

Submission in response to the Discussion

Paper: Indigenous heritage law reform

Aboriginal and Torres Strait Islander

Heritage Protection Act

ABORIGINAL AREAS PROTECTION AUTHORITY

December 2009

Executive Summary.

- The *Northern Territory Aboriginal Sacred Sites Act (Sacred Sites Act)* is the key legislative framework for the protection of sacred sites in the Northern Territory and is regarded as leading practice in Australia. It has a 99.95% success rate in protecting sacred sites in the Northern Territory.
- The Aboriginal Areas Protection Authority (AAPA) supports the establishment of national standards for the protection of Indigenous heritage. These proposals should not weaken the existing mechanisms in place in the Northern Territory. Some aspects of the proposals appear to have the effect of weakening rather than enhancing existing mechanisms for the protection of Indigenous heritage in the Northern Territory.
- The *Sacred Sites Act* provides for clearly legislated, independent and transparent mechanisms to achieve Indigenous heritage protection in an effective balance with use and development of land. The AAPA supports mechanisms to increase transparency and reduce duplication in Indigenous heritage protection, but believes that the proposed reforms will not achieve this outcome in the Northern Territory.
- The AAPA supports the aim of ensuring that Indigenous Australians will have the best opportunities to protect their heritage, but believes that the proposed reforms will not achieve this outcome in the Northern Territory.
- The AAPA asserts that legislative frameworks for the protection of Indigenous heritage that are not linked to development approval processes or consent mechanisms provide unambiguous protection for Indigenous heritage.
- The AAPA considers that there are significant difficulties with the proposal that the *Native Title Act 1993 (NTA)* and the *Aboriginal Land Rights Act (NT) 1976 (ALRA)*, and their associated agreement making provisions should be the primary mechanism for the protection of Indigenous heritage. In a regime with stringent requirements upon state and territory accreditation, these statutes can play a strong supporting role in Indigenous heritage protection. However, the

proposed requirements for state and territory accreditation clearly provide for independence from development and consent decisions, transparency of legislative and administrative mechanisms and publicly accessible information. Further with the clear requirement to reduce complexity and multiple approval mechanisms, the use of multiple statutes and procedures, primarily based around differing land tenures and management regimes, would appear to introduce additional complexity to Indigenous heritage protection rather than reduce such complexity.

- The AAPA is supportive of Indigenous economic development as promoted by the *NTA* and the *ALRA* agreement making provisions, but sees considerable advantage in maintaining independent mechanisms for the protection of Indigenous heritage.
- The AAPA operates under the preamble of the *Sacred Sites Act* where it must aim to affect a practical balance between Indigenous heritage protection and development. However, the AAPA does not support the notion of compulsorily negotiated heritage outcomes that involve third party developers as proposed by the discussion paper and requests further discussion on this proposal.
- The standards that states and territories would need to meet in relation to the accreditation process (Proposal Four) do not appear to be applied to Commonwealth procedures for protecting Indigenous heritage in the absence of accreditation (Part 2). This inconsistency undermines the proposed accreditation process.
- The proposal to establish a requirement for advice from the relevant Commonwealth Minister into the accreditation process would challenge the independence of the Board of the AAPA from the elected arm of government. in relation to sacred site protection. This proposal requires further discussion.
- The AAPA supports the establishment of call in powers within the *Sacred Sites Act*, but notes that this is only proposed in relation to the Commonwealth.
- The provision of orders to repair adverse impacts on traditional areas is supported

- The AAPA agrees that applications under the *ATSIHP Act* should not be an available mechanism for dispute in relation to Land Use Agreements, except to the extent that such dispute relates unambiguously to the protection of Indigenous heritage.
- The AAPA agrees that there needs to be effective mechanisms for reaching agreement over Indigenous heritage protection, and that there needs to be an appropriate mechanism for “arbitrating” and “reviewing” such agreements. Given the effectiveness of the *Sacred Sites Act* in this regard, the AAPA considers that the proposals addressing these issues may have negative impacts in the Northern Territory and require considerable further discussion.
- The AAPA strongly believes that for any Indigenous heritage protection agreement to be effective, it must apply consistent and legislatively enforceable standards and conditions, and that state and territory agencies are the appropriate mechanism for the monitoring, “registering” and record keeping for such agreements.
- If the intent of the proposed reforms of the Act is to be followed, then the Commonwealth should relinquish any responsibility for discoveries of Indigenous personal remains to states and territories in order to remove duplication.
- The AAPA believes that if national standards for Indigenous heritage protection are to be established then the Commonwealth must abide by them also.
- The accreditation process proposed establishes inconsistent standards by removing the last resort to the *ATSIHP Act* in accredited states and territories, but Indigenous people in un-accredited states and territories retain this capacity.
- The AAPA supports a national system of penalties for incursions against Indigenous heritage. Under the *Sacred Sites Act* the AAPA has successfully brought more than 30 prosecutions for unauthorised entry, works or desecration of a sacred site. This compares favourable to every other jurisdiction.

- The AAPA supports the implementation of a review process for accreditation and the reformed *ATSIHP Act*. But it is unclear from the proposals how the review process would assess heritage outcomes under the *NTA* and state and territory land rights regimes. These review related proposals require further discussion.

- The AAPA has strong concerns regarding the proposed public access to information which may be of a secret or sacred nature. The *Sacred Sites Act* provides for an offence to making available such information without the AAPA's approval, which would only be given with the permission of the relevant custodians. This is also in line with the Northern Territory's *Information Act*, which provides privacy protection for that information which may identify a person by their spiritual or religious beliefs. The information secrecy and accessibility proposals require further discussion.

Introduction

The purpose of the proposed reforms subject of this submission is to strengthen the *ATSIHP Act* which has not been effective in meeting its purpose of providing a means for the Commonwealth “to protect traditional areas and objects when there are gaps in state and territory legislation”. The discussion paper identifies the key aims of proposed reforms to the *ATSIHP Act* to:

- 1) Ensure that Indigenous Australians will have the best opportunities to protect their heritage; and
- 2) To cut duplication and red tape.

Since the passing of the *ATSIHP Act* in 1984 only two applications have been made under this legislation that relate to areas in the Northern Territory, and only one of these has resulted in a declaration under that Act.¹ In the same period the Northern Territory has protected over 11,000 sacred sites and has processed approximately 4000 applications for protection of Indigenous heritage in the context of the *Northern Territory Aboriginal Sacred Sites Act* (the *Sacred Sites Act*); and has similarly protected Indigenous archaeological objects and places under the *Northern Territory Heritage Conservation Act*. This represents a 99.95% success rate for the Northern Territory legislation in protecting Indigenous heritage, compared to a 93% failure rate for the Commonwealth’s legislation. The AAPA supports a reform agenda to make the Commonwealth legislative framework relevant to contemporary Indigenous heritage protection issues. The Aboriginal Areas Protection Authority (AAPA) supports efforts to strengthen the framework for Indigenous heritage protection nationally via the definition of standards and via an accreditation process. However, some aspects of the proposed reforms will not achieve either of the stated aims of improving opportunities for Indigenous Australians to protect their heritage, or cutting duplication and red tape. The reforms also do not significantly address gaps in Northern Territory legislative framework concerning Indigenous heritage protection, and if implemented will likely force a reduction in Indigenous heritage protection

¹ This declaration relates to Junction Waterhole and the proposed Alice Spring flood mitigation dam

standards; increase duplication and red tape; and diminish the autonomy that Indigenous people currently enjoy in relation to the protection of their heritage in the Northern Territory.

The *ATSIHP Act* was introduced as a temporary measure pending the introduction of national land rights legislation. A 1996 review of the Act (the Evatt review), which informs the current proposed reforms, identified key problems with the Act as being:

- **Uncertainty and delays** with applications arising from a lack of procedural definition; and lack of clarity between Commonwealth and state/territory processes;
- **Fair Procedures not spelled out** that leave the Minister's discretion open to legal challenges, are burdensome, and expose Indigenous people to intensive scrutiny of their religious beliefs;
- **Impeding Development** by the potential to intervene after planning processes and project approvals have been finalised; and
- **Lack of Aboriginal involvement and respect for custom** by privileging state and territory processes that do not recognise the role of Indigenous people in the identification, management and protection of heritage; and by not making adequate provision for maintaining confidentiality in respect of Indigenous tradition and knowledge in relation to heritage. Overall the Evatt Review presented a number of proposals for reform of the *ATSIHP Act* that are not dissimilar to those presented in the current discussion paper. Notably, Evatt made recommendations concerning increasing the opportunities for Indigenous people to protect their heritage, the establishment of national standards for the protection of Indigenous heritage, and the accreditation by the Commonwealth of States and Territories to meet minimum standards.

In 1998 John Reeves Q.C. reported on his review into the *Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)*.² In his report he considered the extent to which the *Sacred Sites Act* met the minimum standards as defined by

² Reeves, J. 1998 Building on Land Rights for the Next Generation, The Review of the Aboriginal Land Rights (Northern Territory) Act 1976. Appendices pp K1-K4).

the Evatt Report. Importantly, this assessment found that the *Sacred Sites Act* met all the minimum standards except for the Act's inability to provide for Aboriginal people to act as inspectors or to monitor compliance of the Act. Developments in the establishment and operation of Indigenous ranger groups across the Northern Territory have now provided a basis for close cooperation in the monitoring of compliance with regard to the *Sacred Sites Act*.

The discussion paper to which this submission responds reflects much of the Evatt Review findings, but importantly lessens the extent of protection for Indigenous heritage proposed by the Evatt Review. The discussion paper arises from a process of consultation with stakeholders. However, the Aboriginal Areas Protection Authority (AAPA) as the key Indigenous heritage agency in the Northern Territory was not consulted about the proposed reforms. Accordingly, this submission outlines the current and successful framework of Indigenous heritage protection in the Northern Territory with a focus on the protection of sacred sites, and responds to the discussion paper proposals in terms of the impact that these will have on the protection of sacred sites in the Northern Territory. This submission does not support the proposal that the *Native Title Act 1993 (NTA)* and associated Indigenous Land Use Agreements (ILUAs) are an appropriate mechanism for the primary protection of Indigenous heritage and provides case study material to illustrate its position. In addition, the submission asserts that the proposed negotiated heritage outcomes may privilege proponents of development, and could undermine the currently high standards of Indigenous heritage protection in the Northern Territory.

The Northern Territory Aboriginal Sacred Sites Act and the Aboriginal Areas Protection Authority

The Aboriginal Areas Protection Authority (AAPA) is an independent statutory organisation established under the *Northern Territory Aboriginal Sacred Sites Act* (the *Sacred Sites Act*) and is tasked with the protection of all sacred sites in the Northern Territory whether identified or not. The *Sacred Sites Act* is the primary mechanism for the protection of sacred sites in the entirety of the Northern Territory. The AAPA has delegations under the *Northern Territory Heritage Conservation Act* in relation to the protection of prescribed archaeological objects and skeletal remains.

The *Sacred Sites Act* was enacted by the Northern Territory Legislative Assembly in 1989 using powers provided under S73 of the *Aboriginal Land Rights (NT) Act 1976 (ALRA)*. This legislation improved on the original *Sacred Sites Act*, which had at that stage been in operation for 10 years.

The *Sacred Sites Act* does not delegate any functions or sacred site protection role for any other organisations in the Northern Territory. Northern Territory Land Councils (established under the *ALRA*), are required under the *Sacred Sites Act* to provide nominees for appointment by the Administrator of the Northern Territory as members of the Board of the Aboriginal Areas Protection Authority (AAPA). The 12 member board of the AAPA consists of ten Indigenous people nominated by Northern Territory Land Councils, and two members nominated by the Northern Territory Government. Currently 11 members of the Board are Indigenous.

In 1987 an amendment to the *ALRA* provided an additional function to Northern Territory Land Councils:

To assist Aboriginals in the taking of measures likely to assist in the protection of sacred sites on land (whether or not Aboriginal land) (S23(1)(ba)).

Although under S23(2)(a), with the permission of the Commonwealth Minister, a Land Council may perform functions in relation to the protection of sacred sites conferred on it by a law of the Northern Territory, no such functions have been conferred on any Land Council in the Northern Territory.

The *Sacred Sites Act* spells out, in detail, procedures for the protection of sacred sites across the entirety of the Northern Territory. By comparison the measures of sacred site protection defined in the *ALRA* are limited to the extent of the statement at S23(1)(ba). It is noted that major land councils in the Northern Territory have developed procedures similar to those of the AAPA in relation to sacred site protection, however the standards that are applied are not defined in legislation, and are not open to review. Similarly processes utilised by land councils in relation to heritage protection in the context of the *Native Title Act 1993 (NTA)* are not specified by that legislation. Notwithstanding this lack of definition in the responsibility of Land Councils to protect sacred sites, the AAPA respects the expertise of Land

Councils in representing their constituents, and seeks to cooperate in matters where there is a potential for jurisdictional overlap.

The *Sacred Sites Act* applies across all land in the Northern Territory (s.3 *Sacred Sites Act* and S73(1)(a) *Land Rights Act*). All sacred sites are protected, whether identified or not, and any damage to sacred sites is liable for prosecution under the *Sacred Sites Act*, regardless of whether agreement may have been reached with Land Councils under provisions contained in the *ALRA* or the *NTA*.

The Northern Territory experience highlights that there is significant value in having a centralised legislative responsibility in relation to sacred site protection. The proposal contained in the draft discussion paper to utilise state and territory land rights legislation and the *NTA* as primary mechanisms for heritage protection would fundamentally undermine the accountability of the Northern Territory Indigenous heritage protection regime, and introduce complexity through the application of multiple statutes in relation to the protection of Indigenous heritage. Currently, the *Sacred Sites Act* has the capacity to prosecute under the offence provisions of the legislation regardless of the existence of an ILUA or other agreement under the *ALRA*.

Independence of the *Sacred Sites Act* & AAPA

The AAPA is a body corporate with perpetual succession and is a prescribed statutory corporation within the meaning of the *Financial Administration and Audit Act*. The independence of the organisation is established by the *Sacred Sites Act*.

The AAPA must report annually to the Minister on the administration and operation of the Authority including audited financial statements. While the AAPA is subject to some direction of the Minister, a number of important functions are specifically excluded from Ministerial direction. They relate to:

- Staff of AAPA (S17 of the *Act*)
- Issue of Authority Certificates (S19A – 19L; 22 - 23)
- Registration of Sites (S27-29)
- Permission to enter a Sacred Site (S43)

- Prosecutions under the Act (S33-39)

One function of the Minister under the *Sacred Sites Act* is to seek nominations from the Land Councils for membership of the AAPA Board (S6(5)) when positions become vacant. The Minister also may receive applications from persons aggrieved by a decision or action of AAPA for a review under Division 3 of the Act and determine whether or not such a review is warranted.

The independence of the AAPA in carrying out its functions³ under the *Sacred Sites Act*, and the limited capacity for the relevant Northern Territory Minister to intervene is an important aspect of sacred site protection in the Northern Territory. Such independence is not replicated in other state and territory Indigenous heritage protection regimes.

Ministerial review

The Ministerial review component of the *Sacred Sites Act* can only result in an override of an Authority decision to protect a sacred site in extreme circumstances. It has been used only on one occasion in 20 years, and has greater checks and balances than those proposed under the *ATSHIP Act* reforms. The process is described below.

³ Functions of the AAPA prescribed in Section 10 of the *Sacred Sites Act* relate to the protection of Aboriginal sacred sites in the Northern Territory. They may be reduced to the following:

- Receive requests for site protection from Aboriginal custodians, document information provided by custodians in support of their requests, execute protection measures for sites and maintain confidential records of traditional information.
- Establish and maintain a Register to be known as the Register of Sacred Sites and such other registers and records as required by or under the *Sacred Sites Act*.
- Carry out surveys to determine the constraints, if any, imposed by the existence of sacred sites on work on land anywhere in the Northern Territory (the Authority consults with custodians and proponents of work to reach a mutually acceptable agreement and issues an Authority Certificate setting out the conditions under which the proposed works may proceed).
- In the event of an appeal against a decision or action of the AAPA, convene, review and report on matters arising from the appeal. In these circumstances the AAPA must notify all parties affected by the review and invite written representations. When the resolution of the matter is not possible the AAPA must provide the Minister with a report and recommendation.
- Make available for public inspection the Register and records of all agreements, Certificates and refusals, except to the extent that such availability would disclose sensitive commercial information or matters required by Aboriginal tradition to be kept secret.
- Enforce the *Sacred Sites Act*.
- Prosecute offences against the *Sacred Sites Act*, with the exclusive power provided under Section 39 of the *Sacred Sites Act*.

Persons aggrieved by a decision or action of AAPA in carrying out its functions under Part III Division 1 of the *Sacred Sites Act* (Authority Certificates)⁴ may appeal to the Minister for a review. The Minister may either request AAPA to conduct a review of the matter or reject the applicant's appeal. Before reaching a decision as to whether to trigger a review, the Minister must consult with AAPA. The primary objective of a review under S30 of the *Sacred Sites Act* is to provide a framework for AAPA to try and resolve the issues that have precipitated the application for the review.

In the event that AAPA is unable to resolve these issues, AAPA must provide the Minister with a full report of the circumstances of the case along with any other documentation that may be relevant to the Minister's consideration.

The objective of a report under S30 is to provide advice to the Minister on the wishes of Aboriginal custodians in relation to sites in the vicinity of the proposed works which are the subject of a review. This advice is fundamental to the Minister's decision whether or not to issue a Minister's certificate in relation to the land or any part of the land subject to the original application.

The role of this report in the exercise of the Minister's discretion under S32 is set out in S30(4) of the *Sacred Sites Act* as follows:

"30(4) where, after due consideration of all representations made as a result of an invitation under subsection (3)(e) (but not later than 28 days after the latest time limited by the notices under that subsection for the making of those representations), the Authority does not, by exercising its powers under any other provision of this Act, satisfy the concerns of the applicant for the review, it shall provide the Minister with a report and its recommendations on the matter

⁴ Part III Division 1 of the *Sacred Sites Act* sets out a scheme whereby AAPA is required to carry out surveys to determine the constraints (if any) imposed by the existence of sacred sites to work on land anywhere in the Northern Territory. AAPA is obliged within the time frame imposed by the *Sacred Sites Act* to consult with Aboriginal custodians for the affected areas, arrange meetings between custodians and the proponents of the proposed work, liaise with all parties concerned and assist the custodians and the proponents of works to reach a mutually acceptable agreement.

Under Section 22 AAPA shall issue an Authority Certificate when and if it is satisfied that the work or use of the land can proceed without there being a substantive risk or damage to a sacred site on or in the vicinity of the land or when an agreement has been reached between the Aboriginal custodians of any affected sites and the applicant for the certificate, setting out conditions on which work may be carried out or use made.

The holder of an Authority Certificate is indemnified against prosecution under the *Sacred Sites Act* if, at any time in the future, it is argued that a sacred site has been damaged or entered and the holder of the certificate can show that they acted in accordance with the provisions of the Certificate (s.25 and s.33).

and copies of all documents or records likely to be relevant to the Minister's consideration of it."

Where the Minister

- a) has received a report from AAPA under S30(4);
- b) has considered the report and its recommendations;
- c) has considered such other information as the Minister considers appropriate; and
- d) has taken into account the wishes of Aboriginals relating to the extent to which sacred sites should be protected.

The Minister may either uphold the decision or action of AAPA or issue the applicant for the review a Minister's certificate relating to the proposed use or works of the area over the application. Importantly, in making a decision the Minister is constrained by S73 of the *ALRA* that forbids an action under the *Sacred Sites Act* that would lead to desecration of a sacred site.

The Minister shall provide written advice to all parties affected by the review of the Minister's decision and the reasons for the decision. This advice must also be tabled in the Legislative Assembly of the Northern Territory.

Conduct of the Inquiry:

Section 30(3) of the *Sacred Sites Act* requires AAPA to notify and invite submissions from the applicant, custodians and other specified persons.

Where the Minister refers a matter to AAPA for review, AAPA provide:-

- (a) the applicant under Sub-section (1);
- (b) where appropriate, the custodians of sacred sites affected, and
- (c) any other person appearing to the Authority to be affected,
with a notice -
- (d) stating the matter to be reviewed;

- (e) inviting them to make written representation in connection with the review by a specified date, being not earlier than 28 days nor later than 60 days after the date of the notice; and
- (f) specifying an address to which such representations may be sent.

Protection of sacred sites

The *Sacred Sites Act* allows for senior and experienced traditional custodians from across the Northern Territory (the AAPA) to make decisions regarding the “registration”⁵ of sacred sites. These custodians are themselves nominated by Land Councils for their experience and traditional knowledge as custodians.

AAPA has registered and protected sacred sites on the basis of the definition⁶ provided in the *ALRA*, and in accordance with the clear advice taken on consultation with the relevant custodians of those sites. In so doing many sites are registered in individual locations, and others have been registered as site complexes, where the members of the AAPA have been convinced that the traditional connections between sites and site features warrant such an approach.

⁵ One of the most important functions of AAPA is to maintain a Register of Sacred Sites. The process of “registering” a site begins when the Aboriginal custodians make an application to AAPA requesting protection of the site through registration.

As soon as practicable after receiving such an application AAPA must consult with the Aboriginal custodians of the site to determine:

- a) the traditional basis of custodianship
- b) the names and addresses of custodians
- c) the traditional story of the site
- d) the location and extent of the site
- e) the traditional restrictions applying to the site
- f) the physical features of the site
- g) the period of registration
- h) the restrictions applying to traditional information about the site.

Before a sacred site is registered AAPA must provide the owner of land on which a site is situated, with a notice giving details of the area to the registered and inviting the owner to make written representations in connection with the application by a specified date. AAPA is required to give due consideration to all representations made by an owner and is required to make findings on the immediate or possible detrimental effects that the registration of the site may have on the owner’s proprietary interest in the land.

An owner may request that AAPA arrange and be represented at a meeting between the owner and custodians to discuss the restrictions imposed by the existence of the site.

Once a sacred site is registered, the *Sacred Sites Act* provides that the site will be accepted as prima facie evidence by all courts, judges and persons acting judicially, that it is a sacred site.

⁶ “Sacred sites” are defined as places that are “sacred or otherwise of significance according to Aboriginal tradition”. In the majority of instances sacred sites comprise unmodified natural features; there is no way of identifying the location and extent or significance of such places other than by reference to the Aboriginal custodians.

In recent years the Authority members have referred to the “Aboriginal tradition” component of the definition to assist in determining whether a location is a sacred site or a site with Aboriginal heritage significance.

Use of Prosecutions to support effective sacred Site Protection

In comparison to every other jurisdiction in Australia, AAPA has an admirable record when it comes to prosecutions for damage to sacred sites. In the past 20 years under the current *Sacred Sites Act*, there have been more than 30 successful prosecutions for breaches of the Act related to the illegal entry, desecration and works on a site or for breaches of an Authority Certificate issued to proponents. This is more than all other jurisdictions combined in the same period.

AAPA has also been active in supporting traditional Aboriginal custodians to negotiate matters such as compensation and restitution payments, and restoration of site damage. On occasion, the AAPA has worked successfully with Land Councils in seeking such compensation. AAPA is currently preparing amendments to the *Sacred Sites Act* for government consideration, that relate to the establishment of direct and effective compensation methods under the *Sacred Sites Act*.

The effectiveness of the *Sacred Sites Act* is positively demonstrated by the fact that over the past 20 years, and in the 10 years under the previous Act, approximately 11,000 sacred sites have been protected in the course of works, development or use, through the issuing of 4000 Authority Certificates.

Response to the Discussion Paper

The following section of this submission responds directly to the DEWHA discussion paper on proposed reforms to the *ATSIHP Act*. Responses to Questions asked in that discussion paper are provided where relevant.

Response to Summary

The summary of the Discussion paper raises from the beginning the notion of negotiated heritage protection and the use of the *NTA* to reach agreements for the protection of heritage.

Whilst heritage protection is an aspect of negotiations in the Northern Territory undertaken by Northern Territory Land Councils on behalf of native title holders, the

primary legislative framework for the protection of heritage in the Northern Territory is the *Sacred Sites Act* and the *Northern Territory Heritage Conservation Act*.

Question 1 – Overall, what do you think are the main problems with the current situation, and what improvements are needed?

The AAPA agrees with the discussion paper in its assessment that the *ATSIHP Act* has been ineffective, and that this is born out by the low number of declarations since its inception. The AAPA supports efforts to improve the Act's capacity to protect Indigenous heritage nationally where there are gaps in state and territory legislation, and to provide legislative protection of "last resort".

However, the AAPA believes that the proposed reforms have the capacity to change the nature of heritage protection in the Northern Territory which boasts the most successful regime of Indigenous heritage protection in Australia. A key element of the Northern Territory's success lies in the separation of heritage protection from commercial considerations of development and from development consent and approvals processes. In this sense Indigenous heritage is protected in the Northern Territory in its own right. The existence of discrete statutes that protect Indigenous heritage rather than having recourse to other legislative frameworks such as the *NTA* and state based land rights regimes is also a clear advantage in the Northern Territory. This assertion is based on the Northern Territory experience which minimises issues of conflict of interest that may arise in the protection of Indigenous heritage protection and commercial considerations that might arise in the context of negotiated outcomes. These issues are highlighted throughout this submission.

The AAPA supports the establishment of national standards for Indigenous heritage protection. In an immediate sense, the Northern Territory shares borders with Queensland, South Australia and Western Australia, and many custodians of sacred sites have interests that extend into these states. Consistency in standards and methods of protecting Indigenous heritage would be an advantage in these areas.

Proposal 1 – Clarifying the Purpose of the Legislation

- The AAPA supports the clarification of the purpose of the legislation.

- The AAPA considers that Indigenous heritage protection can best be achieved if protection requirements are determined independently of, and then considered in, development approval processes.
- The AAPA does not support the notion of negotiated heritage outcomes that involve third party developers (Point 3), and recognises a potential conflict between the acknowledged primary source of knowledge of traditional laws and customs (Dot point 2) and the encouragement of negotiated heritage outcomes which may not protect Indigenous heritage (Dot points 3 & 6).
- The AAPA considers that there are significant difficulties with the proposal that the *NTA* and the *ALRA*, and their associated agreement making provisions should be the primary mechanism for the protection of Indigenous heritage.

The AAPA supports the clarification of the purpose of the legislation. However, the proposed definitions whilst being more prescriptive than the existing statement do not appear to advance the standards of the original purposes or objects of the Act. The AAPA believes that the proposed definitions:

- Introduce principles of negotiated heritage protection. Point three suggests that developers and Indigenous Australians should agree on practical ways to protect traditional areas and objects. This potentially conflicts with point two that acknowledges the primary role of Indigenous Australians and their customary responsibilities in relation to heritage protection.
- Reduces the intention of the Act to preserve and protect Indigenous heritage objects and places. Point 6 states that “government decisions about whether to allow activities to proceed will avoid or **minimise the likely adverse impacts** on traditional areas and objects”.

In the discussion of this proposal it is implied that the *NTA* has a primary role in Indigenous heritage protection. In the Northern Territory this is not the case. Whilst heritage protection matters may be considered in the processes of the *NTA*, particularly in the context of Indigenous Land Use Agreements (ILUAs), the Northern Territory legislative framework currently provides a mechanism for ensuring accountability within these processes. Regardless of the terms of an Indigenous Land

Use Agreement the *Sacred Sites Act* protects all sacred sites whether known about or not. The AAPA considers there to be significant risks to the protection of Indigenous heritage if the *NTA* becomes the primary mechanism for site protection. The AAPA is supportive of Indigenous economic development as promoted by the *NTA* and the ILUA process, but sees considerable advantage in maintaining independent mechanisms for the protection of Indigenous heritage.

In addition, the discussion of this proposal assumes that heritage laws are part of state and territory development approvals processes. In the Northern Territory this is not the case. The *Sacred Sites Act* establishes a voluntary system of sacred site protection. It is not tied to development approval processes. However, compliance is ensured through the offence provisions of the Act. The *Sacred Sites Act* empowers custodians of sacred sites through acknowledging their authority in relation to sacred sites. A key element of the success of the *Sacred Sites Act* in the Northern Territory is the voluntary nature of the Act and its capacity to be used by proponents of development as a risk management tool. Under the *Sacred Sites Act* heritage protection in the context of development is incumbent on developers. Early advice on heritage protection is also incumbent on developers as part of their consideration of risk management at the planning stage of their project. There is clear advantage in a system of Indigenous heritage protection that sits outside commercial negotiations for land access and consent such as those under the *ALRA* and the *NTA*. Such separation reduces the possibility for a conflict of interest to arise in relation to negotiated heritage protection measures, and ensures that the protection of Indigenous heritage occurs in its own right, not in respect of other commercial considerations.

The assumptions made by the Discussion Paper about the *NTA* and the role of heritage protection legislation are critical to significant parts of the proposed reforms to the *ATSIHP Act*.

Question 1.1 – Do these points adequately express the purpose of the legislation?

The proposal seeks to define the purposes of the legislation against eight key points. Currently the Northern Territory legislative regime concerning Indigenous heritage protection addresses all of these purposes.

Whilst the eight dot points seek to spell out the ‘underlying need for the legislation’, they appear more focussed on the style of protection to be afforded. This is particularly apparent in dot point three that relates to developers, and dot point seven which raises the concepts of transparency, timely decision making and the imposition of unnecessary costs. The proposed purposes also introduce the concept of negotiated heritage outcomes, which in the view of the AAPA is detrimental to the protection of Indigenous heritage and contrary to the original intent of the *ATSIHP Act*. The proposal does not reflect the ‘need’ for the legislation which should more adequately reflect the value of Indigenous heritage not just to Indigenous people but to the Australian nation, and the purpose of the Act to **protect** such heritage.

Proposal 2 – Making terminology consistent with the purposes

- The AAPA supports clarifying definitions consistent with other legislative frameworks but believes that the proposed definitions are not consistent with the *Evidence Act 1995*.

The proposed changes to definitions of ‘traditional area’ and ‘traditional object’ are not entirely consistent with the definition of Traditional laws and customs contained in the *Evidence Act 1995*. In particular, the proposed definitional changes specify that for an area to be considered traditional and therefore warrant protection under the *ATSIHP* it must have a ‘use or function’ or be subject of a ‘narrative’ associated with traditional laws and customs (as per the *Evidence Act 1995*). The terms use, function and narrative also require definition. In addition, the proposals also specify that for an area to be considered a ‘traditional area’ it must be ‘protected or regulated under traditional laws and customs’. It is unclear whether significant places and objects of Indigenous heritage may be denied protection where there is no formal recognition of traditional law and custom under the *NTA* or state or territory land rights regimes. An example might be the Larrakia native title claim over Darwin, where Larrakia people assert custodial rights and interests in respect of sacred sites, but where there is no recognition of proprietary rights and interests under the *NTA*. This matter needs further clarification.

The discussion of this proposal makes it clear that an inability to establish the ‘particular significance’ of an area or object has prevented such places and objects

from being protected, or has raised contested issues due to the definitional breadth of “particular significance”. The AAPA foresees the potential for further definitional confusion in the proposal and suggests that the definition of Traditional Laws and Customs as contained in the *Evidence Act 1995* be more fully adhered to in the definition of ‘traditional areas’ and ‘traditional objects’. This would reduce definitional ambiguity and allow greater scope to the relevant Minister in protecting Indigenous heritage places and objects. Suggested definitions are:

- A traditional area is a place that is recognised in the *traditional laws and customs* of an Aboriginal or Torres Strait Islander group (including a kinship group).
- A traditional object is an object that is recognised in the *traditional laws and customs* of an Aboriginal or Torres Strait Islander group (including a kinship group).

Question 2.1 – Overall, what do you think about this proposal?

In principle the standardisation of terminology is supported. The proposal still contains definitional complexity in that it introduces a dual test of ‘use or function’ or ‘subject of a narrative’, and the test of ‘protection or regulation’ under traditional laws and customs (as defined by the *Evidence Act 1995*). This matter needs further discussion and clarification.

Question 2.2 – Would the proposed definitions leave out any areas and objects that are covered by the current legislation because they are ‘of particular significance to Aboriginals in accordance with Aboriginal tradition’?

The AAPA is concerned that the proposed definitions of traditional area and traditional object introduce a test of whether a place or object is protected or regulated in accordance with traditional laws and customs. It is unclear if this test is reliant on legal recognition of the existence of traditional laws and customs. The AAPA is concerned that the definitions may preclude the protection of ‘traditional areas’ of Indigenous people in the Northern Territory who have failed to establish their proprietary rights and interests under the *ALRA* or the *NTA*, but who still exercise

custodial responsibility for places and objects of significance in accordance with their traditions.

Question 2.3 – Would the proposed definitions apply to additional areas or objects that are not covered by the current legislation?

The ‘use or function’ test that is introduced in the definitions has the potential to include a range of places that may be difficult to establish have a ‘particular significance in accordance with Aboriginal tradition (notwithstanding the definitional restrictions of the current legislation). The definitions may allow the protection of areas and objects that are not necessarily considered as having heritage significance. An example might be a hunting or resource use area or ‘rangeland’ as such places are sometimes referred to, or a fishing place. Such a place may satisfy the criteria of the proposed definitions, and therefore warrant protection under the *ATSIHP Act*, but may have no other intrinsic heritage value. Other places that could also satisfy the proposed definitions include camping places or residential locations. Such places it could be argued, have a use or function in accordance with Aboriginal traditional laws and customs, but may not have ‘particular significance’ in accordance with Aboriginal tradition.

Currently in the Northern Territory, such places may be afforded protection under the *ALRA* and the *NTA*, but are not normally protected under the Northern Territory Indigenous heritage protection framework. This is not to suggest that such places should not be protected. In the Northern Territory a distinction is currently made between areas that are significant to Indigenous people for reasons other than for their heritage value, and that mechanisms for protection of these areas is contained in the consent and agreement making provisions of the *ALRA* and the *NTA*.

Proposal 3 – Promoting effective laws through accreditation

- In principle the AAPA supports the accreditation proposal as a way of establishing national standards of Indigenous heritage protection, but the AAPA is concerned that the standards proposed for accreditation and other aspects of the proposed reforms may impact negatively on sacred site protection in the Northern Territory (See Proposal 4, and Proposal 2).

The discussion of this proposal highlights a tension in the overall proposals between the purpose of the *ATSIHP Act* to operate as a last resort in protecting Indigenous heritage, and to enforce national standards by way of accreditation which would supposedly negate the need for the Commonwealth to act as a last resort. In addition there is an unresolved tension between the desire to enable states and territories to protect Indigenous heritage via their own statutes and processes and the retention of significant Commonwealth influence over these. The AAPA is concerned that the proposed reforms are weighted in favour of the Commonwealth's objectives of setting national standards, but do not properly accommodate the Northern Territory's already high standards of Indigenous heritage protection – particularly in relation to the *Sacred Sites Act*.

The AAPA is not opposed to the retention of the capacity of the Commonwealth to act as a last resort for the protection of Indigenous heritage nationally, and also recognises the significant role that the Commonwealth can play in the establishment of national standards for the protection of Indigenous heritage. However, it does not regard these two important areas as mutually exclusive as established by the accreditation process in the proposed reforms. The Northern Territory's highly successful and highly regarded system of protecting sacred sites could be negatively impacted by the imposition of Commonwealth objectives of ensuring state and territory Indigenous heritage protection regimes reflect the purposes of the *ATSIHP Act* and meet standards set by that legislation (See discussion on standards below). There are clear negative implications of accepting an accreditation framework that insists that a Commonwealth Minister's advice be taken into account in the operation of an independent authority established under the laws of the Northern Territory. This is particularly so given that the *Sacred Sites Act* already establishes standards that are higher and more successful than the Commonwealth's legislative framework.

Question 3.2 – Could the proposed method of accreditation be improved?

The AAPA does not oppose a national system of accreditation. However, the proposed reforms contain caveats on the process of accreditation that appear to contradict the purpose of accreditation. Namely, the process of accreditation empowers states and territories to legislate for the protection of Indigenous heritage, but the objectives of the Commonwealth must be incorporated via the acceptance of

standards, the incorporation of the purposes of the *ATSIHP Act* and the requirement to accept the advice of the relevant Commonwealth Minister.

In addition the standards that states and territories would need to meet in relation to the accreditation process (Proposal Four), do not appear to be applied to Commonwealth procedures for protecting Indigenous heritage in the absence of accreditation (Part 2). This inconsistency undermines the proposed accreditation process.

Question 3.3 – If the Australian Government Minister could provide advice for ministers of accredited states and territories to consider when making decisions, could this help make accreditation work effectively?

Currently in the Northern Territory the relevant Minister has limited powers to influence to outcome of decisions made by the AAPA in relation to the protection of sacred sites. The Northern Territory Minister only has the capacity to make declarations in relation to the protection of sacred sites in the circumstances of the review processes of the *Sacred Sites Act* under S30 (see above). It is assumed that in order for the Northern Territory Minister to accept advice from the Commonwealth Minister in relation to the protection of sacred sites a significant change to the *Sacred Sites Act* would be required. Currently, the AAPA is governed by a 12 member Board of predominantly Indigenous people from across the Northern Territory. The success of the AAPA in protecting sacred sites in the Northern Territory is largely due to the independence of the Board from the elected arm of government. The proposal to insert a requirement for advice from the relevant Commonwealth minister into the accreditation process would challenge the independence of the Board and the important separation that currently exists in the Northern Territory in relation to sacred site protection.

Question 3.4 – Do you think that periodic reviews would help make accreditation work effectively, especially if the Minister can add to the standards for accreditation?

Periodic reviews would assist in monitoring standards and making states and territories accountable. However, the principles by which the Commonwealth

Minister could add to the standards for accreditation would need to be established in order for the process to work in an open and accountable manner.

Proposal 4 – Specifying Standards for Accreditation

The preamble to the discussion of Proposal 4 states that standards would encourage:

- Governments to make decisions in a timely manner;
- To identify the traditional custodians;
- To resolve matters by agreement where possible, and
- To ensure that ‘assessments of the possible impacts of activities on Indigenous heritage are made independently of government decisions to approve the activities’.

Under the *Sacred Sites Act* the protection of sacred sites in the Northern Territory is undertaken independently of government. In all cases of sacred site protection the *Sacred Sites Act* requires that the AAPA ensures appropriate traditional custodians are identified, consulted with, and their wishes reflected in decisions about the protection of sacred sites. Provisions also exist in the *Sacred Sites Act* for the resolution of conflict where the development needs of a proponent are impacted by the protection of sacred sites. Importantly, the *Sacred Sites Act* is emphatic in relation to the protection of sacred sites in relation to development. In the 30 year history of the *Sacred Sites Act* there are very few instances of irresolvable conflict between development and sacred site protection. Given the scale of the Northern Territory land mass there are very few examples of non-negotiable development proposals in relation to the protection of sacred sites.

The discussion paper suggests the formalising of the *NTA* and state and territory based land rights regimes as appropriate mechanisms for the protection of Indigenous heritage. However, processes under such statutes such as ILUAs, and agreements under the *ALRA* are also defacto approval processes for development. Albeit such mechanisms are outside the ambit of government decision making processes, but there is a resulting lack of clarity in the intention

of the proposed reforms in terms of the intended protection mechanisms for Indigenous heritage. Currently in the Northern Territory the underlying mechanisms for Indigenous heritage protection are outside the ambit of agreements, though do not preclude the inclusion of such measures in agreement frameworks. A key and important element in the Northern Territory regime is that Indigenous heritage is protected for its inherent value to Indigenous custodians of that heritage, and its imputed value to the Australian nation. The proposed reforms suggest a regime where Indigenous heritage is protected relative to other considerations associated with the commercial and private agreement making processes of the *NTA* and the *ALRA*. This is reflected throughout the discussion paper on the proposed reforms. It is the view of the AAPA that this would fundamentally undermine the effectiveness of the *Sacred Sites Act*, and would create a system of protecting Indigenous heritage that is fundamentally different from mechanisms to protect non-Indigenous heritage.

- **The early identification of Indigenous heritage issues** occurs under the *Sacred Sites Act* currently. The *Sacred Sites Act* places the onus on proponents of development via a voluntary system of heritage protection that stipulates penalties for damage to sacred sites. After thirty years of operation the need to obtain Authority Certificates (see above) at an early stage of planning for development is entrenched in the Northern Territory. The *Sacred Sites Act* contains provisions for the proponents of development to meet with custodians of sacred sites. However, it is the experience of the AAPA that decisions about the protection of sacred sites are better made without the presence of developers. This separation ensures that Indigenous custodians have the best opportunity to protect their heritage and is entirely consistent with the stated aims of the proposed reforms to the *ATSIHP Act*. The AAPA considers the proposal to impose such consultation between custodians and developers to be retrograde in terms of the standards and processes already in place in the Northern Territory. It is the experience of the AAPA that custodians are unlikely to make agreements as a result of such consultations, and more likely to require an Authority Certificate as a clear and legislatively enforceable approach to sacred site protection and certainty for proponents.

- **Appropriate consultation and opportunities to reach agreements** are well established under the *Sacred Sites Act*. The issue of an Authority Certificate entails a process of agreement making that ensures that the wishes of custodians are reflected in conditions imposed for the protection of sacred sites. In the event that such conditions impose unworkable restrictions on development a proponent can seek a variation to their certificate and can request a conference with custodians. Usually both processes entail the provision of information about the proposed development by the developer for the consideration of custodians. In the event of incompatibility between sacred site protection and development, a proponent can ultimately seek a Ministerial review (see above). This allows the Minister to fully consider the matter and decide whether to issue a Minister's Certificate in relation to the proposed development. However, the *Sacred Sites Act* has a range of offences that protect sacred sites from damage and desecration, and its primary concern is the protection of sacred sites.
- **Independent assessments based on the advice of Indigenous people** are a key element of the processes of the *Sacred Sites Act* and the AAPA. Consultation with custodians of sacred sites is legislatively required for all protective measures imposed.
- **Protection for sensitive information** is currently ensured under S10(g) and under S38 of the *Sacred Sites Act* which makes it an offence to disclose secret or sacred information relating to a sacred site, except as permitted by the AAPA. This protection is balanced by the *Sacred Sites Act* requirements for public access to the registers of sacred sites and Authority Certificates held by the AAPA, and the transparent information access arrangements for information on sacred sites. Additionally, all sacred sites formally registered under the *Sacred Sites Act* are legally given *prima facie* recognition for the purposes of court action, and should be similarly recognised with regard to the information on which decisions are proposed to be made under the proposed reforms. Protection for sacred site information must not be reduced as a result of the proposed reforms and the *prima facie* recognition of sacred sites registered under the *Sacred Sites Act* must not be over-ridden by the proposed reforms.

- **Transparent decision making** is also ensured by the processes established by the *Sacred Sites Act* and AAPA. All decisions relating to the protection of sacred sites are documented. Relevant information is publicly available via an inspection of the registers that the AAPA holds. In light of the proposed intention to formalise processes under the *NTA* and state based land rights regimes, confidentiality provisions associated with processes under these statutes will limit rather than facilitate transparency in decision making.

If agreements under the *NTA* and state based land rights regimes are to be included as part of the proposed reforms, then the reforms should mandate an accountable process for the recording and protection of areas and objects, which should be managed and monitored by the relevant state or territory agency in line with accreditation requirements. The reforms should mandate that any agreements which protect areas or objects under the *NTA* or state based land rights regimes must be registered or recorded with a central state or territory agency, so that information about those areas and objects can be both certified and protected and appropriate information can be made publicly available, in line with accreditation requirements.

- **An ability for the Australian Government to provide input** does not currently exist in the Northern Territory in any formal sense. The purpose of this proposal is unclear and would appear to run counter to the proposed accreditation process (see above). In addition the ‘need to influence key decisions where necessary’ is ambiguous in its intention to either protect Indigenous heritage or to protect the interests of proponents of development. Such ambiguity undermines the intention of the standards to create certainty for Indigenous people and third parties in relation to the protection of Indigenous heritage.
- **An ability for Indigenous Australians and others to seek legal reviews** is not precluded by the *Sacred Sites Act*. The capacity of Indigenous people to seek review of heritage decisions is supported by the AAPA.

Question 4.1 – Would these standards, if adopted, help to improve the ways that Indigenous traditional areas or objects are protected in your state or territory?

The proposed standards generally reflect those that are already in place in the Northern Territory. It is implied that a key element of heritage protection would be the early discussion between proponents of development and Indigenous people in relation to the protection of heritage. This would potentially have a cost impact on the Northern Territory in terms of the resources required to achieve this, if the implication is that an additional step in the process would need to be included. The view of the AAPA is that this would not necessarily improve outcomes for Indigenous heritage protection or for developers.

Question 4.2 – Do these standards need to be specified differently, or in more detail?

The standards require more detailed explanation to remove ambiguity in their intention.

Proposed standards

- 1) *Protecting all traditional areas and objects*: This standard is supported. This standard is already reflected in the *Sacred Sites Act* and the *Heritage Conservation Act*. However this standard may be affected by the proposed “adverse impacts” test. The current standard in the *Sacred Sites Act* S22 is that “the work or use of the land could proceed or be made without ...a substantive risk of damage to or interference with a sacred site on or in the vicinity of the land”.
- 2) *Enabling activities to proceed*: This standard is supported. This standard is already reflected in the *Sacred Sites Act* S25. A proponent who acts in accordance with an Authority Certificate issued under the *Sacred Sites Act* is not liable to be prosecuted.
- 3) *Ability to impose conditions*: This standard is supported. This standard is already reflected in the *Sacred Sites Act* S22.
- 4) *Call in power*: This standard is supported, but requires clarification. Currently the *Sacred Sites Act* does not contain provision for a ‘call in’. The *Sacred Sites Act* is a voluntary regime that imposes penalties for lack of compliance. The

AAPA supports the establishment of call in powers. The proposal to take into account representations from the relevant Australian Government Minister requires further clarification in relation to the process of accreditation and to remove any ambiguity in the relative powers of states and territories and the Commonwealth under the legislation.

- 5) *Reporting discoveries of personal remains*: This standard is supported. This standard is already reflected in the *Northern Territory Heritage Conservation Act* which delegates powers in relation to human remains to the AAPA.
- 6) *Promoting compliance*: This standard is supported. This standard is largely reflected in the *Sacred Sites Act* through the effect of the offence provisions of the Act. However, the formal inclusion of provisions for stop work orders and orders to repair adverse impacts on traditional areas is supported.

Preferring agreement-making to arbitration

In isolation, the preference for agreement making is an effective approach, but it must be balanced by effective controls to ensure such agreements are enforceable. The effectiveness of Authority Certificates issued under the *Sacred Sites Act* relies upon certainty for custodians regarding the sacred site protection measures they have requested, certainty for the proponent with regard to the works they can carry out within those measures, and ensuring that the conditions of the Authority Certificate can be legally enforced if necessary.

The AAPA has 30 years experience with sacred site protection across the Northern Territory. The *Sacred Sites Act* is arguably the most successful regime with regard to prosecution for illegal entry, works, desecration and damage to sites. From the experience of the AAPA, agreement-making in isolation is neither effective for custodians nor proponents.

For example, courts have increasingly required that AAPA issued Authority Certificates are specifically clear in the terms and conditions of an Authority Certificate (the manner of “agreement” under the *Sacred Sites Act*). The capacity to promote compliance (Standard 6), and to prosecute offences against

sacred sites is largely dependent upon a consistent approach to the setting of conditions protecting sites and allowing entry or certain works. Agreements must ensure reference to and maintenance of required legal standards to be effective in the protection of Indigenous heritage areas and objects.

Any regime promoting early direct agreement making between proponents and custodians is at risk of failure without an effective mechanism for formally monitoring compliance of the agreement with the required standards, and subsequent “approval/certifying” and registration as an agreement. Without such checks and balances, this approach is more likely to cause disputation and delay.

In the Northern Territory, the proposed early direct agreement making proposal is likely to duplicate the available processes under the *Sacred Sites Act* and create additional levels of bureaucracy and disputation. It is possible that traditional custodians and proponents will seek a legally enforceable agreement in such instances, as it provides all parties with certainty. Currently the Authority Certificate process satisfies this need.

- 7) *Meeting traditional custodians:* This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. The AAPA is the “Indigenous heritage body” in the Northern Territory with statutory responsibility under state or territory laws (the *Sacred Sites Act*), and under the *Heritage Conservation Act* to consult with the traditional custodians about decisions that could affect the area or object. The *Sacred Sites Act* contains provisions for a proponent to apply for an Authority Certificate to allow for works to occur in an area. The AAPA must then consult with custodians prior to providing a response to the proponent, in the form of a Certificate, or a refusal to issue. The AAPA, as an Indigenous heritage body, would be representatives of traditional custodians in this instance. If, before or after the issue of an Authority Certificate, the proponent so wishes, then under the *Sacred Sites Act*, a meeting can be arranged between the proponent and custodians.

The AAPA does not consider it necessary for the proponent to be provided with

all the names of relevant custodians at any stage in this process, as the legislative provisions of the *Sacred Sites Act* require the AAPA to consult with the appropriate custodians for that area. There is no requirement for all custodians to be identified by the proponent, and the AAPA has concerns about how the privacy of custodians might be ensured in relation to this proposed standard, particularly with regard to the provisions of the *Information Act* which preclude the provision of information about an individual that would identify their religious or spiritual beliefs, without their consent.

The proposed standard with “pre-meetings” of proponents and custodians would have cost implications for both the Northern Territory and proponents without offering any substantive improvement in processes already utilised. In addition the discussion of this standard explicitly emphasises processes of negotiation in relation to Indigenous heritage protection by promoting agreement or avoiding *or minimising adverse* impacts of the proposed activity on traditional areas or objects (emphasis added). Fundamentally this suggests a lower standard of Indigenous heritage protection than is currently in place in the Northern Territory (see below).

- 8) *Reaching agreement*: This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. Essentially the *Sacred Sites Act* process of issuing Authority Certificates satisfies this proposed standard. However 8(c)ii promotes standards that are lower than those currently established by the *Sacred Sites Act*. Whilst there are instances under the *Sacred Sites Act* of impacts being minimised rather than being avoided, in relation to the protection of sacred sites, such minimisation is at the discretion of custodians of sacred sites rather than the result of a formal negotiation. The AAPA is concerned about the ongoing capacity of custodians to exercise their discretion in relation to their sacred sites.

Additionally, with 30 years experience of protecting sacred sites across the Territory, and having provided works specific protection using Authority Certificates under the current *Sacred Sites Act* for the past 20 years, the AAPA has strong concerns that the standards will allow agreements which will not be

effective in providing certainty of either protection or works. The AAPA is constantly monitoring the impact of conditions provided to protect sites, in the light of successful protection, site damage and legal action, as a means to ensure that conditions allowing works are worded in the clearest possible terms. Experience shows that significant disputation (and delays) will occur between land users / developers and traditional custodians where the “negotiated” conditions allowing works on or near a sacred site are not clear.

Providing for arbitration when agreements are not possible

Accreditation standards 9-17 appear to be based on the assumption that direct agreement making processes will occur outside of a current state/territory heritage protection regime, such as the Territory’s *Sacred Sites Act*, and that the state/territory regime will then be required to step in as an “arbitrator”. Given the risks associated with poor and ineffective direct agreement making outlined above (see 7 & 8), this has the potential to create a significant burden. The AAPA considers that the focus of Indigenous heritage protection must be on early agreement making, within an effective legislative-based framework. In the Northern Territory, the *Sacred Sites Act* clearly provides such a framework, and does so in a context of effectively reaching an “agreement” without the need to progress to formal arbitration.

If however, the intention of these standards is to provide for further arbitration following the issue of an Authority Certificate, then in the case of the *Sacred Sites Act*, this would be an unnecessary and over-riding procedure which could not be met within the current effective frameworks of the *Sacred Sites Act*. This would require the establishment of an additional framework over and above that already provided by the *Sacred Sites Act*.

- 9) *Ability to seek approval:* This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. The *Sacred Sites Act* does provide for two levels of “arbitration” within its legislative framework, and within the processes of issuing an Authority Certificate.

Firstly a proponent can seek a variation to an Authority Certificate, as a means to further explore possible means to enable use or works on an area to proceed. This provides for further consultations, and potentially meetings between proponents and custodians, to clarify what works or use could proceed whilst retaining appropriate protection of sacred sites. This has been an effective mechanism for both custodians and proponents.

Secondly through a formal review procedure, where all other avenues have been exhausted, a proponent can seek a Ministerial review of their application. (See explanation above).

- 10) *Efficient applications process*: This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. All procedures under the *Sacred Sites Act* are achieved within the minimum possible timeframes. The Act establishes standards for critical timeframes, and particularly for reasonable timeframes in which to commence consultations with custodians. In many circumstances however, the 21 day timeframe will be onerous and would require a significant increase in resources to implement. Currently under the *Sacred Sites Act* consultations must commence within 60 days of receiving an application for an Authority Certificate. Most often consultations commence well before the 60 day timeframe has expired. The intent of the *Sacred Sites Act* is to encourage proponents of development to consider the protection of sacred sites at the planning phase of their project. The suggested 21 day timeframe appears arbitrary and is inconsistent with other development consent processes in the Northern Territory.
- 11) *Requirement to consider impacts on traditional areas and objects*: This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. The intent of this standard is already reflected in the *Sacred Sites Act* and the processes adopted by the AAPA, as an independent authority. However, the standard appears to extend the protection of Indigenous heritage to consider the context within which it occurs. Historically this has not always been possible in the context of large

developments. The AAPA welcomes this extension but can foresee that further definition of the standard is required in order to make it workable.

- 12) *Independent assessment of impacts*: This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. Currently the *Sacred Sites Act* only concerns the protection of sacred sites and is not an approvals process for development activities. The *Sacred Sites Act*, through the independent AAPA, may place constraints, if any, on development in relation to the protection of sacred sites. This proposal would require significant amendment to Northern Territory planning laws and development approvals processes. The level of detail required by this proposal is already satisfied by the processes of the AAPA in relation to sacred sites. It is possible that the “Ministerial review” processes within the *Sacred Sites Act* may satisfy this criterion, however, the proposal is unclear, and impacts on the secrecy of sacred site information in terms of who would have access to such information.
- 13) *Need to consult traditional custodians*: This standard is supported. This standard is already reflected in the *Sacred Sites Act*, as custodians must be consulted over all applications for an Authority Certificate.
- 14) *Respect for traditions of secrecy*: The principle of secrecy of secret sacred information is supported and is stringently reflected in the *Sacred Sites Act*. A primary principle of the *Sacred Sites Act* remains that traditional custodians should not be required to publicly divulge the sacred and secret information relating to an area in order to provide protection, but that an independent assessment, as provided by the AAPA, would allow for effective protection mechanisms. Retention of this principle is important, and release of such information would in most circumstances only be permitted by the AAPA where it would enhance the protection of a sacred site. It is unlikely that the Authority would permit the release of sacred secret information for the purposes of accreditation. It is important to note that early agreement making and an effective balance between sacred site protection and use or development is dependent upon the early participation of custodians. Custodians will be reluctant to participate in any process which may risk the disclosure of sacred

and secret information, for which they are traditionally held responsible, beyond that needed for the protection of the sacred sites. However, implementation of this standard would require further and detailed definition of how such information is handled as it passes through the process.

- 15) *Requirement to consider other matters:* This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. The *Sacred Sites Act* is established “to effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition...and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement”. All actions within the framework of the *Sacred Sites Act* occur in this context, with a primary intent of the protection of sacred sites.

As part of standards for the provision of arbitration on agreements outside of the *Sacred Sites Act*, this standard would require significant amendment to the Act and a specific broadening of the Act’s intent. Currently 15(a) is fully accommodated by the processes of the AAPA and the *Sacred Sites Act*. Standard 15(b) extends consideration of heritage protection to a quasi socio-economic impact assessment, and the impact on third parties and requires further definition in order to be workable.

- 16) *Requirement to consider Australian Government views:* This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. The intent of this standard is unclear throughout the proposed reforms discussion paper. The process of accreditation ensures that the objectives of the Commonwealth are reflected in state and territory legislative arrangements for the protection of Indigenous heritage. The requirement for further unspecified advice from the Commonwealth to be considered appears onerous and unnecessary, and potentially contrary to the broad intent of removing the need for the Australian Government to provide an additional avenue for “appeal” where a state or territory is accredited.
- 17) *Requirements for giving approval:* This proposed standard needs further clarification in relation to the current effective legislative provisions of the

Sacred Sites Act. This standard provides a mechanism for the destruction of Indigenous heritage where its protection is in conflict with an assessment by the state or territory that ‘the cultural, social economic and environmental welfare of the community outweighs the imperative to avoid adverse impacts on the traditional area or object’. This appears unworkable in the context of establishing national standards in that it introduces the prospect of divergent value systems to be employed in relation to impacts and the merit of heritage protection. This standard also appears to be a fundamentally disempowering of Indigenous people in making decisions about heritage protection, and their own cultural, social economic and environmental welfare. This proposed standard contradicts the intent of the proposed reforms to ‘Ensure that Indigenous Australians will have the best opportunities to protect heritage’. How this standard interacts with proposed standard 15 is unclear.

Under the *Sacred Sites Act*, the AAPA can only issue an Authority Certificate if there is not a substantial risk of damage or interference to a sacred site, or if there is an agreement between custodians and proponents regarding the proposed use or works – with a clear onus on evidence that custodians have agreed to such use or works. The AAPA would not be able to issue an Authority Certificate (or “approval”) under the criteria for this standard. The provisions within the *Sacred Sites Act* for Ministerial review may allow for this standard to be implemented; however the preamble and intent of the Act clearly indicate its primary objective of protecting sacred sites.

Transparency and accountability

- 18) *Requirement to maintain records*: This standard is supported in principle. This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. The essence of this standard is already reflected in the *Sacred Sites Act*. However, there is a significant lack of clarity in relation to 18(c) concerning the capacity of the relevant state or territory to access agreements that are made by third parties, in particular those made under the *NTA* or state and territory land rights legislation. Any regime promoting early direct agreement making between proponents and custodians is

at risk of failure without an effective mechanism for formally monitoring compliance with the required standards, and subsequent “approval” and registration as an agreement. The *Sacred Sites Act* provides such a mechanism by enabling the issuing of Authority Certificates based on agreements between custodians and proponents.

- 19) *Requirement to make records available*: This standard is supported in principle. This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. The *Sacred Sites Act* provides for publicly accessible registers to be kept of all sacred sites which have been registered by the AAPA, and for all Authority Certificate applications, Certificates issued and refused, and their relevant conditions. The Act also allows the AAPA, at its discretion, to provide information regarding all known sacred sites (whether registered or not) within an area, to bona fide applicants for information. This access to records is subject to secrecy and commercial sensitivity provisions. The *Sacred Sites Act* also has stringent secrecy provisions which limit the production of records, including to courts. (see Standard 14).
- 20) *Opportunity for legal reviews*: This proposed standard needs further clarification in relation to the current effective legislative provisions of the *Sacred Sites Act*. The *Sacred Sites Act* contains significant provisions for review. However, the opportunity for a review of a decision taken in accordance with accredited standards will contribute to uncertainty and the possibility of delays.

Proposal 5 – Ensuring that, if legally recognised traditional custodians exist, only they can seek Commonwealth protection.

This proposal requires further clarification.

The intent of this proposal is to empower legally recognised Indigenous people to protect their heritage, and to ensure that government policies do not undermine the advantages that Indigenous people have gained under the *NTA* and state or territory based land rights regimes. In the Northern Territory both of these objectives currently inform a successful regime of Indigenous heritage protection. However, the proposal

introduces unnecessary complexity into Indigenous heritage protection by creating parallel processes in respect of different land tenure types and the roles and responsibilities of Indigenous people in respect of those tenure types. Non-Indigenous heritage protection is not tied to property rights, and it could be argued that to do so could compromise heritage protection by making it subject to decisions about land use and commercial decision making. The proposal assumes that statutes such as the *NTA* and the *ALRA* recognise adequately the rights and interests of Indigenous people in relation to the protection of Indigenous heritage. This is not necessarily the case. In many parts of the Northern Territory there are Indigenous people who have responsibilities delegated for the protection and management of sacred sites who may not necessarily satisfy the definitions of a traditional owner under the *ALRA*, or be recognised as a native title holder under the *NTA*. Often people retain knowledge of sacred sites from their experience of living or working in a location far from their traditional estate. Local traditional owners or native title holders may respect and defer to the knowledge and authority of such regional experts. Often such people are incorporated into local land owning groups, but this may not always be the case, or such incorporation may not necessarily be recognised by relevant statutes. In the event of the latter situation, such people could be precluded from making application under the reformed Act and representative organisations may or may not take their views into account when making an application.

In addition vast tracts of the Northern Territory were scheduled as Aboriginal freehold land when the *ALRA* was passed. The identification of traditional owners in respect of these areas is largely reliant on primary research. Land Councils in the Northern Territory and the AAPA have long established processes for the identification of the land interests of Indigenous people in such areas. The research processes utilised do not discriminate according to non-Indigenous land tenure, but are flexible enough to accommodate and reflect traditional lines of authority and social organisation in relation to setting conditions for land access and heritage protection.

Whilst the intent of the proposal is to empower Indigenous people who have legally recognised rights and interests in relation to land, the proposal could easily serve to disempower these people, and ultimately impact on their capacity to protect their heritage. Such a case could arise where an Indigenous person has legally recognised

rights and interests but is disenfranchised from the land owning group or the representative organisation. Such situations are relatively common in relation to Indigenous land tenure disputes, and nationally in relation to instances of poor governance in Indigenous organisations. The restrictions implied in this proposal could serve to deny natural justice to people who have legitimate rights and interests and who may wish to make an application for the protection of their heritage.

The AAPA is committed to ensuring that the rights and interests of Indigenous people in respect of land and heritage be protected. However, to preclude certain categories of people from applying for heritage protection appears inconsistent with standards for non-Indigenous heritage protection, and tends towards compartmentalising the consideration of Indigenous heritage as a phenomenon that is only of interest to Indigenous people themselves. The AAPA sees greater value in empowering Indigenous people to protect their heritage, and for such protection to be considered as part of the national interest rather than as an exclusively Indigenous domain.

Proposal 6 – Ensuring that Commonwealth protection would not prevent an act authorised under a registered Indigenous land use agreement.

This proposal requires further clarification.

The *NTA* is not explicit in its intent to protect Indigenous heritage. Whilst the terms of ILUAs may, on occasion, contain conditions that relate to the protection of sacred sites and potentially other Indigenous heritage places and objects, these agreements are essentially commercial agreements relating to land use and access. The AAPA is concerned that by removing ILUAs from review of the *ATSIHP Act*, there remains no transparent mechanism for the protection of Indigenous heritage in the context of commercially negotiated ILUAs. This heightens the risk of a conflict of interest arising in relation to the protection of Indigenous heritage and the proposal makes no clear recommendation of how such conflict of interest might be managed.

There is a significant lack of clarity in this proposal in relation to other proposals (in particular Proposal 4 –standard 18, 19, 20), and against the overall intent of the *ATSIHP Act* to provide adequate protection for Indigenous heritage. If activities

permitted by an ILUA impact on Indigenous heritage but are precluded from consideration of the *ATSIHP Act*, this raises serious questions about the overall validity and relevance of the *ATSIHP Act* to protect any Indigenous heritage.

The AAPA appreciates the implication of current arrangements that allow an application under the *ATSIHP Act* to be a potential avenue for dissent in relation to the ILUA process. The AAPA agrees that applications under the *ATSIHP Act* should not be an available mechanism for dispute in relation to Land Use Agreements, except to the extent that such dispute relates unambiguously to the protection of Indigenous heritage.

The proposal does not make explicit the role of Native Title Representative Bodies or Prescribed Bodies Corporate in Indigenous heritage protection, despite their clear and unambiguous role in the negotiation of ILUAs. It is the experience of the AAPA that PBCs in the Northern Territory do not possess appropriate expertise in relation to the assessment of heritage issues. This proposal, to ensure adequate protection of Indigenous heritage against the proposed standards, would require significant additional resources for PBCs to undertake this role. In addition the governance of many PBCs nationally may place Indigenous heritage in jeopardy.

Case Study - Lhere Artepe Aboriginal Corporation and ILUAs

The Lhere Artepe Aboriginal Corporation is a PBC established to represent the interests of the Central Arrernte people who are the successful native title holders of the Alice Springs area. Lhere Artepe, in keeping with the economic development ethos of the *NTA* has explored ways to represent their membership in a range of social and economic programs. Notably, the corporation has entered into commercial negotiations relating to land development and subdivision in parts of the town where native title is recognised. The process by which such land is released is subject of ILUAs under the *NTA*.

Issues surrounding the Mt Johns residential subdivision in Alice Springs are an illustration of the difficulties that the proposed reforms to the *ATSIHP Act* pose to the protection of Indigenous heritage. Mt Johns is a sacred site that was registered by the AAPA in 1994. Negotiations concerning the release of land adjacent to Mt

Johns involved Lhere Artepe Aboriginal Corporation, and the Northern Territory Government.

As part of the early planning process the AAPA issued an Authority Certificate for the development that identified constraints relating to sacred site protection in relation to the proposed development. Consultations with custodians of the sacred site, who are all members of Lhere Artepe Aboriginal Corporation revealed significant concerns about the protection of Mt Johns. In addition it was clear that a number of people who have custodial interests in relation to the site did not agree with Lhere Artepe's proposal to place a large residential development adjacent to the site. The AAPA is constrained by the *Sacred Sites Act* to only consider factors that might impact on sacred sites. In this case it was assessed that a range of objections by custodians of Mt John to the development, related more to the internal governance of Lhere Artepe, than to the protection of the site, and hence were outside the purview of the *Sacred Sites Act*.

As the plans for the development progressed, Lhere Artepe, as the principal commercial developer of the land, applied for a variation to the defined protective area around the site in order to allow the subdivision to accommodate further residential blocks. The variation specifically sought clearance for the construction of a drainage bund to be constructed adjacent to the sacred site and within the protective area defined.

Office holders of Lhere Artepe did not participate in the consultation process for this variation of their own volition, despite their legitimate right to do so. Through the consultation process it became apparent that significant dispute existed within the membership of Lhere Artepe. Issues of dispute concerned the negotiation of the ILUA for the development of the Mt Johns subdivision, the governance and decision making process of the organisation, and the impact of the development on the Mt Johns sacred site. In addition, some senior custodians of sacred sites potentially impacted by the development considered themselves to be disenfranchised from Lhere Artepe Aboriginal Corporation, despite their legitimate status as native title holders. The AAPA through its processes was able to define further protective measures for sacred sites in relation to the proposed

drainage wall, and remain independent of the political and commercial considerations of the Lhere Artepe Aboriginal Corporation.

A key element of this case study, and in relation to the proposed reforms, is that under the *Sacred Sites Act* custodians are able to stipulate protective measures for their sacred sites independently of the commercial or other constraints of an ILUA, and independently of issues of dispute and governance associated with the PBC. Disenfranchised members of the prescribed body corporate who had a legitimate right to protect their heritage were able to do so, and a potential conflict of interest was successfully navigated through the separate and independent consideration of sacred sites protection under the *Sacred Sites Act*.

A separate ILUA concerning a subdivision in Alice Springs negotiated by the Lhere Artepe Aboriginal Corporation did concern heritage protection. Importantly the ILUA specified heritage restrictions in relation to the subdivision. In addition the AAPA was asked to provide a sacred site clearance in the form of an Authority Certificate. Subsequent to the ILUA and the Authority Certificate, confusion arose in relation to protective measures imposed by the ILUA on locations that were not sacred sites as recognised by senior custodians of the area. This highlights that skills and capacity for heritage protection in relation to agreement making would need to be developed in the context of PBCs in the event that the proposed reforms to the *ATSIHP Act* are implemented.

These two case studies indicate a need for an effective mechanism for formally monitoring compliance with the required standards, and subsequent “approval” and registration as an agreement. The *Sacred Sites Act* does provide for this independent mechanism under its Authority Certificate procedures. However the use of the Authority Certificate mechanisms remains voluntary under the Act, and consideration should be given for reforms to the *ATSIHP Act* to include the requirement for heritage protection agreements to be monitored, and “registered” and maintained in records by the relevant state or territory Indigenous heritage protection agency.

Proposal 7 – Removing duplication of state and territory protection for Indigenous remains

In the Northern Territory there are clear and established processes associated with Indigenous personal remains. The AAPA has delegated powers under the *NT Heritage Conservation Act* in relation to such remains. The proposal highlights areas of duplication in relation to the discovery of Indigenous remains but elects to retain some duplication in respect of areas managed by the Australian Government. The AAPA is of the view that if the intent of the proposed reforms of the Act is to be followed, then the Commonwealth should relinquish any responsibility for discoveries of Indigenous personal remains to states and territories in order to remove duplication.

Proposal 8 – Addressing gaps in state and territory laws to ensure respectful treatment of Indigenous secret and sacred objects and remains

Overall this proposal is supported. However, the definition of Secret and Sacred objects that excludes objects created for exhibition, gift, sale or barter or works of art is problematic and inconsistent with the protection of non-Indigenous heritage. A clear example of differing opinions of what constitutes a sacred object is the Papunya Boards. Many of these early paintings from Papunya are considered to depict secret and sacred information, but may have been sold at the time of their creation.

Similarly the exclusion of objects imported into Australia for exhibition by a public museum or gallery may allow the display of objects that are secret or sacred, and that may cause offence or distress.

PART 2: Improving Procedures

As a general comment the proposals specified in Part 2, which would apply in states and territories that aren't accredited, or in areas where there is no ILUA in place, do not establish the same standards as those specified in Part 1. The AAPA believes that if national standards for Indigenous heritage protection are to be established then the Commonwealth must abide by them also.

Proposal 9 – Improved process, specifying information

This proposal is straight forward in terms of the administration of the Act. It is not clear to what extent the processes and procedures need to be stipulated by legislative change. As with comments above, the AAPA questions why an ILUA of itself would prevent an application from being made, given that the procedures and standards of heritage protection contained in ILUAs are not legally defined. Similarly the agreement making procedures under the *ALRA* do not establish procedures for Indigenous heritage protection. In addition the denial of applications from Indigenous people resident in accredited states and territories highlights a tension in the proposed reforms for the *ATSIHP Act* to be last resort protection for Indigenous heritage. Notwithstanding that the accreditation process is designed to enforce appropriate standards of Indigenous heritage protection at the state and territory level, the lack of recourse effectively locks any appeal until such time as a review takes place.

Whilst the Commonwealth is seeking to improve its procedures, the accreditation process, which entails the implementation of Commonwealth defined standards, entails the potential for cost shifting to states and territories. It is unclear where additional resources will come from in the implementation of the Commonwealth's objectives.

Proposal 10 – Using Conferences to consider how best to deal with the issues

The proposal to use conferences requires further definition to make the proposed process clear. In particular there are no timeframes specified, which contrasts with the 21 day timeframe for accredited states to make applications available to traditional custodians (Proposal 4, standard 10). The definition of parties to be notified for consultation also requires clarification. For example does the term 'occupiers' include people who may be resident on an area, but do not have a legal right to carry out an activity in the area? There is an absence of any state or territory bodies that may have an interest in the matter except to the extent that these might be delegates of the relevant minister.

Proposal 11 – Protecting Sensitive Information

By giving the Minister discretion over the disclosure of sensitive information this proposal directly contradicts proposal 4, standard 14 which stipulates that an Indigenous person can advise that information is restricted under traditional laws and customs. The AAPA believes that if standards are to be developed for the protection of Indigenous heritage then the Commonwealth must abide by them also. This proposal fails to establish any guidelines for the disclosure or otherwise of information of a sensitive nature by the Minister - either cultural or commercial.

Proposal 12 – Clarifying Reasons for seeking interim protection

This proposal is inconsistent with the standards stipulated for accreditation of states and territories. It is unclear why there is not a requirement for states and territories to make provision for emergency or interim protection in the accreditation process. It is also unclear why only Indigenous people in unaccredited states and territories would have access to the application for emergency or interim protection of their heritage.

In addition the delegation of powers to make interim or emergency protection orders does not appear to be subject to the same checks and balances that are required of states and territories in relation to the protection of Indigenous heritage.

Proposal 13 – Clarifying Reasons for providing and revoking longer-term protection

The AAPA supports this proposal. However, further clarification is required to ensure that that same standards being proposed by the reforms are reflected in Commonwealth assessments for providing and revoking longer term protection. For example the proposed way of revoking protection orders does not limit the ability to request such revocation to particular categories of Indigenous people. Rather, in instances where there are no traditional custodians, the Minister may respond to a request from any Indigenous person.

Part 3: Making sure that protection works

Under the *Sacred Sites Act* the AAPA has successfully prosecuted 30 instances of damage to sacred sites. Nationally this is the most successful Indigenous heritage protection legislation

Proposal 14 – Updating Penalties & Improving Enforcement powers

The AAPA supports the proposal. However, this proposal does not appear to be reflected in the standards for accreditation for states and territories. The AAPA supports a national system of penalties for incursions against Indigenous heritage. In addition there are aspects of this proposal that could usefully be incorporated into the *Sacred Sites Act* penalties and offences regime including the provisions for repair and restitution to Indigenous heritage places.

Proposal 15 – Reviewing the Legislation

The AAPA supports the implementation of a review process for the protection of Indigenous heritage. Any review would need to be focussed on individual states and territories. The AAPA considers that the review process would have resource implications for the Northern Territory. It is unclear from the discussion paper how the review process would assess heritage outcomes from ILUAs, and what call the Australian Government would have on Native Title Representative Bodies and PBC under the *NTA* in relation to information referred to in Proposal Four. Similar questions relate to the transparency of agreements made under the *ALRA* in relation to their Indigenous heritage protection capacity.