ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE (INTERIM PROTECTION) ACT 1984

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On 25th June, 1984 the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 received Royal assent and came into force. On 27th June 1984, by order of the Governor-General published in the Gazette dated 2nd July 1984, the administration of the Act was committed to the Minister for Aboriginal Affairs.

The commencement of the Act was almost unmarked by public comment. This was uncharacteristic. When the legislation was in draft form it aroused a great deal of public discussion and was the subject of pressing representations by the various groups whose interests it affected one way or another. Both the philosophy and the drafting of the Bill caused debate. As a result, various changes were made to the original draft Bill. Now that the Bill has become law it is time to look closely at the final product.

It is not the province of this paper to concern itself with the philosophical objectives of the Act. It will be concerned only to take the Act, being an important piece of recent legislation, and to analyse it with a view to assisting the knowledge and understanding of its provisions and to comment about its technical fitness to achieve its objectives.

An essential prelimary is to note that s.33 of the Act provides that, at the expiration of two years after its commencement, the Act will cease to be in force. To understand the future of the legislation it is necessary to refer to the Second Reading Speech in the Senate. There it was said:

> It is an interim measure which will be replaced by more comprehensive legislation dealing with Aboriginal land rights and heritage protection. As evidence of the Government's intention to legislate more comprehensively, the Bill before the Senate is expressed to have effect for no more than 2 years from the date of its commencement.

The starting point for a consideration of the Act must be s.4 which states the purposes of the Act. It is in these terms:

> 4. The purposes of this 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 Aborigine tradition.

This provision is an important one because it appears in legislation which, as we will see, leaves a great deal to depend upon the exercise by the Minister of his discretion. Insofar as the Minister would be guided in exercising his discretion by the purposes of the Act, s.4 gives to him an unequivocal direction. It is unequivocal in that the statement of purposes is unqualified by an obligation to balance any other inconsistent interests against the preservation objective. Once he is satisfied that a significant Aboriginal area or object is under threat of injury or desecration, if the Minister is to fulfill his duty to achieve the purposes of the Act, it would seem that he has no choice but to exercise his discretion in a way which would avoid that threat, regardless of the other competing interests giving rise to it.

There is a provision in the Act whereby, in relation to areas, the Minister will be informed about the effect of preservation and protection upon proprietary and pecuniary interests. It is doubtful whether the existence of that provision gives the Minister an option to prefer the threatening interests if, by doing so, he would water down his ability to fulfill the purposes of preserving and protecting significant Aboriginal areas and objects.

How, then, are the purposes of the Act to be fulfilled?

For those unfamiliar with the Act it might be useful, first, to give a description of its structure in very general terms without, at this stage, referring specifically to sections of the Act or attempting to describe comprehensively all its provisions.

Upon an application being made to him by an Aboriginal, or a group of Aboriginals, if the Minister is satisfied that an area or object is a significant Aboriginal area or object and is under threat of injury or desecration, he may make a declaration containing provisions for its preservation and protection. In the case of areas, where there is no urgency, the Minister first must obtain and consider a report. In cases where the threat is serious and immediate, the Minister has power, without a report, to make a declaration which can be effective for up to 60 days. There is provision for another emergency power to be exercised, in urgent circumstances, on his own initiative by an officer authorized by the Minister.

A declaration by the Minister describes the area or object and contains provisions for its preservation and protection. It is to be effective, at the earliest, upon being published in the Gazette. It must be published, as well, in a local newspaper (if any) in the region concerned. The Minister is to take reasonable steps to give notice of the declaration to persons substantially affected by it.

There is a separate provision in regard to Aboriginal remains. A person who discovers anything which he has reasonable grounds to suspect to be Aboriginal remains is obliged to report his discovery to the Minister. If the Minister is satisfied that the discovery is of Aboriginal remains, he will take steps to dispose of them in accordance with Aboriginal wishes.

The Act imposes severe penalties for contravening a provision of a declaration. Breach by a private person of a declaration concerning an area is punishable by a term of imprisonment not exceeding five years, or a $10,000 fine, or both. In the case of companies, the maximum fine is increased to $50,000. In the case

of declarations concerning objects the fine is halved in each case. The maximum term of imprisonment is two years. In addition, there is provision to obtain injunctions in the Federal Court to prevent breaches of the provisions of declarations.

In cases where the form of the protection involves the acquisition of property, compensation is payable. There is a limited power in the Minister to delegate his functions and a power to make regulations.

Against that background I turn now to consider specific provisions in the Act.

There are some important terms which are defined in the definition clause. Some of those terms were used in s.4, the 'purposes' section. I will deal with those terms first.

Perhaps the most important definition in the Act is the definition of 'Aboriginal'. It specifies the particular racial group in the Australian community whose interests in this regard the Act is designed to preserve and protect. If the definition is too narrow, the Act partly will fail in its objectives. If the definition is too wide, the Act might become an instrument of use by numbers of other racial groups in the Australian community whose interests Parliament did not wish to preserve and protect. Further, if areas and objects, not truly of significance to Aboriginals, were preserved under that guise, the purity of the preserved collection might come to fall under suspicion. The definition is in the following terms:

> 'Aboriginal' means a member of the Aboriginal race of Australia, and includes a descendant of the indigenous inhabitants of the Torres Strait Islands.

As a lawyer, not being also an anthropologist, I am unable to take the matter of the meaning of the words 'Aboriginal race of Australia' any further. It seems that even anthropologists have difficulty satisfying themselves as to what is the Aboriginal race of Australia, and that there is a long reading list on the question. The Act itself does not state expressly whether persons, having blood partly Aboriginal and partly of a race which is not Aboriginal, would fall within the definition. The inclusion in the definition of 'Aboriginal' of 'a descendant of the indigenous inhabitants of the Torres Strait Islands', suggests that persons having only part Aboriginal blood are intended to be included. The reference to 'a descendant' is not restricted to full-blooded descendants and it would seem clear enough that a person who had a forebear who was an indigenous inhabitant of the Torres Strait Islands would not cease to be a descendant of an indigenous inhabitant of the Torres Strait Islands because not all forebears were from Torres Strait Islands. It would be logical that, if part blooded Torres Strait Islanders are intended to be included, part blooded descendants of members of the Aboriginal race on mainland Australia also should be included.

Section 3(2) and (3) of the Act defines when an area or object shall be taken to be injured or desecrated or under threat. It is in these terms:

> 3(1) . . .
> (2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if —
> (a) in the case of an area —
> (i) it is used or treated in a manner inconsistent with Aboriginal tradition;
> (ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
> (iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or
> (b) in the case of an object — it is used or treated in a manner inconsistent with Aboriginal tradition,
> and references in this Act to injury or desecration shall be construed accordingly.
> (3) for the purposes of this Act, an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.

These provisions draw attention to the expression 'Aboriginal tradition'. It is of recurring importance in the Act.

It is apparent that it is essential, for the purposes of identifying whether a threat of injury or desecration exists, that the relevant Aboriginal tradition be identified clearly. Without such an understanding it would be impossible to ascertain what acts would be likely to be inconsistent with that tradition or to affect it adversely. I will return to this later, when dealing with s.10(4) concerning reports to the Minister, because there seems to be a hiatus in the Act in this regard.

'Aboriginal tradition' is defined in s.3(1) of the Act in the following terms:

> 'Aboriginal tradition' means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

One sympathises with the draftsman who had to struggle with this. The reference to 'the body' apparently is an attempt to refer to something which is not merely idiosyncratic to an individual and to involve some limit to the width of the definition. The definition does not require that the motivating force of the tradition, observance, custom and belief must have any religious, or mystical basis. No doubt that is for very good reason but it contributes to a wide effect, so that 'the beliefs' of a group of Aboriginals about any subject seem capable of forming part of Aboriginal tradition for the purposes of the Act. The definition specifically includes as subjects 'traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships'. One doubts whether the draftsman of the Act intended that, if a group of Aboriginals (say, only three) working together in an office in Melbourne have a belief about their office supervisor, Carlton football ground, a motor car or mateship, that belief should be capable of falling within the definition of 'Aboriginal tradition'. Nevertheless, the width of the definition is such that these improbable examples seem to be included. In the context of these comments I suggest that this definition may be a suitable candidate for construction by reference to the use of extrinsic material pursuant to s.15AB, Acts Interpretation Act 1984.

This last matter leads to the observation that, although the use of the word 'tradition' suggests that there must be something about it which is historical or long-established, the terms of the definition are not so limited. There is nothing to prevent the relevant belief from being formed today. It is appropriate that there should be room for contemporaneous development because we are not dealing with a people which has ceased to exist, such as the Ancient Romans. Aboriginals are members of a living race. Their areas of significance are not in a category which was closed somewhere back in the halls of time. The use of the word 'tradition' should not be permitted to create confusion by falsely creating the impression that the definition has some historical limitation which does not exist.

A 'significant Aboriginal area' is defined in s.3(1) of the Act as follows:

'significant Aboriginal area' means —
(a) an area of land in Australia or in or beneath Australian waters;
(b) an area of water in Australia; or
(c) an area of Australian waters,
being an area of particular significance to Aboriginals in accordance with Aboriginal tradition.

There is a comparable definition of Aboriginal objects but it is not limited to objects in Australia or 'Australian waters' (a phrase which also is defined).

One wonders about the effect of the inclusion of the word 'particular' in the phrase 'of particular significance to Aboriginals'. It might refer to the degree of significance that an area or object must hold for Aboriginals so as to mean that among areas which are of significance in accordance with Aboriginal tradition, this area is particularly significant. On the other hand, it might mean that the relevant significance is one which must be particular to Aboriginals as opposed to any other section of the Australian community. But if this latter construction were intended it would not have been necessary to include the word 'particular' in the phrase. One might turn for clarification to s.10(4) which sets out various matters which must be covered in the report to be made for the consideration of the Minister before making a declaration. This provision should be useful in construing the definition because the identification of the matters with which the report must deal must be expected to be directed accurately if the report is to be relevant, and therefore, useful, to the Minister's considerations. Sub-clause 10(4)(a) specifies the following matter as a subject for report: 'the particular significance of the area to Aboriginals'. I suggest that the introduction of the definite article into the phrase in this specification gives a different meaning and thereby adds to the uncertainty. The specification does not direct itself accurately to either of the alternatives which offer themselves from the definition. It seems to be directed not to the degree of the significance, not to the racial aspect of the significance but to the nature of the significance of the area to Aboriginals. That is, to the reasons why the area is of significance to Aboriginals. Certainly, a report about the particular significance of the area to Aboriginals would not permit the Minister always to assess how its significance stood in the scale of significance of areas and objects to Aboriginals. It might do so, but the conclusion would be inferential.

It seems that there is a need for the Act to be clarified in this respect. As it stands, the Minister is left with ambiguity in a vital definition and, it seems, is deprived of a requirement that the report to him provide assistance about one of the essential matters as to which he must be satisfied before making a declaration.

Part II of the Act (ss.9 to 21) is entitled 'Protection of Significant Aboriginal Areas and Objects'. The procedures initiating the making of a declaration in respect of an area are set out in ss.9, 10 and 18 of the Act. Sections 9 and 10 of Division 1 deal with declarations by the Minister upon applications made by or on behalf of an Aboriginal or a group of Aboriginals in respect of an area. Section 18 in Division 2 provides for the emergency declaration made by an authorized officer of the Minister. Applications for a declaration by the Minister in respect of objects are dealt with in s.12 of Division 1.

Section 9 deals with applications by an Aboriginal or a group of Aboriginals in cases where the area is under serious and immediate threat of injury or desecration. It enables the Minister to make a declaration affecting the area for 30 days, with power to declare an extension for up to 60 days. The application may be made orally or in writing and must seek the preservation or protection of a specified area from injury or desecration.

The provision does not require that either the Minister or the applicant give notice of the making of the application to a person who might be affected adversely by the making of any resulting declaration. Further, in the case of oral applications, the provision does not specify how the Minister is to maintain a record of its terms. These omissions bid fair to cause considerable and, possibly, unexpected, difficulties for persons who have an interest in the affected land. It may be that the affected landowner, leaseholder or licensee would wish to provide information and make submissions concerning the matters as to which the Minister must be satisfied before making his declaration. Whatever rights to an opportunity to be heard such a person might have outside the Act, the Act does not expressely extend any under s.9. Indeed, in the case of an oral application, the Minister might have difficulty in providing an exact record of its terms. This is a surprising state of affairs because although a declaration under s.9 might apply only for up to 60 days, it is not hard to envisage circumstances when a freeze on an area for 60, or even 30, days could cause serious loss.

It would be better if the legislation itself provided a system for giving notice of the application to interested parties. This would be fairer and provide greater certainty for all concerned, including the Minister. It is to be expected that a person likely to be adversely affected by the making of a declaration would, provided he learned of the making of the application, be pressing the Minister to hear any case he wished to make against it. Injunctive proceedings seeking a stay based on natural justice grounds would be on the cards unless the party were entirely satisfied that his representations, first, could be made with knowledge of the grounds of the application itself, secondly, were capable of preparation and submission in the time available and, thirdly, were being given adequate consideration. The Minister could be expected, not unnaturally, to wish to avoid legal proceedings in the urgent situations in which s.9 is intended to operate.

Section 13(3) of the Act empowers the Minister, at any time after receiving an application, to request such persons as he considers appropriate to consult with him or his nominee with a view to resolving to the satisfaction of the applicant and the Minister any matter to which the application relates. This section seems wide enough to give the Minister the necessary power to consult with the party likely to be adversely affected. Nevertheless, it appears to be a provision more directed to conciliation than to arbitration. Submissions flatly opposing the making of a declaration would hardly be likely, as the provision requires, to satisfy the applicant.

It may be that, acting from an ordinary sense of fairness, the Minister would, in any event, invite submissions from persons likely to be adversely affected, even in urgent cases. However, if that course were contemplated, the Act would be likely to make provision for it. Some weight is given to this observation by the fact that some such provision is made in cases involving less urgency and falling under s.10.

Another element relevant to the uncertainty created is that the applicant, either an individual or a group, need not have any particular standing in relation to the area, such as being a traditional owner of the land. Thus, a user, or would-be user, of the land might believe himself to have consulted fully with all interested Aborigines — and to have ascertained and met their concerns (if any) — only to find that at the last minute an application has been made from an unexpected and unforeseeable Aboriginal source, perhaps far removed from the area in question. Further, since there is no onus on the applicant to act promptly upon learning of a developing threat, the application might be made unnecessarily late. The Act does not require the Minister to consider any such matter in making his decision. Indeed, the purposes of the Act being so clear, it is hard to see how he legitimately could. The lateness of the application might reflect on its merits or bona fides, but once the Minister is satisfied that a significant Aboriginal area is under threat, to fulfill the purpose of the Act it would seem he should act, late application or not.

Section 9(1) specifies the obligations and powers of the Minister upon receiving an application. He may make a declaration if he is satisfied that the area is a significant Aboriginal area and that it is under serious and immediate threat of injury or desecration. The declaration has effect for such period, not exceeding 30 days, as is specified in the declaration. If he is satisfied that it is necessary to do so, the Minister may make another declaration extending the first declaration for a period not extending beyond 60 days after the first declaration came into effect. (s.9(3)) The Act is silent as to the earliest time when the extension is to be made. It would seem that, if he wished, the Minister could make it at the same time as making the 30 day declaration under s.9(2). Presumably, however, he would make it later when he could assess better its necessity.

The Act does not specify any procedure to follow on the 60 day period if the threat has not, by that time, dispersed. There is nothing in the Act to prevent another s.9 application being made so that another 30, or 60 day, period could follow consecutively. It obviously would be unsatisfactory if this situation were to continue without an application being made under s.10, which is intended to deal with the long-term situation. In ordinary circumstances one would expect the Minister to refuse to continue to make declarations under s.9, but, if the threat continued, it would be difficult for him to refuse once he had accepted (as he would have to do before making the first declaration) that the area was a significant Aboriginal area under threat. The stipulation in s.4 of the purposes of the Act is important in this respect. Further, if the applicants in consecutive applications were different persons or groups, it might be all the more difficult to refuse the applications.

In this context it is to be noted that s.18(1)(b) prevents an authorized officer of the Minister from making an emergency declaration in relation to area or object if a declaration has been made within the previous three months by reason of substantially the same threat.

It does not seem that the injunctive power in s.26 could assist to maintain the status quo. It is geared to conduct in breach of a provision of a declaration. If no declaration is subsisting, s.26 is inappropriate.

The provisions as to the content of declarations in relation to an area under both s.9 and s.10 are set out in s.11. The declaration must describe the area so that it can be identified and 'contain provisions for and in relation to the protection and preservation of the area from injury or desecration'. There is no specification of precisely what these provisions might be. Little guidance is to be obtained by referring to what the Act treats, in s.3(2), as injury or desecration.

The Act does not expressly give the Minister power to acquire property but s.28 provides for compensation to be paid where a declaration would result in the acquisition of property otherwise than on just terms. The term 'property' in s.51(xxxi) of the Commonwealth Constitution has been given a wide construction. It is not limited to freehold ownership. In *Minister for State for the Army v Dalziel* (1943) 68 CLR 261 the Commonwealth was held to have acquired property when it took from a weekly tenant exclusive possession of land for an indefinite period. In *Bank of N.S.W. v The Commonwealth* (1948) 70 CLR, 1 at 349/350, Dixon J. said that 's.51(xxxi) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognised at law or in equity and to some specific property in a chattel or chose in action similarly recognized but it extends to innominate and anomolous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property'.

It remains to be seen whether the provisions for preservation and protection will be such that they fall within even the flexible approach commended in the Banking case. For a general discussion relevant to this matter, see chapters 2 and 9 in 'Compulsory Acquisition of Land in Australia' by G. L. Fricke QC. It is not very useful to speculate further until there is an actual example.

Section 10 empowers the Minister to make declarations in cases where the threat is not serious or immediate. As under s.9, the application may be made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals.

Apart from receiving an application, under s.10 there are four conditions to be fulfilled before the Minister may make a declaration. First, the Minister must be satisfied that the area is a significant Aboriginal area. Secondly, he must be satisfied that the area is under threat of injury or desecration. (The following third and fourth conditions do not have counterparts under s.9.) Thirdly, the Minister must have received a report in relation to the area from a person nominated by him and have considered the report and any representations attached to it. Fourthly, he must have considered 'such other matters as he thinks relevant'. If these conditions are fulfilled, the Minister may make a declaration. It will have effect for such period as is specified in the declaration: s.10(2).

The report to the Minister must comply with s.10(4) and be made by a person nominated by the Minister. The Act does not specify any particular qualifications for the person to be nominated. To the extent that an anthropological question is involved, some expertise in that area would appear desirable but, on the other hand, the report must deal with legal issues as well. It would be guesswork to forecast how the Minister will see this nominating provision as working best. It may be that his nominee will be somebody from his own Department whom he knows he can trust.

Section 10(3) specifies steps the Minister's nominee must take, before submitting his report, in order to give notice of the nature of the report and to invite representations. The nominee is required to publish notices in the Gazette and in a local newspaper (if any) circulating in the region concerned. The notice must state 'the purpose of the application made' and the matters to be dealt with in the report. The requirement that 'the purpose of the Application' be stated is not an altogether satisfactory way of requiring that the precise nature of the application is stated. Nevertheless, no doubt the good sense of the nominee would ensure that this was done.

The matters set out in s.10(4) to be dealt with in a report are as follows:

(a) the particular significance of the area to Aboriginals;
(b) the nature and extent of the threat of injury to, or desecration of, the area;
(c) the extent of the area that should be protected;
(d) the prohibitions and restrictions to be made with respect to the area;
(e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aboriginals referred to in paragraph (1)(a);
(f) the duration of any declaration;
(g) the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law;
(h) such other matters (if any as are prescribed).

Sub-clause (a) ('the particular significance of the area to Aboriginals') has been discussed earlier in this paper. It is of great importance because, no doubt, this information would be weighed carefully by the Minister in deciding whether the first condition for the exercise of his power had been fulfilled; that is, that it be a significant Aboriginal area. There are, however, grave criticisms to make of this provision. I already have pointed out that, in my opinion, it does not direct the enquiry in a way which would enable its target to be met. To tell the Minister about the particular significance of the area to Aboriginals would be more likely to confuse false issues with the real issues to be addressed. No more striking illustration of this could be the absence from the report requirements of any assessment of Aboriginal tradition. As we have seen the definition of a 'significant Aboriginal area' requires that it be of 'particular significance to Aboriginals *in accordance with Aboriginal tradition*'. Reference already has been made to the definition of 'Aboriginal tradition'. Depending upon the nature of the Aboriginal tradition said to be relevant to the application, it could involve complex and lengthy anthropological investigation. Despite this, the Act makes no provision for the Minister to be given any assistance in determining whether a relevant Aboriginal tradition exists, or what it is. Furthermore, the notice published by the nominee will not even seek information about relevant Aboriginal tradition.

The absence of information in the report about Aboriginal tradition causes another disadvantage for the Minister. The specification of the preservation and protection provision will depend on the nature of the threatened injury or desecration. As we have seen (s.3(2)), that injury, in turn, is constituted by use or treatment inconsistent with Aboriginal tradition. To the extent that the Minister is uninformed about the precise nature of the Aboriginal tradition, the more clumsy and ineffective the preservation and protection provision is likely to be. There is power under clause (h) to prescribe 'other matters', for report but if my criticisms are thought to be justified, the Act should be amended.

While considering the drafting of this provision, it is perhaps worth mentioning the unfortunate way the first four elements for report are framed. They are framed in a way which seems to assume the existence of that as to which there should be an enquiry. The nominee should not have put to him what are, in effect, leading questions. For his sake, and for the peace of mind of anybody who might wish to resist the application, it would have been much better if, at least, the words '(if any)' were included. This would mean, for example, that the report would be not as to 'the prohibitions and restrictions to be made' but as to 'the prohibitions and restrictions (if any) to be made'; it would be as to 'the particular significance (if any)' and the 'threat of injury (if any)'. This way of identifying the subject would be consistent with the form of clause (e) which is stated in a way more likely to produce an approach which does not proceed from an assumption. It seeks a report about 'the effects the making of a declaration *may have* on the proprietary or pecuniary interests' of persons other than the Aboriginal applicants. The difference emerges quite sharply if this sub-clause is re-phrased in a style similar to that used in the first four sub-clauses. It then would read: 'the effects the making of a declaration will have on the proprietary or pecuniary interests' of persons other than the Aboriginal applicants.

The reference to clause (e) draws back a matter touched on earlier in this paper. We have seen that the report must deal with the proprietary and pecuniary effects of a declaration on persons other than the ap-

plicant and that the Minister must consider the report. Nevertheless, by reason of the statement of purposes in s.4 it would seem that the effect the Minister could give to adverse effects on others necessarily must be limited. It seems that upon considering those adverse effects the Minister would be able to do little more than shape the declared provisions for preservation or protection of an area in a way which would minimize as much as possible the loss for others while not compromising the purpose of preserving and protecting a significant Aboriginal area. Obviously, since the Commonwealth might be paying compensation for the proprietary or pecuniary loss, the Minister would have an obligation to follow the course of minimum cost to the Commonwealth consistent with preservation and protection.

Sub-clause (g) contains an interesting inclusion in the subjects for report: an assessment by the Commonwealth Minister's nominee of the effectiveness of any remedies available under State or Territorial law with regard to protection. It is a courageous Minister who would feel entirely comfortable until the report came back without any political time bombs with which he might have to deal at the next Minister's Conference.

The manner in which information for the report is to be obtained and the time within which it must be submitted are not covered by the Act. These could be important omissions. Consider the position of an objector who, unlike the applicant, has not necessarily had an opportunity to commence preparation before the application is made. It seems likely that considerable preparation might be involved in order to present a representation to the nominee. Anthropological opinions commonly take a long time to obtain. Anthropologists with relevant expertise cannot be expected to be on tap and able even to commence an investigation, let alone to complete it. Insofar as the co-operation of relevant Aboriginals is necessary, that frequently is a process requiring patience. Another potentially time consuming process could be the preparation of an assessment of the proprietary and pecuniary effects of a declaration. Part of the problem would be coping with costing the effect of the various preservation alternatives upon which the Minister might decide.

If one takes, say, a grazier wishing to resist an application in respect of part of his property it can be expected that months might pass before he felt able to put his best case forward. But what if the nominee, for perfectly good reasons, will not wait that long? A sidelight is thrown on this by the salutary provision in s.30 that a person who considers his proprietary or pecuniary interests are likely to be affected by a declaration proposed to be made may apply to the Attorney-General for legal assistance. If the Attorney-General, or his authorized officer, is satisfied that refusal would involve hardship, and that it is reasonable that the application should be granted, he may authorize a grant of assistance. Although this provision is welcome and fair, the application to the Attorney-General, and its determination must occupy a considerable amount of time, possibly weeks, before preparation of the representation could begin.

The Act does not contain any provision for notification to the various interested parties of the contents of other representations to the nominee. It must be recognised that to do so might infringe the desire of Aboriginals for confidentiality in respect of the information provided by them. This is a persistent problem in this area: a matter which does nothing to alleviate the difficulties caused for all who must arrange their affairs.

While at this point of confidentiality it is convenient to mention that s.27 of the Act provides for court proceedings to be in camera if desirable in the interests of justice and Aboriginal tradition.

Section 10(1)(d) requires the Minister, in addition to considering the report, to consider such other matters as he thinks relevant. This provision is to be deeply regretted. It seems deliberately to authorize the Minister to make decisions, at least partly, on grounds never aired or opened for representation. It is unfair, and inexplicable, that while an applicant, or an opponent, can make representations to the Minister's nominee about a range of matters, he will not be afforded an opportunity to address himself to, or even know of, other matters which the Minister thinks relevant and is required by law to consider before making his decision. One of the matters which the Minister must consider relevant in every case and which is not mentioned in s.10(4) is 'Aboriginal tradition'. Will the Minister consider Aboriginal tradition under this paragraph without giving the applicant an opportunity to establish his case on that issue? It is a serious thing that such a criticism is open in respect of legislation which purports to be fair to all concerned and purports to give them an opportunity to be heard.

The provisions relating to declarations in relation to objects are set out in s.12. In general terms, the requirements are similar, with necessary changes, to those in s.10 of the Act. There is, however, no provision for a report to the Minister before he makes any declaration.

Division 2 of the Act (ss.17 to 19) deals with declarations by officers authorized by the Minister who are empowered to make emergency declarations in relation to significant Aboriginal areas and objects. An important matter to notice is that authorized officers may act on their own initiative without any application being made to them by an Aboriginal or group of Aboriginals. A condition of their being able to make a declaration is that the area or object must be under serious and immediate threat of injury or desecration. In the case of an area, the officer must be satisfied that the circumstances of the case would justify the making by the Minister of a declaration under s.9 but the injury or desecration is likely to occur before such a declaration can be made.

The officer cannot make a declaration if a declaration under the section in relation to the area or object has been made within the previous three months by reason of a threat that is substantially the same as that then existing. A declaration by an authorized officer can remain in force only for a period not exceeding 48 hours. The inference one draws is that this is considered sufficient time for at least an oral application, perhaps made by telephone, to be made to the Minister under s.9 and for the Minister to exercise his powers under that section.

This provides an interesting insight into the scale of time which the legislature envisaged as being involved in the making of a declaration by the Minister under s.9. It is obvious that the Minister will be acting quickly. One notes here, almost as a matter of light relief, that the legal aid provision in the Act extends to persons wishing to resist emergency declarations by the Minister and by his authorized officer. The picture comes to mind of a desert, a bulldozer, an authorized officer writing out an emergency declaration and a bulldozer driver writing out his application to the Attorney-General for legal aid to resist the making of the declaration.

In acting with speed under s.9 there will be a heavy burden upon the Minister and upon his Department. The accurate ascertainment of the elements about which the Minister must be satisfied might be difficult in practice. In cases where a s.9 application follows a declaration by an authorized officer under s.18, the Minister probably would be heavily reliant upon the advice of his authorized officer to satisfy himself about factual matters. The convenience of this is manifest but it might appear that there is a self-interest in the authorized officer to ensure that, by making the declaration under s.9 the Minister vindicates the officer's original judgment in making the emergency declaration. In this time, too, if the authorized officer has acted on his own initiative, it would be essential that an Aboriginal, or group of Aboriginals, be selected or found (one supposes, by the officer) prepared to become an applicant to the Minister for the purposes of the s.9 application. Unless this happened, the area could be injured or desecrated after 48 hours. One might query whether it is desirable that the Act should create a situation in which it is likely that an officer vested with the Minister's authority should be involved in these ways in laying a foundation for an application upon which the Minister is expected to make a disinterested determination.

It should be noticed that the Act does not contain a provision expressly stating when a declaration made under Division 2 by an authorized officer comes into effect. This is to be contrasted with the provisions of Division 1, dealing with declarations by the Minister. Section 14 of Division 1 provides that the Minister's declaration shall be published in the Gazette and in a local newspaper (if any), and that the Minister's declaration comes into operation on the date of its publication in the Gazette, or on such later date as is specified in the declaration. Section 19 of Division 2 (relating to authorized officers) contains requirements as to the giving by the authorized officer of notice of the declaration but is silent as to the time when the declaration will begin to operate. Section 18(2)(b) provides that a declaration made by an authorized officer shall specify the period not exceeding 48 hours 'for which it is to remain in effect'. It may be that this provision can be construed so as to give the word 'for' the meaning of 'during' and thereby save the situation. Against this is the fact that, in Division 1, s.9(2) and s.10(2) are in very similar terms to s.18(2)(b) but nevertheless it was considered necessary to provide, separately, under Division 1 for a commencement date. Otherwise, the relevant wording in Division 2 is comparable with that in Division 1. The fact that it was deemed necessary under Division 1 to specify a time when the declaration would operate, suggests it also should be necessary to make such a provision under Division 2. Unless s.18(2)(b) can be brought into service, this omission seems to be a defect which will, until amendment, render illusory the emergency declaring power of authorized officers under Division 2.

The Act does not provide for there to be an independent register of areas and objects as to which a declaration, or application, has been made. Section 14(2)(b) requires the Minister to serve a copy of any declaration made by him or the Australian Institute of Aboriginal Studies, and provides that, if the Institute maintains a register of significant Aboriginal areas, it shall enter the area in the register. To the extent that the provision depends upon the Institute's decision as to whether it maintains such a register, as to significant Aboriginal areas (as defined in the Act) it scarcely seems very satisfactory. There is nothing required as to objects. Having regard to the gravity of the penalties imposed for breach of provisions of declarations, it is desirable that a register be established and maintained of all areas and objects which have, at any time been the subject of a declaration or an application.

Section 24 of the Act deals with evidence in proceedings for an offence. Sub-section (3) is in the following terms:

> In proceedings for an offence referred to in sub-section 23(1), where there is evidence that, at the relevant time, the defendant neither knew, nor had reasonable grounds for knowing, of the existence of the declaration alleged to have been contravened, the defendant shall not be committed for trial or convicted unless the prosecution proves that, at that time, the defendant knew, or ought reasonably to have known, of the existence of the declaration.

This sub-section is the result of an amendment to the original draft Bill; it was said to be an improvement. Apparently, the intention is to cast upon the prosecution the burden of proving that the defendant knew, or ought reasonably to have known, of the existence of the declaration. Unless either one of those elements is proved, the defendant shall not be committed for trial or convicted.

The first point to note is that the offence is constituted by contravening a provision of a declaration. There is a difference between knowing, or having reasonable grounds to know, of the existence of a declaration and knowing, or having reasonable grounds to know, the precise terms of what the declaration contains. A bushwalker might well be aware of the existence of a declaration but be quite vague about the limit of the area it covers or of the type of conduct it prohibits. By the time he hears that the declaration has been made, the bushwalker might find it impossible to rustle up an old (or new) copy of the local newspaper or a copy of the relevant Gazette. No doubt signs will be posted and so forth, but in rough country they might be missed.

It is not known yet whether a court would hold that publication in the Gazette and a local newspaper constituted reasonable notice. One expects that a realistic approach would be taken; the Gazette is not usually delivered with the milk. There is support for the proposition that publication in the Gazette is not reasonable notice from the fact that, as well as requiring publication of the declaration in the Gazette and a local newspaper, s.14 requires the Minister 'to take reasonable steps to give notice, in writing, of the

declaration to persons likely to be substantially affected' by it. If publication in the Gazette constituted reasonable notice, this provision would not be necessary.

The next point about s.24(3) is that it operates only where there is evidence that, at the relevant time, the defendant neither knew nor had reasonable grounds for knowing 'of the existence of the declaration'. This means that, despite the fact the ultimate burden of proof is on the prosecution, a defendant would be forced to give evidence in every case in which he is charged with an offence under the Act and wishes to rely upon his lack of knowledge, actual or constructive. Further, it means that the prosecution must be entitled, in each such case, to call a rebutting case after the defendant has given his evidence. This is a substantial departure from the usual course of a criminal trial and would be justified only if strong grounds for it appeared. I suggest that they do not and that this provision is a bad one.

The final point is that the provision renders constructive notice, not of the precise provision, but of the declaration containing it, sufficient as an element constituting guilt of an offence having such serious penalties. This, of itself, leaves much criticism. However, when one considers that the Act creating these penalties does not even deign to provide for a public register of the areas and objects concerned, the criticism to be made is profound.

Finally, I mention that s.15 of the Act provides for a declaration to be reviewable by Parliament. It does so by making sections 48, 49 and 50 of the *Acts Interpretation Act 1901* substantially apply to declarations as if they were regulations. In effect, if either House disallows a declaration after it is tabled, it is revoked. Beyond mentioning this, I regret to say that the full consideration of the considerations about reviewing decisions under this Act is a substantial, independent topic and not one which it is possible within the confines of available time, to treat adequately.

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