreditation process is poorly detailed in the Bill and ATSIC believes that there is value in ensuring greater accountability for decisions accrediting State and Territory governments.

This could be achieved by insisting on the following:

- ✓ the inclusion of more detailed minimum standards in the Bill supplemented by the drafting of detailed regulations to provide guidance to State/Territory Governments on how to meet the standards and to administrators for their assessment;
- ✓ provide indigenous people and other interested parties with the opportunity to comment on the relevant State/Territory legislation and its administration prior to a decision on accreditation;
- ✓ ensure that monitoring of the administration and enforcement of State/Territory legislation occurs after accreditation. This could be a function of the Director of Indigenous Heritage with a provision providing for the periodic review of accredited States and Territories.

The revised Bill goes some way in this direction by making the Minister's decision to accredit a disallowable instrument.

4.2.5. Further Amendments

We believe there is some value in making the Commonwealth Act relevant as a 'standard' - ensuring that the standards met by the Commonwealth are also expected of the States and Territories. For example, the confidentiality provisions in the Bill could form a standard for the minimum standards. There will always be some areas which relate specifically to States and Territories – for instance – including indigenous heritage as a matter to be dealt with in the initial planning stages due to the States and Territories having primary responsibility for land management and heritage matters.

4.2.6. Participation of Indigenous people

Overall, the Bill does not provide indigenous people with sufficient responsibility or involvement in the protection of their heritage, either at the State level through the minimum standards, or the processes outlined in the Bill for the Commonwealth level.

- ✓ provision should be made for an indigenous dominated Committee to make findings on significance to the Director and to advise on other relevant matters of policy and procedure; and
- ✓ a requirement that the independent reviewer have appropriate qualifications.

The revised Bill now defines qualifications for the proposed Director.

4.2.7. Protecting Cultural Values

Public interest immunity was an important component of Evatt's discussion on the maintenance of indigenous values are maintained during the protection process. The existing provision in the Bill (s.74) describes the common law test without giving any indication as to the weight that should be placed on the public interest in protecting culturally sensitive information.

- ✓ the Bill should give clear direction to the courts as to the weighting to be applied.

4.2.8. *What is Heritage?*

One major concern of indigenous people has been the limited definition of cultural heritage which is applied to their heritage. Unlike European heritage in this country which is assessed on a wide range of features – and is not limited in anyway to ‘tradition’ – indigenous heritage is thought of in a limited manner.

ATSIC would like to see a greater understanding of indigenous heritage reflected in the Bill – and have it apply, explicitly, for the protection of areas and objects of significance to contemporary traditions, to historic sites and objects as well as archaeological sites. This definition is more comparable to that provided to European heritage in this country.

All of these points have been made by Evatt in her 1996 Review of the Act. ATSIC believes that indigenous people would be highly supportive of the Bill if it was changed to reflect the recommendations in the Evatt Report.

We hope that the Government will agree to amend the Bill to reflect the recommendations of the Evatt Report more closely.

If nothing else changes, we would hope to see the Act amended to ensure that it continues to provide a forum of last resort, irrespective of whether State/Territory regimes are accredited.

ATSIC
February, 1999

1 Second Reading Speech, Mr. Moore, *House of Representatives Hansard*, 2 April 1998 p.1697.
2 Section 57.
3 Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection*
4 *Act 1984* (Cth.), p112.
5 Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection*
6 *Act 1984* (Cth.), recommendation 8.6.
7 *International Covenant on Civil and Political Rights*, Article 27.
8 Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection*
9 *Act 1984* (Cth.), recommendation 11.16, p223.
10 Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection*
11 *Act 1984*, Recommendation 5.2.
12 Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection*
13 *Act 1984*, para 6.4.
14 Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection*
15 *Act 1984* (Cth.), Recommendation 6.1.
16 Ministerial Council on Aboriginal and Torres Strait Islander Affairs *Working Party Report on*
17 *Item 4.1: Aboriginal Heritage Interaction between States, Territories and Commonwealth*,
18 1995, p35 reproduced in Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait*
19 *Islander Heritage Protection Act 1984* (Cth.), Annex VI, p263.
20 Ministerial Council on Aboriginal and Torres Strait Islander Affairs *Working Party Report on*
21 *Item 4.1: Aboriginal Heritage Interaction between States, Territories and Commonwealth*,
22 1995, p35; Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage*
23 *Protection Act 1984* (Cth.), Recommendation 6.1.
24 See Jago, M & Hancock, N, “The Case of the Missing Blanket: Indigenous Heritage and
25 States’ Regimes’, 1998 4(16) *Indigenous Law Bulletin*, 18.
26 Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection*
27 *Act 1984* (Cth.), p.81.
Two New South Wales cases suggest that a court may only accept a ‘mistake of fact’ defence
if the defendant made reasonable inquiries prior to committing the offence: *State Rail*
Authority v. Hunter District Water Board (1992) 65 ACR 101; *Australian Iron & Steel Pty Lt*
v. Environment Protection Authority (1992) 29 NSWLR 497.
Ministerial Council on Aboriginal and Torres Strait Islander Affairs *Working Party Report on*
Item 4.1: Aboriginal Heritage Interaction between States, Territories and Commonwealth,
1995, p35.
Second Reading Speech, 2 April, 1998, *House of Representatives Hansard*, p.1697.
Second Reading Speech, 2 April, 1998, *House of Representatives Hansard*, p.1698.
In other words, in contrast to the current Bill (clause 31(1)), the requirement to exhaust State
or Territory remedies should not apply in unaccredited regimes.
See Second Reading Speech, 6 June 1984, *Senate Hansard*.
In the Second Reading Speech, the Government referred to a ‘constitutional responsibility’ to
provide protection for areas and objects of particular significance to indigenous people.
Kartinyeri v. The Commonwealth [1998] HCA 52.
International Covenant on Civil and Political Rights, Article 27.
International Covenant on economic, Social and Cultural Rights, Article 1; see also
Declaration of the Principles of International Cultural Co-operation, Article 1.
Convention for the Protection of the World Cultural and Natural Heritage.
Second Reading Speech, 2 April 1998, *House of Representatives Hansard*, p.1698.
Such as the mandatory detention of illegal immigrants: *Salemi v. MacKellar (No.2)* (1977)
137 CLR 396.
For example, tax incentives for mining: *Re the Commissioner of Taxation of the*
Commonwealth of Australia and BHP Minerals Ltd (1983) 68 FLR 132; *Minister for*
Aboriginal Affairs v. Peko Wallsend Ltd (1986) 162 CLR 24.

28 For example, the power of the Minister to override mining and future act negotiations under
the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.) and the *Native Title Act 1993*
(Cth.).

29 For example, the implied power derived from nationhood: *Victoria v. The Commonwealth*
and Hayden (1975), 134 CLR 338; prerogative and executive power of Commonwealth under
s.61: *Government Davis v. The Commonwealth* (1988) 166 CLR 79.

30 *Victoria v. The Commonwealth* (1971) 122 CLR 353.

31 *Polyukovich v. The Commonwealth* (1991) 172 CLR 501; *Attorney – General (UK) v.*
Heinemann Publishers of Australia Pty. Ltd. (1988) 165 CLR 30.

32 For example, the validity of restrictions on importation licences during hostilities: *Election*
Importing Co. Pty. Ltd v Courtice (1949) 80 CLR 657; national security implications of
political parties: *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1;
acquisition of property for security purposes: *Nelungaloo Pty. Ltd. v The Commonwealth*
(1952) 85 CLR 545

33 For example, public interest immunity & disclosure of government documents: *Sankey v.*
Whitlam (1978) 142 CLR 1

34 *Leisure and Entertainment Pty Ltd v. Willis* No. QG 204 of 1995 FED No. 1/96.

35 *Administrative Decisions (Judicial Review) Act 1977*, s.5(1)(e) & s.5(2)(a), s.5(2)(b), s.5(2)(f).

36 *Murphyores Incorporated Pty. Ltd. v. The Commonwealth* (1976) 136 CLR 1, per Stephen J
at 14.

37 *Tickner v. Chapman* (1995) 133 FLR 226, per Burchett J, at 249.

38 *Reg. v. Toohey; Ex parte Meneling Station Pty. Ltd.* 158 CLR 326 Per Brennan J, at 362, see
also Gibbs CJ, at 375 and Wilson J, at 349. See subsequently eg *Garawa/Mugularrang*
(Robinson River) Land Claim, No.33, 1991, per Olney J, para 7.2.

39 *Minister for Aboriginal Affairs v. State of Western Australia* (1995) 37 ALD 633, per Carr J.

40 Section 63(2)(b)(iii).

41 Section 39(2).

42 The ‘no evidence’ rule requires that a decision maker have some evidence regarding a
consideration used to make a decision: *Associated Provincial Picture Houses v Wednesbury*
Corporation (1948) 1 KB 223 see also *Prasad v Minister for Immigration and Ethnic Affairs*
(1984-1985) 6 FCR 155, per Wilcox J, at 169.

43 It has been said that ‘Aboriginal people construct knowledge based on local factors - most
usually, local features of country. Aboriginal knowledge is grounded in a particular place and
cannot be transferred from one place to another without losing its validity’: Baldwin Jones,
Submission to the *Review of the Aboriginal and Torres Strait Islander Heritage Protection*
Act 1984, Submission No.18.

44 Jurisdictional fact: *Secretary of State for Education and Science v. Tameside Metropolitan*
Borough Council (1977) AC 1014, per Wilberforce LJ, at 1047; *R v. Home Secretary, Ex*
parte Khawaja [1984] 1 A. C. 74, Per Scarman LJ, at 110. The doctrine was discussed in
relation to a similar question before the Australian Heritage Commission of whether certain
areas formed part of the ‘National Estate’: *Between: Mount Isa Mines Limited And: The*
Australian Heritage Commission (1994) 128 ALR 509.

45 See, for example, Administrative Review Council, *Rule Making by Commonwealth Agencies*,
Report No. 35, Parliamentary Paper No 93 of 1992.

46 The Legislative Instruments Bill 1998, would require all legislative ‘instruments’ to be pass an
extensive public consultation process: Part 3. These decisions would have the effect of
altering the content of the law by removing avenues for review regarding protection. They
would also be of general application because they apply in respect of all applicants within a
particular State or Territory.