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Aboriginal Cultural Heritage: Emerging from the Shadows of Native Title

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SUMMARY

Since the first recognition of Aboriginal native title by the High Court in Mabo in 1992, and the vigorous debate surrounding the introduction of the Native Title Act 1993 (Cth) and its subsequent amendment in 1998, there has been a perhaps understandable focus by mining and petroleum companies and their advisers on native title in considering land access issues. However, more recent judgments of the High Court have imposed higher barriers to those seeking to maintain a claim for native title. The paper points out that the Aboriginal cultural heritage legislation of the Commonwealth and the States and Territories, which mostly predates the judicial and legislative recognition of native title, imposes an additional layer of regulation which can act as a barrier to resources exploration and development.

The paper examines the operation of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), in particular the mechanism for the making of declarations of preservation under that Act which have the potential for freezing development or exploration. It notes the anomaly of Pt IIA of that Act, which operates as Commonwealth legislation applicable only to Victoria. The paper also notes some proposals for reform of the Act.

The paper goes on to give a brief examination of the Aboriginal cultural heritage legislation in force in the various States and in the Northern Territory. It points out where this legislation operates to impose strict liability for interference with sites protected under the legislation, and highlights the means – in some cases unfortunately lacking – by which mining and petroleum companies may take appropriate steps to ensure that their activities are not unlawful. Brief comments are included on the novel "cultural heritage duty of care" under the newly-commenced Aboriginal Cultural Heritage Act 2003 (Qld) and the consequences of compliance or breach.

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INTRODUCTION

The recognition by the courts of Aboriginal native title, commencing with the High Court's decision in *Mabo v Queensland (No 2)*[1] in 1992, and the subsequent enactment of the *Native Title Act* 1993 (Cth) (NTA) and complementary State and Territory legislation, has been the cause for much discussion and debate on the need or the desirability of balancing the interests and claims of Aboriginals and Torres Strait Islanders[2] against those of other Australians. Much of the debate has centred on whether Aboriginal claimant groups should have the right of veto over mining or petroleum exploration or development over their claimed lands. The NTA, as originally passed in 1993, provided that claimants would not have an absolute right of veto, but would have a right to negotiate with mining or petroleum companies and the governments which proposed to issue to them permits facilitating the exploration or development activity. The 1993 legislation was widely criticised by the mining and petroleum industries as unworkable and as imposing significant barriers to the continued existence of the resources sector as Australia's prime earner of export revenue. Following the longest and what has been described as the most acrimonious debate in Australian parliamentary history, the NTA was amended in 1998. The right to negotiate was retained, but a number of amendments (notably, the introduction of provisions providing for indigenous land use agreements) were made.

However, prior to the NTA, all States and Territories had already enacted legislation to protect Aboriginal cultural heritage, and by the time the NTA was passed in 1993 the Commonwealth, the States and Territories had already legislated relating to the protection of Aboriginal cultural heritage.

Certain recent decisions of the High Court have given rise to the perception – and possibly to the reality – that proving native title, particularly outside Western Australia and Queensland, may be difficult. But the Aboriginal cultural heritage legislation, whether Federal or State or Territory based, applies whether or not native title exists over land. Those involved in exploration or development of natural resources must be mindful of the impediments to exploration or development which are posed by that legislation. Although this paper does not attempt a comprehensive analysis, it notes some features of this legislation which are of ongoing importance for mining and petroleum companies.

NATIVE TITLE: PROOF

In *Western Australia v Ward*,[3] the High Court effectively ruled that the native title right to control access to and use of land may well have been extinguished by

1 (1992) 175 CLR 1.

2 For ease of reference I will, unless the context otherwise requires, use the terms "Aboriginal" and "Aborigine" to mean both Aboriginals and Torres Strait Islanders. This is not meant as any disrespect to the indigenes of the Torres Strait Islands.

3 (2002) 191 ALR 1.

government action over much of Australia. However, since in that case the court also confirmed that native title is essentially made up of a bundle of rights, the loss of the right to control entry onto and use of land may well have left intact some other native title rights, rights which may well still be sufficient to found a claim for native title.

Of greater practical significance from the perspective of the mining and petroleum industries was the High Court's decision in *Yorta Yorta.*[4] In that case the court found that it was necessary, in order to be able to show the continued existence of native title rights, that not only did those rights have to be still the subject of contemporary recognition, but also that they had to be so recognised under a "normative system" which has been continuously recognised from the time when the British Crown acquired sovereignty over the lands of Australia (ie progressively from 1788 onwards) until the present time. Thus, it is fatal to a claim of native title that the claimants have not continuously since the acquisition of British sovereignty been recognised under their tribal or clan laws, or "normative system", as the holders of the rights amounting to native title over the lands concerned, or that the "normative system" involved has not been continuously recognised as affecting and effectively binding the native title claim group since that time.

As the High Court ruled in *Mabo (No 2),*[5] native title may be lost in two ways. The first is by reason of the severance of the relationship between the original native title holders and the land concerned, and it is in relation to the severance of that link that the High Court's decision in *Yorta Yorta* is directed. The second is the extinguishing effect on native title of various valid acts of government, and it is in relation to that effect on native title that the High Court's decision in *Western Australia v Ward* largely pertains. Doug Young's paper takes up in some detail this question of the extinguishment of native title by inconsistent government actions, and as he shows, it is overly simplistic simply to look at a map showing the extent of the grant of certain tenures by government and to assume that all of these (even where they have been granted prior to the commencement of either the NTA on 1 January 1994 or the *Racial Discrimination Act* on 31 October 1975) have extinguished native title. As Doug Young points out, only *valid* grants of such tenures will have had any such extinguishing effect, and the results of detailed forensic examination of the validity of the grants of these tenements can in many cases be quite surprising.

Nevertheless, it remains the case that, particularly with the *Yorta Yorta* decision, the High Court has erected what are undeniably difficult evidentiary barriers to the establishment of claims of native title. Moreover, the 1998 amendments to the NTA had already raised the bar of proof of native title, by providing that the Native Title Registrar cannot register a claim for native title where, for example, the claimed area includes a claim for native title over lands which have previously been the subject of a freehold grant, or where the native title rights and interests claimed include a right to subsurface minerals or petroleum.

[4] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 558.
[5] (1992) 175 CLR 1.

ABORIGINAL CULTURAL HERITAGE LEGISLATION AND NTA COMPARED

The NTA is essentially non-prescriptive in operation. It does not prevent anything. Rather, from the perspective of the energy and natural resources industries, its central operation is found in s 24OA, which provides that certain acts which adversely affect native title ("future acts") are invalid to the extent of the native title. Thus, for example, the grant of a mining tenement in future will generally be invalid to the extent that it affects native title, unless the tenement has been issued in accordance with one of the relevant exceptions – for example, it may have been issued pursuant to a registered indigenous land use agreement under Subdiv C of Div 3 of Pt II of the NTA, or it may have been issued following strict compliance with the "right to negotiate" procedures under Subdiv P of Div 3 of Pt II of the NTA.

It is to be noted that (unlike the position which obtained before the NTA was amended in 1998) the NTA does not provide that a "future act" is invalid in toto; it is invalid only to the extent that it affects native title. In other words, the future act does not affect native title but is otherwise valid. It follows that any rights which are conferred by the grant of the future act are effectively encumbered by the continuance of the unaffected native title. In a natural resources context, this means that if for example a government issues a mining or petroleum tenement and neither the right to negotiate procedures have been complied with nor was the tenement issued in accordance with a registered Indigenous Land Use Agreement (ILUA), the tenement will be valid but the rights of the tenement holder will be encumbered by the superior native title rights. The difficulty, of course, is that it will not be until a determination of native title is made that the tenement holder will know how extensive the native title rights are; and by reason of s 13 of the NTA, only a determination of native title made by the High Court can ever be regarded as final – other determinations may be varied or revoked. The tenement will therefore be of uncertain extent. The so-called "Swiss cheese" approach, under which governments issue tenements which are stated not to cover any land where native title subsists, is hardly helpful in this regard, however protective it may be of the position of government.

It is possible that those who claim to hold native title, and those in whose favour a determination of native title has been made, may seek the assistance of the courts to frustrate exploration or development by mining or petroleum companies, by application for injunctions and the like, on the grounds that the proposed development will interfere with the native title rights of the claimants or native title holders. However, those common law and equitable rights of native title claimants and native title holders do not, essentially, derive from the NTA – they derive from the native title rights themselves.

Aboriginal cultural heritage legislation, however, does operate in a prescriptive manner. It operates to make disturbing protected sites or objects a criminal offence. Prohibitions issued under this legislation can prevent, and have prevented, development of mining, petroleum, and infrastructure projects.

Aboriginal groups whose claims to native title fail, or who cannot mount claims because their native title has been extinguished, will still have the rights to protection of their Aboriginal cultural heritage set out in Commonwealth, State and Territory legislation. As this paper shows, the protections in that legislation may impose significant barriers to resource exploration and development, giving Aboriginal groups in some cases considerable bargaining power in their dealings with mining and petroleum companies.

OVERVIEW OF ABORIGINAL CULTURAL HERITAGE LEGISLATION AND ITS IMPLICATIONS FOR RESOURCE INDUSTRIES

Commonwealth Legislation

The Commonwealth has the constitutional power to make laws in respect to "people of any race for whom it is deemed necessary to make special laws".[6] In the *Tasmanian Dams Case* the High Court held that the power encompasses the power to make laws to preserve the material evidence of the history and culture of Aboriginal people, including such things as sites of particular significance to them and other elements of their cultural, historical and spiritual or religious heritage.[7]

Aboriginal and Torres Strait Islander Heritage Protection Act (1984)

From the perspective of the mining and petroleum industries, the relevant Commonwealth legislation under which Aboriginal cultural heritage is recorded and protected is the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) (the HPA).

The HPA was enacted in 1984 and under the HPA "declarations of preservation" can be made over certain sites. A declaration of preservation can be made in terms which prohibit project development.

Section 4 provides that the purposes of the HPA are:

> "the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition."

An area will come under the HPA if it is land or water in Australia that is of "particular significance to Aboriginals in accordance with Aboriginal tradition",[8] and under s 3(2) will be taken to be injured or desecrated if:

[6] The *Constitution*, s 51(xx).

[7] *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 at 158-60 per Mason J, at 180-1 per Murphy J, at 244-6 per Brennan J, at 274-6 per Deane J.

[8] Section 3.

(a) it is used or treated in a manner inconsistent with that tradition;
(b) the use or significance of the area in accordance with that tradition is adversely affected; or
(c) entry or passage through or over the area occurs in manner inconsistent with Aboriginal tradition (in introducing the Bill on 6 June 1984, Senator Ryan provided examples of inconsistent circumstances as: "the construction of a road through or near a significant Aboriginal area, entry by tourists to such an area in a way inconsistent with the entry restrictions of local Aboriginal traditions, or the construction of a dam near to such an area").[9]

Sections 9 and 10 of the HPA impose as a necessary condition on the Minister's power to make a declaration of preservation that the Minister must be satisfied both that the area covered by the proposed declaration is a "significant Aboriginal area" and that the area is under threat of injury or desecration.

" Significance"

The courts have treated the "significance" requirement as involving relativity. As noted by von Doussa J of the Federal Court in *Chapman v Luminis Pty Ltd,* "it is the content of Aboriginal tradition which renders [an] area significant. The content of that Aboriginal tradition also controls the meaning of injury or desecration for the purposes of the [HPA]".[10]

Some guidance is given by the statements of Brennan J in the *Tasmanian Dams Case*, who noted, though in a different context, "[t]he phrase of 'particular significance' cannot be precisely defined. All that can be said is that the site *must be of a significance which is neither minimal nor ephemeral*, and that the site may be found by the Aboriginal people in their history, in their religion or spiritual beliefs, or in their culture."[11]

The National Native Title Tribunal has since adopted the view of Brennan J in relation to "particular significance",[12] as did Burchett J in *Tickner v Chapman*.[13]

"Injury or desecration"

"Injury or desecration" within the meaning of the HPA is likely to occur where there is extensive mining or resource development over a significant Aboriginal area, such as earthworks or site clearance involved in mine development. However, there can never be an exhaustive list of acts which will be considered injurious or otherwise. This is in part because determining inconsistency or adverse effect necessarily involves an ad hoc factual analysis. It is also due to the obvious fact that, given the widely differing mores and multiplicity of Aboriginal tribes and clan groupings, attempting a comprehensive definition of Aboriginal

[9] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia, *Eleventh Report* (1998), 10.
[10] [2001] FCA 1106, at para 252.
[11] *Commonwealth v Tasmania* (1983) 158 CLR 1, 245.
[12] *Western Australia v Thomas* (1996) 133 FLR 124, 173.
[13] (1995) 57 FCR 451, 477-478.

traditions or cultural heritage is difficult if not impossible. The question arises whether "injury or desecration" might occur in less invasive activities such as low-impact exploration works. Much will depend on the extent of the works proposed and the extent of their disturbance of the place or objects concerned.

The meaning of desecration or injury in a natural resources industry context may be illuminated by *Carriage v Duke Australia Operations Pty Ltd.*[14] In that case the defendants were constructing a gas pipeline in New South Wales. The defendant's predecessors in the pipeline development had signed an Agreement with a local Aboriginal group, which amongst other things, stated that the company would implement a Cultural Heritage Plan for the protection and management of Aboriginal cultural heritage along the entire route of the pipeline. This included a provision to the effect that "at all stages of construction involving land disturbance" an Aboriginal consultant and two monitors would be employed. Disagreement arose over whether the acts done by the defendant constituted "land disturbance". In granting an order for specific performance of the obligation to employ monitors, Young J noted that the term "land disturbance" in agreements of this kind tend to be very widely construed. He held there was a good arguable case that the mere backfilling of a trench amounted to land disturbance.

Depending on the nature of items or places of Aboriginal cultural heritage significance, exploration activities involving trenching, costeaning, trial mining pits or conducting seismic shooting, would appear to be likely to involve "desecration or injury", whereas the flying of aeromagnetic surveys may not.

Declarations of preservation

The HPA's machinery for the protection of cultural heritage is contained in the power of the Minister (and in some cases other persons) to make "declarations of preservation" in relation to areas of Aboriginal cultural heritage significance. These powers are contained in Pt II of the HPA, in ss 9 and 10, and (in relation to Victoria only) in Pt IIA.

The only limits in the HPA on what may be contained in a declaration of preservation Pt II are contained in ss 11 and 18(2). Effectively, the declaration need only describe the area or objects sought to be preserved with sufficient particularity to enable them to be identified, and must "contain provisions for and in relation to the protection and preservation of the area [or objects concerned] from injury or desecration". Accordingly, the Minister or authorised person is empowered by the HPA to make declarations of preservation which will have the effect of prohibiting or freezing any mining, exploration, or infrastructure or any other kind of project development which threatens injury or desecration of the area or objects concerned.

Section 9 gives the Minister power to make "emergency" declarations of preservation, of up to 30 days' duration (effectively extendable to 60 days); s 10 empowers the Minister to make what can effectively be permanent declarations.

[14] [2000] NSWSC 239.

In addition, under s 18, an "authorised officer" may also make an emergency declaration of preservation. An authorised officer is a person designated as such in writing by the Minister. Each authorised officer must have a identity card which must be shown to a person to whom the declaration is announced if it is reasonably practicable to do so. A declaration under s 18 will be effective for 48 hours, and can be varied or revoked by the Minister or authorised officer. However, under s 18(1)(b), an emergency declaration may be made in relation to an area or object because of threat X only if there has been no emergency declaration made within the three months beforehand by reason of threat X or one substantially the same. This means that subsequent to an emergency declaration, any further declaration under Pt II within three months in relation to the same matter will be valid only if made by the Minister.

In order to make a s 10 declaration the Minister must:

(a) have received an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking preservation of an area;
(b) be satisfied both that the area is a "significant Aboriginal area" and that it is under threat of injury or desecration;
(c) have received a report in relation to the area from a person nominated by the Minister detailing, amongst other things, the nature and extent of the threat of injury. This report must be published in a local newspaper and the *Gazette*; and
(d) consider such other matters as the Minister thinks relevant.

A s 10 declaration has effect for such period specified in the declaration.

The Minister is also empowered to make an emergency declaration under s 9. Again, the Minister may make an emergency declaration only after receiving an oral or written application made by or on behalf of an Aboriginal group seeking preservation or protection of the area, and only then if the Minister is satisfied that there is an immediate threat of injury or desecration to a significant Aboriginal area.

There is no requirement that the Minister must have received any report. An emergency declaration has effect for 30 days, but may be extended by the Minister if she or he feels it necessary to do so, for a period of time not exceeding a further 30 days. Moreover, there is no restriction on the Minister's power to make successive emergency declarations.

The Minister has similar powers under s 12 to make declarations of preservation in relation to objects if he or she is satisfied that the object concerned is a significant Aboriginal object, or a class of objects is a class of significant Aboriginal objects, and that that object or those objects are under threat of injury or desecration; again, the Minister may make such a declaration only on application from an Aboriginal group.

Although the power given to the Minister to make declarations is wide, the success rate for applications is relatively low. Precise figures are difficult to obtain, but there have been over 130 applications for declarations of preservation

under Pt II of the HPA, and at least 27 such applications have been successful. However, according to the Department of Environment and Heritage, as at July 2004, only one such declaration is currently in force under the HPA.[15]

Duty to those Affected

Von Doussa J in *Chapman v Luminis* considered whether the Minister owed a private law duty to people affected by his or her decision. Von Doussa J found[16] that "the making of a declaration under sections 9 or 10 is legislative in nature. The exercise of the discretionary power involves matters of national interest and is likely to require the weighing of important matters of policy and the division of power between the Commonwealth and a State or Territory." He held that an official exercising such a public power has immunity against a private law remedy, applying the rule in *Calveley v Chief Constable of Merseyside.*[17] *Chapman v Luminis* highlights the proper nature of the Minister's power to take into account the wider public interest. The scheme of the HPA is that interested members of the public (including both those who might support or oppose the making of the declaration) should have an opportunity to provide information and express opinions in the making of the decision. The Minister should make an informed decision and should have the benefit of submissions from interested persons.[18]

A number of the decided cases have considered the issue whether, in an administrative law sense, those who have a proprietary or other legitimate interest in an area which will be affected by the making of declaration of preservation are entitled to the benefit of the rules of natural justice. In *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia*,[19] the Full Federal Court held that the rules of natural justice do apply. In the words of the joint judgment of Black CJ, Burchett & Kiefel JJ, the HPA recognises

> "that the effect a declaration may have on other persons interests and the extent to which the land or objects might already be considered as the subject of protection are important matters for the Minister's consideration … [the lessees of a crocodile farm located on the land concerned] had interests such that a duty to afford natural justice arose before the Minister exercised the power under the [HPA] to make a declaration having the effect of severely limiting the uses to which the land could be put for a substantial period. It would only be if the statute clearly excluded the common law requirements that the duty could be held not to arise".

The court pointed out that the question is not

[15] This is a declaration under section 10, in relation to the Junction Waterhole (north of Alice Springs, near the Todd River. It has been a significant Aboriginal site since 1992 and is under the protection of the declaration until 2012.
[16] [2001] FCA 1106 at para 263.
[17] [1989] AC 1228 (House of Lords).
[18] *Norvill v Chapman* (1995) 57 FCR 451 at 457.
[19] (1996) 149 ALR 78, 90-91.

> "whether the rules of natural justice require an extension of the rights already conferred by the statute, but whether its terms display a legislative intention to exclude, relevantly, the common law right to be heard in opposition to a potential decision prejudicial to a party's interest … the provision for notification to the public made by the [HPA] is no substitute for what natural justice would require to be given to those who might be directly affected by a declaration. In fact, the purposes, as well as the nature, of these statutory provisions are different from those of natural justice. This statutory provision aims … to ensure a widely diffused public participation, so as to garner all the knowledge of the community. Thus the process of inquiry will have the potential to be enriched from many sources. The principle of natural justice aims, on the other hand, to focus on those particular individuals whose interests or legitimate expectations may be affected by the making of a declaration. Theirs is a special right protected by the principle, and the nature of the protection it requires them to have is much more specific than the publication of notices in journals or gazettes. They are entitled, unless the statute excludes the right, to a proper opportunity to advance all legitimate arguments to avert a decision that might profoundly affect their interests. Such a proper opportunity involves proper notice of the case they have to meet".

It is also clear from the cases that certain of the duties which the Minister must discharge before making a declaration are personal to the Minister and cannot be delegated. In *Tickner v Chapman,*[20] in relation to the Hindmarsh Island dispute, the Federal Court considered the question of the Minister's obligation under s 10(1)(c) of the HPA to consider a report under s 10(4) from the Minister's nominated reporter containing information relating to the significance of the area in question to Aboriginals, the nature of the threat to the area, the extent of the area requiring protection, any conditions to be put on a declaration, the effect that making a declaration may have on the proprietary or pecuniary interests of third parties, the duration of a declaration and the extent to which the area may be protected by State or Territory legislation. The male Minister elected to delegate the task of considering representations by indigenous groups that were considered "secret women's business" to his female delegate. The Full Federal Court held that the Minister's obligation to consider the report could not be delegated, and that as discharging the obligation to consider it was a precondition to the Minister's ability to make the relevant declaration of preservation, the making of the declaration was ultra vires.

PART IIA – Victoria

In addition to the general provisions applicable Australia-wide, Pt IIA of the HPA contains provisions applicable to Victoria only. This Part was added to the HPA in 1987 when the then Victorian Labor government was unable to get legislation to similar effect through the Victorian Parliament, as it did not have a majority in the Legislative Council. The then Labor government of the Commonwealth sponsored

[20] (1995) 57 FCR 451, 461-466.

the addition of what is now Pt IIA of the HPA. In the same year (1987) the Commonwealth Minister delegated to the Victorian Minister for Aboriginal Affairs under s 21B all of the power conferred on the Commonwealth Minister under Pt IIA, and this delegation has not been revoked.

Importantly, unlike Pt II, Pt IIA does not purport to be legislation of last resort and it operates without reference to the *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic) (the Relics Act), which is considered below. In practice, declarations under both Pt IIA of the HPA and the Relics Act may be sought by Aboriginal groups in Victoria.

Part IIA of the HPA provides for declarations of preservation to be made in relation to Aboriginal objects and Aboriginal places which are of *particular* significance to Aboriginals in accordance with Aboriginal tradition. As with Pt II, declarations of preservation may be "emergency", temporary or permanent. Any such declaration may be made by the Minister on receiving advice from a local Aboriginal community that an Aboriginal place or object is under threat of injury or desecration. However, any inspector (a person appointed after consultation with a local Aboriginal community and who has knowledge and expertise in the identification and preservation of Aboriginal cultural property), or the Minister may make an emergency declaration *whether or not such an application is made* to him or her by a local Aboriginal community, or by a magistrate after such an application has been made.

There are a number of important differences between Pt IIA and the rest of the Act:

- Under s 21C(3), an emergency declaration made by an inspector may be varied or revoked only by that inspector. It cannot be revoked or varied by the Minister or by another inspector or a magistrate, even on application by a local Aboriginal community. Moreover, there is nothing in Pt IIA to stop an inspector from issuing another emergency declaration immediately after the first expires, and so on.
- The Minister must keep a register containing a summary of particulars of declarations of preservation. The register is confidential. However, as prescribed in reg 10A of the *Aboriginal and Torres Strait Islander Heritage Protection Regulations* 1984 (Cth), on application to the Minister, a person may inspect the register where the Minister is satisfied that person is likely to be affected by a declaration under Pt IIA and that disclosure would not likely frustrate any purposes of the Act.
- When the Minister makes a declaration, a person affected may request the Minister to appoint an arbitrator to review the decision, or where a declaration is refused an Aboriginal community may make this request. The arbitrator may vary, confirm or set aside the decision. It is to be noted, however, that where an emergency declaration is made by an inspector, there is no right for any person affected to seek a review.

- Part IIA provides for Aboriginal Cultural Heritage Agreements. A local Aboriginal community may enter into such an agreement with a person who owns or possess any Aboriginal cultural property. An Agreement may cover the preservation, maintenance, exhibition, sale or use of the property and the rights, needs and wishes of the person and of the Aboriginal and general communities.
- Under s 21U a person is guilty of an offence if that person wilfully defaces, damages or otherwise interferes with an Aboriginal object or place. However, a person may apply to a local Aboriginal community for consent for the "excavation" of any Aboriginal place or Aboriginal object in the defined community area of the community or for the carrying out of scientific research on Aboriginal objects, and any act done in accordance with such a consent (which may be given subject to terms and conditions)[21] is not an offence. As no register of Aboriginal places is maintained under the HPA, a mining or exploration company cannot know in advance which places are "Aboriginal places" within the meaning of the Act. It will therefore be necessary to have reliance on the so-called "consent to destroy" given under s 21U, and such a consent protects only acts done in accordance with that consent from the criminal sanctions imposed by s 21U(1) ($10,000 or imprisonment for five years, or if the offender is a body corporate $50,000).

Proposals for reform

In her 1996 report on the operation of the HPA the Hon Elizabeth Evatt AC identified the following issues arising from the operation of Pt II of the Act:

1. *Relationships between State and Territory laws and the HPA*

   Section 13(2) of the HPA provides that before making any declaration under Pt II, the Minister must consult with the relevant State or Territory Minister as to whether there is, under the law of that State or Territory, effective protection of those areas or objects from injury or desecration. Where a declaration has already been made, the Minister is to revoke it to the extent that it relates to an area adequately protected by State or Territory law. However, s 13(4) provides that the Minister's failure to consult with State and Territory counterparts does not invalidate the making of a declaration (effectively negating the requirement in s 13(2) to consult).

   The HPA was originally intended to act as a last resort. As stated in the Second Reading Speech, "Where a State or Territory has no law capable of providing effective protection, or no action is being taken to give effect to that law, the Commonwealth will act in appropriate cases."[22] However, by reason of s 13(4) the Act can effectively be used as a "first resort".

[21] *Summons v Victoria and Ors* (2003) 176 FLR 1 (NNTTA) at 2r.

[22] Graham Neate, "Power, Policy, Politics and Persuasion- Protecting Aboriginal Heritage under Federal Laws" (1989) *Environmental and Planning Law Journal* 214, 225.

2. *Predictability*

Secondly, for a developer or State or Territory government it may be hard to predict with any certainty what an Aboriginal or public interest as decided by the Federal Minister will be. As French J observed in *Tickner v Bropho*,[23] the impetus to protect Aboriginal cultural heritage often conflicts with other perceived public or private interests that involve its destruction or impairment. Even amongst the Aboriginal community there can be differing views as to the significance of an area or its need for protection.[24]

3. *Aboriginal Cultural Heritage Information*

The Evatt Report noted that the HPA does not recognise that there are Aboriginal traditional restrictions on information which ultimately play an important part in the protection of cultural heritage. This issue was highlighted in the Hindmarsh Island controversy.

4. *Reporting Process*

It also noted that the HPA establishes a reporting process as a guide to the exercise of the Minister's discretion, but it does not specify how the reporter should ensure that interested parties are treated fairly. This has left the Minister's discretion open to legal challenges.

5. *Ministerial Discretion*

The Evatt Report took the view that the wide discretion afforded to the Minister is a feature of the HPA that should be retained. The Report concluded that protection should not attach as of right to every site falling within the definition of "significant Aboriginal area" in the HPA. Rather, it is appropriate that the Minister weigh the competing interests of Aboriginal heritage protection with the interests of others affected and the overall public interest.

The decided cases show that the Minister's power to make a declaration under ss 9 or 10 is facultative and not imperative. The Minister may, in his or her discretion, refrain from making a declaration even where an application is made and the Minister is satisfied that an area is of Aboriginal cultural heritage significance and is in danger from injury or desecration. The court has no power to order the Minister to make a declaration; it may only set aside a decision making or refusing a declaration and then remit the matter to the Minister for a fresh decision in accordance with the law.[25]

Given the wide ambit of the Minister's discretion, it is not surprising that the decided cases on the HPA largely relate to the proper or improper exercise

[23] Ibid.

[24] Aliza Taubman, "Protecting Aboriginal Sacred Sites: The Aftermath of the Hindmarsh Island Dispute" (2002) 19 *Environmental and Planning Law Journal* 140, 147.

[25] See *Toomelah Boggabilla Local Aboriginal Land Council v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 140 ALR 620 at 621; *Wamba Wamba Local Aboriginal Council v Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (1989) 23 FCR 239.

of that discretion rather than the subject matter of the decision. As such, challenges to decisions made under the Act will usually come in the form of administrative law actions. For example, it was held in *Douglas v Minister for Aboriginal and Torres Strait Islander Affairs*[26] that persons who have lost the right to carry out development work due to a declaration being made under the Act are "persons aggrieved" within the meaning of s 3(4) of the *Administrative Decisions (Judicial Review) Act* 1997 (Cth), and hence have standing to bring proceedings under that Act.

Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 (Cth)

Following the Evatt Review, amending legislation was drawn up in the form of the Aboriginal and *Torres Strait Islander Heritage Protection Bill* 1998. After undergoing amendments from both houses, the Bill lapsed when Parliament was prorogued in October 2001. It has since been listed several times for consideration by Parliament but the Bill has yet to be re-introduced. It may be instructive to consider some aspects of the now-lapsed Bill.

Accreditation regime

As explained in the Explanatory Memorandum, and as recommended by the Evatt Report, the Bill proposed to maintain and strengthen the nature of the legislative regime as a last resort. This, it was argued, allows for flexibility in heritage protection laws based on the specific circumstances faced locally in various jurisdictions. To give effect to the "last resort" concept, the Bill has incorporated an accreditation system, allowing State and Territory governments to design laws to meet their own conditions and for the Commonwealth to provide minimum standards for protection of Aboriginal cultural heritage where those minimum standards are not met. The minimum standards put forward in the Bill are contained in cl 26 which provides that a State or Territory legislative regime must provide:

- for the protection of all areas and objects that are significant to indigenous persons in terms of their traditions;
- that indigenous persons are the primary source of information about the significance of areas;
- that decisions in relation to the significance of areas be made in consultation with indigenous persons and separately from any decisions made in relation to the protection of areas;
- an option for persons to obtain advance approval of an activity in relation to an area containing a site;
- the opportunity for negotiated outcomes between indigenous groups and other parties affected by the legislation;

[26] (1994) 34 ALD 192.

- for the protection of culturally sensitive information;
- that interested parties are accorded natural justice;
- effective deterrents to injury or desecration of areas; and
- provisions for the reporting of findings of indigenous remains.

Part 4, Div 1 of the Bill was framed so that a person will be able to apply for a long term protection order (LPO) in respect of a significant indigenous area or object which is under threat of injury or desecration. Importantly, it provided that if the Director of Indigenous Heritage Protection (a new position) is satisfied that the applicant has not exhausted the remedies available under the laws of the State or Territory where the area to be protected is situated, the Director must reject the application. Further, the Minister has power to reject an application if the Minister is satisfied that the application is frivolous.

The Bill provided that where the Minister makes a declaration in respect of a site in an unaccredited State or Territory, the Minister must take into account the recommendation of the Director, who in turn must have considered not only the significance of the site and potential damage, but also the proprietary and pecuniary interests of other parties; but in respect of sites that are located in accredited jurisdictions, the Minister may make a declaration only when he or she considers that the making of such an application is in the "national interest".

"National interest" is not defined in the Bill. As with the NTA and the *Foreign Acquisitions and Takeovers Act* 1975 (Cth), what is in the national interest is essentially a political question, so prediction as to where a declaration will be made or otherwise in respect to this criterion will be difficult. The Bill met with some criticism for imposing this criterion.

The Bill provides that the Minister may make an Emergency Protection Order of not more than 7 days' duration, or an Interim Protection Order for a site under serious threat or injury whilst an application for a long term protection order is being processed in respect to that site. Where the area in question is covered by an accredited heritage protection regime, it must also be in the national interest to make these declarations. There is no power under the Bill for an inspector to make an emergency declaration (compare the current Pt IIA). In fact, there is no provision for inspectors under the Bill at all, the Commonwealth Government presumably seeking to withdraw from enforcement of orders providing only for injunctions by the Federal Court on the Minister's application where a person is engaging or proposing to engage in an act that would contravene an order.

Although it may be true that there is currently only one declaration of preservation under the HPA which remains current, there have been a not inconsiderable number of such declarations issues in the past. Presumably, a number of these have lapsed or have been withdrawn after negotiations between the developers and the relevant Aboriginal groups; the writer has had professional experience in at least one such occurrence.

State Legislation

Victoria

The *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic) (the Relics Act) operates in Victoria, concurrently with Pt IIA of the HPA, to protect any "archaeological relic" or "'relic"', defined as a relic pertaining to past occupation by Aboriginal people, whether or not the relic extended prior to the occupation of that part of Australia by European descent. The term includes any Aboriginal deposit, carving drawing, skeletal remains or anything belonging to the total body of material relating to the past Aboriginal occupation of Australia.

Under s 21 of the Relics Act, a person is guilty of an offence if that person wilfully or negligently defaces or damages or otherwise interferes with a relic, or carries out an act likely to endanger a relic. The section operates regardless of the intention or knowledge of a person who has committed a negligent act. If it is known to or suspected by a person undertaking work that a relic is on or near the proposed work site, that person can apply for Ministerial consent to deface or damage or otherwise interfere with a relic under s 21. Before giving such consent the Minister must give notice in local newspapers calling for submissions. The Minister may give consent only where he or she is satisfied that the consent does not relate to a relic of special significance and there is no reasonable likelihood of further relics of special significance being discovered at the site. However, where such a relic exists work may progress if the Minister directs the removal of the relic to a place of safe storage.

Importantly, s 21 has been interpreted extremely widely. In *Walker v Shire of Flinders*[27] it was held that the section will apply to any act concerning a relic even where the relic is not worthy of preservation. Kaye J noted merely that "the purpose of protecting and preserving a relic which is not worthy of preservation is not readily apparent. Be that as it may, in my opinion, the provisions of the Act operate to protect all relics, regardless of their quality of lack of it."

In addition to the general duty not to deface relics, additional restrictions may be imposed by the proclamation an archaeological area or temporary archaeological area where the Governor-in-Council is satisfied that it is necessary to reserve the land for the preservation of relics, that for reservation it is necessary to restrict entry upon that land, and that arrangements have been made for the proper management of the area as an archaeological area. A temporary order (of duration up to six months) may be made where it is considered expedient to do so for the purpose of the preservation of a relic. Once an order has been made, it is an offence to be within an archaeological area without the permission of an authorised person. An authorised person includes the Minister and in the case of private land, the owner or occupier of that land.

Archaeological places and other areas where relics are present are entered onto the Sites Register which was established in 1973. Entries are made onto the

[27] [1984] VR 409.

register as a result of field surveys or where relics have been located during development. As at 2003, there were approximately 23,000 registered sites, and approximately 600 to 1,000 are added each year.[28]

Although the Register is useful for identifying where cultural heritage issues may arise in exploration or development, it must be treated with caution for the following reasons:

(a) it is not a comprehensive list of all sites of relics in Victoria. Liability under s 21 can arise from interference with a relic even where that relic is not on the Register and is not known to the person who interferes with it; and

(b) there is no guarantee that a declaration of preservation under the HPA will not be made over any site which is not on the Register under the Relics Act.

From the perspective of mining and exploration companies, the fact that a search of the Register affords no defence to a contravention of s 21 is of continuing concern. Some reliance may be placed on the fact that one of the elements which must be proved before that section is contravened is that the mining or exploration company concerned has interfered with a relic "wilfully or negligently". It is unclear whether a person who has searched the Register and found nothing there, and who then carries out activities which interfere with a relic, can be said to have "negligently" interfered with the relic.

Western Australia

Under the *Aboriginal Heritage Act* 1972 (WA) an "Aboriginal site" to which the Act applies is:

- any place of importance and significance where persons of Aboriginal descent have appeared to have left any object, natural or artificial which is used for, made or adapted for use for any purpose connected with traditional cultural life;
- any sacred, ritual or ceremonial site, which is of importance or special significance to persons of Aboriginal descent;
- a place which in the opinion of the Aboriginal Cultural Material Committee is or was associated with Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State; or
- any place where objects to which the Act applies are traditionally stored, or to which, under the provisions of the Act, such objects have been taken or removed.

Under s 17 of the Western Australian Act it is an offence for a person to:

- excavate, destroy, damage, conceal or in any way alter an Aboriginal site;
- in any way alter, damage, remove, destroy, conceal or deal with any object on or under an Aboriginal site in a manner not sanctioned by relevant custom; or

[28] *Summons v Victoria and Ors* (2003) 176 FLR 1 at 24.

- assume the possession, custody, or control of any object on or under an Aboriginal site,

unless the act in question was done within authorisation given by the Registrar of Aboriginal Sites under s 16 or the consent of the Minister under s 18. These provisions are discussed below.

The Aboriginal site concerned need not be a site which has been specifically protected by the Minister or entered onto the Register maintained by the Registrar under s 38. Accordingly, it is likely that s 17 will be contravened by a mining company where any but the lowest-impact exploration work is undertaken on a place of importance or significance to Aboriginal people, whether or not it is known to the company. However, under s 62 it is a defence to a contravention of s 17 if the person committing the act did not know, and could not reasonably be expected to have known, that the place or object to which the charge relates was a place or object to which the Act applies. This provides some protection for miners or explorers who are unaware that any land that they propose to disturb is an "Aboriginal site". However, the element of constructive knowledge in the defence means that those intending to disturb any land (eg by excavation in exploration activities) cannot be wilfully blind to the possibility that the land may be an Aboriginal site. A defendant seeking to establish the defence must show not only that it did not know that the place concerned was an Aboriginal site; the defendant must also show it could not reasonably be expected to have known that the site was an Aboriginal site. What a defendant could not reasonably be expected to have known in this context does not appear to have been considered by the courts, but clearly the burden on the defendant would be unlikely to be found to have been discharged by anything less than reasonable inquiry. Thus, the defendant will not be able to establish the defence unless at least it has made inquiries with the Registrar as to whether the land concerned contains an Aboriginal site (s 38 obliges the Registrar to maintain a register of all protected areas and known cultural material, and although the Act contains no explicit provision under which the register may be searched, in practice the Registrar will respond to requests for information).

Of course, if a miner or explorer has reason to suspect that land which its proposed activities will disturb may be an Aboriginal site, the burden of proving the requisite elements of the s 62 defence will be harder to discharge. If for example an inspection of the area reveals Aboriginal tools or artefacts, cultural heritage significance might reasonably be expected. So much the more so if there is also a registered native title claim over the area and rights claimed under it refer to sites of cultural heritage significance on the land. Accordingly, despite the protection afforded by s 62 of the Western Australian Act, it would be prudent to undertake an assessment of any proposed site prior to commencing activities in these circumstances.

Where areas of cultural significance are identified, an offence will still not be committed under s 17 of the Act if consent has been obtained under ss 16 or 18. Pursuant to s 16, the right to permit excavation or removal of anything from an

Aboriginal site is reserved to the Registrar. The Registrar may, but only on the advice of the Committee, authorise entry upon and excavation of an Aboriginal site and the examination or removal of any thing on or under the site subject to any conditions advised by the Committee.

Alternatively, an approval can be sought pursuant to s 18 of the Act. Under s 18, where an "owner of any land" (which for this purpose includes a Crown lessee, the holder of any mining or tenement or mining privilege, or a petroleum pipeline licensee) is likely to do an act that would result in a breach of s 17, that person can give notice to the Committee. Upon forming an opinion as to the importance and significance of the site, the Committee must give to the Minister notice a recommendation as to whether or not the Minister should consent to the use of the land for the purpose specified in the application and whether any conditions should attach to the consent.

In considering whether or not to consent to the use of the land for a purpose which would be likely to result in the alteration, damage or destruction of an Aboriginal site, the Minister must make his or her decision having "regard to the general interest of the community" (s 18(3)). In *Bropho v Tickner,*[29] Wilcox J was of the view that the Minister may give consent having regard to the general interest of the community, notwithstanding that the proposed action may have significant or even devastating consequences to a significant Aboriginal area.

The Minister may consent to the use of the land the subject of the notice, or specify a part of the land that may be used subject to conditions, or decline the application. Pursuant to s 18(5), the owner of any land (as defined in s 18) may appeal the Minister's decision to the Supreme Court of Western Australia. The court may confirm or vary the decision or substitute a decision which will be effective as if made by the Minister. Under s 18(8), where consent has been given under s 18 to use the land for a particular purpose, nothing done by or on behalf of the person to whom consent has been given constitutes an offence under the Act. Regulation 7 of the *Aboriginal Heritage Regulations* 1974 (WA) provides that it is an offence to bring on to any land that is an Aboriginal site or protected area any digging equipment, lifting equipment or explosive, except under an in accordance with the prior approval of the Minister or the Registrar. Where consent has been gained under ss 16 or 18, this consent will also cover the consent required under the Regulations.

Aboriginal sites may also be declared by the Minister as protected sites. A specific site may be recommended by the Aboriginal Cultural Material Committee if the Committee determines it is of outstanding importance. An Aboriginal site may be declared a protected area whether or not the land is privately owned or is reserved for any public purpose. When an area of land becomes a protected area, the Crown becomes exclusively entitled to the occupation and use of the land, and the holders of interests in or relating to the land prior to the declaration have rights to be compensated. There is doubt as to whether or not mining tenements (and particularly exploration tenements) constitute "interests in or relating to" land for this purpose.

[29] (1993) 40 FCR 165 at 171.

In *Minister for Indigenous Affairs v Catanach,*[30] it was held by Pullin J that consent given by the Minister under s 18 does not provide a blanket clearance in relation to all or any work on the site. Rather, the provisions operate so that consent applies only to the particular purpose which has been specified in the application for consent. Pullin J held that where an owner of land obtains consent from the Minister, that consent attaches personally to the owner and does not "run with the land".

This decision emphasises the direct nature of the prohibitory provisions found in Aboriginal cultural heritage legislation and their possible impact on the resources industries. If a consent under s 18(8) of the WA Act operates only in favour of a particular "owner" who has applied for it, it will be necessary to ensure that the applicant for the consent is the holder or holders of the tenements concerned and not, for example, a joint venture manager which does not hold the tenements. Moreover, it will be necessary to consider carefully the position of mining or drilling contractors which are not "owners".

Applicants for exploration and prospecting licences in Western Australia are now required to sign a Standard Heritage Agreement before the government will commence implementation of the expedited procedure under s 32 of the NTA in relation to the grant of those licences. The Standard Agreements include (subject to regional variations) considerations such as the applicant agreeing to undertake heritage clearance surveys prior to commencing work. They also set out fixed rates for services by traditional owners who carry out such surveys. The mere signature and despatch to the relevant Aboriginal group of a Standard Heritage Agreement will not, of itself, amount to compliance with s 17. Presumably, however, compliance with that agreement (requiring cultural heritage assessments, the employment of cultural heritage monitors, and so on) will be likely to give the exploration company involved a viable defence under s 62.

Northern Territory

The purpose of the *Northern Territory Aboriginal Sacred Sites Act* 1989 (NT), as stated in its preamble, is to effect a practical balance between the need to preserve and enhance Aboriginal cultural tradition and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement.

Under s 33 of the Northern Territory Act, it is an offence for a person to enter or remain on a "sacred site" except in the performance of a function under or in accordance the Act or under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (the Land Rights Act). Section 34 makes it an offence to carry out work on a sacred site, and under section 35 it is an offence to desecrate a sacred site.

"Sacred site" has the meaning given to it under the Land Rights Act, namely "a site that is sacred to Aboriginals or is otherwise of significance according to

[30] [2001] WASC 268.

Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition".

Under s 36 of the Northern Territory Act it is defence to each of these offences if it is proved that the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site. Where a sacred site is on Aboriginal land within the meaning of the Land Rights Act, the burden is higher. In that case, the defendant must also prove that his or her presence on the land would not have been unlawful if the land had not been a sacred site. Further, the defendant must prove that he or she had taken reasonable steps to ascertain the location and extent of sacred sites on any Aboriginal land likely to be visited.

In similar manner to s 62 of the Western Australian legislation, the defence afforded by s 36 of the Northern Territory Act will be unlikely to be made out unless the defendant has searched the Register of Sacred Sites maintained by the Aboriginal Areas Protection Authority (the Authority). The Authority must make the Register available for public inspection except to the extent that such availability would disclose sensitive commercial information or matters required by Aboriginal tradition to be kept secret. As the Register will not contain information which the Authority has determined should not be recorded, which may include the location and extent of the site, the absence of information as to the location and the extent of the site cannot be taken as evidence that no such site is present on the land. Moreover, the definition of "sacred site" explicitly includes not only sites which have been declared to be sacred sites, but others. Accordingly, as with the Western Australian legislation, if a mining or exploration company suspects that ground is a "sacred site", as defined in the Land Rights Act above, it will be prudent to arrange for a cultural heritage assessment with local Aboriginal groups, in particular, those identified under the Land Rights Act as having rights attaching to the area where work will be carried out.

The Act also contains an effective clearance procedure. Despite ss 33 and 34, work may be carried out on a sacred site if it is done with, and in accordance with the conditions of, an Authority Certificate issued by the Authority. The Authority must take into account the wishes of affected Aboriginal groups. If requested to do so, the Authority must also arrange a conference between the applicant and the custodian of the relevant sites. The Authority must issue an Authority Certificate where it is satisfied that the work could proceed without substantial risk of damage to or interference with the site or where the applicant and custodians have reached an agreement. It is an offence to do works not in accordance with any conditions specified in the Authority Certificate which has been issued.

Cultural heritage in the Northern Territory is also protected by the *Heritage Conservation Act* 1991 (the HCA). The object of the HCA is to provide a system for the "identification, assessment, recording, conservation and protection of places of prehistoric, proto-historic, historic, social, aesthetic or scientific value". In this sense, the HCA relates to material objects and sites of observable significance rather than the matters of spiritual significance. The HCA relates not

only to Aboriginal cultural heritage, but the Heritage Advisory Council, which causes sites to be protected under the HCA, must include one member nominated by the Aboriginal Areas Protection Authority. Sites are protected once identified by the Council as being of heritage significance on the basis of the Council's own formulated assessment criteria. A person may apply to the Council to declare a place to be a heritage place. The Minister also has the power to make an interim protection order which is effective for up to 90 days. The Council may prepare a conservation management plan that will allow work to be done in respect to a heritage site which contains a description and any conditions on work that can be carried out there.

Any cultural heritage assessment undertaken to avoid liability under the *Northern Territory Aboriginal Sacred Sites Act* will also need to take into account areas protected under the HCA. Further, persons wishing to undertake development will need to be aware that orders under the HCA may be used to frustrate development, and that management plans formulated by the Heritage Advisory Council may add an additional layer of regulation in respect to what work may be undertaken.

South Australia

The *Aboriginal Heritage Act* 1988 (SA) protects Aboriginal sites, objects and remains. "Aboriginal site" is defined as an area of land that is of significance to Aboriginal tradition, or that is of significance to Aboriginal archaeology, anthropology or history.

It is an offence under s 23 to damage, disturb or interfere with any Aboriginal site without the authority of the Minister. There are no defences available. In addition, s 41 provides that if an employee or agent, acting in the course of his or her employment or agency, commits an offence against the Act, the employer or principal is also guilty of an offence and is liable to the same penalty; and s 41(2) has the effect that if a corporation commits an offence against the Act, each of its directors is guilty of an offence and may be similarly liable unless it is proved that the director could not by the exercise of reasonable diligence have prevented the commission of the offence by the corporation.

Where the Minister is satisfied that it is necessary to do so for the protection or preservation of an Aboriginal site, object or remains, the Minister may give directions relating to the access to or use of the site. The Minister must take reasonable steps to give at least eight weeks' notice of the proposed directions to the owners and occupiers, if any, of the land in question, the Aboriginal Heritage Committee, any Aboriginal organisation considered by the Minister to have a particular interest in the matter, and a representative of any traditional owners. In like manner to Pt IIA of the HPA in relation to Victoria, s 25 of the South Australian Act provides that any of the appointed inspectors may also give directions prohibiting activities or access in relation to a particular Aboriginal site or object, but only if the inspector is satisfied that urgent action is necessary for the protection or preservation of the site or object concerned. An inspector's

directions lapse after 10 days, but unlike Pt IIA of the HPA, the South Australian Act provides that an inspector's directions may be revoked by the Minister.

The Minister must also maintain the Register of Aboriginal Sites and Objects, describing sites and objects determined by the Minister to be Aboriginal Sites or objects. Section 12 establishes a process whereby developers (or Aboriginal groups) may apply to the Minister to determine whether or not a particular area contains Aboriginal sites, and if the Minister determines that a site is an Aboriginal site an entry to that effect must be made in the Register. The State encourages developers to use this provision prior to undertaking development works. It is the only tool available to mining and exploration companies to eliminate the risk of contravening s 23, since the determination by the Minister whether or not to enter the site in the Register will conclusively determine whether the area in question is an Aboriginal site or not.

The Minister may enter into an "Aboriginal heritage agreement" with the owner of the land on which an Aboriginal site, object or remains are situated. For this purpose "owner" includes any mining tenement holder. Under s 37B of that Act, an Aboriginal heritage agreement may contain any provision for the protection or preservation of Aboriginal sites. Examples given in the section are provisions which restrict the work which may be done on the land concerned, or which require works to be carried out in accordance with specified standards. The South Australian legislation is unique in Australia in that an Aboriginal heritage agreement attaches to the land and is binding on the owner and occupiers from time to time of the land.[31] This is achieved not only through statements to that effect in s 37A(2) and (4), but also via the practical scheme of s 37C, which obliges the Registrar-General, on application by the Minister or a party to the Aboriginal heritage agreement, to note the agreement against the relevant instrument of title to the land concerned.

New South Wales

In New South Wales, Aboriginal cultural heritage is protected under the *National Parks and Wildlife Act* 1974 (NSW) (NPWA). The provisions of the NPWA relating to Aboriginal cultural heritage apply to lands across the State, not only those within parklands administered under the NPWA.

Under s 84, the Minister may, by order published in the Gazette, declare any place to be an "Aboriginal place" if in the opinion of the Minister, it is or was of special significance with respect to Aboriginal culture. The stated purpose for reserving land as an Aboriginal area is to identify, protect and conserve areas associated with a person, event or historical theme, or containing a building, place, object, feature or landscape of natural or cultural significance to Aboriginal people or of importance in improving public understanding of Aboriginal culture and its development and transitions.

[31] See ss 37A(2), (4), 37C.

It is an offence under s 90 of the NPWA for a person to knowingly destroy, deface or damage, or knowingly permit the destruction or defacement of damage to, an Aboriginal object or place.

The wording of this section is narrower than comparable provisions in other jurisdictions considered, in that it requires actual as opposed to constructive knowledge. Accordingly, it cannot be an offence against s 90 for a mining or exploration company to carry out exploration or development activities which destroy or damage an Aboriginal place or object, unless the company knows that the place or object concerned is an "Aboriginal place" or an "Aboriginal object".[32] This appears to be appropriate, because although under s 5 an "Aboriginal place" is defined as a place declared to be an Aboriginal place under s 84 (so one can ascertain whether a place is an Aboriginal place by examination of the appropriate gazettals), s 5 defines "Aboriginal object" widely as "any deposit, object or material evidence… relating to … Aboriginal habitation… of… New South Wales…" (ie in terms making it practically impossible for a mining or exploration company to ascertain whether an object is or is not an Aboriginal object).

A person will not commit an offence under s 90 if consent to destroy, deface or damage is given by the Director-General of National Parks and Wildlife under s 90(2). An applicant may appeal the decision of the Director-General to the Minister.

In addition to protection under s 84, the Governor may, by notice published in the Gazette, reserve land as an "Aboriginal area" under s 30A(1)(g). Section 64 the NPWA has the effect of prohibiting prospecting and mining in relation to an Aboriginal area by treating that area in the same manner as a national park or historic site. (Under s 41, it is unlawful to prospect or mine for minerals in a

[32] Items [1] to [9] of Sched 3 of the *National Parks and Wildlife Amendment Act* 2001 (NSW) will, if introduced into law, effect changes to the offence under s 90 by removing the requirement that a person must "knowingly" cause damage to an Aboriginal object or place. Under the amendments, damaging an object or place will become a strict liability offence; it will be a defence to prosecution if the defendant can show that he or she took reasonable precautions and exercised due diligence to determine whether the action constituting the offence would or would likely be likely to impact on the Aboriginal object or place concerned, and the defendant reasonably believed that the action would not destroy, deface, damage or desecrate the Aboriginal object or place. However, no offence will be committed where an Aboriginal place or object is dealt with in accordance with a "heritage impact permit" issued by the Director-General. Unfortunately neither "reasonable precautions" nor "due diligence" is defined in the amendments, nor is there any particularity as to what may be contained in a heritage impact permit. It was expected that relevant guidelines as to these matters would be published by regulation.

However, after representations made subsequent to the passing of the amending Act, these amendments have still not commenced. Of particular concern to the mining industry is the fact that the amended s 90 effectively reverses the onus of proof, and for a defendant to make out the due diligence defence may well impose greater obligations than a search of the Aboriginal Sites Register; it may be necessary for the defendant to have commissioned a detailed archaeological survey. Given however that the provisions have yet to commence almost three years after the Amendment Act was passed, it may be the case that any amendments to s 90 will be in a different form.

national park, except as expressly provided for by an Act of Parliament.) Limited prospecting rights can be obtained from the Minister if notice of intention to grant an approval is tabled in Parliament. However, outside "Aboriginal areas" (of which only 11 are gazetted) and protected archaeological areas as declared by the Minister, there is no blanket offence relating to damage to unknown cultural heritage sites.

Under s 65, the Minister may declare lands on which an Aboriginal object or place is situated to be a protected archaeological area. The order must be published in the Gazette. The Director-General may, in relation to land the subject of a protected archaeological area, give directions prohibiting or regulating entry or use of the lands by specified persons or classes of persons.

Section 64 of the NSW Act provides difficulties for mining companies by placing an absolute prohibition on mining in respect of "Aboriginal areas".

Before undertaking any mining or development work in New South Wales, advice should be sought as to whether, in respect to the area the subject of work, protection of the area as an "Aboriginal area" or as a "protected archaeological area" has been gazetted.[33]

The Director-General may also make a stop work order or an interim protection order under ss 91AA and 91A respectively. A stop work order may be made where the Director-General is of the opinion that work is being carried out, or is about to be carried out, that is likely to significantly affect an Aboriginal object or place. A stop work order is effective for up to 40 days and under s 91DD the Director-General may extend the operation of the stop work order for a further period or periods of 40 days if he or she thinks fit. The operation of s 91DD might allow the Director-General to renew a stop work order indefinitely without recommending an interim protection order. However, s 91EE(2) obliges the Director-General to recommend the making of an interim protection order where satisfactory arrangements cannot be made to modify the works which are the subject of a stop work order. Under s 91CC, an appeal against the making of a stop work order may be made to the Minister, who may modify or rescind the order but only if this is consistent with the principles of ecologically sustainable development as described in s 6(2) of the *Protection of the Environment Administration Act* 1991.

Under s 91A, the Director-General may recommend to the Minister the making of an interim protection order (IPO) in respect of an area if the Director-General is of the opinion that the area has cultural significance (this is not limited to, but

[33] Mining or development work may also be affected by recent changes to natural resource management in NSW, through the *Native Vegetation Act* 2003 (NSW), *Natural Resources Commission Act* 2003 (NSW) and the *Catchment Management Authorities Act* 2003 (NSW). These changes also have implications for the protection of Aboriginal cultural heritage. Under the latter Act, Catchment Management Authorities (CMAs) have been established to provide for planning and decision making relating to catchments. Each board of a CMA must have at least one board member with knowledge relating to cultural heritage, which has been narrowed in practice (through advertisements for the boards) as Aboriginal Cultural Heritage. The Minister has appointed four Aboriginal CMA board members (see www.dipnr.nsw.gov.au).

clearly may include, Aboriginal cultural heritage significance). It is not necessary that either the Director-General or the Minister is of the opinion that any action is being or is about to be carried out that will adversely affect the area. Under s 91B(3), an IPO may contain terms relating to the preservation, protection and maintenance of an Aboriginal object or place subject to the order. An IPO may be made for a period up to two years; it is an offence to breach an IPO. An IPO must be gazetted and entered on a register which is open for public inspection. Under s 91F, the Minister must once an IPO has been made give notice of the making of the IPO to any person "who appears to the Minister to be an owner or occupier" of land subject to the IPO. However, under s 91C, the Minister is *not* obliged to inform any person who may be affected by the IPO prior to the making of the IPO. Hence, a company holding a mining or exploration tenement has no right to be notified before an IPO is made. This may be contrasted with the making of a temporary or permanent declaration of preservation under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth), where (as noted above) the courts have held that those whose interests will be adversely affected by the making of such a declaration are entitled to be notified and to be heard on the matter.

Queensland

The *Aboriginal Cultural Heritage Act* 2003 (Qld) commenced on 16 April 2004. This new Queensland Act imposes significantly higher penalties on those who interfere with Aboriginal cultural heritage, and imposes more prescriptive obligations on mining and resources companies and other developers to ensure the protection of Aboriginal cultural heritage, than its predecessor. Criminal sanctions are imposed for breaches of the Act, and the Minister may issue stop orders if satisfied that there are reasonable grounds for concluding that an activity that the person is carrying out or is about to carry out will harm Aboriginal cultural heritage or have a significant adverse impact on the cultural heritage value of Aboriginal cultural heritage.

The most significant development under the Queensland Act is the enactment of a new "cultural heritage duty of care" requiring developers to take all reasonable and practical measures to ensure that their activities do not harm Aboriginal cultural heritage.

A person will breach the protection provisions and commit an offence under the Act if that person:

- carries out an activity in breach of that duty of care (s 23);
- harms Aboriginal cultural heritage if that person knows or ought to have known that it is Aboriginal cultural heritage (s 24);
- excavates, relocates or takes away Aboriginal cultural heritage if that person knows or ought reasonably to have known that it is Aboriginal cultural heritage (s 25); or

- unlawfully possesses Aboriginal cultural heritage if that person knew or ought reasonably to have known that the object is Aboriginal cultural owns Aboriginal cultural heritage in question, or is acting with the consent of that person.

Under s 20, the Queensland Government owns all Aboriginal cultural heritage except where the Act makes specific provision to the contrary (eg, in relation to secret or sacred objects or other Aboriginal cultural heritage owned by Aboriginal people under the Act).

It will not be an offence under the above provisions if the defendant was acting:

- under the authority of the Act;
- under an approved cultural heritage management plan under the Act;
- under a native title agreement or another agreement with an Aboriginal party;
- in compliance with cultural heritage duty of care guidelines; or
- in compliance with the cultural heritage duty of care.

The concept of "cultural heritage duty of care" is key to understanding the offences under the Queensland Act. First, discharge of the duty affords a "catch-all defence". Secondly, a simple breach of the duty of care under s 23 will be an offence under the Act even if the defendant had no actual or constructive knowledge that Aboriginal cultural heritage was present on the site concerned. Indeed, it would appear that s 23 will be contravened if the cultural heritage duty of care is breached even if no Aboriginal cultural heritage is harmed; the duty/breach/damage rubric familiar from the law of negligence does not appear to apply. Whether a prosecution would be launched in such circumstances is a matter for conjecture.

For this reason, it is important for mining and other development companies operating in Queensland to be familiar with the cultural heritage duty of care guidelines, which were gazetted on 16 April 2004.[34] There is no offence in not complying with the guidelines, in that failure to comply with them is not necessarily a breach of the duty of care. However, compliance with the guidelines affords strict compliance with the prescribed duty of care.

The duty of care guidelines are divided into five categories of activities, in ascending order of the likelihood those activities will cause harm to Aboriginal cultural heritage. Each category of activity prescribes steps to be taken in order to comply with the duty of care.

Category One: *Activities involving No Surface Disturbance*

Examples of Category One activities are: walking, driving along existing roads or tracks, aerial surveys, navigating through water, carrying out surveys which do not cause disturbances, and photography. The guidelines indicate that such activities are unlikely to harm Aboriginal cultural heritage, and that accordingly it

[34] *Queensland Government Gazette* (no 80).

is reasonable and practicable for these activities to proceed without further heritage assessment.

Category Two: ***Activities causing No Additional Surface Disturbance***

This means surface disturbance not inconsistent with previous surface disturbance. In relation to mining and exploration, examples include use and maintenance of existing roads, tracks and powerlines and services and utilities. No additional assessments need to be undertaken in respect to these activities. In such circumstances, prior to undertaking the relevant activity, miners and explorers are advised to check the Register and Database maintained by the Department to determine if there are any registered sites or objects of Aboriginal cultural heritage significance in the vicinity.

Category Three: ***Developed Areas***

A developed area means an area that is already developed or maintained for a particular purpose such as use as a road or access route, a municipal or infrastructure facility such as powerlines, telecommunication lines or electricity infrastructure. The Guidelines advise that the Register and Database should be checked and that if the activity is to take place in the vicinity of a feature or landscape that suggests a heightened likelihood of encountering Aboriginal cultural heritage, the relevant Aboriginal party should be consulted as to how best the activity proposed may be managed to minimise or avoid harm to Aboriginal cultural heritage.

Category Four: ***Areas previously subject to Significant Ground Disturbance***

Significant ground disturbance means disturbance by machinery of the topsoil or surface rock layer of the ground, such as ploughing, drilling or dredging, and the removal of native vegetation by disturbing root systems and exposing underlying soil may proceed under the Guidelines on the same basis as those under Category Three.

Category Five: ***Activities causing Additional Surface Disturbance***

A Category Five activity is any activity that does not fall within Category One, Two, Three or Four. The Guidelines note that such an activity will involve a high risk to Aboriginal cultural heritage, and that in order to comply with the guidelines, a person should search the Register and Database, consult with relevant Aboriginal parties, and undertake a cultural heritage assessment. The assessment should include consideration of the nature of an activity and the likelihood it will cause harm and the nature of that harm.

The guidelines define a "Cultural Heritage Find" as "a significant Aboriginal object or, evidence of archaeological or historic significance of Aboriginal occupation of an area of Queensland or Aboriginal human remains". The guidelines provide that where it is necessary to excavate, remove or harm a "Cultural Heritage Find", work must stop immediately and certain procedures

must be carried out. Although this is a requirement under all the categories (except Category One), it is most likely to occur in relation to Category Five activities, given that "Cultural Heritage Finds" are much more likely to be identified due to the compulsory cultural heritage assessment. In this situation, a person must notify the Aboriginal Party for the area and seek their advice and agreement as to how best this may be managed or harm minimised. Where an agreement cannot be reached, the duty of care to take all reasonable and practicable measures to preserve Aboriginal cultural heritage will nevertheless continue unabated.

Cultural Heritage Management Plans

Part 7 of the Act contains a detailed framework for the development and approval of Cultural Heritage Management Plans (CHMPs), which, if approved and complied with, provide a defence against the criminal sanctions in the Act.

Where any "project" (loosely defined so as to include any use or proposed use of land) requires a lease, licence, permit, approval or other authority (whether under the *Aboriginal Cultural Heritage Act* or under any other Act), and also requires an environmental impact statement, no activities that may harm Aboriginal cultural heritage may be undertaken unless a CHMP is developed and approved. Moreover, the entity authorised to give the lease, licence, etc must not give it unless either a CHMP is developed and approved or the lease, licence, and so on, is given subject to conditions ensuring that no excavation, construction or other activity takes place without the development and approval of a CHMP for the project. However, even where a CHMP is not mandatory, the development and approval of a CHMP may be desirable in the context of large-scale mining and other projects in order to provide certainty in management and safety against prosecution.

In order to develop a CHMP, any person, including the Minister, may "sponsor" the CHMP. The sponsor must give notice about the CHMP to the owners and occupiers of the land, the Director-General of the Department of Natural Resources, Mines and Energy, any registered "Aboriginal cultural heritage body" (or if there is none, to any registered native title claimants under the NTA). Aboriginal parties that provide timely response to that notice become "endorsed parties" and may participate in negotiations concerning the CHMP. The sponsor and each endorsed party must make reasonable efforts to reach agreement which must provide for the minimisation of harm to Aboriginal cultural heritage and may include details of the project, the way in which cultural heritage will be assessed, and contingency planning for disputes, unforeseen delays and other foreseeable or unforeseeable obstacles to carrying out the activities under the plan. Once an agreement is reached, the CHMP must approved by the chief executive (Director-General).

Disputes arising from negotiation may be referred to the Land and Resources Tribunal. The Tribunal may also mediate disputes arising from negotiations. Where no agreement can be reached, the sponsor may apply to the Tribunal for an approval of the proposed CHMP. The Tribunal must invite each party to the dispute to make a submission and may, but is not required to, hold a hearing on the

matter. The Tribunal is then to make a recommendation to the Minister whether to approve the plan or otherwise.

Tasmania

Under s 9 of the *Aboriginal Relics Act* 1975 (Tas) a person may not, except in accordance with the terms of a permit granted by the Director of National Parks and Wildlife, destroy, damage, disfigure, conceal, uncover, expose, excavate or otherwise interfere with a "protected object" or carry out any act likely to endanger a protected object.

A "relic" becomes a "protected object" by the Minister's declaration of a site or object under s 7. The Minister may make a declaration where he or she is satisfied that there is on or in any land a relic and that steps should be taken to protect or preserve that relic.

In turn, the definition of "relic" includes any object, site or place that bears signs of the activities of any of the original inhabitants of Australia or their descendants. However, no object made or created after the year 1876 is treated as a relic, and no activity taking place after that year is regarded as being capable of giving rise to a relic.

Under s 9(2), the Minister may, on the recommendation of the Director, grant a permit to undertake activities that would be an offence under s 9.

Under s 21(3), it is a defence to a prosecution for an offence concerning a relic that the defendant did not know, or could not reasonably be expected to know, that the object destroyed, etc, was a relic. As there is no register of relics, a prudent resources company should search for gazetted orders of the Minister to determine whether any site likely to be affected by its proposed activities is a protected site.

A review of the *Aboriginal Relics Act* 1975 (Tas) is currently being undertaken. According to "The State of the Environment Report 2003"[35] only a very small part of Tasmania has been visited and examined for Aboriginal heritage.

Negotiation and Mediation

One feature of the now-lapsed *Aboriginal and Torres Strait Islander Heritage Protection Bill* is that it attempted to provide a workable regime for negotiation and mediation. There are no provisions currently in the HPA (other than in Pt IIA) for the making of agreements between mining or petroleum companies (or other project developers) and Aboriginal groups. However, as reported in the *Eleventh Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, the HPA may have had the positive effect of encouraging negotiated agreements relating to site use, in that the potential resort to the use of the Act may have encouraged negotiated settlements.

[35] Resource Planning and Development Commission 2003, *State of the Environment Tasmania 2003*, available from, http//www.rpdc.tas.gov.au/soer.

It is also demonstrable that the introduction in 1998 of the provisions of the NTA relating to ILUAs, replacing the unworkable s 21 of the original *Native Title Act* 1993 (Cth), have led to a growing number of negotiated outcomes in relation to the grants of mining and exploration tenements and the doing of other "future acts" (as defined in the NTA) required for resources development. Indigenous Land Use Agreements almost invariably contain extensive provisions relating to the protection of Aboriginal cultural heritage. These provisions are commonly expressed to be without prejudice to the rights of the native title parties, and not to affect the obligations of the developer under, the HPA and the applicable State or Territory laws relating to Aboriginal cultural heritage. According to the "Agreements, Treaties & Negotiated Settlements Project",[36] which monitors any agreements between indigenous people and other groups, as at June 2004 there were 179 agreements making provision for Aboriginal cultural heritage protection in Australia, and of these, 77 were ILUAs under the NTA.

The recently enacted Queensland legislation recognises this reality. It includes in Pt 7 detailed provisions for the development of Cultural Heritage Management Plans. Part 7 provides procedures for negotiation and if necessary assisted mediation between prospective developers and Aboriginal groups. Section 105 gives a non-exhaustive list of the possible content of a CHMP. It includes:

- arrangements for access to the land;
- identification of known Aboriginal cultural heritage;
- the way Aboriginal cultural heritage is to be assessed;
- management of damage and relocation of Aboriginal cultural heritage; and
- contingency planning for disputes, unforeseen delays and other foreseeable and unforeseeable obstacles to carrying out activities under the plan.

The Queensland Act also focuses on the importance of negotiated agreements by acknowledging that arrangements in respect of cultural heritage already exist in many Native Title agreements. Section 23(3)(a)(iii) of the Queensland Act provides that a person is taken to have complied with the cultural heritage duty of care if that person is acting under a native title agreement or another agreement with an Aboriginal party, unless the Aboriginal cultural heritage is expressly excluded from being subject to the agreement.

There is a clear commercial imperative for mining and petroleum companies and other developers to have a pre-arranged method of dealing with Aboriginal cultural heritage issues which arise during the life of the projects concerned, from the commencement of exploration activities through to project development, construction, operation, maintenance and eventual decommissioning, demolition and site rehabilitation. By their very nature, items and places of Aboriginal cultural heritage significance cannot always be known in advance. Recent legislative developments such as those in Queensland, and in proposed

[36] Available from Agreements, Treaties & Negotiated Settlements Database at www.atns.net.au/database.html

amendments to the HPA, which are designed to facilitate agreement between project developers and interested Aboriginal groups, are welcome – although there may a danger in introducing overly prescriptive requirements. The achieving of a negotiated outcome is desirable at an early stage of a resources project, if only to forestall the making of cultural heritage claims after all other regulatory requirements have been met – an issue identified in the Evatt Report, and the potential for which continues to exist. Unfortunately, achieving a negotiated outcome is not always possible.

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