
Review of the *Protection of Movable Cultural Heritage Act 1986* (Cth)

Ministry for the Arts
Attorney-General's Department

20 August 2015

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Acknowledgement

The Law Council acknowledges contributions to this submission from the Law Council's indigenous Legal Issues Committee, Alternative Dispute Resolution Committee in the Federal Litigation and Dispute Resolution Section, Law Society of the Northern Territory, Law Institute of Victoria and Law Society of South Australia.

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Executive Summary

1. This submission provides comment on the *Position Paper on the Review of the Protection of Movable Cultural Heritage Act 1986* released 30 July 2015. It recommends that:

- the Australian Government ensure that the proposed legislation complies with Australia's international legal obligations and undertakings in relation to indigenous cultural and intellectual property rights (ICIP) and includes best practice statutory procedures developed in consultation with appropriate national cultural institutions;
- movable cultural property that Aboriginal and Torres Strait Islander people regard as sensitive be exempt from the transparency principle advocated by the Review;
- stakeholders be consulted further on the definition of movable cultural heritage in view of the contemporary value of Aboriginal and Torres Strait Islander cultural objects and the communal nature of many processes of cultural production;
- further consideration be given to the proposed register in relation to expertise in Aboriginal or Torres Strait Islander cultural material, and the consultation processes that should be engaged in;
- statutory consultations with prescribed bodies corporate and registered native title bodies corporate should be considered in relation to applications to export Aboriginal and Torres Strait Islander movable cultural property;
- the Review consult further with Aboriginal and Torres Strait Islander communities about the proposal to reclassify Aboriginal and Torres Strait Islander art as 'Australian art';
- further detail be provided and further consultation occur on the proposed changes to the offence and enforcement provisions of the Act;
- the offence and enforcement provisions accord with fundamental principles of the criminal law and the rule of law;
- the Position Paper be amended to recognise the breadth of the Constitutional powers available to the Commonwealth to protect Aboriginal and Torres Strait Islander heritage, including movable cultural heritage; and
- the proposed legislation should interact with state and territory Aboriginal heritage legislation in a sensitive way, with reference both to the protections within such legislation and in relation to consulting with traditional owners or other appropriate Aboriginal or Torres Strait Islander bodies within the states and territories before exercising a power which would override provisions of a state or territory Aboriginal Heritage Act.

Introduction

2. The Law Council welcomes the opportunity to provide comments to the Ministry for the Arts, Commonwealth Attorney-General's Department, in response to the *Position Paper on the Review of the Protection of Movable Cultural Heritage Act 1986* released 30 July 2015.
3. The *Review of the Movable Cultural Heritage Act*, led by lawyer Mr Shane Simpson AM,¹ is aimed at modernising the *Movable Cultural Heritage Act 1986* (Cth) (the Act) and its regulations, and clarifying the processes and requirements involved in the import and export of cultural objects. The Act protects Australia's movable cultural heritage and provides for the return of illegally imported foreign cultural property to its country of origin. It gives effect to Australia's agreement to the UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Cultural Property 1970. The non-statutory *Australian Best Practice Guide for Collecting Cultural Material* provides policy guidance in relation to dealings with movable cultural property. The Review is due to report to the Australian Government Minister for the Arts by 30 September 2015.
4. The Law Council's policy positions that are relevant to the issues raised in this submission include the Law Council's *Policy Statement on Indigenous Australians and the Legal Profession* (2010), *Policy Statement on Rule of Law Principles* (2011) and *Policy on Alternative Dispute Resolution* (1989 reaffirmed 2008).

Key Issue One

Indigenous cultural and intellectual property rights (ICIP)

5. The protection of Aboriginal and Torres Strait Islanders' cultural and intellectual property rights needs to be seen in the context of Australia's ratification of several international Conventions that require indigenous cultures and religions to be protected and not be discriminated against. Australia has also signed the United Nations Declaration on the Rights of Indigenous Peoples. These international instruments recognise:
 - the rights of minorities (including indigenous peoples) to enjoy, profess and practise their culture, religion and language, and the rights of everyone to freedom of religion;²
 - the freedom to enjoy the life and culture within which a person has been brought up, and the rights of an author to benefit from the protection of the moral and material interests resulting from their

¹ Shane Simpson AM, *Review of the Movable Cultural Heritage Act 1986: Position Paper 2015* (Attorney-General's Department 2015).

² Articles 27 and 18.1, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171.
<http://www.refworld.org/docid/3ae6b3aa0.html>.

scientific, literary or artistic production, without distinction based on gender, race or other status;³

- the obligations on governments to eliminate all discriminatory distinctions, exclusions, restrictions or preferences based on race, colour, descent, or national or ethnic origin, and the special measures that governments may implement to secure the advancement of racial or ethnic groups or individuals;⁴ and
- the rights of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions and manifestations and ceremonial objects, and their right to the repatriation of human remains in accordance with Articles 12 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁵

Recommendation:

6. The Law Council recommends that the Australian Government ensure that the proposed new movable cultural heritage legislation complies with Australia's international legal obligations and undertakings in relation to indigenous cultural and intellectual property rights (ICIP).

7. In the years following the release of the 1996 review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) by the Hon Justice Elizabeth Evatt,⁶ Aboriginal and Torres Strait Islanders' aspirations for better protection of their movable and immovable cultural heritage have not abated. Many of the recommendations of the 1996 Evatt Report were not implemented. They included harmonised legislation, the establishment of an independent expert Aboriginal Cultural Heritage Agency, significance assessments based on consultations with Aboriginal communities and other information provided with their consent, use of mediation to resolve disputes, a range of short and longer term protective declarations for cultural heritage under threat, and the designation of particular Aboriginal and Torres Strait Islander groups as prescribed interested persons for notification purposes.
8. More recent expert reports and domestic policy statements that various significant national cultural institutions have adopted, concern recognition and protection for ICIP rights. These include:
- Terri Janke and Michael Frankel, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property* (AIATSIS, 1998)

³ Articles 2, 3, 15(1c), UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, 3 <http://www.refworld.org/docid/3ae6b36c0.html>.

⁴ International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966).

⁵ Under Article 12, fair, transparent and effective repatriation mechanisms ought to be developed in conjunction with the indigenous peoples concerned.

⁶ The Hon Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Minister for Aboriginal and Torres Strait Islander Affairs, Canberra, 1996.

- *Draft policy statement: Engage Early – Guidance for proponents on best practice indigenous engagement for environmental assessments under the EPBC Act* ([draft, 2015](#))
 - Australian Government Ministry for the Arts, [Australian Best Practice Guide for Collecting Cultural Material](#) (2014)
 - the [National Museum of Australia’s Indigenous Cultural Rights and Engagement Policy](#) (2015)
 - the [Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services \(Australian Library and Information Association \(ALIA\) 1995\)](#), endorsed by the Aboriginal and Torres Strait Islander Library, Information and Resource Network (ATSILIRN), and updated in 2005 and 2010; and
 - the [Australian Institute of Aboriginal and Torres Strait Islander Studies’ Access and Use Policy](#).
9. Any replacement legislation for the Movable Cultural Heritage Act should include best practice, statutory consultation procedures, with guidance from Australia’s national cultural institutions, including provisions that:
- wherever reasonably practicable, the free, prior and informed consent of culturally appropriate Aboriginal and Torres Strait Islander stakeholders is obtained before unpublished/secret ICIP is put into the public domain or authorised for export;
 - cultural and customary laws concerning secret and sacred matters, gender, privacy and the representation of deceased people is respected in the administration of the Act, including the conditions attached to export permits;
 - Aboriginal and Torres Strait Islander peoples’ intellectual and cultural property rights are respected, and benefit-sharing arrangements with traditional owners are negotiated where publicly-owned cultural material is authorised for export, or where there is evidence that the material was obtained without the consent of its traditional owners;
 - Aboriginal and Torres Strait Islander stakeholders have a right to be consulted about the interpretation and use of their ICIP in a respectful, informed, ethical and meaningful way and to have individuals, families and communities acknowledged where appropriate;
 - the agency administering the new legislation (the Commonwealth Attorney-General’s Department in the *Position Paper*), commits to interacting in a respectful, informed, ethical and meaningful way with Aboriginal and Torres Strait Islander stakeholders and as an initial step, to commit to an informal alternative dispute resolution mechanism to resolve disputes that may arise with Aboriginal and Torres Strait Islander stakeholders.⁷ The Law Council welcomes

⁷ Consistent with the recommendations of the Australian Government, Productivity Commission, *Access to Justice Arrangements Inquiry Report* (2014), Ch 8 and Evatt, *ibid*, Ch 9.

the proposal in the *Position Paper* to include compulsory mediation in relation to disputed foreign cultural property.⁸

Recommendation:

10. The Law Council recommends that the proposed new Movable Cultural Heritage Act include best practice statutory procedures developed with guidance from appropriate national cultural institutions such as the Australian Institute of Aboriginal and Torres Strait Islander Studies and the National Museum of Australia.

Transparency

11. The *Position Paper* says that ‘transparency and accountability should be central principles of the scheme’ subject to the requirements of the *Privacy Act 1988* (Cth). The *Position Paper* proposes that the following information be made publicly available: the details of applications for export permits, including detailed object information, current owner and provenance, significance reports, and decisions on applications, including reasons for the grant or refusal of export permits.⁹ These recommendations need to be considered further in relation to confidentiality requirements attaching to some Aboriginal and Torres Strait Islander movable cultural material.

Recommendation

12. Movable cultural property that Aboriginal and Torres Strait Islander people and others regard as sensitive because it is culturally restricted, including material that is secret, sacred, offensive or personal in nature, should be a clear statutory exception to the transparency principle, and the Law Council recommends that the *Position Paper* be amended accordingly.

Definitions

13. Several issues arise in relation to the definitions proposed in the *Position Paper*.

Proposed new definition of movable cultural heritage:

14. The *Position Paper* recommends that a new definition of movable cultural heritage be adopted:

A reference to the movable cultural heritage of Australia is a reference to objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific, spiritual, or technological reasons, being objects falling within one or more of the National Cultural Heritage Control List categories.¹⁰

15. Other paragraphs of the proposed new definition would see ‘Australian-made object’ defined broadly to include objects recovered from land,

⁸ Simpson AM, above n 1, 73–74.

⁹ *ibid*, 4, 31, 47, 52, 58, 67–69, 70, 73, 78, 87, 99.

¹⁰ *ibid*, 7.

water, seabed or subsoil or the sea, and as including a wide range of objects made in Australia, or with substantial Australian content, or with extensive past use in Australia. The creative input of an Australian citizen or resident, or creation or modification in Australia with substantial Australian content, or that is strongly associated with an Australian person, activity, event place or period, or with subject-matter motifs related to Australia, would also be required.¹¹

16. The Law Council requests that the definition be drafted sufficiently widely to accommodate elements of ancient Aboriginal water infrastructure and aquaculture. Aboriginal people were innovative in relation to agriculture, aquaculture and some housing. For example, the Gunditj Peoples of Lake Condah in western Victoria have an 8,000 year old aquaculture industry with sophisticated engineering and dry stone wall buildings and works. The category of Declared Australian Protected Objects needs to be sufficiently wide to include such objects so as to prevent parts being exported.
17. A definition that recognises the contemporary value of Aboriginal and Torres Strait Islander cultures would better accord with Australia's international treaty obligations. Aboriginal and Torres Strait Islander communities' movable cultural heritage is a part of the world's oldest living culture, is changing and dynamic, and has contemporary and future relevance. The use of the term 'ethnographic' may not be welcomed by Aboriginal and Torres Strait Islander people.
18. Other parts of the definition focus on individual achievement. 'Traditional' Aboriginal art and design tends to be a much more communal activity than art and design in the European/'western' tradition.
19. Terry Janke and Michael Frankel and Co recommended a new statutory definition for ICIP in 1998. That definition referred to the intangible and tangible aspects of the cultural practices, resources and knowledge systems that have been and continue to be developed, nurtured and refined and passed on by Aboriginal and Torres Strait Islander people as part of expressing their cultural identity. Their definition covered items of moveable cultural property, including burial artefacts, ancestral remains, human genetic material (including DNA and tissues), cultural environment resources (including minerals and species), and documentation in all forms of media.¹² This approach is broader than the proposed definition in the *Position Paper*, but the Law Council considers that the Review should consider further its emphasis on community, and living cultural traditions.
20. Whilst statutory interpretation tools enable references to persons in the singular to include persons in the plural as well as a body politic or corporate it would be more culturally sensitive to Aboriginal and Torres Strait Islander communities to recognise the creative outputs from communal cultural activities expressly.

¹¹ *ibid*, 7.

¹² Terri Janke and Michael Frankel and Company, [Our Culture: Our Future, report on Australian indigenous cultural and intellectual property rights](#), report commissioned by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission (1998), 3.

Recommendation

21. The Law Council recommends that the definition of movable cultural heritage be considered further in consultation with stakeholders with a view to amending it to better accord with the contemporary value of Aboriginal and Torres Strait Islander cultures, and the communal nature of many processes of cultural production.

Expert advisors

22. The Law Council considers that the replacement of the National Cultural Heritage Committee with a Register of Cultural Property Experts, to advise the Department and the Minister on an *ad hoc* basis, if it includes Aboriginal or Torres Strait Islander experts and a process of broader engagement with traditional owner organisations, may be a governance improvement.¹³ However, the Law Council considers that further consideration is needed concerning those broader consultations with Aboriginal and Torres Strait Islander people about who should constitute the Aboriginal or Torres Strait Islander experts and the consultation processes that should be engaged in with traditional owners of cultural heritage items.
23. The Law Council also has some concern about replacing the National Cultural Heritage Committee with *ad hoc* advice from time to time. The Law Council considers that more consultation and engagement with stakeholders will be needed to ensure that appropriate expert Aboriginal or Torres Strait Islander people are identified.
24. In order to meaningfully engage and consult with traditional owners on these issues, consideration should be given to the potential for prescribed bodies corporate or registered native title bodies corporate under the *Native Title (Prescribed Body Corporate) Regulations 1999* and *Native Title Act 1993* respectively, to undertake consultation processes with native title holders in their constituencies in accordance with traditional decision-making processes, or any other decision-making processes agreed to.

Recommendation:

25. The Law Council recommends that further consideration is needed concerning nominees for the proposed register with expertise in Aboriginal or Torres Strait Islander cultural material, and the consultation processes that should be engaged in with the traditional owners of cultural heritage items and indigenous communities.
26. Consideration should be given to the potential for prescribed bodies corporate or registered native title bodies corporate to undertake consultation with native title holders in relation to Aboriginal or Torres Strait Islander movable cultural property.

Australian art

27. The *Position Paper* proposes that all works of visual art, craft and design made for commercial purposes should 'be treated the same, irrespective of the artist's race'. Aboriginal and Torres Strait Islander

art, draft and design should be re-classified 'Australian art', with Class A status applied as appropriate for maximum protection. The *Position Paper* notes that this reclassification will enable the spiritual significance of works to be better assessed.¹⁴

28. The Law Council notes that this is a policy matter for the Commonwealth, but that Aboriginal and Torres Strait Islander people may regard the proposed reclassification of Aboriginal and Torres Strait Islander art as 'Australian art' as a sensitive issue warranting detailed consultation and negotiation.

Recommendation

29. The Law Council recommends that the Review consult further with Aboriginal and Torres Strait Islander communities about the proposal to reclassify Aboriginal and Torres Strait Islander art as 'Australian art'.

Key Issue Two

Offence provisions

Reversal of onus of proof

30. In relation to offences for unlawful imports, the *Position Paper* recommends that the onus of proof be on the importer to demonstrate that the object has been legally exported from its country of origin, or was not a protected object of the foreign country.¹⁵ The *Position Paper* does not specify whether it is intended that a legal or evidentiary burden of proof placed on a defendant. A reversal of the onus of proof may offend the rule of law and the presumption of innocence. The Law Council's Policy Statement on Rule of Law Principles provides that:

The state should be required to prove, beyond reasonable doubt, every element of a criminal offence, particularly any element of the offence which is central to the question of culpability for the offence. Only where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, should the defendant bear the onus of establishing that matter. Even then the defendant should ordinarily bear an evidential, as opposed to a legal burden.

31. It is not clear that the matters required to be proven in relation to the offences are peculiarly within the defendant's knowledge and not available to the prosecution. The fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant.¹⁶

¹⁴ Simpson AM, above n 1, 19.

¹⁵ *ibid*, 93 [22.2]

¹⁶ *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, 50.

32. The Scrutiny of Bills Committee will usually comment adversely on a Bill that places the burden of proof on a defendant.¹⁷
33. In addition to reversing the onus of proof for offences relating to unlawful imports, the Paper also recommends reducing the fault element from recklessness to something less (potentially negligence).¹⁸ This may raise particular concerns especially when combined with the reverse onus proposal.

Preparatory offences

34. The *Position Paper* states that consideration is being given as to whether the offences of ‘attempted export’ should be replaced with an offence of committing acts preparatory to export (for example entering into a contract for export).¹⁹
35. Offences that attempt to capture preparatory conduct at a very early stage generally challenge conventional principles of criminal law. Preparatory and preliminary offences give rise to broad prosecutorial and enforcement discretion and may offend rule of law principles. The Law Council’s *Policy Statement on Rule of Law Principles* requires, for example, that offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct should or should not be subject to sanction: principle 1(b).
36. These types of offences, which may seek to impose criminal sanctions for actions performed before a person has formed a definite plan to commit a specific criminal act, represent a departure from common forms of criminal liability. As then Chief Justice Spigelman observed in *Lodhi*:

*Preparatory acts are not often made into criminal offences.*²⁰

37. The extension of criminal responsibility to cover preparatory acts requires prosecutorial and law enforcement authorities to exercise a considerable degree of discretion when determining whether an otherwise innocuous act should be subject to charge and prosecution.

Foreign jurisdiction

38. In Australia the Commonwealth Parliament has the authority to enact extraterritorial laws under its external affairs power²¹ The Paper does not appear to indicate the type of extraterritorial operation sought to be applied to the proposed offences relating to stolen and looted property.²²

¹⁷ See the Senate Standing Committee for the Scrutiny of Bills’ comments at para 2.56 in *The Work of the Committee during the 41st Parliament November 2004–October 2007*.

¹⁸ Simpson AM, above n 1, 91 [22].

¹⁹ *ibid*, 91 [22.1].

²⁰ *Lodhi v The Queen* [2006] NSWCCA 121 at [66], cited with approval by Bongiorno JA in *R v Kent* [2009] VSC 375.

²¹ Australian Constitution, s 51 (xxix). See also *XYZ v Commonwealth* (2006) 227 CLR 532.

²² Simpson AM, above n 1, 94 [22.3].

39. Difficulties may be faced in the detection and enforcement of these proposed offences. As noted in the Attorney-General's Department's *Guide to framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011):

*Caution should be exercised before extending geographical jurisdiction beyond the standard articulated in section 14.1. It will often be more appropriate to leave the laws of a foreign jurisdiction to apply to matters falling outside standard jurisdiction as it is unrealistic to expect that Australian enforcement officials could engage in enforcement action overseas.*²³

40. It is also important to avoid giving the offence wider operation than is necessary or intended in case it would result in unintended consequences.

Seizure upon suspicion

41. As noted in the *Guide*, seizure should only be allowed under a warrant, even if entry and search without warrant are permitted.²⁴

42. The Paper notes that the current enforcement provisions, including those covering seizure and search warrants, fail to provide a coherent range of tools to assist law enforcement officers to protect and prevent the illicit trade in cultural material. It goes on to state that it is important that Inspectors have the ability to seize on suspicion so that material can be appropriately safeguarded until its status can be ascertained.

43. As noted in the *Guide*:

*Seizure is a significant coercive power and the Commonwealth has consistently taken the approach that it should require authorisation under a search warrant.... There is a very limited range of circumstances where it may be appropriate to allow officers the ability to seize pending issue of warrant. The Scrutiny of Bills Committee regards that entry onto premises without consent may be reasonable in situations of emergency, serious danger to public health, or where national security is involved.⁹⁴ Seizure in such circumstances would only be appropriate where reasonably necessary to resolve a situation of immediate emergency.*²⁵

44. The Law Council also notes there is a question of the compatibility with the international human right to freedom of religion, in relation to statutory powers to compel testimony, whether under the *Royal Commissions Act 1902* (Cth) (see *Aboriginal Legal Rights Movement Inc v South Australia* (1995) 64 SASR 511), *Evidence Act 1995* (Cth) or (potentially) more specialised legislation such as the *Australian Crime Commission Act 2002* (Cth). None of these Acts provides any defence for persons refusing to provide testimony on religious grounds (whether that be testimony relating to sacred beliefs of Aboriginal

²³ Australian Government, Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), 36.

²⁴ *Ibid*, 82.

²⁵ *Ibid*, 83

peoples, testimony regarding confessions made to religious authorities etc), raising a potential conflict.

Recommendation:

45. The Law Council recommends that:

- the Attorney-General's Department provide further detail on the proposed changes to the offence and enforcement provisions of the Act;
- further consultation on the proposed changes to the offence and enforcement provisions should be undertaken prior to the introduction of a Bill on this matter; and
- the offence and enforcement provisions should accord with fundamental principles of the criminal law and the rule of law.

Key Issue Three

Constitutional/intergovernmental issues

46. Issues of foreign jurisdiction and the potential extra-territorial application of the legislation are noted above. The *Position Paper* proposes that the new legislation recognise assessments of significance made 'by other Commonwealth bodies and state and territory governments', with a tentative proposal to recognise lists managed by local governments. It proposes that objects assessed as significant to local regions become 'Declared Australian Protected Objects'.²⁶ The policy reasons given include cost effectiveness and efficiency, community expectations and Constitutional limitations.

47. The *Position Paper* suggests that 'the Commonwealth does not have the Constitutional power to prevent the movement of cultural material within Australia' but it does have the exclusive power to control its export. Inter-governmental co-operation is recommended.²⁷ It is a policy matter for the Commonwealth as to which Constitutional powers it wishes to exercise, but from a legal point of view this statement is very broad and contestable. Indigenous stakeholders have been urging the Commonwealth to enact wide-ranging legislation to protect ICIP.²⁸

48. In 1996 in her Honour's review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) Justice Elizabeth Evatt noted that the Commonwealth had a range of Constitutional powers

²⁶ Simpson AM, above n 1, 33–34.

²⁷ *ibid*, 34.

²⁸ National Congress of Australia's First Peoples, [The Call for a National Indigenous Cultural Authority](#), 2013. including Terri Janke and Michael Frankel and Company, [Our Culture: Our Future, report on Australian indigenous cultural and intellectual property rights](#), report commissioned by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission (1998).

available to it for the discharge of its 'significant national responsibility' to protect Aboriginal heritage. These included the power to make special laws with respect to people of any race; to acquire property on just terms; to make laws with respect to copyright, patents of inventions and designs, and trade marks; and to overcome restrictions on the free exercise of any religion.²⁹ Additional Constitutional powers include those concerning trade and commerce, corporations, territories, and external affairs (relying on both trade and treaty obligations). The High Court has upheld various Commonwealth laws that operate on matters within states and territories, and on cross-border trade.³⁰

49. In relation to the recognition of state, territory and local government assessments, if the Commonwealth takes the view that it does not wish to legislate to cover the field (as appears likely), the Law Council queries whether the approach the Commonwealth is implementing in the environment portfolio, to accredit state and territory legislation, should be considered in this context. In 2014 the Commonwealth Environment Department released Standards for Accreditation of Environmental Approvals under the *Environment Protection and Biodiversity Conservation Act 1999*. The Standards set out the

Environmental and systems outcomes to be achieved through bilateral agreements with states and territories

*Standards for accreditation which reflect the specific accreditation requirements of the EPBC Act, and requirements of Commonwealth law that will be important for the Commonwealth to be satisfied that high environmental standards will be maintained.*³¹

50. If state, territory and local governments' assessment law and policies are to be recognised by the Commonwealth, this should only occur after the legislation and policies in place in other jurisdictions have been assessed for compliance with international human rights standards, and the best practice principles advocated by expert agencies and Aboriginal and Torres Strait Islander stakeholders, noted above.
51. The Law Council also queries whether sufficient emphasis has been given in the *Position Paper* to the range and type of conditions that should be attached to Temporary Export Permits and General Permits.³² Again in the Environment portfolio, consultation is occurring on an *Outcomes-based Conditions Policy* and an *Outcomes-based Conditions Guidance* document. The policy explains what outcomes-based conditions are, and what kinds of impacts are within the range of

²⁹ The Hon Elizabeth Evatt, above n 6 [3.2].

³⁰ See for example: *Spencer v Commonwealth of Australia* [2015] FCA 754 (regulation of native vegetation clearing not acquisition of property); *New South Wales v Commonwealth* [2006] HCA 52 (the WorkChoices case); *Commonwealth v Tasmania* ("Tasmanian Dam case") [1983] HCA 21; *Australian National Airways Pty Ltd v Commonwealth (No 1)* ("Airlines Nationalisation case") [1945] HCA 41.

³¹ Australian Government, Environment Department, [Standards for Accreditation of Environmental Approvals under the *Environment Protection and Biodiversity Conservation Act 1999*](#), 2014.

³² Simpson AM, above n 1, 48, 57.

acceptability. The main policy rationale is to enable the Department to focus on achieving and monitoring outcomes.³³

52. The Law Council also notes that the proposed new legislation should interact in an optimal way with any provisions of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and *Environment and Biodiversity Conservation Act 1999* (Cth) that may also apply to movable objects of Aboriginal or Torres Strait Islander heritage significance.
53. Similarly, the proposed legislation should interact with state and territory Aboriginal heritage legislation in a sensitive way and with reference to protections within such legislation. In particular, the Federal Minister should be required to consult with traditional owners or other appropriate Aboriginal bodies within the states and territories before exercising a power which would override provisions of a state or territory Aboriginal Heritage Act.

Recommendations:

54. The Law Council recommends that the *Position Paper* be amended to recognise the breadth of the Constitutional powers available to the Commonwealth to protect Aboriginal and Torres Strait Islander heritage, including movable cultural heritage.
55. The proposed legislation should interact with state and territory Aboriginal heritage legislation in a sensitive way, with reference both to the protections within such legislation and in relation to consulting with traditional owners or other appropriate Aboriginal or Torres Strait Islander bodies within the states and territories before exercising a power which would override provisions of a state or territory Aboriginal Heritage Act.

³³ Environment Department, [Draft Outcomes-based conditions policy and guidance](#), 2015.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents its constituent bodies consisting of 16 Australian State and Territory law societies and bar associations and the Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.