SUBMISSION TO THE EPBC ACT REVIEW

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Victoria

Areas of interest

Heritage

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Victorian Aboriginal Heritage Council
Initial Submission to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*

Introduction

The Victorian Aboriginal Heritage Council (Council) welcomes the opportunity to make this submission to the Independent Review (the Review) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC). By way of context, Council is a statutory body corporate established under s 130 of the *Aboriginal Heritage Act 2006* (Vic.) (Victorian AHA). It comprises up to 11 Victorian Traditional Owners expert in Aboriginal Cultural Heritage matters who are appointed by the Victorian Minister for Aboriginal Affairs. Under the Victorian AHA Council has a broad range of statutory functions broadly designed to facilitate Victorian Traditional Owners' control of their cultural heritage. More specifically these functions include:

- the appointment, oversight and regulation of local Traditional Owner corporations as Registered Aboriginal Parties (RAPs) with the exclusive statutory ability to authorise interference with Aboriginal Cultural Heritage within the area of their appointment and to register exclusive commercial exploitation rights in relation to intangible Aboriginal cultural heritage;
- the management of Aboriginal Ancestral Remains and Secret or sacred Aboriginal Objects located in Victoria with the aim of repatriating this material to the communities of origin;
- advising the Victorian Minister for Aboriginal Affairs in relation to Aboriginal Cultural Heritage and promoting an awareness and understanding of the importance of Aboriginal Cultural Heritage to the broader Victorian community.

In light of the statutory expertise of Council this submission to the initial phase of the Review will focus on issues relating the management and protection of Indigenous Cultural Heritage (ICH) within the Commonwealth environmental legislation framework. As such the submission particularly addresses the Review's term of reference that requires it to consider "Indigenous people' knowledge and role in the management of the environment and heritage". However, the submission is also relevant to other terms of reference that require consideration of:

- international obligations;
- previous reviews and publications;

- other legislation relevant to the operation of the EPBC; and,
- the views of Indigenous peoples.

In summary the submission proposes that consideration should be given to the incorporation of protection of ICH as a matter of national "environmental" significance under the EPBC and that the Review should sponsor a broad range of consultations with Traditional Owners and their organisations to explore the detail and support for this proposal. In putting forward this proposal Council is not suggesting that it will necessarily have unanimous support from all Traditional Owners or their organisations. It does however have broad support and, as discussed below, has been the subject of consideration for many years. It is certainly a matter the Review should turn its attention to.

The primary focus of this submission stated, Council would also like to note that at later stages of the Review it intends to prepare a broader submission that addresses the role of Traditional Owners' in the management and protection of those areas that constitute the existing matters of national environmental significance. However, Council intends to present its submissions on these matters subsequent to the release of the substantive Review Draft Report.

Current Situation and Background

Legislative responsibility for the management and protection of Indigenous Cultural Heritage (ICH) in Australia is currently divided between the states and territories and the Commonwealth and contained within over a dozen pieces of legislation.[1] In general, primary legislative responsibility for tangible ICH management and protection lies in state and territory legislation.[2] However, there are four relevant pieces of Commonwealth legislation. The *Movable Cultural Heritage Act 1986* (Cth) deals (inter alia) with non-land based (movable) tangible ICH. The *Copyright Act 1968* (Cth) deals (again inter-alia) with some aspects of intangible ICH. The EPBC addresses tangible manifestations of ICH where these are world heritage properties or national heritage places. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSHIPA) applies to tangible movable and immovable ICH which is the subject of a Ministerial direction under that Act. As such the greatest potential for overlap between a state or territory ICH legislative regime and Commonwealth legislation lies with ATSIHPA. This fact noted, it must also be accepted that the extension of the EPBC to

[1] The state and territory legislation is: *Northern Territory Aboriginal Sacred Sites Act 1989* (NT); *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 1972* (SA); *Aboriginal Relics Act 1975* (Tas); *Aboriginal Heritage Act 2006* (Vic); *Aboriginal Heritage Act 1972* (WA). In NSW and the ACT the *National Parks and Wildlife Act 1974* (NSW) and the *Heritage Act 2004* (ACT) contain provisions that deal specifically with Aboriginal cultural heritage management. The Commonwealth legislation is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); the *Protection of Movable Cultural Heritage Act 1986* (Cth); the *Copyright Act 1968* (Cth.), the *Native Title Act 1993* (Cth) and the EPBC.

[2] The Victorian AHA is the only state or territory legislation with a regime directly applicable to intangible ICH.

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address heritage issues particularly through the 2003 Amendments to the EPBC has meant in this area also lies the potential for overlap with state or territory ICH legislative regimes.

The prospect of overlap, or more specifically conflict, between the Commonwealth legislative regime represented by ATSHIPA and state or territory ICH legislation was specifically contemplated when ATSHIPA was first enacted. From the outset it was intended to be legislation of "last resort" that is deployed only when relevant state and territory legislation has not been effective in addressing Indigenous concerns regarding the injury or desecration of an Aboriginal object or area of significance.[3] The uncomfortable relationship between a Commonwealth ICH legislative regime and state and territory ICH legislative regimes evident by ATSIPA's characterization as legislation of "last resort" was apparent even before the passage of ATSHIPA in 1984. As Neate also notes,[4] a 1983 Commonwealth Government discussion paper that considered the development of Commonwealth ICH legislation posed the following questions:

- Should there be separate legislation dealing with the protection of Aboriginal sites of significance (sacred, archaeological, historical) and objects relating to land?
- What Commonwealth legislation would be most appropriate:
    - (a) Legislation which includes or refers to legislation in the States and Territories (both existing and proposed) and adds to that legislation; or
    - (b) Legislation which 'covers the field' by being the only law on land rights for all of Australia?
- If (a) how would the Commonwealth legislation relate to existing and proposed State and Territory legislation?

Significantly, nearly forty years later these questions remain largely unresolved.

The awkward position of ATSHIPA as overlapping "last resort" legislation is manifested in the statistics around its application. The *State of the Environment Report 2016* noted:

> 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.[5]

Looking further back, the Productivity Commission noted that between 2007 and 2013 there had been 130 applications under ss 9, 10 and 12 of ATSIHPA but that (at that time) no

[3] Graeme Neate, "Power, Policy, Politics and Persuasion – Protecting Aboriginal Heritage under Federal Laws" (1989) *Environment and Planning Law Journal,* 214 – 248 at, 223 citing *Hansard,* House of Representatives 9 May 1984 p 2129; Senate 6 June 1984, p 2587.

[4] *Ibid* at 220 -222

[5] Richard Mackay, *Australia State of the Environment 2016 – Heritage*, Commonwealth of Australia, Canberra 2017, 84.

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declarations had been made (although 25 applications were under consideration).[6] Finally, Neate notes that between June 1984 and July 1988 from 57 applications received only four had been approved.[7] Of course it should also be noted, as the Productivity Commission does, that measuring the number of successful applications under ATSIHPA may not be a legitimate measure of its effectiveness. Its ability to impact upon the behaviour of proponents (and State and Territory governments) may be a more accurate measure, although not capable of quantification.[8]

The EPBC, Historical Proposals, and International Impetus for Reform of ATSIHPA

Given this record of operation it is not surprising that there have been frequent suggestions for reform of ATSIHPA. The possibility of incorporating ICH as a matter of national environmental significance within the EPBC has been one frequent proposal. Of course, it was in 2003 that the *Australian Heritage Commission Act 1975* (Cth) (AHCA) was repealed[9] and a heritage (including Indigenous heritage) protection and management system introduced into the EPBC[10] with heritage matters being introduced as a matter of national environmental significance under that Act. The potential for these provisions to operate to protect ICH was demonstrated in *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries (etc.)* (No 2).[11]

The notion that the EPBC is the appropriate legislative vehicle for the protection of ICH is not novel. The first independent ten-year review of the EPBC was forthright in recommending incorporation of ATSIHPA into the EPBC.[12] This view was supported in the submission of Indigenous Advisory Committee (IAC) established under the EPBC[13] to the Hawke Review

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[6] Productivity Commission, (2013), *Report No 65 – Mineral and Energy Resource Exploration,* Commonwealth Government, Canberra, September 2013, 165. The latter figure from the State of Environment Report 2016 suggests none of the applications under consideration in 2013 were approved.

[7] Graeme Neate, "Power, Policy, Politics and Persuasion – Protecting Aboriginal Heritage under Federal Laws" (1989) *Environment and Planning Law Journal,* 214 – 248 at 246.

[8] Productivity Commission, 2013, above n 6 at 165.

[9] *Australian Heritage Council (Consequential and Transitional Provisions) Act 2003* (Cth.).

[10] *Environment and Heritage Legislation Amendment Act (No. 1) 2003 (Cth.). A component of this revised regime was the passage of the Australian Heritage Council Act 2003 (Cth.) which gives the Council functions under the EPBC.*

[11] [2016] FCA 168. This is so despite the subsequent overturning of that decision in appeal in *Secretary Department of Primary Industries (etc.) v Tasmanian Aboriginal Centre* [2016] FCAFC 129.

[12] Hawke et al, 2009, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Commonwealth Government, Canberra 2009. ("Hawke Review"), Recommendation 18.22 p 294.

[13] IAC submission to the Hawke Review as reported in Susan Shearing, 2012, "Reforming Australia's National Heritage Law Framework", *Macquarie Journal of International and Comparative Environmental Law*, 2012, Vol 8(1), 81.

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although the view is certainly not without contradictors.[14] Short of wholesale incorporation into the EPBC there have been frequent calls for significant reform of ATSIHPA.

In addition to the Hawke Review, the views of the IAC and the Productivity Commission noted above, there are also the proposals contained in the: [Evatt] *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*[15], and the August 2009 Departmental discussion paper: *Indigenous Heritage Law Reform possible reforms to the legislative arrangements for protecting traditional areas and objects.*[16] Most recently and notably are the views of the Commonwealth Government which proposed consideration of significant reform of ATSIHPA in the *Our North Our Future: White Paper on Developing North Australia.*[17]

Significant also is the fact that in the nearly forty years since the commencement of ATSHIPA international legal norms relevant to ICH have developed to a significant extent. This development suggests that, while in 1983 it may have been acceptable for the Commonwealth to limit itself to "last resort" ICH legislation, the expectations of the international community with respect to the obligations of national governments towards the facilitation of Traditional Owner management and protection of ICH have developed considerably in the meantime.

The provisions of the *UN Declaration of the Rights of Indigenous Peoples*[18] (UNDRIP) are of course prominent amongst this development but so too is the International Labor Organisation's "*Indigenous and Tribal Peoples Convention (No. 169)*";[19] the developments in the application of the *World Heritage Convention Concerning the Protection of World Cultural and Natural Heritage*[20] to ICH,[21] the *Convention of Biological Diversity*,[22] the *2003 UNESCO Convention for the Safeguarding of the Intangible Heritage*[23] and other developments in international law in the area of intangible heritage[24] and of movable heritage.[25] In addition to the development of these international instruments, is the acceptance of the standards arising

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[14] See for example, Productivity Commission (2013) above n 6, p 167-168.
[15] Report by the Hon Elizabeth Evatt AC, Commonwealth of Australia, August 1996.
[16] Commonwealth Government, Canberra 2009.
[17] Commonwealth Government, Canberra, 2015, 79.
[18] A/res/61/295 Ann. 1 (Sept 13, 2007).
[19] *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries* (No. 169), 72 ILO Official Bulletin 59, concluded 27 June 1989 (entered into force September 5 1991). ("Convention 169").
[20] UNESCO 1972.
[21] As to which see Alexandra Xanthaki, "International Instruments on Cultural Heritage: Tales of Fragmentation", Chapter in Xanthaki, Valkonen Heinamaki and Nuorgam (Eds.) *Indigenous Peoples' Cultural Heritage: Rights, Debates and Challenges*, Brill 2017, 1 – 19.
[22] *Convention on Biological Diversity* of 5 June 1992 (*1760 U.N.T.S. 69*).
[23] *2003 UNESCO Convention for the Safeguarding of the Intangible Heritage* Opened for signature 17 October 2003, 2368 UNTS 3 (entered into force on 20 April 2006)
[24] Such as the 1996 *WIPO Performances and Phonograms Treaty* signed 20 December 1996, TRT/WPPT/001 (entered into force (20 May 2002) arts 5–10.
[25] For example, the *UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects 1995* Opened for signature 24 June 1995, 34 ILM 1322 (1995) (entered into force 1 July 1998).

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from them by the international corporate community,[26] in particular by international resource companies[27] that often, through their operations, have a significant interaction with ICH issues.

In light of this background, it is both necessary and appropriate that the current Review provide a further forum for consideration of the various proposals for the reform of Commonwealth ICH legislation and its relationship with the EPBC.

ICH in Commonwealth Environment and Heritage Legislation

A necessary threshold question is, even accepting the need for reform of ATSHIPA, "should ICH be incorporated within the EPBC?" As outlined above, there have been mixed views on this issue. Even within the Traditional Owner community there are some who advocate that the best approach is to reform ATSHIPA as a continuing separate piece of legislation. Similarly, the Productivity Commission in 2013 responding to the suggestion of incorporation of ATSIHPA into the EPBC that had been put by the Minerals Council of Australia stated:

> The Commission views Indigenous heritage and environmental protection as separate issues. Given that the ATSIHP Act was designed as a short-term measure two decades ago, to operate where Indigenous heritage protection by state or territory jurisdictions has failed, a preferred interim solution would be to introduce state and territory accreditation into the ATSIHP Act.

By contrast the Hawke Review at paragraph 18.22 stated:

> The [Department Discussion Paper[28]] *Reform of Indigenous heritage protection laws* also raises the possibility that any reforms to the ATSIHP Act could be incorporated into the proposed *Australian Environment Act*. This is in line with this Review's goal of placing all Commonwealth legislation relating to biodiversity conservation and heritage protection in one Act where possible. The outcomes of the proposed reforms to the Commonwealth Indigenous heritage protection laws should be considered in tandem with the outcomes of this Review, and its recommendation for the ATSIHP Act to be incorporated into the *Australian Environment Act*.

The Commonwealth Government in 2015 was somewhat more equivocal when it stated in the *Our North Our Future: White Paper on Developing North Australia*:[29]

> The Government will consult Indigenous Australians and industry on possible amendments to the Aboriginal and Torres Strait Islander Heritage Protection Act to reduce duplication in the heritage protection regimes across jurisdictions, while safeguarding decision making powers for traditional owners. This includes considering the establishment of a system to accredit

[26] For example, the 2011 United Nations Guiding Principles on Business and Human Rights (*Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, HRC, UNGOAR, 17th Sess, UN Doc A/HRC/17/31)

[27] International Council on Mining and Metals May 2013 Position Statement on *Indigenous Peoples and Mining:* https://www.icmm.com/website/publications/pdfs/social-and-economic-development/9520.pdf

[28] Cited above, n 15.

[29] At p 79.

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appropriate state and territory Indigenous heritage protection regimes, thus reducing the potential for regulatory duplication once Commonwealth requirements and standards are met.

Amongst this divergence of views Council submits that it **is** appropriate for consideration to be given for implementation of the Hawke Review recommendation for Commonwealth's ICH legislative regime to be incorporated into the primary Commonwealth environment legislation - which could be restyled as the *Australian Environment and Heritage Act.* This incorporation would be on the basis of the accreditation of appropriate state and territory ICH legislation. Council bases this submission on the following considerations:

- Incorporation of Commonwealth ICH legislation into broader Commonwealth environment legislation provides a comprehensive regulatory framework to the benefit of proponents (the "one stop shop").
- The beneficiaries of the "one stop shop" are not limited to proponents. By integrating ICH approvals with a broader approvals framework, ICH matters are not relegated (as they currently commonly are) to the 'last blockage' to a development proceeding with the consequent negative outcomes from this status.
- There is a well-established regulatory and administrative framework around the EPBC and incorporation would obviate the need to duplicate this for ICH.
- Contrary to the 2013 assertions of the Productivity Commission, the EPBC already addresses heritage matters. Accordingly, incorporation of ICH into the Commonwealth environment legislation would remedy the existing legislative bifurcation.
- Incorporation of the ICH matters into Commonwealth environment legislation would similarly overcome the existing Commonwealth legislative dichotomy between "heritage" and "environment" which is antithetical to Indigenous perspectives and knowledge.

Council's views and the rationale for them on this matter stated, Council would also like to emphasise that at this point in time its submission is merely that *consideration should be given* to a recommendation for the Commonwealth's ICH legislative regime to be incorporated into the primary Commonwealth environment legislation. Council's submission is phrased in this fashion not because of any equivocation in its own views. Rather Council is mindful of the fact that the processes of the Review to date, exacerbated by the restrictions imposed by current public health considerations, have meant that there has been inadequate opportunity for Traditional Owners nationally to meet, discuss, consider and articulate a view on this matter. In Council's view it is fundamental that any major amendment to the current Commonwealth ICH legislative regime should only occur subsequent to comprehensive consultation with, and the consent of, Australia's Traditional Owners.

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Possible Structure of ICH within Commonwealth Environment and Heritage Legislation

Guiding Principles

Accepting for current purposes that the Commonwealth's ICH legislative regime should be incorporated into the primary Commonwealth environment legislation the question that is raised is "what structure should be adopted to achieve this incorporation?" This section of Council's submission aims to postulate a structure to achieve this incorporation. Before doing so however it is important to identify the principles upon which such a structure should be based. For these purposes it is useful and important to have to regard to international legal norms to supply a broadly agreed basis from which to derive appropriate structures. It is here that UNDRIP adopts a particular importance.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly on 13 September 2007. The Commonwealth Government announced its support for the declaration in 2009. The UNDRIP does not impose new international legal obligations on states. Rather, it restates existing international legal obligations but framed in the specific context of Indigenous Peoples. The UNDRIP is widely understood by the world's Indigenous Peoples as articulating the minimum standards for the survival dignity, security and well-being of Indigenous Peoples worldwide. Acceptance of the UNDRIP obligations is increasingly a requirement of the processes of many multi-national agencies and organisations. The International Finance Corporation, the Equator Principles, the International Council of Mines and Metals and the UN Guiding Principles on Business and Human Rights are merely some examples of this general acceptance.

A number of the provisions of UNDRIP directly address issues associated with the enjoyment, management and protection of ICH. Articles 11, 12, 13 18, 31 and 40 are examples of this. Several other provisions of UNDRIP *indirectly* impact upon ICH. Provisions of UNDRIP that recognise the obligation to ensure the free prior and informed consent of affected Indigenous Peoples prior to the approval of any project that affects Indigenous Peoples' lands or the resources therein (particularly Article 32) are an example of this. The relevant provisions of UNDRIP are attached as an annexure to this statement.

Council believes as a foundational principle, Australia's Indigenous Peoples are entitled to expect that Commonwealth Indigenous cultural heritage legislation will uphold the international legal norms contained in the UNDRIP.

Postulated Structure

Council submits the following structure provides a model that broadly conforms to the principles contained in UNDRIP. The structure has two key elements.

First, in conformity with the existing EPBC structures, an action that had a significant impact upon ICH would require authorisation under the Act. That authorisation may be gained in one of three ways:

- through approval under an accredited state or territory ICH legislation;
- in jurisdictions without accredited state or territory legislative regimes, through approval subsequent to referral to existing Indigenous structures under the Commonwealth's *Native Title Act* (so as to ensure satisfaction of the requirements of the principles of self-determination); or,
- in jurisdictions without accredited state or territory legislative regimes and in areas where there is no relevant existing structure under the *Native Title Act* through approval by the Minister subsequent to referral to appropriate accountable Indigenous decision-making structures established for the purposes of the Act.

Second, effective national regulation that recognises the status of Traditional Owners, of items of movable cultural heritage, including Ancestral Remains, and the commercial exploitation of intangible ICH.

Accreditation of State and Territory ICH legislative regimes.

The EPBC currently provides for accreditation of state and territory legislation for the purposes of assessment and approval of controlled actions. While there are bilateral agreements with states and territories in place in relation to the *assessment* of controlled actions there are no such agreement in place with respect to the granting of approval for controlled actions. This point highlights the importance of ensuring that accreditation standards for state and territory legislation in the context of ICH satisfy the expectations arising from the international legal norms referred to above. Beyond the issue of principle, state and territory ICH legislation accreditation standards would need to address practical requirements in relation to matters such as Definitions; Indigenous Self-Determination; Process; Indigenous Ancestral Remains; Secret and Sacred ICH; and Intangible ICH.

Council understands that the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) is currently engaged in a project of developing "Best Practice Standards" for ICH Legislation. The outcomes of this project could usefully inform the further discussion of the content of the accreditation standards postulated in this submission. Council does not hold unrealistic expectations regarding the content of the proposed standards. For example, in Council's view, of current state and territory ICH legislation the Victorian AHA and the *Northern*

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Territory Aboriginal Sacred Sites Act would already manifest the elements necessary to approach a standard appropriate for accreditation.

Reference to Native Title Structures in Jurisdictions Without Accredited Regimes

The key to UNDRIP is the principle of self-determination. In the context of ICH this principle requires that the affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage.

Application of the UNDRIP is, in a practical sense, dependent upon the ability of the affected Indigenous Peoples to act collectively and independently. Thus, in the crucial UNDRIP Article 32, reference is made to Indigenous Peoples acting through “their own representative organisations”. Identification of the legitimate representative organisation of a particular Indigenous Peoples can, at times, be challenging. However, in the context of ICH in Australia, the rigorous processes associated with the appointment of Prescribed Bodies Corporate (PBCs) under the *Native Title Act 1993* ensure that such organisations, where they exist, satisfy the definition of “representative organisations” under UNDRIP.

Thus, where a PBC exists, ICH legislation should vest in that PBC control of the management of the ICH aspects of any proposal that will impact upon the ICH of the PBC’s native title holders. Where a PBC does not yet exist, it may be that there are Traditional Owner organisations that can be legitimately characterised as “representative organisations”. The Commonwealth ICH legislative regime should consider including mechanisms for the identification and appointment such organisations undertake this role. In areas where no PBC has been established a Native Title Representative Body may have authority to perform this role or, alternatively, to serve as the accountable Indigenous structure as discussed below.

Accountable Indigenous Structures in other circumstances

In jurisdictions were there is not an accredited state or territory ICH legislative regime and in the areas of those jurisdictions where there is no PBC under the *Native Title Act* a question arises as to how to ensure the necessary level of Traditional Owner control over decisions affecting their cultural heritage. Two potentially complementary approaches present themselves. The first, as alluded to above, is for the Commonwealth legislation to include a procedure for recognition of a Traditional Owner corporation for the purposes of ICH decision making either in its own right or through advice to the Minister. This approach is similar to that adopted under the Victorian AHA with respect to the appointment of Registered Aboriginal Parties that do not have PBC status. The second approach would be for the Ministerial appointment of a committee of relevant Traditional Owners to provide the necessary advice to the Minister. Of course, the challenge to be faced with both these approaches is in ensuring

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that whichever structure is utilized is in fact representative as far as possible of relevant Traditional Owners.

Movable and Intangible Indigenous Cultural Heritage

As outlined earlier, the Commonwealth currently plays some role in the management and protection of both movable and intangible Indigenous cultural heritage. This occurs through ATSHIPA, which can have application to Indigenous secret and sacred objects and Ancestral Remains, the *Protection of Movable Cultural Heritage Act 1986* (Cth) which regulates the international movement of cultural heritage and the *Copyright Act 1968* (Cth) which can provide some level of legal protection to some manifestations of intangible ICH.

Under the proposal outlined above, an accredited state or territory ICH legislative regime would provide effective protection for movable ICH within the jurisdiction. Constitutional considerations however impact upon the ability of such regimes to regulate the interstate and international transfer of movable ICH. This matter would require effective Commonwealth regulation. Similarly, Commonwealth regulation of these issues may be necessary in jurisdictions without an accredited ICH legislative regime.

Constitutional considerations arise also in the context of the management and protection of intangible ICH. The Victorian AHA makes some provision in relation to this issue. These provisions aside, the management and protection of intangible ICH is addressed only in part in the *Copyright Act 1968*. The scope and effectiveness of these provisions should be expanded to bring the Australian intangible ICH management and protection regime into conformity with contemporary international standards. The details of this expansion require exploration beyond the scope of this current submission.

Conclusion

In concluding this submission Council wants to reiterate its appreciation of the opportunity to explore the Indigenous cultural heritage issues raised by the Review's terms of reference. As it is hoped the submission has highlighted, these issues have long been recognised as requiring attention and in many respects, there has been a broad consensus around the reforms that are necessary. Council hopes the submission has crystalised that matters that need further consideration. In this vein Council also reiterates the earlier point that the processes of the Review to date, exacerbated by the restrictions imposed by current public health considerations, have meant that there has been inadequate opportunity for Traditional Owners nationally to meet, discuss, consider and articulate a view on this matter. In Council's view it is fundamental that any major amendment to the current Commonwealth ICH legislative regime

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should only occur subsequent to comprehensive consultation with and the consent of Australia's Traditional Owners. Council believes it is crucial that resources within the Review should be allocated to support this consultative process.

Council also wishes to reiterate that in light of its particular statutory expertise it has limited this submission to the initial phase of the Review to focus on issues relating the management and protection of Indigenous Cultural Heritage (ICH) within the Commonwealth environmental legislation framework. At later stages of the Review it intends to prepare a broader submission that addresses the role of Traditional Owners' role in the management and protection of those areas that constitute the existing matters of national environmental significance. However, Council intends to present its submissions on these matters subsequent to the release of the substantive Review Draft Report.

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