

31 JULY 2020

SUBMISSION TO THE JOINT STANDING COMMITTEE ON NORTHERN AUSTRALIA

Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

Beatty Legal is a specialist planning, environmental and heritage law firm based in Sydney.

We welcome the opportunity to make this submission to the Joint Standing Committee.

A. Background to this submission

This submission is informed by, amongst other things:

- a) our role in the ***Rocla case***¹, Australia's leading decision on the application of the ***Burra Charter***² in the protection of cultural heritage landscapes; and
- b) our ongoing work with the Gomeroi Traditional Custodians in their efforts to protect significant and sacred areas in and near the Liverpool Plains in northern NSW that will be destroyed or desecrated by the proposed Shenhua Watermark open cut coal mine.

In 2015 and 2017 the Gomeroi Traditional Custodians lodged applications with the Federal Minister for the Environment under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSHP Act)* for protection of these areas of particular Aboriginal cultural heritage significance.

In late June and early July last year the Minister determined to refuse the application for protection. In her Statement of Reasons the Minister acknowledged the areas ***“retain immeasurable cultural values and connection to Country for the Applicants and the Gomeroi people as a whole ... [and] are of particular significance to Aboriginal people”***.

However, the Minister nonetheless declined to grant protection on the grounds that the “expected social and economic benefits of the mine to the **local** community” (as estimated by the mine owner in 2013) outweighed the destruction of these areas of “immeasurable cultural values”. We note that the Minister accepted that there was doubt as to the potential benefits of the mine to the State and national economies, these benefits were likely overstated, and that she could not support a conclusion that the economic benefits to the broader regional,

¹ *Darlingjungle Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor; Australian Walkabout Wildlife Park Pty Limited (ACN 115 219 791) as Trustee for the Gerald and Catherine Barnard Family Trust v Minister for Planning and Infrastructure & Anor* [2015] NSWLEC 1465

² <https://australia.icomos.org/wp-content/uploads/The-Burra-Charter-2013-Adopted-31.10.2013.pdf>



State and national economies from the mine were to be preferred over the impacts to the Indigenous community from the loss of their cultural heritage.

A recent Federal Court challenge to the Minister's decision to decline the applications for protection³ has failed. Tellingly, it appears that the Court has found that the *ATSIHP Act* will oblige any applicant for protection, even one who satisfies all the criteria (as was the case here), to also somehow quantify the financial value of that which is sought to be protected against the "social and economic impacts" to the wider community of a protective declaration⁴.

In our view, this test (assuming it remains in place) establishes a threshold which few, if any, applicants could ever satisfy. It further undermines the objectives and effectiveness of the Commonwealth's only indigenous heritage "safety net".

Had this test been applied to an application made under the *ATSIHP Act* by the Puutu Kuntj Kurrama people and the Pinikura people (PKKP People) in the case now under consideration by this Committee, we doubt that a protective order would have been made.

B. Terms of Reference

This submission addresses the following three (3) terms of reference:

- (g) the effectiveness and adequacy of State and Federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;
- (h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites; and
- (i) opportunities to improve indigenous heritage protection through the *Environment Protection and Biodiversity Conservation Act 1999*.

C. Observations

At the heart of the experiences of the PKKP People and the Gomeroi Traditional Custodians is the failure of State and Territory laws to properly:

- recognise and give weight to the views of Aboriginal traditional owners in determining cultural heritage value;
- understand and account for the difficulties many Aboriginal people have in documenting heritage values in the manner required by our legal system within the timeframe for project approvals; and
- accommodate any mechanism to allow for the receipt and consideration of new information on cultural heritage matters not available to decision makers after an approval is given to destroy cultural heritage items.

³ *Talbott v Minister for the Environment* 2020 FCA 1042 per Abraham (decided 22 July 2020)

⁴ *Ibid* at [95]



We **attach** an extract (Chapter 4) from the 1996 Inquiry Report of the Hon Elizabeth Evatt AC into the ATSIHP Act (the **Evatt Inquiry**). It succinctly summarises some of the cultural hurdles faced by Aboriginal people in seeking protection for heritage.

The hurdles faced by Aboriginal people in communicating heritage values to decision makers include:

- issues associated with customary law restrictions on cultural information and knowledge including the intertwined nature of secrecy and significance, gender restrictions and the coexistence of multiple layers and levels of knowledge;
- difficulties in converting cultural information into a western framework for assessment of heritage such as documenting in a written form an oral culture and tradition, literacy and familiarity with the written form, seeking to capture in writing what is essentially a spiritual relationship,⁵ documenting and mapping intangible values, defining spatial boundaries;⁶
- resources imbalances between those seeking to protect heritage and proponents of competing land uses, i.e. financial constraints, access to experts, negotiating power;
- gaining access to land for the purpose of documenting and mapping cultural heritage. If a landowner refuses to provide access to Aboriginal people or their experts appropriate documentation of heritage values is denied.⁷ This is particularly an issue for Aboriginal heritage where the articulation of cultural values requires being on country and walking through country in a culturally appropriate manner;
- time pressures and the difficulties in obtaining information on secret and sacred values at the time when destruction is proposed; and
- a system which places responsibility on project proponents to fund and carry out heritage assessments.

⁵ *"the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship ... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole". It is a relationship which sometimes is spoken of as having to care for, and being able to 'speak for', country"*

Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167.

Michael Dodson: *"Everything about Aboriginal society is inextricably interwoven with, and connected to, the land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence. ... Removed from our lands, we are literally removed from ourselves."*

[Dodson, "Land Rights and Social Justice", in Yunupingu (ed), *Our Land Is Our Life: Land Rights – Past, Present and Future* (1997) 39 at 41]

⁶ *"For Aboriginal people, the significance of individual landscape features is derived from their interrelatedness within the cultural landscape. This means features cannot be assessed in isolation and any assessment must consider the feature and its associations in a holistic manner"* Dept Environment, Climate Change and Water 2009 fact sheet

⁷ For example, the Gomeri Traditional Custodians were denied access to their traditional lands to map areas of cultural heritage value and then suffered the indignity of being told by the land owner's consultants that their information lacked credibility because it was not supported by formal (GPS) mapping.



State based laws and the *Environment Protection and Biodiversity Conservation Act 1999*⁸ (**EPBC Act**) are largely just registration systems which require culturally significant sites to be assessed, documented and registered before any competing land use is identified. This type of system can only provide effective protection for cultural heritage if there are virtually unlimited resources (funding and expertise), trust and time.⁹ They are generally ineffective in protecting areas which have not been fully assessed and documented before a project approval is sought.

D. The importance of the ATSIHP Act

The purposes of the Act “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”.¹⁰

The Act empowers the Federal Minister to issue a declaration (either an emergency declaration under s9 or a permanent declaration under s10) to protect a specified area (essentially in the form of an injunction prohibiting certain activities). It is intended for use as a last resort to protect Aboriginal heritage where State and Territories laws are ineffective or there is an unwillingness to enforce them. An application for protection under s10 must meet three criteria, the first two of which are established in a s10(1)(c) report prepared by a Ministerially appointed Reporter:

- the area must be of particular significance to Aboriginals in accordance with Aboriginal tradition;
- the area must be under threat of injury or desecration; and
- State or Territory law does not make effective provision for protection of the area.

In his Second Reading Speech, the then Minister for Aboriginal Affairs, Minister Holding envisaged the following for the Act:

*This will be beneficial legislation, as other legislation remedying social disadvantage has been. **Aboriginals and Islanders will be secure in the knowledge that areas and objects of particular significance to them can be preserved and protected.** Mr Justice Murphy recently observed as part of the High Court's judgment in the Tasmanian dams case:*

The history of the Aboriginal people of Australia since European settlement, is that they have been the subject of unprovoked aggression, conquest, pillage, rape, brutalization, attempted genocide and systematic and unsystematic destruction of their culture.

⁸ In relation to the EPBC Act we note that despite its objects (in section 3 of the Act) to recognise and promote the role of indigenous people in the protection and management of the environment and its biodiversity, the Act has no statutory measures to achieve this aim.

⁹ By way of example, the listing of the Calga Cultural Heritage Landscape as an Aboriginal Place under the NSW NPW Act was a process that took several years, cost in the order of a hundred thousand dollars and was the culmination of lengthy, contested legal proceedings. The World Heritage listing of the Budj Bim Landscape was the culmination of a decades long process.

¹⁰ ATSIHP Act s4



This Bill is an exercise of a Commonwealth constitutional power aimed at preserving what has survived that process. ... But the benefit will not be confined to those local Aboriginals and Islanders whose areas and objects receive the direct protection of the law. In a wider and very real sense, the benefit will be felt by the whole community. The preservation and protection of this ancient and significant culture from the destructive processes which have been operating at different rates across this country can only enrich the heritage of all Australians.” (emphasis added)

Unlike the systems of protection founded on prior identification and registration of significant Aboriginal places (such as those under State and Territory laws and the EPBC Act) the ATSIHP Act is intended to provide a mechanism to secure protection of particularly significant areas and objects informed directly by the Aboriginal experience. For instance:

- It allows for oral applications for protection.
- Protection is provided to “areas” rather than “sites”. As stated in the Second Reading Speech: *“The use of the word ‘area’ rather than site will allow flexibility in recognising what Aboriginals believe to be significant. It will save a narrow and artificial approach being taken to sites, for example, to discrete geological formations. Where a site is particularly secret and sacred there may be an area immediately adjacent to it where people ought not to go. Transgression of that space may be as offensive as entry to the site. It may also be thought to place people going there in physical danger. This Bill is worded to enable those situations to be accommodated”*.¹¹
- The Act places Aboriginal people at the centre of the assessment. The Act is structured in such a way that each of the element of particular significance (i.e. to whom the area is significant, the nature of the significance, and its degree) must be considered from the perspective understanding and experience of Aboriginal people.¹²
- It does not lock Aboriginal culture into a concept of tradition that predates colonisation. *“The benefit of the Act is not limited to people living traditionally. Even where tradition has been diluted as a result of dispossession and displacement, areas and sites may retain their special significance for Aboriginal people. Their obligation to protect the area remains, and its significance may even be enhanced, where the site is one of the few remaining links with culture. Nor does a site necessarily lose its significance to Aboriginal people if it undergoes change or damage. The question of significance can be resolved only by reference to Aboriginal people themselves, to their understanding of their “traditions, observances, customs or beliefs”*.¹³
- It provides for a subjective test as the role of the Reporter (advising the Minister) is to report on the evidence that touches on the degree and intensity of belief and feeling that exists in relation to the area.

¹¹ Second Reading Speech 9 May 1984

¹² Evatt Inquiry paragraph 8.3

¹³ Evatt Inquiry, paragraph 8.5



E. The ATSIHP Act is an acknowledged failure

However, as Justice Evatt observed in her 1996 inquiry report:

*“These modest achievements of the Act have to be weighed against an ever-growing number of problems and difficulties, the effect of which has been to prevent the objectives of the Act from being realized. The problems concern the procedural framework of the Act, the relationship with State and Territory laws and procedures and **the general failure in the eyes of Aboriginal people to be an effective means of protecting cultural heritage.**”¹⁴ [emphasis added]*

The effectiveness of the ATSIHP Act was assessed in the Australian State of the Environment Report (SoE) for 2011 and 2016.¹⁵

In 2011 the SoE stated:

“The ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects. Few declarations have been made: 93 per cent of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations. Also, Federal Court decisions overturned two of the five long term declarations that have been made for areas.”¹⁶ [emphasis added]

In 2016 the SoE provided the following update:

“The ATSIHP Act has done little to fulfil its intended purpose of protecting significant Aboriginal areas or objects. Between 2011 and 2016, 32 applications were received for emergency protection under s. 9 of the Act, 22 applications were received for long-term protection under s. 10 of the Act, and 7 applications were received for protection for objects under s. 12 of the Act. During the past 6 years, no declarations under ss. 9, 10 or 12 of the Act were made.”¹⁷ [emphasis added]

The failure of the ATSIHP Act in the eyes of Aboriginal people to provide effective protection for significant heritage is borne out by the experience of the Gomeroi Traditional Custodians. In their case, all of the relevant criteria under the Act were met, the particular significance of the area was established, as was the destructive effect of the mine and the failure of State law. Nevertheless the **“immeasurable cultural value”** of the area and the irreversible and complete nature of its destruction was outweighed by a project proponent’s estimation (in

¹⁴ Evatt Inquiry, paragraph 2.25

¹⁵ While information on the effectiveness of the Act since 2016 is not readily available we note that public notification of the appointment of a Reporter was notified in the Government Gazette in respect of 20 applications for protection under s10. Declarations were made in 2019 in respect of only two areas in NSW: one to extend the curtilage area around the “Butterfly Cave” (giving the NSW listed heritage site additional protection from aspects of an encroaching residential development) and the other to create a curtilage area around a sacred tree.

¹⁶ Australian Government Department of the Environment, Water, Heritage and the Arts. Indigenous heritage law reform discussion paper. Canberra: DEWHA, 2009, viewed 22 July 2011, www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/index.html.p4 as cited in the State of the Environment Report 2011 at p750

¹⁷ Mackay R (2016). Heritage: Planning. In: Australia state of the environment 2016, Australian Government Department of the Environment and Energy, Canberra, <https://soe.environment.gov.au/theme/heritage/topic/2016/planning>, DOI 10.4226/94/58b658bbe13a0



2013) of the potential benefits of the mine to the local economy. To our knowledge, this assertion was never independently tested. We also note that the mine was and is widely opposed by the local farming community.

If the relevant test under the ATSIHP Act is an economic one:

- Is it the case that an Aboriginal applicant must somehow quantify the financial value of that which is sought to be protected **and** the local, regional, state and national social and economic benefits and disbenefits of the proposal that will destroy the area for which protection is sought?
- What consideration is given under this test to the national public interest in the protection of Australia's cultural heritage?

The ATSIHP Act was, when enacted, envisaged to play a critical role in the protection of particularly significant areas of cultural heritage that fall through the cracks of State and Territory laws. However, unless it is applied and enforced in accordance with its objects it will remain a failure in the eyes of Aboriginal people and we as a nation will suffer as our ancient and shared culture is destroyed.

F. What is the solution to this problem?

We suggest that, apart from considering potential, limited moratoria on all projects which will destroy places of objects the subject of **undetermined ATSIHP Act** applications, this Committee should immediately explore:

- the publication of suitable guidelines for ATSIHP Act applicants on what information is required to assist the Minister in determining applications for protection as well as realistic timeframes for, and forms¹⁸ in which that information should be provided; and
- where information properly required by the Minister will be expensive or time consuming for applicants to procure, there should be, in appropriate cases, assistance provided to them to obtain access to land and to pay for suitable, independent experts such as archaeologists, land mapping specialists and forensic accountants. The proponents of projects with claimed social and economic benefits to the wider community but which also have the potential to destroy or desecrate places or objects which are *prima facie* worthy of protection under the *ATSIHP Act* should be the primary source of this support as directed by the Minister.

G. Discussing this submission

We would welcome an opportunity to address the Committee to expand upon the matters raised here.

¹⁸ Recognising that some applicants for protection may prefer to express themselves orally or, in cases of highly culturally sensitive material, to do so only to selected individuals or groups.

